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September 8, 2003

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VIA COURIER

Lawrence H. Norton
General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

Re: MUR 5199 -- Bush-Cheney 2000, Inc. and David Herndon, as Treasurer

Dear Mr. Norton:

Attached please find the Brief in Response to the Office of General Counsel's Probable Cause Brief in the above captioned matter.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Benjamin L. Ginsberg', written over the typed name.
Benjamin L. Ginsberg

cc: The Commissioners
Tracey L. Ligon, Esquire

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BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)
) MUR 5199
Bush-Cheney 2000, Inc.)
And David Herndon, as Treasurer)

**RESPONSE OF BUSH-CHENEY 2000, INC.
AND DAVID HERNDON, AS TREASURER,
TO THE OFFICE OF GENERAL COUNSEL'S
PROBABLE CAUSE BRIEF**

I. INTRODUCTION.

The central issue in this matter is why the Office of General Counsel's Brief ("OGC Brief") has created an issue where none exists and elevated form over substance in an effort that would make new (and mistaken) law through the enforcement process. On behalf of Bush-Cheney 2000, Inc., and David Herndon, as treasurer, we urge the Commission to reject the OGC's Brief, which concedes it is based only on a "general rule". In urging adoption of its "general rule", OGC cannot cite to any statute, regulation or advisory opinion that mentions a recount involving a taxpayer-financed campaign or cite any other instance in which it has pursued a recount committee to file a report of its receipts and disbursements with the Commission. Of course, it should not be lost on the Commission that the original complaint was filed by the chair of the opposition party and that the complaint, which lay dormant for nearly three years, came back to life at the start of the 2004 presidential campaign.

The OGC Brief rejects outright any distinction between a publicly financed presidential campaign and the congressional recount committees that are the subject of the Commission's Advisory Opinions ("AOs"). We disagree, but even if there is no distinction, the precedents cited by the OGC Brief actually dictate a dismissal of this matter.

The Federal Election Campaign Act of 1971, as amended (the "Act") and Commission Regulations, as interpreted by its advisory opinions, explicitly exempt a "separate recount committee" from the reporting requirements of the Act. The Act and Commission Regulations do not define a "separate recount committee". Here, a segregated, previously unused account that never had any funds in it prior to the recount became the Bush-Cheney Recount Fund ("BCRF"). The heart of the OGC Brief's argument is that because this is an unused account, as opposed to a new account, it should be treated differently and subject to a politically-charged draconian penalty.

Furthermore, the OGC Brief is apparently unaware that its analysis of the congressional recount committees in the Advisory Opinions also describes the structure and activities of BCRF, confirming that BCRF merits the same treatment as those committees and that there is no violation of the Act or Regulations. If OGC is going to rely on the Advisory Opinions' treatment of the congressional recount committees, then OGC must also concede that:

- "Donations and payments made with respect to a recount of the results of a federal election are exempted from the definition of 'contribution' and 'expenditure'. 11 C.F.R. 100.7(b)(20) and 100.8(b)(20)." *quoting* OGC Brief at 4 n.3.
- Congressional recount committees for non-publicly funded campaigns may set up new accounts or "separate vehicles" for recounts. Such a newly established account for recount activities does not have to register with the FEC. BCRF, established just after the November 2000 election, used a separate account that had never had any other activity in it. It did not register with the FEC, but it did register and report with the IRS.
- Recount committees do not have to report their receipts and disbursements to the FEC. BCRF did not report its activity to the FEC.
- Recount committees may have the same officers, leadership and staff as the principal campaign committee. BCRF had similar officers and leadership to Bush-Cheney 2000.
- Recount committees may use the same office space and employees as their campaign committees. However, in the case of BCRF, the OGC Brief argues that this somehow means that it "operates" as part of the campaign committee and therefore has violated the Act.
- Recount committees may use the same vendors as their campaign committees. BCRF used many of the same vendors as its campaign committee.

- Recount committees may establish their accounts at the same banks as their campaign committees. BCRF did so.
- The separateness between a recount committee and a campaign is not legally altered when funds are exchanged between the recount committee and the campaign committee.

OGC's theory hinges on the conclusory argument that BCRF is fatally flawed by being an internal part of Bush-Cheney. Yet OGC must concede that the Act, Commission Regulations and the Advisory Opinions do not define a "separate recount committee", or the criteria for determining whether a recount committee is a separate entity from the campaign committee. It can cite only Advisory Opinions that do not lay out the legal standards for making such a determination and, therefore, consistent with the Commission's established precedent, should not be used as a "sword of enforcement". See Commissioner Darryl R. Wold, et al., Statement of Reasons for the Audits of Dole and Clinton Presidential Campaigns 2-4 (June 24, 1999).

In short, the entire OGC argument rests on its belief that there is a difference between BCRF being established through a separate unused but existing account, and the same Bush-Cheney 2000 officials walking down the street to the same bank to open a new account for the very same recount fund to carry on the very same activities. OGC concedes that if BCRF had been established in a new account, it would not have had to register with or report to the FEC. See FEC AOs 1978-92 & 1998-26. That is form over substance. This matter should be dismissed.

II. STATEMENT OF FACTS.

In the wake of the unprecedented presidential recount following the November 7, 2000 election, Bush-Cheney formed BCRF in order to raise funds and pay costs associated with the recount and election contest. BCRF was established by making use of an existing separate media bank account that never contained any campaign funds and was never used to finance any campaign activities. By operating BCRF in this separate entity, Respondents segregated all recount moneys

from campaign funds. Money was exchanged between the campaign and BCRF to finance only allocable activities between the two organizations, as is required for a taxpayer funded campaign.¹

III. LEGAL ANALYSIS.

The OGC Brief does not cite any statutory or regulatory authority supporting its argument that the recount fund established and operated by Bush-Cheney was not a “separate recount committee.” This is because there is no statutory or regulatory authority defining what constitutes a separate recount committee to distinguish it from a recount committee formed through an existing, unused and separate account established by a campaign committee. Without being able to make this legal determination, it is impossible for OGC to make the allegation that Respondents were “required” to report BCRF’s receipts and disbursements on their periodic reports filed with the Commission. Respondents believe the AOs are not binding because this is a publicly financed Presidential recount, but even accepting the OGC premise, the AOs’ discussion of what constitutes a separate recount committee provides ample protection to Respondents. The OGC has failed to show how Respondents do not fit clearly within the ambit of these AOs and, therefore, the Commission must find that there is no probable cause to believe that a violation has occurred.

- A. The Act and Commission Regulations do not define what constitutes a separate recount committee or provide criteria for determining whether a recount fund is established as a separate entity or as an internal part of a campaign committee.

The OGC Brief does not cite any statutory or regulatory authority defining or referring to recount funds, providing guidance concerning the necessary steps to establish a separate recount fund, or what may or may not be included in the name of such a fund. Moreover, the OGC Brief does not cite any previous MURs involving recount funds or evidence that the Commission has pursued an enforcement action against a campaign committee involving the raising and spending of

¹ Such transfers would not be required for the congressional committees of AOs 1978-92 and 1998-26 since the campaign committee could make an unlimited contribution to the recount committee. That is not the case for a publicly funded Presidential campaign where such a contribution to a recount fund would be a non-qualified campaign expense.

recount funds, the structure and operation of such a fund, or the reporting requirements of such a fund. Accordingly, there is no statutory or regulatory guidance concerning the proper structure of a separate recount committee, whether established in the aftermath of a presidential or congressional election.

- B. FEC AOs 1978-92 and 1998-26 explicitly permit the principals of a campaign committee to establish a separate recount fund and do not prohibit a campaign committee from using an existing, though never previously used, bank account as a separate recount fund.

The gist of the OGC argument is that Bush-Cheney should have opened another account in the same bank or walked down the street to another bank to open BCRF, rather than using an existing campaign bank account that never contained any funds and never financed any campaign activities. This is form over substance. As discussed below, neither AO cited by the OGC Brief supports its argument.

- i. AO 1978-92 holds that a separate recount fund may be established and administered by the principals of a campaign committee without converting it into an internal part of the campaign committee.

In AO 1978-92, the requestor asked whether the current officers and staff of the campaign committee are permitted to “organize and operate a separate recount committee” and whether “this separate recount committee [is] required to report receipt and disbursements to the Commission”. The Commission held that such an entity would not become a political committee under the Act and regulations since “its receipts and disbursements would not be contributions or expenditures”. See FEC AO 1978-92. “The fact that persons connected with the [campaign committee] were the organizers and principals in a ‘separate recount committee’ would not change this result.” Id. This being the case, the only possible structural separateness that could logically follow from this holding is a bank account separate from the campaign’s operating bank account. As such, this Advisory Opinion does not require a recount committee to use a different bank than the campaign committee, have different officers and vendors, or maintain separate office space and employees. It

also does not limit a recount committee's ability to use the name of the candidate or campaign committee in the recount committee's name. The OGC cannot change this holding by fiat or mischaracterizing the structure and operation of the BCRF.

- ii. FEC AO 1998-26 holds that a campaign committee and a recount committee can transfer funds between the two accounts and otherwise cooperate in achieving their shared goals and still remain "separate" from each other.

In AO 1998-26, the requester asked whether it was permissible for the campaign committee account to accept a "loan repayment from a fund established to defend against an election challenge." The requestor did not request guidance concerning the proper structure or criteria for establishing a separate recount committee. See id.² In this Advisory Opinion Request, the campaign committee made loans to an election contest fund to finance its activities and the fund wished to make large, lump-sum repayments to the campaign committee. The Commission held that the large, lump-sum repayments from the election contest fund to the campaign are permissible. See id. This Advisory Opinion does not hold that the use of campaign funds by a recount committee and the corresponding loan repayments convert a separate recount or election contest committee into an internal part of the campaign committee. Therefore, the transfer of funds between a campaign committee and a separate recount fund to finance allocable recount activities does not change the status of a separate recount committee.

² The discussion regarding the option of establishing a "separate bank account" by the campaign committee as opposed to a "separate organizational entity" is dicta and not the holding of this Advisory Opinion since it was not in response to the question asked. Even if it was the holding of the AO, there is no logical or factual distinction between a "separate bank account" (whose receipts must be reported according to the OGC Brief) and "separate organizational entity" (whose receipts need not be reported the OGC Brief concedes), where both could be established and operated by the campaign committee's principals. To the extent the OGC attempts to use this distinction without a difference against Bush-Cheney, the OGC Brief fails to remind the Commission AOs can only be used as a shield, not a sword. See 2 U.S.C. § 437f; U.S. Defense Comm. v. FEC, 861 F.2d 765, 771 (2d Cir. 1988).

- C. The structural and operational activities cited by OGC as evidence are permissible activities for separate recount committees and do not support the argument that BCRF was an internal part of Bush-Cheney.

AOs 1978-92 and 1998-26 permit recount and campaign committees to maintain common principals, officers and employees. They do not require these committees to maintain separate vendors, office space or funds to remain "separate" in any way. If these AOs are to govern BCRF, then OGC Brief does not demonstrate, as a matter of law, that BCRF was an internal part of Bush-Cheney to the extent that BCRF should be held to a different set of rules than any other recount committee.

- The OGC argues that the Respondents admit that BCRF was an internal part of Bush-Cheney. Respondents admitted that BCRF was created in a separate unused account of Bush-Cheney. Of course, OGC cannot cite to a statutory or regulatory definition of "separate recount fund," so this is a distinction without a meaningful difference.
- The OGC argues that the Bush-Cheney 2000 audit and investigation of this matter establish that Bush-Cheney converted an existing campaign bank account and re-named it Bush-Cheney Recount Fund. However, the Act, Commission Regulations, and Advisory Opinions do not provide that the use of a separate existing campaign bank account as a recount committee converts an otherwise separate recount committee into an internal part of the campaign. AO 1978-92 says just the opposite: a separate organization exists even when campaign principals establish and operate the separate recount committee. It need only be separate from the campaign committee's election operating account.
- The OGC argues that BCRF "cooperated" with Bush-Cheney's other accounts by exchanging funds, making in-kind contributions, and using general election funds for

recount purposes. However AO 1998-26 holds that a campaign committee is permitted to loan funds to and receive funds back from a separate recount committee without affecting the separate status of the recount committee. In addition, the campaign committee principals are permitted to “cooperate” with the recount committee by establishing and operating it. AO 1978-92. Furthermore, the OGC Brief ignores that this was a taxpayer-funded campaign and, as such, BCRF expenditures could not be “qualified campaign expenses”. That mandated that BCRF reimburse Bush-Cheney 2000, as it did. Cf. OGC Brief at 5.

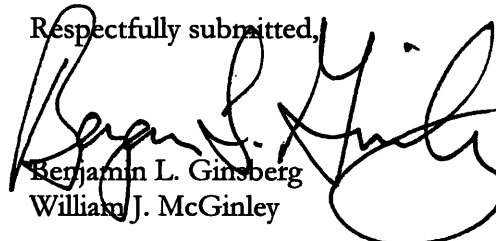
- The OGC argues that the use of the same payroll account by BCRF and Bush-Cheney is evidence that BCRF was an internal part of campaign committee. Nothing in the Act, Commission Regulations, or even the Advisory Opinions provides that the use of common vendors between a campaign committee and a separate recount committee affects a recount committee’s status as a the separate entity. To the contrary. If common principals can be used to establish and operate both entities, *a fortiori*, a common payroll account can be used.
- The OGC cites as evidence that BCRF listed the primary campaign committee and compliance campaign committee as “related entities” on its IRS Form 8871, but not Bush-Cheney (general election campaign committee). BCRF did not list Bush-Cheney as a related entity on IRS Form 8871 because it shares the same Employer Identification Number – an IRS identification number that does not have any bearing on whether BCRF is an internal part of Bush-Cheney. BCRF and Bush-Cheney share the same EIN for administrative efficiency purposes since it was on

record with the bank. BCRF was not required to apply for a new EIN under the Internal Revenue Code or Treasury Regulations. Rev. Rul. 2000-49, 2000-44 I.R.B.³

IV. CONCLUSION.

The Act and Commission Regulations do not define what constitutes a separate recount committee or the criteria for determining whether a recount committee is a separate entity. Moreover, under AO 1978-92, the principals of a campaign committee are permitted to establish a separate recount committee without incurring any reporting requirements with the Commission. In addition, the Commission has held that a campaign committee and its recount committee may exchange funds without affecting the separate status of the recount committee. See AO 1998-26. The structural and operational factors cited by the OGC Brief that BCRF is an internal part of Bush-Cheney are permissible activities for separate recount committees under these Advisory Opinions. Accordingly, there is no legal basis supporting a probable cause finding and the Commission should dismiss this matter.

Respectfully submitted,



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³ Contrary to the erroneous arguments in the OGC Brief, BCRF filed IRS Forms 8871 and 8872 as protective filings to ensure that no one questioned its tax exempt status as a political organization under section 527 of the Internal Revenue Code ("IRC"). If a non-FEC organization does not file such forms it is not an IRC violation. Rather, the organization may be subject to tax on its receipts and disbursements. BCRF filed the forms to ensure that it is not subject to federal tax. Therefore, BCRF was not "out-of-compliance" or subject to IRS fines as alleged in the OGC Brief.