FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

SENSITIVE

OFFICE OF THE CHAIRMAN

BEFORE THE FEDERAL ELECTION COMMISSION

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

STATEMENT OF REASONS
CHAIRMAN BRADLEY A. SMITH

On November 4, 2003, the Commission voted 5-0 to find probable cause to believe that Bush-Cheney 2000 Inc. violated 2 U.S.C. 434(b)(2)(J); 434(b)(4)(G); 434(b)(3)(G) and 434(b)(6)(A).[1] I write separately to emphasize that the law at issue here is well defined. There are many factors that mitigate the violation, and some truth to Respondent's contention that the rules here elevate form over substance. Even so, the straightforward application of well-established regulations to the facts leads to the conclusion that the Bush-Cheney Committee was obliged to disclose recount receipts and disbursements on its FEC reports.

If a recount effort is funded through a federal political committee, the receipts and disbursements are reportable transactions of that committee. The Act at 2 U.S.C. 434(b)(2)(J) requires the reporting of "the total amount of . . . other forms of receipts" and at 434(b)(4)(G) reporting of "any other disbursements." That information is reported under "other receipts" (line 21) and "other disbursements" (line 29) on the committee's Form 3P and itemized on an attached Schedule A and B. Here, the respondents used an existing Committee account for its recount funds. Under a plain reading of the law, then, the recount funds were reportable. The Commission need not delve into the other relationships the recount fund enjoyed with the Committee, and I believe the General Counsel's apparent consideration of these details potentially clouds our analysis.[2]

Respondents distinguish their situation by asserting that no Commission recount precedent has ever involved a publicly financed presidential campaign.[3] They also contend that under Advisory Opinion 1978-92 and 1998-26 they could operate a separate

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[1] Federal Election Commission, Minutes of an Executive Session (Nov. 4, 2003) (Commissioners Mason, McDonald, Smith, Thomas and Weintraub voting affirmatively, Commissioner Toner recused).
[2] *See* General Counsel's Brief, MUR 5199 (July 17, 2003) at 5-6.
[3] Respondents argue that our previous Advisory Opinions in this area do not apply to a publicly funded Presidential recount. Response of Bush-Cheney 2000, Inc. (Sept. 8, 2003) at 4.

recount committee and that activity would not be reportable to the FEC as federal "contributions" or "expenditures."[4] They are correct, but their situation lacks the critical factual predicate presented by the requesters of those opinions – a separate committee. Specifically, in Advisory Opinion 1978-92 we state that "if the Miller Committee . . . establishes any bank account for recount purposes, the receipts and disbursements of those accounts would be reportable transactions of the committee." It remains the case that Bush-Cheney 2000, Inc. is a political committee governed by Section 434. Accordingly, its receipts and disbursements should be reported.

Our conclusion would be different if a separate recount committee had been formed, and the recount activities done through that committee.[5] In that case, the law and our precedents provide that recount activity is not included within the definition of "contribution" or "expenditure" and so reporting with our agency is not required. But here, an entity that is already required to report with the Commission is raising and spending recount funds. Respondents do not appear to have done anything to constitute a separate recount entity, so we are not confronted with a closer case where we would evaluate whether such efforts were sufficient. True, recount funds are not technically "contributions" or "expenditures" and thus not subject to other FECA limits. But, just as interest, dividends, and other committee receipts that are not "contributions" or "expenditures" are reportable, so are these.

Respondents' counsel suggested before us that the timing of this matter has been manipulated to come "back to life at the start of the 2004 presidential campaign."[6] I am troubled whenever allegations of political bias are made in the enforcement context, and am concerned about the Commission's timeliness in resolving matters. From the testimony the Commission received in its consideration of its enforcement policies, prompt resolution of open matters is a concern for attorneys and activists generally.[7]

Closer examination, however, indicates that Respondents' counsel has asked for delays at several steps in the process. Respondents sought to hold the matter in abeyance pending the statutorily mandated audit of Bush-Cheney 2000 in May 2001, and the Commission held the matter until the completion of the Preliminary Audit Report. In July 2002 the matter was reactivated. Once the Commission found reason to believe a violation had occurred, Respondents' counsel sought a 20-day extension to file a response. Respondents then engaged in pre-probable cause negotiations for about two months. After receiving the General Counsel's Brief in support of a finding of probable cause, Respondents' counsel requested a 35-day extension of time. Respondents were well within their rights to seek abeyance and time extensions, but in so doing, they should

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[4] *Id.* at 5-7.

[5] The Conciliation Agreement at paragraphs 4 and 10 notes that had Bush-Cheney established a separate organization, it would not have this reporting obligation. It should be clear, even though it is not stated explicitly in the Agreement, that the recount receipts and expenditures would also need to be done through this separate organization.

[6] *Id.* at 1; *see also* Additional Factual and Legal Material (May 5, 2003) at 2.

[7] *See e.g.* written comments of: Robert F. Bauer (May 30, 2003) at 13; Cleta Mitchell (May 30, 2003) at 8; Joseph E. Sandler (May 30, 2003) at 6; Glen Shor, the Campaign Legal Center (May 30, 2003) at 3.

not be heard to complain about the length of the investigation, or when the case is concluded.

Respondents were also well within their rights to contest this case to the fullest extent. There are several mitigating factors, including Respondent's voluntary disclosure on the Internet of donations to the recount, and their disclosure to the IRS under the rules for 527 reporting. Moreover, Respondents are correct to observe that their particular situation was unprecedented. But all of that is not to say that the Act and our regulations provide no guidance for their situation. Accordingly, our decision should be understood as a straightforward application of our recount precedents to political committees generally and consistent with Advisory Opinions 1998-26 and 1978-92.

March 29, 2004

Bradley A. Smith
Chairman