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Washington, D.C. 20463

**SENSITIVE**

2004 SEP -1 A 10: 15  
FIRST GENERAL COUNSEL'S REPORT

DATE COMPLAINT FILED: February 6, 2004  
DATE OF NOTIFICATION: February 11, 2004  
MUR 5409  
DATE ACTIVATED: April 5, 2004

EXPIRATION OF STATUTE OF  
LIMITATIONS: January 1, 2009

COMPLAINANT: Citizens for Responsibility and Ethics in Washington

RESPONDENTS: Grover Norquist  
Americans for Tax Reform, Inc.  
Ken Mehlman  
Bush-Cheney '04 and David Herndon, as treasurer

RELEVANT STATUTES: 2 U.S.C. § 431(8)(A)(i)  
2 U.S.C. § 434  
2 U.S.C. § 441a(a)(1)(A)  
2 U.S.C. § 441a(f)  
2 U.S.C. § 441b(a)  
11 C.F.R. § 100.52(d)

INTERNAL REPORTS CHECKED: Disclosure Reports

FEDERAL AGENCIES CHECKED: None

**I. INTRODUCTION**

Complainant alleges that Grover Norquist, president of Americans for Tax Reform, Inc. ("ATR"), gave to Ken Mehlman, campaign manager of Bush-Cheney '04 ("Committee"), a "master contact list" of activists in 37 states. The complaint alleges that these activists would "help organize the conservative base to support the Bush-Cheney campaign." According to the

1 complaint, Mr. Norquist spent five years developing this list “using considerable corporate  
2 resources” provided by ATR. Complaint at 3. The complaint alleges that this list constitutes an  
3 in-kind contribution “with a substantial market value” to the Committee, in the form of either an  
4 impermissible corporate contribution from ATR to the Committee or an excessive contribution  
5 from Mr. Norquist to the Committee. *Id.* at 3-4. The complaint also alleges that Mr. Norquist,  
6 ATR and the Committee failed to report the making and the receipt of this contribution. *Id.* at 5.  
7 The complaint is based on two press articles, from the *Washington Post* and *Forbes.com*, which  
8 are attached to the complaint.

9       The Committee and its treasurer David Herndon and campaign manager Ken Mehlman  
10 jointly responded to the complaint (“Committee response”), asserting that no provision of the  
11 Commission’s regulations makes publicly or otherwise readily available information a thing of  
12 value under the Federal Election Campaign Act of 1971, as amended (“the Act”). The  
13 Committee response critiques as “not [ ] accurate or informed” the complaint’s characterization  
14 of the list as a thing of value because it was a membership list or mailing list. The Committee  
15 response describes the information “actually provided” as “readily available information  
16 concerning regularly occurring meetings of conservative activists in several states and varied  
17 from state to state and in some instances included contact information for individuals.” The  
18 response adds that “[a] list of activists in many states is available publicly on the website of  
19 [ATR] at <http://www.atr.org/stategroups/index.html>.” Finally, the Committee response asks the  
20 Commission to dismiss the complaint and take no further action in this matter.

21       Similarly, ATR’s response to the complaint asserts that the complaint erroneously  
22 characterized the documents provided by Mr. Norquist to Mr. Mehlman as “valuable.”<sup>1</sup> These

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<sup>1</sup> Respondent Grover Norquist did not separately respond to the complaint.

1 documents "were *not* proprietary, confidential lists," according to ATR's response, but rather  
2 "included lists of state contacts for state coalition meetings and the key contact person for each  
3 state is listed on ATR's website." [emphasis in original]. ATR's response adds that additional  
4 documents were included "which were state reports discussing the issues and activities of  
5 various grassroots organizations in various states." ATR asserts that such information is publicly  
6 available "and no doubt known to politically active individuals in each state, including especially  
7 the paid staff and volunteers in the Bush-Cheney campaign in the states." Finally, ATR states  
8 that "[t]he key information regarding contacts in each state is posted on the ATR website for all  
9 to see and as such, constitutes no 'thing of value' within the meaning of 2 U.S.C. § 431(8)(A),"  
10 and that accordingly, the complaint should be dismissed.

11 Neither the complaint nor the responses provided the materials alleged in the complaint  
12 to constitute a contribution from Grover Norquist or ATR to the Committee. This Office asked  
13 respondents through counsel if they wanted to voluntarily provide the materials. On May 24 and  
14 May 25, 2004, respectively, counsel for ATR and Mr. Norquist and counsel for the Committee,  
15 its treasurer David Herndon and campaign manager Ken Mehlman submitted documents to this  
16 Office. The latter are included as an attachment to this Report.<sup>2</sup>

17 As discussed below, this Office believes that the materials provided by Mr. Norquist to  
18 the Committee constitute a contribution. Accordingly, this Office recommends reason to believe  
19 findings. Because the contribution appears to be limited in size and impact, however, we

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<sup>2</sup> The two sets of materials are similar, but not identical. Counsel for ATR and Mr. Norquist states in a cover letter that her clients "did not keep a copy of the [materials] in exactly the same form in which it was furnished to Mr. Mehlman, because the information is updated regularly and is publicly available in various formats and from various public sources." Counsel adds that her clients "do have in their files copies of some memoranda which they believe were included in [the materials] and those memos are enclosed with this letter." Counsel for the Committee stated in his cover letter that he was enclosing "a copy of the materials" requested by this Office. Hence, this Office has attached a copy of the materials provided by counsel for the Committee.

1 recommend that the Commission exercise its prosecutorial discretion and take no further action  
2 and close the file in this matter.

3 **II. FACTUAL AND LEGAL ANALYSIS**

4 **A. The Materials at Issue**

5 The materials provided by counsel for the Committee consist of the following documents:

- 6 • A cover page titled "Center-Right Coalition Meetings In the States," dated October 15,  
7 2003 (Attachment page 2);
- 8 • A map of the United States identifying the 36 states and the District of Columbia that  
9 have Coalition meetings, and nine additional states that were to have Coalition meetings  
10 by the end of 2003 (Attachment page 3);
- 11 • A memorandum regarding state legislature resolutions supporting President Bush's  
12 "national agenda," and a list of state legislatures that have introduced and/or passed such  
13 resolutions (Attachment page 4);
- 14 • Descriptions of Coalition meetings in 22 states, most of which are accompanied by  
15 extensive lists of attendees, their related organizations and contact information  
16 (Attachment page 8);
- 17 • A memorandum stating that Coalitions in other states "were unable to meet the time  
18 constraints to submit their information," accompanied by a list marked "Confidential"  
19 identifying 592 Coalition meeting attendees in 33 states, most of which are organizations  
20 (Attachment page 81);
- 21 • An ATR announcement regarding a Center-Right Coalition Conference call with Grover  
22 Norquist regarding Coalition successes (Attachment page 95);

- 1       • A list of state legislators and other state officials who have signed ATR's "Taxpayer  
2       Protection Pledge" (Attachment page 96); and
- 3       • An ATR memorandum for Ken Mehlman regarding a Swedish citizen, Erik Lakomaa,  
4       who "wants very much to work for GWB in 2002," [sic] and Mr. Lakomaa's resume  
5       (Attachment page 106).

6       Of these documents, the descriptions of Coalition meetings and the lists of attendees  
7       seem most related to the complaint and responses in this matter. These items appear to  
8       correspond to the "master contact list" noted in the complaint and the meetings, contact persons  
9       and state reports referenced in the responses. See Attachment pages 8-80 and 82-94. The  
10      meeting and attendee information appears to have been provided to ATR by the various state  
11      Coalitions in response to ATR requests.<sup>3</sup> See, e.g., Kansas Taxpayers Network, responding to  
12      ATR's "various e-mail requests for information from this Office" (Attachment page 25); New  
13      Jersey Tuesday Group, responding to ATR's September 29, 2003 e-mail (Attachment page 49).

14     The descriptions of Coalition meetings are exemplified by the California meeting:

15             The meeting is attended by an array of business, social and political groups  
16             representing taxpayers, gun owners, social conservatives, college republicans,  
17             non-union contractors, the Republican party, and elected officials. The meeting  
18             serves as a systematized opportunity for representatives of these various  
19             stakeholder groups to meet in an information-sharing environment.

20  
21     Attachment page 8. This description of attendees is consistent with the attendee lists  
22     accompanying the meeting descriptions as well as those separate lists at Attachment pages 82-94.  
23     Two of the Coalitions, California and Illinois, each list a Bush-Cheney '04 representative as an  
24     attendee. Attachment pages 10 and 21. The documents, however, do not otherwise mention the

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<sup>3</sup>       The very formation of at least some of the state Coalitions appears to have been facilitated by ATR  
Included in the Minnesota Coalition materials is a "GUIDE TO STARTING A COALITION MEETING" on ATR  
stationery, which consists of a checklist of 47 suggested groups from which to draw attendees, e.g., National  
Federation of Independent Business; Chamber of Commerce. Attachment page 40.

1 Committee or the 2004 presidential election.<sup>4</sup> Similarly, a few of the state Coalition attendees  
2 are identified as congressional staff and campaign staff, and two are Federal candidates, but the  
3 documents do not discuss Federal elections.<sup>5</sup>

4 The responses to the complaint describe the materials provided by Grover Norquist to the  
5 Committee as publicly available or readily available, some of which assertedly appeared on  
6 ATR's website. We cannot at this stage confirm what documents were posted at the time Grover  
7 Norquist provided the materials to the Committee.<sup>6</sup> ATR's extensive website is divided into six  
8 major areas, one of which, "States," is further divided into nine areas. One of these nine, "State  
9 Groups," contains the website documents most similar to the materials at issue:<sup>7</sup>

- 10 • A map of the United States identifying the 39 states and the District of Columbia that  
11 have Coalition meetings, and six additional states that were to have Coalition meetings by  
12 March 2004.<sup>8</sup> See [http://www.atr.org/graphics/state\\_mtgs.jpg](http://www.atr.org/graphics/state_mtgs.jpg).
- 13 • A list titled "State Center-Right Coalition Meetings," which identifies the date, time and  
14 city of monthly meetings (e.g., "1<sup>st</sup> Friday/Month, 10:00 a.m., Phoenix") and contact  
15 names and information in 38 states and the District of Columbia. See  
16 <http://www.atr.org/graphics/MeetingList.jpg>.

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<sup>4</sup> An exception is the New Jersey Coalition materials, which mention the Bush Campaign in connection with "issues of concern" such as jobs, immigration and security. Attachment page 50. A further mention is a discussion titled "Conservatives Locked Out of Bush Campaign in NJ" regarding a historic practice in the state. *Id.*

<sup>5</sup> See attendee lists of Coalitions in Arizona, California, Illinois, Maryland, Minnesota, Nebraska, New Jersey, New Mexico, Oregon and Virginia. Attachment pages 9, 10, 21, 42-43, 48, 49, 53, 82, 86, 91, 93. The Minnesota materials include "more favorable election results" as a goal but it appears to be focused on state elections. Attachment pages 38-39.

<sup>6</sup> Counsel for ATR and Mr. Norquist stated in the cover letter to their May 24, 2004 production that ATR's website pages "are constantly updated regarding state activities, meetings and leaders."

<sup>7</sup> This Office visited the ATR website on July 2, 2004. On a subsequent visit to the website on August 31, 2004, this Office observed no newly-posted documents.

<sup>8</sup> The map is labeled "Last Update 2/25/04."

- 1       • A section titled "State Groups/State Coalition Meeting Memos," which includes  
2 documents describing fourteen Coalition meetings in eight states with dates ranging from  
3 March 17, 2004 to May 21, 2004. See <http://www.atr.org/stategroups/memos.html>.  
4 These memoranda, mostly on ATR letterhead, specify the date and in most cases the time  
5 of the meetings and the number of attendees. Some of the memoranda identify speakers  
6 and their issues, but only a single memorandum identifies all the attendees.<sup>9</sup> A few of the  
7 speakers are identified as Members of Congress or candidates for Congress, and one  
8 individual is identified as "works on the [National Republican] Senatorial Committee for  
9 [Senator] Allen." These memoranda do not mention the Committee and make only  
10 limited reference to the 2004 Presidential election.<sup>10</sup>
- 11       • A document titled "State Groups" which lists 156 individuals and organizations in 48  
12 states and the District of Columbia "that work closely with Americans for Tax Reform."  
13 The document provides contact information and websites of the individuals and  
14 organizations. See <http://www.atr.org/stategroups>. These individuals and organizations  
15 are not specifically identified as members of the state Coalitions. Some of the listed  
16 individuals and organizations appear on the attendee lists in the materials provided by  
17 respondents to this Office on May 24 and 25, 2004.

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<sup>9</sup> The memorandum regarding the "Iowa Meeting" identifies the three attendees. The other memoranda that specify only the number of attendees contain figures ranging from 10 to 90. On this Office's visit to the ATR website on August 31, 2004, we observed that the Iowa Meeting memorandum along with four other meeting memoranda are no longer accessible

<sup>10</sup> A memorandum regarding "North Carolina's 1<sup>st</sup> Center-Right Coalition Meeting," dated May 24, 2004, states that Grover Norquist "was ... asked to talk about what his sense was on the upcoming Presidential election." A "Hand-Out Packet" regarding the April 14, 2004 "Wednesday Meeting" in Texas includes the American Shareholders Association's *2004 Investor Voter Guide - John Kerry's 19 Year Record on Investor Issues*. This document criticizes Sen. Kerry, the Democratic nominee for President in 2004, as opposing investors' interests, at one point stating that Sen. Kerry's "rhetoric" "demonstrates he is not fit to be President." *Id.* at 15.

1 The ATR website does not include the extensive Coalition meeting attendee lists described  
2 above which comprise most of the materials at issue. See Attachment pages 8-80 and 82-94.

3 **B. The Materials Appear to Constitute a Contribution, but Probably of Limited**  
4 **Size and Impact**  
5

6 The complaint alleges that the materials provided by Grover Norquist to the Committee  
7 constitute either an excessive contribution from Mr. Norquist or an impermissible corporate  
8 contribution from ATR. *See* 2 U.S.C. §§ 441a(a)(1)(A) and 441b(a).<sup>11</sup> The Act broadly defines  
9 “contribution” to include “any gift, subscription, loan, advance, or deposit of money or anything  
10 of value made by any person for the purpose of influencing any election for Federal office.”  
11 2 U.S.C. § 431(8)(A)(i).<sup>12</sup>

12 The responses to the complaint do not deny that Mr. Norquist provided materials to the  
13 Committee, and do not assert that the materials were not for the purpose of influencing a federal  
14 election. *See id.* Rather, the responses argue that the materials provided were not a thing of  
15 value because they were not membership or mailing lists or proprietary, confidential lists but

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<sup>11</sup> The public record discloses a \$500 contribution by Mr. Norquist to the Committee on January 21, 2004, and so he could permissibly contribute another \$1,500 to the Committee in connection with the 2004 primary election. *See* 2 U.S.C. § 441a(a)(1)(A). By contrast, ATR, as a corporation, is prohibited from making any contribution to the Committee. *See* 2 U.S.C. § 441b(a). Mr. Norquist, as the person who allegedly directly gave the materials to the Committee, would face potential liability as a corporate officer of ATR consenting to the contribution. *See id.* The Committee is prohibited from knowingly accepting any contributions in excess of the Act's limits, a prohibition that extends to officers and employees of the Committee such as campaign manager Ken Mehlman. *See* 2 U.S.C. § 441a(f). Finally, the Committee is prohibited from knowingly accepting any corporate contribution, a prohibition that extends to other persons such as Mr. Mehlman. *See* 2 U.S.C. § 441b(a).

<sup>12</sup> The Commission's regulations define “anything of value” to include all in-kind contributions, including the provision of goods or services without charge or at a charge which is less than the usual and normal charge for such goods or services. 11 C.F.R. § 100.52(d)(1). For purposes of section 100.52(d)(1), “usual and normal charge for goods” means the price of those goods in the market from which they ordinarily would have been purchased at the time of the contribution. 11 C.F.R. § 100.52(d)(2). It is difficult to ascertain a market value for unique goods such as the materials Grover Norquist provided to the Committee. The lack of a market, and thus the lack of a “usual and normal charge,” however, does not necessarily equate to a lack of value.



1 rather were readily available on ATR's website or otherwise publicly available or readily  
2 available.<sup>13</sup>

3         Aside from the list assertedly posted on ATR's website, however, the responses do not  
4 explain how or where one would have obtained the materials, other than to assert that the  
5 information in the materials is "no doubt known" to the paid staff and volunteers of the  
6 Committee in the states. Further, circumstances surrounding some of the materials raise  
7 questions as to whether the materials were in fact publicly or readily available. The list of 592  
8 Coalition meeting attendees in 33 states is marked "Confidential," suggesting that it was not a  
9 public document. See Attachment page 82. The descriptions of Coalition meetings in 22 states,  
10 most of which are accompanied by extensive lists of attendees, see Attachment pages 8-80,  
11 appears to have been provided to ATR by the various state Coalitions in response to ATR  
12 requests. Although there is public information regarding the existence of these meetings, such as  
13 on ATR's website, *see supra*, and on the websites of some of the organizations within the state  
14 Coalitions and in press articles, none of these public sources appears to contain the attendee lists  
15 that constitute much of the materials at issue in this matter. Only a few of the listed attendee  
16 individuals and entities appear in the "State Groups" document on ATR's website. These  
17 circumstances suggest that the substantial attendee lists in the materials may not have been  
18 publicly available.<sup>14</sup>

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<sup>13</sup> None of the materials appear to constitute commercial mailing lists of the kind at issue in MURs 5396 (Bauer for President 2000), 5181 (Ashcroft 2000), and 4382/4401 and 4826 (Dole for President).

<sup>14</sup> The Kansas and Illinois state Coalitions are illustrative. The Kansas Taxpayers Network ("KTN") provided information about its meetings, including attendees, to ATR by facsimile. See Attachment page 25. The KTN website does not mention the meetings. See <http://www.kansastaxpayers.com> (visited June 24, 2004). The KTN facsimile lists eleven attendees and their related organizations, two of which appear on the ATR "State Groups" list. The Illinois Coalition meeting information, including a list of attendees, was provided to ATR on the letterhead of the Illinois Policy Institute ("IPI"). See Attachment page 20. The IPI website contains a link to a press article dated October 17, 2002, regarding the launching of the meetings, but there is no listing of attendees. See *Wednesday*

1 In sum, it appears that ATR utilized its resources to obtain and compile state Coalition  
2 meeting materials, which were provided by Grover Norquist to the Committee. These materials  
3 contain information that may be of value in connection with the 2004 presidential election. For  
4 example, the meeting attendee lists of organizations and individuals may at least point the  
5 Committee in the direction of persons who might help the Committee's election efforts.  
6 Although respondents argue that no contribution took place because the materials had no value in  
7 that they were readily or publicly available, it is not clear that the materials were in fact available  
8 except as provided by Mr. Norquist. Under these circumstances, it appears that Mr. Norquist and  
9 ATR may have given the Committee something of value, meeting the Act's broad definition of  
10 "contribution." See 2 U.S.C. § 431(8)(A)(i).

11 Accordingly, this Office recommends that the Commission find reason to believe that the  
12 following persons violated 2 U.S.C. § 441b(a): Americans for Tax Reform, Inc. for making a  
13 corporate contribution; Grover Norquist as a corporate officer consenting to the corporate  
14 contribution; Bush-Cheney '04 and David Herndon, as treasurer, for knowingly accepting the  
15 corporate contribution; and Ken Mehlman for accepting the contribution on behalf of the  
16 Committee. Because the contribution appears to have come from ATR and not Mr. Norquist  
17 personally, and thus he does not appear to have made an excessive contribution to the  
18 Committee, this Office also recommends that the Commission find no reason to believe that  
19 Grover Norquist violated 2 U.S.C. § 441a(a)(1)(A) or that Bush-Cheney '04 and David Herndon,  
20 as treasurer, violated 2 U.S.C. § 441a(f).

21 For the following reasons, however, the materials would seem to constitute only a limited  
22 contribution to the Committee. First, individuals and organizations are listed in the materials

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*Meeting Group Launched in Springfield*, at <http://www.illinoispolicyinstitute.org/news.htm>. The IPI document lists 44 individuals and their related organizations, five of which appear on the ATR "State Groups" list.

1 because they are already actively involved in supporting conservative issues and so are likely  
2 already to be aware of – and possibly involved in – the Committee's efforts in connection with  
3 the 2004 election. Thus, the impact of the materials in “help[ing] organize the conservative base  
4 to support the Bush-Cheney campaign,” as alleged in the complaint, may be limited. Second,  
5 with minor exception, the materials focus on state and local issues and do not discuss the  
6 Committee or the 2004 presidential election. Third, the Committee would have already had  
7 some of the information in the materials – as noted above, Bush-Cheney representatives appear  
8 among the California and Illinois Coalition attendees. Fourth, to the extent that the materials  
9 were publicly available, such as on ATR's website, that might serve to limit the value of the  
10 contribution.

11 **C. Reporting Obligations**

12 The complaint further alleges that Grover Norquist, ATR and the Committee failed to  
13 report the making and the receipt of this contribution. As an initial matter, no reporting  
14 obligation under the Act attaches to persons making contributions, unless those persons are  
15 political committees. *See* 2 U.S.C. § 434. Thus, Grover Norquist and ATR had no obligation to  
16 report any such contributions. The Committee, by contrast, as a political committee, would have  
17 to report the receipt of such a contribution. *See* 2 U.S.C. § 434(b).<sup>15</sup> The Committee has not  
18 disclosed the receipt of any in-kind contribution from ATR or Grover Norquist.<sup>16</sup> Therefore, this  
19 Office recommends that the Commission find reason to believe that Bush-Cheney '04 and David  
20 Herndon, as treasurer, violated 2 U.S.C. § 434(b).

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<sup>15</sup> In-kind contributions must be reported as both contributions received and expenditures made. 11 C.F.R. § 104.13(a).

<sup>16</sup> As noted above on page 8, footnote 11, the Committee disclosed the receipt of a \$500 contribution from Mr. Norquist.

1           **D.    Conclusion**

2           In light of the apparently small value of the materials provided by ATR and Grover  
3 Norquist to the Committee, and in order to devote the Commission's limited resources to more  
4 significant cases, this Office does not recommend pursuing this matter. Accordingly, this Office  
5 recommends that the Commission take no further action and close the file in this matter.

6           **III.   RECOMMENDATIONS**

- 7           1. Find reason to believe that Americans for Tax Reform, Inc. violated 2 U.S.C.  
8           § 441b(a).  
9  
10          2. Find reason to believe that Grover Norquist violated 2 U.S.C. § 441b(a).  
11  
12          3. Find reason to believe that Bush-Cheney '04 and David Herndon, as treasurer,  
13          violated 2 U.S.C. §§ 441b(a) and 434(b).  
14  
15          4. Find reason to believe that Ken Mehlman violated 2 U.S.C. § 441b(a).  
16  
17          5. Find no reason to believe that Grover Norquist violated 2 U.S.C. § 441a(a)(1)(A).  
18  
19          6. Find no reason to believe that Bush-Cheney '04 and David Herndon, as treasurer,  
20          violated 2 U.S.C. § 441a(f).  
21  
22          7. Take no further action and close the file.  
23  
24          8. Approve the appropriate letters.

25  
26  
27                   Lawrence H. Norton  
28                   General Counsel

29  
30                   8/31/04  
31                   Date

32                   BY: Rhonda J. Vosdingh  
33                   Rhonda J. Vosdingh  
34                   Associate General Counsel  
35                   for Enforcement

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Cynthia E. Tompkins by MA  
Cynthia E. Tompkins  
Assistant General Counsel

Mark Allen  
Mark Allen  
Attorney

Attachment  
Bush-Cheney '04 submission received May 25, 2004

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