



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

SENSITIVE

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of:)
)
 Romney for President, Inc. and) MUR 5937
 Darrell Crate, in his official)
 capacity as treasurer)
 Kem Gardner)

**STATEMENT OF REASONS OF
COMMISSIONERS CYNTHIA L. BAUERLY AND ELLEN L. WEINTRAUB**

In June 2007, Kem Gardner, a supporter of Mitt Romney's presidential bid, paid \$150,000 to charter an airplane to fly himself and a large number of Romney supporters from Utah to Boston to work at a Romney for President fundraiser dubbed "America's Calling." A citizen filed a complaint alleging that the travel payment by Mr. Gardner was an impermissible or excessive in-kind contribution to the Romney Committee and asked the Commission to look into the matter.

Based upon the information contained in the complaint and other publicly available sources, the Office of General Counsel recommended that the Commission find reason to believe that Kem Gardner made, and Romney for President, Inc. and Darrell Crate, in his official capacity as treasurer ("RFP") accepted, an excessive in-kind contribution. On January 28, 2009, the Commission split 3-3 on whether to approve this recommendation, and on two additional motions to find reason to believe that Mr. Gardner made an excessive in-kind contribution.¹ The Commission then voted to close the file.

For the reasons stated below, we voted to approve the recommendation of the Office of General Counsel to find reason to believe Gardner and RFP violated the Federal Election Campaign Act ("the Act") and the more limited motions to find reason to believe with respect to Mr. Gardner alone.²

¹ Vice Chairman Petersen and Commissioners Hunter and McGahn voted against the General Counsel's recommendation; Chairman Walther joined us in supporting the recommendation.

² After it became clear that our colleagues would not find the Romney campaign liable for receiving an in-kind contribution from Mr. Gardner, Commissioner Weintraub made two additional motions. The first was to reject all recommendations with respect to taking action against RFP but to find reason to believe that Mr. Gardner had violated the law, and to enter into pre-probable cause conciliation with him without further investigation. After this

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I. Background

The event at issue took place on June 25, 2007 at Boston's TD Banknorth Garden. RFP's press release following the event states that the event comprised more than 600 Romney supporters who used 400 landline phones to make more than 20,000 telephone calls, which raised approximately \$2 million for RFP. In a video posted on the campaign's website, RFP national finance director Spencer Zwick, shown speaking the evening before the calling event, stated:

Well, we've got a great group of supporters from around the country. . .we have close to a thousand people that have traveled at their own expense coming to Boston with the idea that they are going to raise money to help us push toward the end of the quarter. So tonight [a Fenway Park barbecue on July 24] is a thank you for their support, but by and large we are here to raise money. So starting tomorrow, we'll go to the Boston Garden and they will call their personal rolodex. They'll call their friends. They'll call their family. They'll call people that maybe contributed a little bit but need to contribute some more. So our goal is to raise money and expand our base of support.

Mr. Gardner stated in his response to the complaint that RFP asked him to travel to Boston to make fundraising telephone calls for RFP at the "America's Calling" event.³ Gardner chartered a plane to take him to Boston, and when he learned that "a large group of his family and friends" were in the process of booking travel to the event, he invited them to fly aboard his charter plane, at his expense.⁴ RFP plainly knew about Mr. Gardner's charter since an RFP shuttle met the group from Mr. Gardner's plane at the airport and transported them to the scheduled events. RFP states that it paid for and reported all expenses related to the event.⁵

failed, Commissioner Weintraub moved to reject the recommendations with respect to RFP, find reason to believe Mr. Gardner had violated the law and, in response to concerns voiced by her colleagues about the sufficiency of the information then before the Commission, authorize the Office of General Counsel to conduct a limited scope investigation in order to further develop the factual record. Our colleagues who voted against the motion, however, indicated that there was no set of facts in this matter under which they were prepared to proceed.

³ At the time of the event, Mr. Gardner had already contributed \$2,300 to RFP, the maximum for the primary.

⁴ It is not clear from Mr. Gardner's response whether the size (and cost) of the aircraft he ultimately chartered was dependent upon how many travelers he transported. Video of the trip posted on YouTube suggests that the chartered JetBlue airliner holds approximately 200 passengers and appeared to be quite full. *See* <http://www.youtube.com/watch?v=nDWKDuktyGE> (last visited March 12, 2009). It strains credulity to believe that had Mr. Gardner planned to travel to the event alone, he would have chartered a 200 passenger plane.

⁵ In its response to the complaint, RFP states that "[t]he campaign did not request that any individual or entity pay for the travel of any other individual or group of individuals," however, neither RFP nor Gardner's response addresses whether, once Gardner offered to pick up the tab for the flight, the committee played a role in filling the seats.

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II. Analysis

For the campaign cycle at issue here, the Act's limit on contributions from individuals to candidates and their authorized committees was \$2,300 per election.⁶ The Act also provides that no candidate or political committee shall knowingly accept any contribution in violation of the prescribed limits,⁷ and that political committees must report all contributions.⁸ Excepted from the definition of contribution are: "the value of services provided without compensation by any individual who volunteers on behalf of a candidate or political committee"⁹ (the "volunteer exception"), and any unreimbursed payment for travel expenses made by any individual on behalf of a candidate to the extent that the cumulative value of such activity by such individual does not exceed \$1,000 per election.¹⁰

The legislative history of the travel exception provides some important context in this matter. The original version of the provision read that "any unreimbursed payment for travel expenses made by an individual who *on his own behalf* volunteers his personal services to a candidate" would not be a contribution to the extent that those expenses did not exceed \$500.¹¹ Thus, the language of the original provision appeared to deem all unreimbursed payments for travel expenses exceeding \$500 by volunteers to be contributions, whether the volunteer woke up one morning and said "I'm going to travel to California to volunteer for candidate X any way I see fit" or the campaign requested that a volunteer travel to California to perform a specific task.

Two years later, in *Buckley v. Valeo*, the Supreme Court upheld the Act's limitations on volunteers' incidental expenses, and stated that "these provisions are a constitutionally acceptable accommodation of Congress' valid interest in encouraging citizen participation in political campaigns while continuing to guard against the corrupting potential of large financial contributions to candidates."¹² The Court elaborated that "travel undertaken as a volunteer at the direction of the candidate or his staff is an expense of the campaign and may properly be viewed as a contribution if the volunteer absorbs the fare" and contrasts such travel with "actions voluntarily undertaken by citizens independently of a candidate's campaign" which would not be a contribution to the candidate.¹³ In a footnote, the Court extrapolated the "authorized or

⁶ 2 U.S.C. § 441a(a)(1).

⁷ 2 U.S.C. § 441a(f).

⁸ 2 U.S.C. § 434(b). The Act defines the term "contribution" as (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." 2 U.S.C. § 431(8)(A)(i); *see also* 11 C.F.R. § 100.52 ("anything of value" includes all in-kind contributions).

⁹ 2 U.S.C. § 431(8)(B)(i), 11 C.F.R. § 100.74.

¹⁰ 2 U.S.C. § 431(8)(B)(iv), 11 C.F.R. § 100.79.

¹¹ Pub. L. No. 93-443, 88 Stat. 1273 (codified at 2 U.S.C. § 431(e)(5)(D)(1974)) (emphasis added).

¹² 424 U.S. 1, 36 (1976).

¹³ *Id.* at 37.

requested” language from the distinction in the Act between contributions and independent expenditures and applied it to volunteer travel, noting that counting as a contribution only travel “authorized or requested” by a candidate was necessary to avoid the administrative chaos of campaigns tracking “unsolicited travel.”¹⁴

The 1979 amendments to the Act following *Buckley* reflect the Court’s “authorized or requested” instruction by changing the language of the statute to read that “any unreimbursed payment for travel expenses made by any individual *on behalf of a candidate*” would not be a contribution to the extent those expenses do not exceed \$1,000.¹⁵ Notably, the 1979 amendment removed the term “volunteers” from the exception, however, it appears that our colleagues who voted against the General Counsel’s recommendation have chosen to read the term “volunteers” back into this section of the Act.

Thus, the law here is clear: any unreimbursed travel payment exceeding \$1,000 made on behalf of a campaign is a contribution to the candidate.¹⁶ Although our colleagues who voted against the General Counsel’s recommendation in this matter correctly state the corollary of this provision (that travel undertaken independently of a campaign is not subject to the limits of the Act) the facts before us show that Mr. Gardner’s travel was not independent of RFP. In fact, Mr. Gardner states that the campaign specifically requested that he travel to Boston to spend an entire day working in an arena full of other Romney supporters to raise funds on behalf of RFP.¹⁷ His travel expenses exceeded the exception cap by \$149,000 – exactly the type of large financial contributions from an individual that the *Buckley* court foreshadowed when it upheld the contribution limits.¹⁸

RFP’s response to the complaint downplays the work, most notably the 20,000 fundraising phone calls, performed by the attendees. Instead it describes the event as one “where donors were invited to bring check contributions, solicit friends and personal contacts, and socialize with other donors....a large fundraiser where donors—some ‘maxed out,’ and some not—also solicited contributions.”¹⁹ RFP’s own press releases and website videos released

¹⁴ *Id.* at n.43.

¹⁵ 2 U.S.C. § 431(8)(B)(iv), 11 C.F.R. § 100.79.

¹⁶ *Id.*

¹⁷ In their Statement of Reasons in this matter, our colleagues claim that an “invitation” is not a “request.” See Statement of Reasons in MUR 5937 of Vice Chairman Petersen and Commissioners Hunter and McGahn at 5. We note, however, that the definition of “invitation” is: “a request to be present or participate.” See Webster’s New International Dictionary, 3rd Ed., s.v. “invitation;” see also The American Heritage Collegiate Dictionary, 3rd Ed., s.v. “invitation,” “A request for someone’s presence or participation.” We think it would surprise most recipients of invitations to discover that their presence was *not* requested.

¹⁸ Assuming there were 200 travelers on the plane in addition to Mr. Gardner, had each of them paid him \$750, they would have covered the entire cost of the flight and fallen well below the \$1,000 per person travel exception. Instead, Mr. Gardner picked up the tab for the flight, a fact of which RFP admits it was well aware.

¹⁹ RFP Response at 2. (Emphasis in the original).

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around the time of the event, however, demonstrate that, in fact, it was a meticulously staged phone-a-thon comprising a massive volunteer effort to perform fundraising work for the campaign. Furthermore, blog postings from participants suggest that those who didn't come armed with their own rolodex were provided with telephone lists by RFP so that they too could dial for dollars.²⁰

RFP's response to the complaint correctly delineates the type of travel that falls into the exception because it is not "on behalf of a campaign." The response first describes fundraising events at which donors must agree to contribute a particular amount of money in order to be admitted. In that instance, a donor makes a contribution and by so doing, earns an "entrance ticket." Whether the contributor actually attends the event is his or her own choice, but if so, the travel would not be "on behalf of a campaign," but rather on the contributor's own behalf. The response next mentions "fulfillment events" where campaigns do not request contributions but rather seek to reward successful fundraisers and supporters. Clearly, travel to these events would not be "on behalf of a campaign." Finally, RFP discusses events at which admission is contingent upon an attendee's commitment to raise a certain amount of funds for the campaign. This is akin to the first example, except the "entrance ticket" is awarded based on a promise to raise funds. Here again, travel to the actual event is at the individual's discretion and on his or her own behalf. The description of these types of events only further distinguishes the "America's Calling" event where participants were asked to travel "on behalf of a campaign" so that they could participate in fundraising work for the campaign.

We do not dispute that any travel undertaken in the three examples cited by RFP would fall outside of the definition of contribution and thus would not be subject to the travel exception cap of \$1,000. Interestingly, however, RFP's response completely omits any discussion of an event analogous to the "America's Calling" event, where the Romney campaign *requested* that Mr. Gardner travel to Boston, sit in a chair on the floor of the TD Banknorth Garden, and spend an entire day making phone calls *on behalf of the campaign*.²¹ Over 600 people gathered in one location to volunteer their services for the campaign, at the campaign's request. By all accounts, this was a novel event.²²

²⁰ The participants' donation of their time and services falls under the "volunteer exception." *See, supra*, page 3 and fn.9.

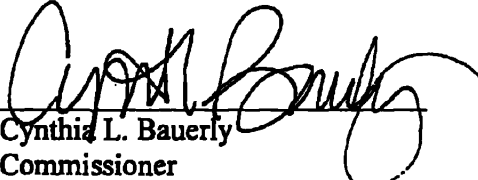
²¹ In their statement of reasons in this matter, some of our colleagues conclude, without any legal support, that "'on behalf of' must mean something more than merely 'at the invitation of.'" They go on to proclaim their own new rule that "the campaign must make a specific request to travel as an agent of the candidate or committee." We cannot find any basis for this conclusion anywhere in the law. The Supreme Court in *Buckley* used the phrase "authorized or requested by the candidate" and did not limit the standard based on the specificity of the request or to those acting as agents of the campaign. Nothing in the legislative history of the 1979 amendments suggests that the drafters put the words "on behalf of" on paper but intended something entirely different, and more narrow, in practice. We cannot and will not follow the letter of the law only when it is convenient and reject it when it is not. "On behalf of the candidate" means exactly what it says.

²² It is possible the RFP response did not include any references to analogous events because this was such a novel undertaking that there haven't been any analogous events. From time to time, the Commission is faced with novel facts or a violation of the Act that is a matter of first impression but that does not mean the Act does not apply. That no one has managed to violate a provision before, or to do so in such an obvious way as to inspire a complaint, does not make the provision unenforceable.


Could Mr. Gardner have made these calls for the Romney campaign from his home in Utah? Of course. But he didn't. Instead, he spent \$150,000 to transport what may have been as many as 200 people across the country to Boston to volunteer for the campaign.²³ Could Mr. Gardner have chartered a flight at the same expense and with the same people to sit in Boston and make fundraising calls completely independently of the Romney campaign? Of course.²⁴ But he didn't. The success of the campaign's event depended on having a lot of people show up in Boston to participate. Kem Gardner ensured that a substantial portion of the participants did show up and thereby contributed significantly to the success of the event. He did it at the request of the campaign; on the campaign's behalf.

III. Conclusion

This was not a difficult case. Kem Gardner paid \$150,000 to charter an airplane to fly himself and as many as 200 Romney supporters from Utah to Boston to work at an RFP fundraising event, at the campaign's request. The law clearly states that any unreimbursed travel payment exceeding \$1,000 made on behalf of a campaign is a contribution to the candidate. RFP did not reimburse Mr. Gardner. The other travelers did not reimburse Mr. Gardner. That is why we voted to find reason to believe that Kem Gardner made, and Romney for President, Inc. and Darrell Crate, in his official capacity as treasurer accepted, an excessive in-kind contribution in this matter.


Cynthia L. Bauerly
Commissioner

3/16/2009
Date


Ellen L. Weintraub
Commissioner

3/16/09
Date

²³ Clearly, there was some value to the campaign in having these 600 people travel across the country to Boston; otherwise, the campaign would have asked its supporters to get out their rolodexes and make the calls from home rather than asking them to travel to Boston to do so. Since the definition of contribution includes "anything of value... for the purpose of influencing an election for Federal office" the determination that travel *on behalf of a campaign* is a contribution if it exceeds \$1,000 is entirely consistent with the Act.

²⁴ We do not dispute that an *individual's* ability to engage in unfettered travel is a constitutional right. However, where the travel is on behalf of a campaign, it is not *individual* travel as far as the Act is concerned. Thus, while Commissioner Weintraub appreciates her colleagues' citation to her Statement with former Chairman Lenhard in MUR 5642, that Statement has little relevance here. That Statement concerned an individual paying for his own travel and lodging expenses to engage in independent activity. Here, by contrast, an individual provided transportation to hundreds of other people so they could participate in an event organized by a candidate's campaign.

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