

BRAND LAW GROUP

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August 10, 2009

HAND DELIVERED

Thomaseia P. Duncan, Esquire
General Counsel
Federal Election Commission
999 E Street N.W.
Washington, D.C. 20463

Re: **MUR 6128**

Dear Ms. Duncan:

We represent Senator Larry E. Craig, Craig for Senate, and Kay O'Riordan, in her official capacity as treasurer, the respondents in the above-captioned matter under review ("MUR"). This letter serves as our response to the letter and Factual and Legal Analysis sent to the respondents on June 30, 2009, in which the FEC asserts that there is reason to believe that respondents violated 2 U.S.C. § 493a(b) and offers to enter into pre-probable cause conciliation. Thank you for your extension of time to respond until August 10, 2009.

The FEC's Factual and Legal Analysis ("Analysis") asserts that all of the Senator's expenditures for legal and public relations services relating to his misdemeanor charge in Minneapolis are permissible under FEC regulations, save for legal fees expended to challenge the misdemeanor conviction. The FEC concludes that such spending violated section 493a(b), which prohibits the use of campaign funds for personal use. See also 11 C.F.R. § 113.1(g)(1)(ii).

In reaching this conclusion, the FEC's Analysis for Respondent Larry E. Craig relies on a series of Advisory Opinions ("AOs") addressing the statute and regulations and cites to an October 4, 2007, letter from the Brand Law Group to Senator Craig. The Analysis concludes that "even if Craig's presence in Minnesota was in connection with travel to Washington, D.C., the conduct that is the subject of his arrest and conviction and his spending on legal fees lack the necessary nexus to Craig's campaign activities

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or his duties as a Federal officeholder, or both." Analysis at 10 (*citing* AO 2005-11 (Cunningham)).

After reviewing the relevant law and FEC Opinions, including several left un-cited by the FEC, it is clear that Senator Craig's legal expenses for the Minnesota state court proceedings resulted directly from his official Senate duties; they should not be deemed personal expenditures. The FEC's Analysis offers no support for its arbitrary imposition of a "necessary nexus" standard nor provides guidance for how such a standard should be applied. In short, the legal expenses in dispute arose in the course of, and in connection with, official Senate travel. The FEC has no authority to look beyond that fact and indeed, has refused to do so in previous AOs. Such inquiry in this matter would violate its statutory and regulatory charge and contradict its prior opinions.

Our legal analysis has not changed since we provided our letter to Senator Craig in October 2007. As we stated then:

[W]e must address whether the charge in Minnesota state court would exist "irrespective" of Senator Craig's duties as a United States Senator. In this regard, the United States Constitution requires that a Senator be "an Inhabitant of that State for which he shall be chosen." U.S. Const., art. I, § 3, cl. 2. The Constitution also provides that Senators "in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same." U.S. Const., art. I, § 6, cl. 1. Accordingly, the Constitution establishes the need for members of Congress to travel between Washington, D.C. and their home states or districts and addresses their rights while doing so.

In this instance, the events giving rise to the charge in Minnesota state court occurred while Senator Craig was traveling from his home state of Idaho to his Senate office in Washington, D.C. Based on the Inhabitancy Clause, together with the Immunity from Arrest Clause, Senator Craig's travel is a necessary incident of his status as a U.S. Senator. As such, it is our opinion that any obligations or expenses incurred as a result of that official travel, including any legal fees stemming from events that occurred during the trip, would not exist irrespective of Senator Craig's duties as a federal officeholder.

While there is little legislative or judicial guidance beyond the language of the statute and regulation, our conclusion is consistent with the relevant AOs issued by the FEC and cited by its Analysis. For example, the FEC cites AO 2005-11 (Cunningham) where the FEC permitted the "use of campaign funds to pay legal fees stemming from a grand jury investigation into fundraising activities and conduct in office because the allegations were directly related to the candidate's campaign and status as a Federal officeholder." Analysis at 10. The FEC reached this conclusion because, in its words,

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"the legal fees and expenses associated with the grand jury investigation would not exist irrespective of Representative Cunningham's campaign or duties as Federal officeholder." AO 2005-11 at 3. The FEC did so despite the presence of allegations relating to benefits unrelated to official duties, including the "sale of his house at an above-market price and a rent-free stay on a yacht." *Id.* at 3.

Similarly, the Analysis cites AO 2006-35 (Kolbe) which authorized the use of campaign funds to pay for expenses related to inquiries by the Department of Justice regarding Representative Kolbe's rafting trip to the Grand Canyon with two former pages. In authorizing the use of such funds, the FEC relied both upon Representative Kolbe's assertion that he "took the trip under the auspices of his office" and documents "showing that the trip was part of an official Congressional visit with support provided by the National Park Service and the Office of Public Affairs of the Grand Canyon National Park." AO 2006-35 at 3-4. The AO does not examine whether the underlying allegations about his conduct on the trip related to Representative Kolbe's official House duties nor, apparently, do those allegations affect its decision to approve his use of campaign funds.

Although the Analysis cites neither AO 1997-27 (Boehner) nor AO 2000-40 (McDermott), both support the conclusion that Senator Craig's expenditure of campaign funds in this matter directly related to his Federal office. In both matters, which addressed legal expenses incurred by parties to litigation concerning unlawful interception and disclosure of a cellular telephone call, the FEC approved expenditures of campaign funds. See 1997-27 at 3 ("activity . . . for which he seeks a judicial remedy . . . resulted directly from the pursuit of his duties as a Federal officeholder") and 2000-40 at 4 ("conduct that is at issue . . . resulted directly from activities that you engaged in because of your position at the time as Ranking Minority Member of the Ethics Committee").

Similar to the Cunningham, Kolbe, Boehner, and McDermott matters, Senator Craig's misdemeanor conviction was "directly related" to his official duties, in this case Senate travel. Were it not for his constitutionally-mandated obligations as a United States Senator, he would not have been in the Minneapolis airport and would not have been subject to the misdemeanor charge. That the alleged conduct underlying the disturbing the peace charge was not strictly performance-related is of no consequence. Certainly, the Department of Justice's investigation into Representative Kolbe's conduct on an official trip went beyond his official House duties. Similarly, the allegations at issue in *Boehner v. McDermott* – that Representative McDermott improperly provided copies of an illegally taped telephone call to members of the media – exceeded his official House duties. Nor did the free lodging or fraudulent home sale alleged in Cunningham implicate official duties. Instead, in all four AOs, the FEC held that it was sufficient that the behavior arose from official duties.

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In contrast, the Analysis cites a single AO rejecting campaign expenditures related to the receipt of Veterans benefits (AO 1996-24 (Cooley)). Other examples of non-permissible expenditures provided by the Analysis contemplate fees for "divorce or [a] charge of driving while under the influence of alcohol." 60 Fed. Reg. 7862, 7868 (Feb. 9, 1995) ("Personal Use E & J").

The Analysis makes no attempt to, nor can it, analogize this matter with the circumstances for which an expenditure of campaign funds would be improper. Unlike such personal matters, Senator Craig's arrest occurred while he was serving as a Federal officeholder. Senate rules authorized Senator Craig to charge the cost of his transportation, his meals, and other related expenses while traveling. If there had been a fee for use of a bathroom, that too would have been chargeable to the United States Senate. See 152 Cong. Rec. S11403, S11473 (Dec. 7, 2006) ("Per diem expenses include all charges for meals, lodging, personal use of room during daytime, baths") (United States Senate Travel Regulations).

The FEC also fails to provide any standards or notice for what type of activity would provide a "necessary nexus" to official duties; it simply refers to "conduct that is the subject of his arrest" and alleges a lack of such a "nexus." Analysis at 10. As the Analysis states, Senator Craig plead guilty to a misdemeanor charge of disorderly conduct." *Id.* at 2. As with the aforementioned AOs, however, that the conduct at issue occurred during the performance of official duties must serve as the beginning and the end of the FEC's analysis.

In conclusion, we elect not to pursue pre-probable cause conciliation and respectfully request that the FEC terminate this matter forthwith.

Sincerely,



Stanley M. Brand
Andrew D. Herman

ADH:lls

cc: Shana M. Broussard

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United States Senate

SELECT COMMITTEE ON ETHICS
HART SENATE OFFICE BUILDING, ROOM 220
SECOND AND CONSTITUTION AVENUE, NE
WASHINGTON, DC 20510-6425

February 13, 2008

The Honorable Larry E. Craig
United States Senate
Washington, DC 20510

Public Letter of Admonition

Dear Senator Craig:

In response to improper conduct by you reflecting upon the United States Senate, the Select Committee on Ethics of the United States Senate issues this public letter of admonition to you pursuant to Section 2(d)(3) of Senate Resolution 338, 88th Congress, 2nd Session (1964), as amended by Senate Resolution 222, 106th Cong., 1st Session (1999) and its Supplementary Procedural Rules, Rule 3(g)(2).

The Committee's action in this matter addresses your conduct in connection with your June 11, 2007, arrest at the Minneapolis-St. Paul International Airport and your August 2007 guilty plea in the State of Minnesota, County of Hennepin, Fourth Judicial District, and your conduct related and subsequent thereto, as discussed more fully below. The Committee bases its action on the following determinations:

- Through your accurate, voluntary and intelligent guilty plea, you were convicted in August 2007 of disorderly conduct, a misdemeanor, occurring on June 11, 2007, in a men's public restroom at the Northstar Crossing in the Lindbergh Terminal of Minneapolis-St. Paul International Airport. The Committee accepts as proven your guilty plea and all matters set forth in your guilty plea, including your statements therein: that you reviewed the arrest report and/or complaint relating to the charges against you; that on June 11, 2007, at the Minneapolis-St. Paul International Airport restroom you engaged in conduct which you "knew or should have known tended to arouse alarm or resentment [in] others which conduct was physical (versus verbal) in nature"; that at the time of your plea you made no claim that you were innocent of the charge to which you entered a guilty plea; and that you entered your guilty plea freely and voluntarily.
- Following your arrest on June 11, 2007, you showed the arresting officer a business card that identified you as a United States Senator and stated to the officer, in words or substance, "What do you think about that?" Under the circumstances present at that time, you knew or should have known that a reasonable person in the position of the arresting officer could view your action and statement as an improper attempt by you to use your position and status as a United States Senator to receive special and favorable treatment.

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- Although, in our view, you committed the offense to which you pled guilty and you entered your plea knowingly, voluntarily and intelligently, it appears you are attempting to withdraw your plea in significant part because your initial calculation that you could avoid public disclosure of, and adverse public reaction to, this matter by pleading guilty proved wrong. Even if an attempt to withdraw a guilty plea under the circumstances present in this case is a course that a defendant in the State of Minnesota *may take*, by the standards within this Committee's jurisdiction it is a course that a United States Senator *should not take*. Your claims to the court, through counsel, to the effect that your guilty plea resulted from improper pressure or coercion, or that you did not, as a legal matter, know what you were doing when you pled guilty, do not appear credible.

We consider your attempt to withdraw your guilty plea to be an attempt to evade the legal consequences of an action freely undertaken by you – that is, pleading guilty – and, as such, to be conduct contrary to the injunction of Paragraph 2 of the Code of Ethics for Government Service, which provides that any person in Government service, in this case a United States Senator, should “[u]phold the Constitution, laws, and legal regulations of the United States and of all governments therein and never be a party to their evasion.”

- Construing Senate Rule 38.2, which prohibits the conversion of campaign funds to personal use, the *Senate Ethics Manual* states that “Members, officers or employees may pay legal expenses incurred in connection with their official duties with funds of a Senator’s principal campaign committee, *but only if such payment is approved by the Committee.*” (Emphasis added.) It appears that you have used over \$213,000 in campaign funds to pay legal (and, apparently, “public relations”) fees in connection with your appeal of your criminal conviction and in connection with the preliminary inquiry before the Committee in this matter. It appears that some portion of these expenses may not be deemed to have been incurred in connection with your official duties, either by the Committee or by the Federal Election Commission (which has concurrent jurisdiction with the Committee on the issue of conversion of a Senator’s campaign funds to personal use). However, without here reaching the issue of what portion of your legal expenses in this matter may be payable with funds of your principal campaign committee, it is clear that you never sought the Committee’s approval, as required, to use campaign funds for these purposes. You should also take careful note that the Committee will consider any further use of your campaign funds for legal expenses without the Committee’s approval to be conduct demonstrating your continuing disregard of ethics requirements.

The conduct to which you pled guilty, together with your related and subsequent conduct as set forth above, constitutes improper conduct reflecting discreditably on the Senate and through this letter the Select Committee on Ethics, on behalf of and pursuant to authority granted by the United States Senate, publicly admonishes you for that conduct.

This public admonition of you, and the determinations on which it is based, concludes a preliminary inquiry in which the Committee reviewed and considered allegations, information, evidence and arguments present to it from a number of sources, including complaints, the public record and your responses, albeit through your counsel, to the Committee’s specific written

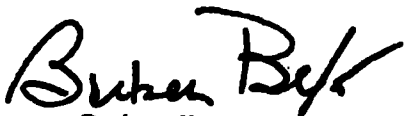
inquiries.

As your counsel has previously questioned the Committee's jurisdiction in this matter we note that the investigative authority of the Committee, and the disciplinary authority of the Senate over its Members, is broad. Senate Resolution 338, as amended, makes it the duty of the Select Committee on Ethics to "receive complaints and investigate allegations of improper conduct which may reflect upon the Senate, violations of law, violations of the Senate Code of Official Conduct, and violations of rules and regulations of the Senate relating to the conduct of individuals in the performance of their duties as Members of the Senate, or as officers or employees of the Senate, and to make appropriate findings of fact and conclusions with respect thereto . . ." S. Res. 338, 88th Cong., 2d. Sess. (1964), as amended by S. Res. 110, 95th Cong., 1st Sess. (1977). "S. Res. 338 gives the Committee the authority to investigate Members who engage in 'improper conduct which may reflect upon the Senate,' regardless of whether such conduct violates a specific statute, Senate Rule, or regulation." *Senate Ethics Manual*, 2003 ed., at page 432. The Committee has stated that the Senate "may discipline a Member for any misconduct, including conduct or activity which does not directly relate to official duties, when such conduct unfavorably reflects on the institution as a whole." *Senate Ethics Manual*, 2003 ed., at page 13. The Committee has jurisdiction over your conduct in this matter.

The Committee's determination to publicly admonish you in this matter is independent of, and will be unaffected by, any subsequent decisions by the courts on your challenge of your guilty plea. In addition, this letter of admonition addresses only your conduct in connection with your arrest at the Minneapolis-St. Paul International Airport and your August 2007 guilty plea, and your conduct related and subsequent thereto as discussed above.

The Select Committee on Ethics resolves this matter through your public admonition so that, on behalf of the United States Senate, it may make known clearly that the conduct to which you pled guilty, together with the related and subsequent conduct discussed in this letter, is improper conduct which has reflected discreditably on the Senate.

Sincerely,



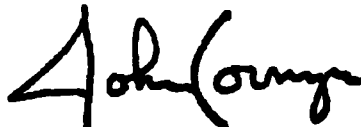
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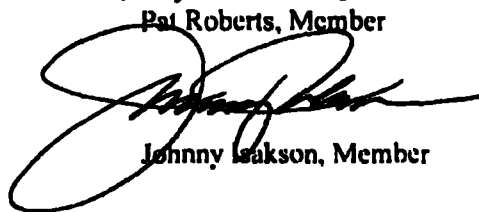
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