



FEDERAL ELECTION COMMISSION  
Washington, DC 20463

April 8, 2011

**BY FACSIMILE AND FIRST CLASS MAIL**  
(202) 737-7565

Andrew D. Herman, Esq.  
Brand Law Group PC  
923 Fifteenth Street, NW  
Washington, DC 20005

RE: MUR 6128  
Craig for U.S. Senate and Kay  
O'Riordan, in her official  
capacity as treasurer  
Larry E. Craig

Dear Mr. Herman:

Based on a complaint filed with the Federal Election Commission ("the Commission") on November 10, 2008, and information supplied by your clients, Craig for U.S. Senate and Kay O'Riordan, in her official capacity as treasurer, and Larry E. Craig, the Commission, on May 19, 2009, found that there was reason to believe that Respondents violated 2 U.S.C. § 439a(b), and instituted an investigation of this matter.

After considering all the evidence available to the Commission, the Office of the General Counsel is prepared to recommend that the Commission find probable cause to believe that a violation has occurred.

The Commission may or may not approve the General Counsel's recommendation. Submitted for your review is a brief stating the position of the General Counsel on the legal and factual issues of the case. Within 15 days of your receipt of this notice, you may file with the Secretary of the Commission a brief (ten copies if possible) stating your position on the issues and replying to the brief of the General Counsel. (Three copies of such brief should also be forwarded to the Office of the General Counsel, if possible.) The General Counsel's brief and any brief which you may submit will be considered by the Commission before proceeding to a vote of whether there is probable cause to believe a violation has occurred.

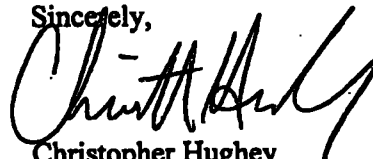
If you are unable to file a responsive brief within 15 days, you may submit a written request for an extension of time. All requests for extensions of time must be submitted in writing five days prior to the due date, and good cause must be demonstrated. In addition, the Office of the General Counsel ordinarily will not give extensions beyond 20 days.

You may also request an oral hearing before the Commission. See Procedural Rules for Probable Cause Hearings, 72 Fed. Reg. 64919 (Nov. 19, 2007) and Amendment of Agency Procedures for Probable Cause Hearings, 74 Fed. Reg. 55443 (Oct. 28, 2009). Hearings are voluntary, and no adverse inference will be drawn by the Commission based on a respondent's decision not to request such a hearing. Any request for a hearing must be submitted along with your reply brief and must state with specificity why the hearing is being requested and what issues the respondent expects to address. The Commission will notify you within 30 days of your request for a hearing as to whether or not the request has been granted.]

A finding of probable cause to believe requires that the Office of the General Counsel attempt for a period of not less than 30, but not more than 90 days, to settle this matter through a conciliation agreement.

Should you have any questions, please contact Shana M. Broussard, the attorney assigned to this matter, at (202) 694-1583.

Sincerely,



Christopher Hughey  
Acting General Counsel

Enclosure  
Brief

1                   **BEFORE THE FEDERAL ELECTION COMMISSION**

2  
3       In the Matter of

4  
5           Craig for U.S. Senate and Kaye O’Riordan,           )  
6           in her official capacity as treasurer                )  
7           Larry E. Craig    )  
8

**MUR 6128**

9                               **GENERAL COUNSEL’S BRIEF**  
10

11       **I.       STATEMENT OF THE CASE**

12           This matter arose from a complaint alleging that former Senator Larry E. Craig  
13       violated the Federal Election Campaign Act of 1971, as amended (“the Act”), by  
14       improperly using in excess of \$213,000 in campaign funds for personal use for legal and  
15       media relations fees stemming from an arrest that occurred on June 11, 2007, at the  
16       Minneapolis International Airport. After considering the complaint, Craig’s response to  
17       the complaint, and publicly available information, the Commission found reason to  
18       believe that Craig and his principal campaign committee, Craig for U.S. Senate and Kaye  
19       O’Riordan, in her official capacity as treasurer, (“the Committee”) violated 2 U.S.C.  
20       § 439a(b) by using campaign funds for legal fees and expenses Craig incurred in  
21       connection with an attempt to overturn his August 8, 2007 conviction, and thus  
22       converting those funds to personal use. See Factual and Legal Analysis for Craig and  
23       Craig for U.S. Senate (setting forth bases of reason to believe findings). The  
24       Commission opened an investigation to determine the specific amount of campaign funds  
25       used for this purpose.

26           The ensuing investigation confirmed that Craig and the Committee disbursed in  
27       excess of \$250,000 in campaign funds for legal representation and expenses to overturn  
28       Craig’s conviction and thus converted those funds to personal use. Based on the results

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1 of the investigation which are set forth and analyzed below, the General Counsel is  
2 prepared to recommend that the Commission find probable cause to believe that Larry E.  
3 Craig and Craig for U.S. Senate and Kaye O'Riordan, in her official capacity as treasurer,  
4 violated 2 U.S.C. § 439a(b).

5 **II. STATEMENT OF THE FACTS**

6 **A. Minnesota Arrest, Guilty Plea and Sentencing**

7 On June 11, 2007, while at the Minneapolis-St. Paul International Airport  
8 awaiting a scheduled flight to Washington, D.C., then U.S. Senator Craig was arrested  
9 and charged with violating Minnesota criminal statute § 609.72, disturbing the peace-  
10 disorderly conduct, and § 609.746, interference with privacy. On August 8, 2007, in the  
11 State of Minnesota, County of Hennepin, Fourth Judicial District, Craig pled guilty to a  
12 misdemeanor count of disorderly conduct. *See State v. Larry Edwin Craig*,  
13 No. 07043231, Petition to Enter Guilty Plea, (D.C., Minn., August 6, 2007), County of  
14 Hennepin, Fourth Judicial District Court. He received a suspended sentence, a reduced  
15 fine, and one year of unsupervised probation. *Id.*

16 Shortly thereafter, Craig retained the Washington, D.C. law firm Sutherland,  
17 Asbill & Brennen ("Sutherland") to serve as lead counsel in his effort to overturn the  
18 conviction, and the Minnesota firm of Kelly & Jacobson ("Kelly") to serve as state  
19 counsel for this effort. *See* News release from U.S. Senator Larry Craig: Senator Craig  
20 Announces Intent to Resign from the Senate, <http://craig.senate.gov/press/>, September 1,  
21 2007 ("Craig Press Release, September 1, 2007"). Craig also hired the media relations  
22 firm Impact Strategies to handle all press inquiries regarding the arrest, conviction, and  
23 the legal efforts to overturn his conviction. *Id.* Craig filed a motion to overturn the guilty

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1 plea in Minnesota state district court, which the court rejected on October 4, 2007. *See*  
2 *State v. Larry Edwin Craig*, No. 07043231, Order of Judge Charles A. Porter, Jr. (D.C.  
3 Minn., October 4, 2007), County of Hennepin, Fourth Judicial District. Craig appealed  
4 the district court's decision to the Minnesota Court of Appeal, which rejected Craig's  
5 appeal on December 9, 2008. *See Craig v. State*, 2008 Westlaw 5136170 (Minn. Ct.  
6 App., Dec. 9, 2008) (unpublished opinion). Craig did not appeal to the state supreme  
7 court. Craig remained in office until the conclusion of his term and retired from the U.S.  
8 Senate in January 2009.

9 **B. U.S. Senate Select Committee on Ethics Investigation**

10 The U.S. Senate Select Committee on Ethics ("SCE") conducted an inquiry into  
11 Craig's conduct in connection with his arrest, conviction, and subsequent conduct. Craig  
12 retained counsel at the Brand Law Group in Washington, D.C., to respond to the SCE  
13 inquiry. *See Craig Press Release*, September 1, 2007. Counsel argued that Craig's arrest  
14 and conviction was "purely personal conduct unrelated to the performance of official  
15 Senate duties," and that because his actions "were unrelated to his duties in Congress,"  
16 the SCE did not have jurisdiction to review this matter. Letter from Stan Brand, Counsel  
17 to Larry Craig, to U.S. Senate Select Committee on Ethics (Sept. 5, 2007). On February  
18 13, 2008, the SCE issued a "Public Letter of Admonition" unanimously concluding that  
19 among other matters, Craig had not complied with Senate Rule 38.2, which requires SCE  
20 approval of any payments for "legal expenses" paid with funds of a principal campaign  
21 committee. Specifically, the SCE wrote:

22 [T]he *Senate Ethics Manual* states that "Members, officers, or employees  
23 may pay legal expenses incurred in connection with their official duties  
24 with funds of a Senator's principal campaign committee, *but only if such*  
25 *payment is approved by the Committee.*" (Emphasis added.) It appears

1 that you have used over \$213,000 in campaign funds to pay legal (and,  
2 apparently, "public relations") fees in connection with your appeal of  
3 your criminal conviction and in connection with the preliminary inquiry  
4 before the Committee in this matter. It appears that some portion of these  
5 expenses may not be deemed to have been incurred in connection with  
6 your official duties, either by the Committee or by the Federal Election  
7 Commission (which has concurrent jurisdiction with the Committee on the  
8 issue of conversion of a Senator's campaign funds to personal use). However,  
9 without here reaching the issue of what portion of your legal expenses in this  
10 matter may be payable with funds of your principal campaign committee, it is  
11 clear that you never sought the Committee's approval, as required, to use  
12 campaign funds for these purposes. You should also take careful note that the  
13 Committee will consider any further use of your campaign funds for legal  
14 expenses without the Committee's approval to be conduct demonstrating your  
15 continuing disregard of ethics requirements.

16  
17 See *Public Letter of Admonition*, United States Senate (Feb. 13, 2008) (Select Committee  
18 on Ethics).

19 **C. Legal and Public Relations Fees**

20 Craig for U.S. Senate's itemized disclosure reports reflect that from July 9, 2007  
21 through October 5, 2008, the Committee disbursed in excess of \$480,000 for legal and  
22 media relations fees as follows:

23

| DATE       | PAYEE                        | AMOUNT              | PURPOSE                  |
|------------|------------------------------|---------------------|--------------------------|
| 7/09/2007  | Sutherland, Asbill & Brennan | \$37,350.50         | P. R. Legal Fees         |
| 9/09/2007  | Brand Law Group PC           | \$22,951.80         | Legal Consultant         |
| 10/29/2007 | Sutherland, Asbill & Brennan | \$7,373.00          | Legal Fees               |
| 10/29/2007 | Brand Law Group PC           | \$23,384.77         | Legal Fees               |
| 10/29/2007 | Sutherland, Asbill & Brennan | \$74,075.84         | Legal Fees               |
| 11/11/2007 | Brand Law Group PC           | \$30,224.70         | Legal Fees               |
| 12/05/2007 | Kelly & Jacobson             | \$22,032.87         | Legal Fees               |
| 12/17/2007 | Sutherland, Asbill & Brennan | \$17,647.08         | Legal Fees               |
| 1/21/2008  | Brand Law Group PC           | \$24,453.83         | Legal Fees               |
| 1/21/2008  | Sutherland, Asbill & Brennan | \$67,468.78         | Legal Fees               |
| 2/03/2008  | Sutherland, Asbill & Brennan | \$80,695.37         | Legal Fees               |
| 10/05/2008 | Kelly & Jacobson             | \$55,000.00         | Legal Fees               |
| 10/05/2008 | Impact Strategies            | \$20,000.00         | Public relations consult |
|            | <b>Total Amount</b>          | <b>\$482,658.54</b> |                          |

1 The law firms retained to overturn Craig's conviction, Sutherland and Kelly, received  
2 \$361,643.44, and the Brand Law Group, retained to address the SCE inquiry, received  
3 \$101,015.10. In addition, the Committee disclosed a \$20,000 disbursement made on  
4 October 5, 2008 to Impact Strategies, the media relations firm retained to respond to  
5 press inquiries regarding former Senator Craig's misdemeanor conviction. Craig  
6 acknowledged these disbursements and asserted that the "applicable law and regulations  
7 authorized Craig for Senate to make any and all disbursements related to this matter."  
8 See Response to Informal Discovery and Documents Requests, Andrew D. Herman,  
9 September 21, 2009 ("Response, September 21, 2009").

10 Billing invoices and summaries obtained from the Committee during our  
11 investigation confirm the Committee's disbursements to Sutherland, Kelly and the Brand  
12 Law Group. Discovery also reveals that a significant portion of the funds disbursed to  
13 Sutherland was for payment to Impact Strategies for public relations services.  
14 Response, September 21, 2009 at pp. 5, 25, 30, 62, 69. The Sutherland firm served as an  
15 intermediary between the Committee and Impact Strategies, wherein Impact Strategies  
16 submitted invoices to the Sutherland firm and these charges were included in the firm's  
17 invoices to Craig. *Id.* at pp. 15-16; *see also* pp. 21-22. The evidence obtained from  
18 Respondents reveals that the amounts billed by Sutherland were divided as follows  
19 between Impact Strategies and Sutherland's own legal fees.

| DATE       | PAYEE                        | INVOICE<br>AMOUNT   | IMPACT<br>STRATEGIES<br>PORTION | SUTHERLAND<br>LEGAL FEES<br>PORTION |
|------------|------------------------------|---------------------|---------------------------------|-------------------------------------|
| 7/09/2007  | Sutherland, Asbill & Brennan | \$37,350.50         | \$8,526.00                      | \$28,824.50                         |
| 10/29/2007 | Sutherland, Asbill & Brennan | \$7,373.00          | \$3,062.50                      | \$4,310.50                          |
| 10/29/2007 | Sutherland, Asbill & Brennan | \$74,075.84         | \$7,926.00                      | \$66,149.84                         |
| 12/17/2007 | Sutherland, Asbill & Brennan | \$17,647.08         | 0.00                            | \$17,647.08                         |
| 1/21/2008  | Sutherland, Asbill & Brennan | \$67,468.78         | \$39,553.01                     | \$27,915.77                         |
| 2/03/2008  | Sutherland, Asbill & Brennan | \$80,695.37         | \$44,655.00                     | \$36,040.37                         |
|            | <b>TOTALS</b>                | <b>\$284,610.57</b> | <b>\$103,722.51</b>             | <b>\$180,888.06</b>                 |

Accordingly, the actual amount disbursed by the Committee to the Sutherland firm for legal fees incurred in the effort to overturn Craig's misdemeanor conviction was \$180,888.06. As noted earlier, the Committee also disbursed \$77,032.87 to the Kelly firm for legal fees incurred in the effort to overturn Craig's state conviction. As set forth below in the legal analysis section, these two sums totaling \$257,920.93 were converted by Respondents to personal use in violation of the Act.

### III. LEGAL ANALYSIS

The Act provides that contributions accepted by a candidate may be used by the candidate for ordinary and necessary expenses incurred in connection with duties of the individual as a holder of Federal office. 2 U.S.C. § 439a(a)(2). Such campaign funds, however, shall not be converted to "personal use" by any person. 2 U.S.C. § 439a(b)(1). "Personal use" is defined as the use of campaign funds of a present or former candidate "to fulfill any commitment, obligation or expense of a person that would exist



1 irrespective of the candidate's election or individual duties as a holder of Federal office."

2 2 U.S.C. § 439a(b)(2). The Act itemizes certain uses of campaign funds that will be  
3 considered *per se* personal use, such as home mortgage, rent or utility payments; clothing  
4 purchases; vacation or other non-campaign-related trip; household food items; and tuition  
5 payments. *See id.*

6 By contrast, the Commission will analyze on a case-by-case basis whether the use  
7 of campaign account funds for the payment of legal expenses constitutes personal use.

8 11 C.F.R. § 113.1(g)(1)(ii)(A). Expenses which the candidate can reasonably  
9 demonstrate result from campaign or officeholder duties will not be considered personal  
10 use. *See* Final Rule and Explanation and Justification, Personal Use of Campaign Funds,  
11 60 Fed. Reg. 7862, 7867 (Feb. 9, 1995) ("Personal Use E&J"). Legal fees and expenses,  
12 however, "will not be treated as though they are campaign or officeholder related merely  
13 because the underlying proceedings have some impact on the campaign or officeholder's  
14 status." *Id.* at 7868. To further demonstrate this distinction, the Commission noted that  
15 "legal expenses associated with a divorce or charge of driving while under the influence  
16 of alcohol will be treated as personal, rather than campaign or officeholder related." *Id.*

17 In the present matter, Craig for U.S. Senate disbursed in excess of \$250,000 in  
18 campaign funds to Sutherland, Asbill & Brennan and Kelly & Jacobson for legal fees  
19 associated with Craig's efforts to overturn his Minnesota conviction for disorderly  
20 conduct. These expenses did not result from Craig's status as a federal candidate or  
21 duties as Federal officeholder and, therefore, Craig's use of campaign funds to pay these  
22 legal fees is personal use in violation of the Act. Craig's spending of campaign funds for  
23 legal fees to overturn his conviction is similar to the example of personal use provided by

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1 the Commission in the Personal Use E&J for campaign spending on legal expenses  
2 associated with a charge of driving while under the influence of alcohol. *See* Personal  
3 Use E&J at 7868. Even if the arrest and conviction at issue in this matter impacted  
4 Craig's status as a Federal officeholder, the use of campaign funds to pay legal fees  
5 remains impermissible. *See* Personal Use E&J at 7868.

6 Furthermore, in a long line of Advisory Opinions regarding legal fees and  
7 expenses incurred by Federal officeholders, the Commission has concluded, consistent  
8 with the Act, the Commission's regulations, and Personal Use E&J, that it would be an  
9 impermissible personal use of campaign funds to pay for legal expenses associated with  
10 allegations that are not related to the requestor's campaign activities or duties as a Federal  
11 officeholder. The analysis presented here is consistent with the Commission's analysis in  
12 these AOs and none of the AOs holding that committees could pay for legal expenses  
13 provide a shield for Craig or the Committee in this matter because the transactions or  
14 activities in those AOs are distinguishable in material aspects from the transactions and  
15 activity at issue in this matter. *See* 2 U.S.C. 437f(c). For example, the Commission has  
16 found that it is permissible to use committee funds to pay for legal representation in  
17 connection with:

- 18 • Allegations of receiving illegal campaign contributions and the improper earmarking  
19 of appropriations to clients of the contributor, *see* Advisory Opinion 2009-10  
20 (Visclosky);
- 21 • House Ethics Committee and Department of Justice inquiries into information  
22 known or obtained by the officeholder, or his staff, regarding another

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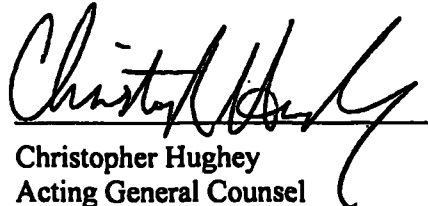
- 1 congressman's communications with House pages and a congressional trip to the  
2 Grand Canyon with House pages, *see* Advisory Opinion 2006-35 (Kolbe);
- 3 • Allegations regarding the candidate's fundraising activity and conduct in office,  
4 *see* Advisory Opinion 2005-11 (Cunningham);
- 5 • Allegations of submitting false reports to the Commission, the aiding and  
6 assisting of making false statements and representations to the Commission, and  
7 fraudulently obtaining state property and funds to pay state workers to staff the  
8 federal candidate's campaign committee, *see* Advisory Opinion 2003-17  
9 (Treffinger);
- 10 • Prosecution of a private right of action stemming from alleged unlawful  
11 interception and disclosure of a cellular phone conversation where the phone  
12 conversation was about the House Republican leadership's response to findings  
13 about to be issued by the House Ethics Committee, *see* Advisory Opinion 1997-  
14 27 (Boehner); *see also* Advisory Opinion 2000-40 (McDermott) (campaign funds  
15 could be used to create a legal defense fund for the conduct at issue in the suit  
16 contemplated by AO 1997-27 where the conduct at issue in the lawsuit resulted  
17 directly from activities the requestor-officeholder as Ranking Minority Member  
18 of the Ethics Committee; and
- 19 • Responding to press allegations of improper or wrongful conduct during a  
20 campaign where the underlying activities that were the subject of the allegations  
21 were not campaign or officeholder related and there were no pending legal  
22 proceedings regarding any of the matters that were the subject of the press  
23 allegations, *see* Advisory Opinion 1996-24 (Cooley).
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1 In each of the AOs, the Commission found that the allegations were directly  
2 related to the requestor's campaign or duties as an officeholder. The evidence in this  
3 matter, however, shows that the Committee disbursed \$257,920.93 to Sutherland and  
4 Kelly to pay for obligations and expenses incurred to overturn Craig's Minnesota  
5 conviction for disorderly conduct. Because these expenses do not result from Craig's  
6 campaign or officeholder duties and would exist irrespective of Craig's status as a  
7 candidate or Federal officeholder, Craig's disbursements constitute personal use of the  
8 Committee's funds.


9 **IV. CONCLUSION**

10 Based on the foregoing, this Office is prepared to recommend that the  
11 Commission find probable cause to believe that Larry E. Craig, Craig for U.S. Senate and  
12 Kay O'Riordan, in her official capacity as treasurer, violated 2 U.S.C. § 439a(b) by  
13 converting campaign funds to personal use.

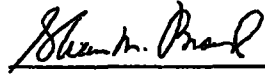
14 4-8-2011  
15  
16 Date

  
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