

**BEFORE THE FEDERAL ELECTION COMMISSION**

**In the Matter of** )  
 )  
**Grover Norquist** )  
**Americans for Tax Reform, Inc.** ) **MUR 5409**  
**Ken Mehlman** )  
**Bush-Cheney '04 and** )  
**David Herndon, as treasurer** )

**STATEMENT OF REASONS  
COMMISSIONER MICHAEL E. TONER**

On October 19, 2004, the Commission voted 5-1<sup>1</sup> to find Reason to Believe that the above named respondents violated §§ 441b(a) and 434b of the Federal Election Campaign Act (“FECA” or “the Act”), but to take no further action and close the file. Based on the facts and evidence presented, I believe this complaint should have been dismissed based on prosecutorial discretion. *See Heckler v. Chaney*, 470 U.S. 821 (1985). However, my motion to dismiss prior to a finding of Reason to Believe pursuant to *Heckler* failed on a vote of 3-3<sup>2</sup> and the General Counsel’s recommendations were then approved.

The FECA prohibits any corporation from making contributions or expenditures in connection with Federal elections. 2 U.S.C. § 441b(a). The Act also prohibits any officer or any director of any corporation from consenting to any contribution or expenditure on behalf of any candidate. The Act also prohibits any candidate or political committee from knowingly accepting or receiving a corporate contribution. *Id.*

Complainant, Citizens for Responsibility and Ethics in Washington, alleged that Grover Norquist, president of Americans for Tax Reform, Inc. (“ATR”), gave to Ken Mehlman, campaign manager of Bush-Cheney ’04 (“the Committee”), a “master contact list” of activist in 37 states. The complaint alleges that these activists would “help organize the conservative base to support the Bush-Cheney campaign.” It was further alleged that Mr. Norquist spent five years developing this list “using considerable corporate resources” provided by ATR. Complaint at 3. However, the complaint did not

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<sup>1</sup> Commissioner Toner dissented.

<sup>2</sup> Chairman Smith, Commissioner Mason and Commissioner Toner voted affirmatively for the motion. Vice-Chair Weintraub, Commission Thomas and Commissioner McDonald dissented.

provide any of the materials alleged in the complaint to constitute a contribution from Grover Norquist or ATR to the Committee.

The joint response of the Committee's treasurer, David Herndon and its campaign manager, Ken Mehlman, as well as the response from ATR, specifically denied that the documents provided by Mr. Norquist to Mr. Mehlman were something of value under the FECA. The Committee's response described the information "actually provided" by Mr. Norquist as "readily available information, concerning regularly occurring meetings of conservative activists in several states and varied from state to state and in some instances included contact information for individuals." The Committee's response pointed out that "[a] list of activists in many states is available publicly on the website of [ATR] at <http://www.atr.org/stategroups/index.html>." ATR's response likewise stated that the documents provided to the Committee "were *not* proprietary, confidential lists," but rather "included lists of state contacts for state coalition meetings and key contact person for each state is listed on ATR's website." [emphasis in original]. ATR asserted that the information provided was publicly available and that "[t]he key information regarding contacts in each state is posted on the ATR website for all to see and as such, constitutes no 'thing of value' within the meaning of 2 U.S.C. § 431(8)(A)."

While this section of the Act broadly defines "contribution", as does the corresponding regulation at 11 C.F.R. §100.52(a), I do not believe that the information provided to the Bush-Cheney '04 Committee by Mr. Norquist, information that was publicly available and posted on the ATR website for all to see and use for their particular purposes, constitutes "anything of value made by any person for the purpose of influencing any election for Federal office," as required by the Act and the regulations. The potential ramifications of a finding that publicly available information posted on an organizations website that is also provided to a political committee by an officer of the organization somehow taints that same information and transforms it into a "contribution" subject to the limits and prohibitions of the FECA while that same publicly available information could be obtained and used by dozens of other political committees with no such consequences is, in my opinion, a dangerous precedent.

Based on the evidence presented and the responses of ATR and the Bush-Cheney '04 Committee, I believe the Commission should not have made a Reason to Believe finding before closing the file but should have exercised its prosecutorial discretion and dismissed the allegations against the respondents. *See Heckler v. Chaney, 470 U.S. 821 (1985)*.

November 12, 2004

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Michael E. Toner, Commissioner