

SENSITIVE



FEDERAL ELECTION COMMISSION
WASHINGTON, D C 20463

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 5-1¹ to find reason to believe that the above named respondents violated §§ 441b(a) and 434(b) of the Federal Election Campaign Act of 1971 as amended ("FECA" or "the Act"), but to take no further action and close the file.

Based on the law and the factual record, I do not believe a reason to believe finding was appropriate in this matter. Rather, I believe the complaint should have been dismissed based on prosecutorial discretion with no reason-to-believe finding. *See Heckler v. Chaney*, 470 U.S. 821 (1985). Accordingly, I made a motion to dismiss prior to a finding of reason to believe, but the motion failed on a vote of 3-3.²

The FECA prohibits any corporation from making contributions or expenditures in connection with Federal elections. 2 U.S.C. § 441b(a). The Act defines a "contribution" as, *inter alia*, "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). "Expenditure" is defined in parallel terms. The Act 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 ("Bush-Cheney Campaign"), a "master contact list" of activists in 37 states. Complaint at 2-3 (citing articles in the *Washington Post*, Jan. 12, 2004,

¹ Commissioner Toner dissented.

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

A01 and *Forbes.com*, Jan. 16, 2004). The complaint alleged that these activists helped “organize the conservative base to support the Bush-Cheney Campaign.” *Id.* at 3. It was further alleged that Mr. Norquist spent five years developing this list “using considerable corporate resources” provided by ATR. *Id.*

The joint response of the Bush-Cheney Campaign’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 Bush-Cheney Campaign’s response described the information 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.” Bush-Cheney Campaign Response at 1. The Bush-Cheney Campaign pointed out that “[a] list of activists in many states is available publicly on the website of Americans for Tax Reform at <http://www.atr.org/stategroups/index.html>.” *Id.* ATR’s response likewise stated that the documents provided to the Bush-Cheney Campaign “were *not* proprietary, confidential lists,” but rather “included lists of state contacts for state coalition meetings and the key contact person for each state is listed on ATR’s website.” ATR Response at 1 (emphasis in original). ATR indicated 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).” *Id.* at 1-2.

I do not believe that the information provided to the Bush-Cheney Campaign by Mr. Norquist, much of which was publicly available and posted on the ATR website for all to see and use, constituted “anything of value.” Moreover, the record indicates that the Bush-Cheney Campaign was already aware of and had access to much of the information separate and apart from the materials Mr. Norquist provided Mr. Mehlman. For example, the materials provided by Mr. Norquist referenced a number of state-level coalition meetings and identified activists who attended the meetings. However, the materials also indicate that representatives from the Bush-Cheney Campaign attended many of these meetings. *See, e.g.*, page 22 of Attachment to First General Counsel’s Report dated August 31, 2004, (indicating that Jafra Karam of the Bush-Cheney Campaign participated in an Illinois coalition conference call); *Id.* at 24 (noting that Mr. Karam of the Bush-Cheney Campaign participated in an Indiana 1st Center-Right Coalition Meeting).

In light of the foregoing, I do not believe the Commission should have made a reason to believe finding in this matter.

November 23, 2004



Michael E. Toner, Commissioner