



FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

Mr. Benjamin L. Ginsberg  
Ms. Kathryn Biber Chen  
Patton Boggs LLP  
2550 M Street, N.W.  
Washington, DC 20037

FEB 06 2009

RE: MUR 5937  
Romney for President, Inc.  
and Darrell Crate, in his  
official capacity as treasurer

Dear Mr. Ginsberg and Ms. Chen:

On September 11, 2007, the Federal Election Commission notified your clients, Romney for President, Inc. and Darrell Crate, in his official capacity as treasurer, of a complaint alleging that they had violated certain sections of the Federal Election Campaign Act of 1971, as amended.

On January 28, 2009, the Commission considered the complaint but was equally divided on whether to find reason to believe Romney for President, Inc. and Darrell Crate, in his official capacity as treasurer, violated 2 U.S.C. §§ 434(b) and 441a(f). Accordingly, the Commission closed its file in this matter.

Documents related to the case will be placed on the public record within 30 days. See Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70,426 (Dec. 18, 2003). One or more Statement(s) of Reasons explaining the Commission's decision will follow.

If you have any questions, please contact Roy Q. Lockett, the attorney assigned to this matter, at (202) 694-1650.

Sincerely,

A handwritten signature in cursive script that reads "Susan L. Lebeaux".

Susan L. Lebeaux  
Assistant General Counsel

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FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

**SENSITIVE**

In the Matter of )  
 ) MUR 5937  
Romney for President, Inc., *et al.* )

**STATEMENT OF REASONS**

**Vice-Chairman MATTHEW S. PETERSEN and Commissioners  
CAROLINE C. HUNTER and DONALD F. McGAHN II**

This matter was generated by a complaint alleging that Kem Gardner made an excessive in-kind contribution to Romney for President, Inc. ("RFP") when Mr. Gardner chartered a plane to fly him and friends and family members to an RFP fundraising event. We do not agree. The Supreme Court has held that travel must be *authorized or requested* by a candidate for it to be considered a contribution to that candidate. Thus, travel undertaken independently of a campaign is not subject to the limits set forth in the Federal Election Campaign Act ("the Act"). In this matter, no evidence was presented demonstrating that Mr. Gardner's travel to the RFP fundraising event was requested or authorized by the candidate or his campaign. Therefore, as explained in greater detail below, we voted (i) against finding a reason to believe that Mr. Gardner and RFP violated the Act<sup>1</sup> and (ii) to close the file.

**BACKGROUND**

On June 24 and 25, 2007, Romney for President, Inc. hosted a fundraising event in Boston, Massachusetts. To attend, individuals had to commit to bring or raise \$5,000 for the campaign. On the evening of the 24th, invitees attended a dinner at Fenway Park. The following day, RFP rented Banknorth Garden, at which attendees could deliver the contributions they had raised, call friends and colleagues to solicit contributions for RFP, consume food and drinks, and otherwise socialize with other supporters of RFP.<sup>2</sup>

<sup>1</sup> Chairman Walther and Commissioners Bauerly and Weintraub voted affirmatively. The undersigned objected. MUR 5937, Certification dated January 28, 2009.

<sup>2</sup> RFP Response at 2.

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Kem Gardner, a Utah resident, chartered a plane to travel to the RFP event. He invited friends and family members who were also planning to attend the event to accompany him on the Salt Lake City-to-Boston flight. According to RFP, the campaign did not ask any individual to provide travel for other event attendees.<sup>3</sup>

The complainant in this matter alleged that Mr. Gardner exceeded the "\$1,000 personal travel exemption for individuals under federal law" by chartering his flight to Boston. Further, the Complaint states that RFP "knowingly received this illegal contribution."<sup>4</sup>

On the basis of the Complaint and after reviewing the responses of RFP and Mr. Gardner, the Office of General Counsel ("OGC") recommended that the Commission find reason to believe that (i) Mr. Gardner made an excessive in-kind contribution to RFP, and that (ii) RFP knowingly accepted and failed to disclose this excessive in-kind contribution.<sup>5</sup>

### ANALYSIS

The Act places limits on contributions by individuals to candidates, political parties, and other political committees.<sup>6</sup> However, the Act includes a variety of exceptions to the definition of "contribution." Among them are (i) services provided by "any individual who volunteers on behalf of a candidate or political committee,"<sup>7</sup> and (ii) "any unreimbursed payment for travel expenses made by any individual on behalf of any candidate . . . to the extent that the cumulative value . . . does not exceed \$1,000 with respect to any single election."<sup>8</sup> The corollary to the latter exception is that travel expenses that are not incurred "on behalf of any candidate" are not considered contributions, regardless of whether such expenses exceed \$1,000.

The Supreme Court construed the travel exception<sup>9</sup> in *Buckley v. Valeo* and specifically distinguished travel "undertaken as a volunteer at the direction of the

<sup>3</sup> Gardner Response at 1-2; RFP Response at 2.

<sup>4</sup> Complaint.

<sup>5</sup> First General Counsel's Report ("GCR") at 9.

<sup>6</sup> See 2 U.S.C. § 441a(a)(1). During the 2008 election cycle, the limit on an individual contribution to a candidate was \$2,300 per election.

<sup>7</sup> 2 U.S.C. § 431(8)(B)(i); 11 C.F.R. § 100.74.

<sup>8</sup> 2 U.S.C. § 431(8)(B)(iv); 11 C.F.R. § 100.79.

<sup>9</sup> The volunteer travel language examined by the *Buckley* Court is slightly different from the current version. The prior version provided an exception to the definition of "contribution" for "any unreimbursed payment [in excess of \$500] for travel expenses made by an individual who on his own behalf volunteers his personal services to a candidate." Pub. L. No. 93-443, 88 Stat. 1273 (codified at 2 U.S.C. § 431(e)(5)(D) (1974)). The volunteer travel exception was later amended by the 1979 amendments to the

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candidate or his staff" from "independently travel[ing] across the country to participate in a campaign."<sup>10</sup> According to the Court, the former was properly treated as a contribution to the campaign as "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."<sup>11</sup>

The Court, however, held that the latter type of travel did not constitute a contribution, nor was it subject to the volunteer travel exception's monetary limit. As the Court noted:

The statute distinguishes between independent expenditures by individuals and campaign expenditures on the basis of whether the candidate, an authorized committee of the candidate, or an agent of the candidate "authorized or requested" the expenditure. As a result, only travel that is "authorized or requested" by the candidate or his agents would involve incidental expenses chargeable against the volunteer's contribution limit. . . . Should a person independently travel across the country to participate in a campaign, any unreimbursed travel expenses would not be treated as a contribution. This interpretation is not only consistent with the statute and the legislative history but is also necessary to avoid the administrative chaos that would be produced if each volunteer and candidate had to keep track of amounts spent on unsolicited travel in order to comply with the Act's contribution . . . ceiling[] and the reporting and disclosure provisions.<sup>12</sup>

**A Fundraising Event is Not a Volunteer Event; Therefore, Attending a Fundraising Event Does Not Constitute Volunteer Activity**

Though found nowhere in the Act or Commission regulations, OGC contemplates a difference between "typical fundraising events" (e.g., golf outings, dinners, and dances) and the event in question here. Under this analysis, individuals may travel to and attend

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Act. Pub. L. 96-187 (1980). The purpose of the amendment was to (i) expand the exception to include volunteer travel on behalf of political parties and (ii) extend the exception not just to volunteers but also to "individuals who are being paid by a candidate or party committee." H.R. Doc. No. 96-422, Comm. on House Admin., at 8 (1979). The change in statutory language does not affect the Court's analysis.

<sup>10</sup> 424 U.S. 1, 36-37 & n.43 (1976).

<sup>11</sup> *Id.* at 36-37.

<sup>12</sup> *Id.* at 37 n.43 (internal citations omitted) (emphasis added).

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so-called typical fundraising events without triggering the \$1,000 travel limit because these attendees “do not provide services on behalf of the candidate, but merely make or deliver contributions.” According to OGC, the event at issue here, by contrast, involved “volunteers, at the invitation of the campaign, expending their time and services on behalf of the candidate” – apparently by attending and participating in a “human telephone bank,” a term undefined in the Act.<sup>13</sup>

This line-drawing exercise is ultimately arbitrary, however. Whether one calls friends and family prior to traveling to an event or after one arrives at an event is a distinction without a difference. Yet under this distinction drawn by OGC, the former traveler would be free from the \$1,000 limit, while the latter traveler would be subject to it.<sup>14</sup>

Neither law nor regulation supports this dichotomy.<sup>15</sup> The timing of the solicitation of contributions is irrelevant for disclosure purposes. We fail to see the rationale for imposing differing legal standards on persons who perform the same fundraising actions but do so in a different order. We have been presented no reason why

<sup>13</sup> Under FEC regulations, a “telephone bank” exists when more than 500 calls “of an identical or substantially similar” nature are made in a 30-day period. 11 C.F.R. § 100.28. To be “substantially similar,” the calls must “include substantially the same template or language,” varying only “in non-material respects such as communications customized by the recipient’s name, occupation, or geographic location.” *Id.* There is no evidence in this matter indicating that the phone calls made in connection with the RFP fundraising event were “identical or substantially similar.” To the contrary, the attendees were calling family members and friends and, without question, were engaging in unique dialogues with each. Merely because telephone calls were made for the same *purpose* does not cause them to be substantially similar in template or language. To view the definition otherwise would stretch beyond recognition the phrase “substantially similar.”

<sup>14</sup> It is irrelevant that Mr. Gardner paid for others to travel as well. Whether paying for one’s own travel or for the travel of others, the relevant standard remains whether the travel was authorized or requested by the candidate. Commission precedent supports this analysis. In MUR 5020 (Harrah’s Entertainment, Inc., *et al.*), which appears to be the only enforcement action involving travel to a campaign event, an individual paid the travel costs both for a federal Senate candidate and for a personal friend to attend a fundraiser. The Commission concluded that the payment for the candidate’s travel—which clearly met the “authorized or requested” threshold—constituted a contribution to the candidate *but* that the payment for the friend’s travel did not, because it was not at the campaign’s request. MUR 5020, General Counsel’s Report #3 at 11-14.

<sup>15</sup> Notwithstanding any attempts in the GCR to use Advisory Opinion 2007-08 as a sword against Mr. Gardner and RFP in this matter (which in and of itself is improper), the AO simply does not conflict with our views here. In fact, the AO merely restates the general exception to the definition of contribution for volunteer activities and the specific \$1,000 limit on travel expenses “incurred on behalf of a Federal candidate.” The example provided in footnote 2 of the AO contemplates a specific request made by a campaign to a specific person to travel across the country to “arrange for an entertainer to perform at the candidate’s campaign event.” Clearly, in that example, the person in question was asked solely and specifically by the campaign to travel to another location to set up a campaign event. Conversely, in the matter at hand, RFP sent a broad invitation to numerous individuals to attend an event that the campaign itself set up as a reward for previous support and an incentive for continued support, which could be undertaken at the event itself. The two situations have little in common.

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changing the order in which the fundraising activities occur matters, which is understandable, because there is no appreciable difference.

Moreover, the event in question consisted not only of the gathering at the Banknorth Garden, but also a dinner at Fenway Park the night before. To be able to go to both the Garden and Fenway, individuals were required to bring or commit to raising \$5,000. Therefore, attendance was premised not on seeking contributions, but rather on bringing or pledging contributions. According to RFP, attendees utilized the Garden event not only to make solicitations of friends and contacts, but also to deliver the contributions they brought with them in addition to dining and socializing with other attendees. Simply because RFP provided an arena for attendees to fulfill their \$5,000 commitment along with an opportunity to raise even more money for RFP does not convert the entire two-day gathering into a volunteer event, subjecting volunteers to a spending limit.

**Mr. Gardner's Travel Expenses Were Not "Incurred On Behalf of" RFP**

To our knowledge, the Commission has never held that a mere invitation from a campaign to its supporters to attend an event—regardless of whether the event was a “volunteer event” or a “fundraising event”—constitutes a campaign request or authorization to travel.<sup>16</sup> The volunteer travel exception itself only covers “travel expenses made by any individual on behalf of any candidate or any political committee of a political party.”<sup>17</sup> As set forth above, *Buckley* further limited the scope of this exception to cover only travel “authorized or requested” by the candidate or the committee.

Therefore, “on behalf of” must mean something more than merely “at the invitation of.” Instead, the campaign must make a specific request to travel as an agent of the candidate or committee. Otherwise, any mass invitation, email, or text message from a candidate asking people to attend an event or volunteer would require the candidate to ensure that no invitee who had already reached the legal limit on what he or she could contribute had, in addition, spent more than \$1,000 on any travel connected with the campaign during the entire election cycle. Such an application would constitute the sort of “administrative chaos” that *Buckley* disdained.<sup>18</sup>

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<sup>16</sup> In fact, OGC provided no examples of enforcement actions where the Commission has found reason to believe that a violation of 2 U.S.C. § 431(8)(B)(iv) and 11 C.F.R. § 100.79 occurred. It is our understanding that there are none.

<sup>17</sup> 2 U.S.C. § 431(8)(B)(iv); 11 C.F.R. § 100.79. Though OGC attempts to define the event in question as a volunteer event rather than a fundraising event, it is unclear why the type of event is of any import. Event type does not appear to play any role in the functionality of the travel exception limit itself. In fact, neither “volunteer” nor “fundraiser” appears in the language of the statute or regulation.

<sup>18</sup> To illustrate the administrative chaos that could emerge if we were to adopt OGC’s recommendation in this matter, consider the following hypothetical: a presidential candidate, a week before the election, emails and text messages all of his supporters, asking them to come volunteer during

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Moreover, because the Supreme Court has held that an individual's ability to engage in unfettered travel is a constitutional right,<sup>19</sup> the Commission must have a compelling reason to restrict it. We are not the first to recognize this.<sup>20</sup> Though an individual may not assume travel expenses for a candidate, one's personal travel cannot be regulated. And assumption of travel expenses does not occur where a mere invitation is extended for individuals to attend a campaign event, a volunteer event, or a fundraising event. As *Buckley* requires, a more specific request must be made, such that the traveler is actually specifically asked to travel to an event at the behest of the candidate.

No such evidence was presented here. For instance, there is no evidence that RFP asked Mr. Gardner to transport other attendees to the event. In fact, RFP specifically 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."<sup>21</sup> The Complaint provides no evidence to the contrary.

Likewise, as in MUR 5020 (*Harrah's Entertainment, Inc., et al.*), there is no evidence to suggest that Mr. Gardner transported any RFP campaign staff, volunteers, or paid consultants to Boston. In fact, Mr. Gardner, in his response, specifically denies ~~knowingly doing so.~~<sup>22</sup> ~~Again, the Complaint provides no evidence to the contrary.~~

Finally, to the extent it is relevant here, application of the travel exception's \$1,000 limit to Mr. Gardner would improperly convert him from a campaign fundraiser

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the last weekend before the election. Under the legal theory we are being asked to adopt, those who travelled to a battleground state would be required to document their travel costs. And the campaign would have to essentially set up check points at its campaign headquarters to determine whether any volunteer's travel costs, either by themselves or combined with other volunteer travel that a particular supporter had previously undertaken, exceeded \$1,000. If the costs did exceed the limit, the campaign would then be required to research how much the traveler had already contributed in order to ensure that the travel expenses that exceeded \$1,000, when coupled with previous contributions, did not exceed the contribution limits in place for that election cycle. The administrative costs would be crippling.

Furthermore, those supporters who are most enthusiastic about the candidate, as evidenced by their previous contributions and travel, would be barred from traveling anywhere to help that candidate once the limits were reached. Such a perverse result cannot be the intention of the statutes and regulations in question.

<sup>19</sup> See, e.g., *Saenz v. Roe*, 526 U.S. 489, 498-501 (1999) (collecting authority).

<sup>20</sup> In a Statement of Reasons signed in 2007, Commissioner Weintraub and then-Chairman Lenhard stated that "an individual's personal travel and lodging expenses are just that – they are personal not campaign expenditures, even if the individual expresses political opinions once he or she arrives at the destination. One need not report such expenses to the Government, whether one travels by Greyhound or Lear jet." MUR 5642 (Soros), Robert D. Lenhard and Ellen L. Weintraub, Statement of Reasons dated Dec. 31, 2007, and Jan. 2, 2008, at unnumbered p. 3

<sup>21</sup> RFP Response at 2.

<sup>22</sup> Gardner Response at 2.

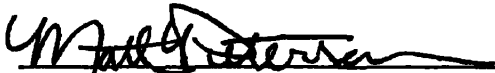
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into a campaign volunteer subject to a spending limit simply because he conducted his fundraising activities at a campaign event.<sup>23</sup> Neither the Act nor FEC regulations allow such a conversion to take place. One cannot be transformed into a volunteer subject to spending limits solely by either contributing one's own money or soliciting or bundling contributions from friends or colleagues.<sup>24</sup>

### CONCLUSION

Acting on behalf of a candidate means more than merely accepting an invitation to attend a fundraising event. To hold otherwise would not only restrict core Constitutional rights but also create an administrative nightmare for supporters and candidates alike. The Supreme Court has warned against both outcomes. Therefore, we cannot support the recommendation that there exists a reason to believe that Mr. Gardner and RFP violated the Act simply because Mr. Gardner chartered a plane for himself and other individuals in response to RFP's general invitation to attend a fundraising event. For these reasons, we voted to close the file in this matter.

March 10, 2009



Matthew S. Petersen  
Vice Chairman



Caroline C. Hunter  
Commissioner



Donald F. McGahn II  
Commissioner

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<sup>23</sup> For the reasons stated previously, however, we believe the dichotomy between "fundraiser" and "volunteer" to be of dubious significance.

<sup>24</sup> Though not addressed in the GCR, the fact that Mr. Gardner chartered a flight for himself and others rather than flying coach does not convert Mr. Gardner's actions into a violation of the Act. That actions, to some, may *feel* like a violation is not sufficient. Rather, the circumstances in question must actually *be* a violation of the Act in order for enforcement to commence.

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FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

**SENSITIVE**

**BEFORE THE FEDERAL ELECTION COMMISSION**

In the Matter of: )  
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 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.<sup>1</sup> 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.<sup>2</sup>

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

<sup>2</sup> 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.<sup>3</sup> 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.<sup>4</sup> 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.<sup>5</sup>

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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.

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

<sup>4</sup> 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.

<sup>5</sup> 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.<sup>6</sup> The Act also provides that no candidate or political committee shall knowingly accept any contribution in violation of the prescribed limits,<sup>7</sup> and that political committees must report all contributions.<sup>8</sup> 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"<sup>9</sup> (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.<sup>10</sup>

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.<sup>11</sup> 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."<sup>12</sup> 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.<sup>13</sup> In a footnote, the Court extrapolated the "authorized or

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<sup>6</sup> 2 U.S.C. § 441a(a)(1).

<sup>7</sup> 2 U.S.C. § 441a(f).

<sup>8</sup> 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).

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

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

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

<sup>12</sup> 424 U.S. 1, 36 (1976).

<sup>13</sup> *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.”<sup>14</sup>

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.<sup>15</sup> 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.<sup>16</sup> 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.<sup>17</sup> 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.<sup>18</sup>

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.”<sup>19</sup> RFP’s own press releases and website videos released

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<sup>14</sup> *Id.* at n.43.

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

<sup>16</sup> *Id.*

<sup>17</sup> 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, 3<sup>rd</sup> Ed., s.v. “invitation;” see also The American Heritage Collegiate Dictionary, 3<sup>rd</sup> 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.

<sup>18</sup> 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.

<sup>19</sup> 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.<sup>20</sup>

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*.<sup>21</sup> 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.<sup>22</sup>

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

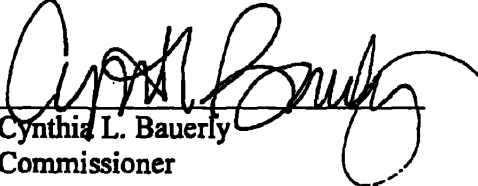
<sup>21</sup> In their statement of reasons in this matter, some of our colleagues conclude, without any legal support, that "'on behalf of' must mean something more than merely 'at the invitation of.'" They go on to proclaim their own new rule that "the campaign must make a specific request to travel 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.

<sup>22</sup> 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.<sup>23</sup> 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.<sup>24</sup> 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

<sup>23</sup> 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.

<sup>24</sup> 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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