UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FEDERAL ELECTION COMMISSION, Plaintiff, v. CRAIG FOR U.S. SENATE, *et al.*, Defendants.	No. 1:12-cv-00958-ABJ MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS

PLAINTIFF FEDERAL ELECTION COMMISSION'S MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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Defendants converted more than $200,000 that donors contributed to Craig for U.S. Senate and used it to pay the legal expenses that former Senator Larry Craig incurred when he attempted to withdraw his guilty plea to one misdemeanor count of disturbing the peace in Minnesota. This misuse of campaign funds violated the prohibition on converting campaign funds to personal use in the Federal Election Campaign Act ("FECA"), 2 U.S.C. §§ 431-57. *See* 2 U.S.C. § 439a(b).

Defendants concede that Craig was arrested for purely *personal* conduct unrelated to his duties as a federal officeholder. But they then contend that Craig's legal expenses were not personal because he was on constitutionally-mandated, official Senate travel at the time of his arrest. The personal use argument is defeated by Craig's concession, and Craig's trip was not required by the Constitution. Nothing about his official duties as a federal officeholder caused him to engage in that personal conduct in the airport restroom, or to subsequently plead guilty, or to thereafter decide to try to withdraw that guilty plea. His resulting legal expenses were thus personal in nature, and defendants' use of campaign funds for those expenses violated FECA.

This common sense result finds support in advisory opinions of plaintiff Federal Election Commission ("FEC" or "Commission"). In Advisory Opinion ("AO") 2006-35 (Kolbe) — upon which defendants primarily rely — the Commission expressly stated that a Member of Congress may *not* use campaign funds to respond to a criminal investigation into the Member's personal conduct, even where that conduct occurred on a Congressionally-sponsored trip. Contrary to defendants' arguments, their conversion of campaign funds to personal use is not excused by any FEC advisory opinions.

The motion to dismiss should be denied.

BACKGROUND

A. The Parties

Plaintiff Federal Election Commission is the independent agency of the United States government with exclusive jurisdiction over the administration, interpretation, and civil enforcement of FECA. *See* 2 U.S.C. §§ 437c(b)(1), 437d(a), 437g. The Commission is authorized to investigate possible violations of FECA, *id.* §§ 437g(a)(1) and (2), and to initiate civil actions in the United States district courts to obtain judicial enforcement of FECA, *id.* §§ 437d(e), 437g(a)(6). FECA provides that a "contribution accepted by a candidate, and any other donation received by an individual as support for activities of the individual as a holder of Federal office," shall not be "converted by any person to personal use." 2 U.S.C. §§ 439a(a)-(b).

Defendant Larry Craig was a United States Senator from Idaho from January 1991 to January 2009. (FEC's Complaint for Civil Penalty, Declaratory, Injunctive, and Other Appropriate Relief ("Compl.") ¶ 6 (Docket No. 1).) In 2007, Craig was a candidate for the United States Senate in the 2008 election, and he authorized defendant Craig for U.S. Senate ("Craig Committee") as his principal campaign committee under 2 U.S.C. §§ 431(5)-(6). (Compl. ¶¶ 6-7). Accordingly, the Craig Committee was authorized to receive campaign contributions and make expenditures on Craig's behalf. Compl. ¶ 7; *see* 2 U.S.C. §§ 432(e)(1)-(2). Defendant Kaye L. O'Riordan was the Craig Committee's treasurer, and therefore had authority to authorize its expenditures. Compl. ¶ 8; *see* 2 U.S.C. §§ 432(a), 433(b)(4).

B. Craig's Arrest, Guilty Plea, and Legal Proceedings in Minnesota

On June 11, 2007, then-Senator Craig was arrested while using a restroom at the Minneapolis-St. Paul International Airport, where he was awaiting a scheduled flight to Washington, D.C. (Compl. ¶ 12; Memorandum in Support of Defendants' Motion to Dismiss

("Defs.' Mem.") at 3 (Docket No. 3-1).) Craig was charged under Minnesota law with disturbing the peace-disorderly conduct and interference with privacy. (Compl. ¶ 12.) About two months later, on August 8, 2007, Craig pleaded guilty to a misdemeanor count of disorderly conduct. (Compl. ¶ 12.)

Craig retained the Washington, D.C. law firm of Sutherland, Asbill & Brennan ("Sutherland") and the Minnesota law firm of Kelly & Jacobson ("Kelly") in an effort to withdraw his guilty plea. (Compl ¶ 13.) On September 10, 2007, Craig filed a motion to withdraw the guilty plea in Minnesota state district court, which was denied on October 4, 2007. (Compl. ¶ 14.) Craig appealed the ruling to the Minnesota Court of Appeals, which rejected the appeal on December 9, 2008. (Compl. ¶ 14.) From July 9, 2007 through October 5, 2008, the Craig Committee paid at least $139,952 to Sutherland and $77,032 to Kelly in connection with Craig's failed efforts to withdraw his guilty plea. (Compl. ¶¶ 19-20.)

C. The Senate Ethics Committee Proceedings

The United States Senate Select Committee on Ethics ("Senate Ethics Committee") conducted an inquiry into Craig's conduct in connection with his arrest, conviction, and subsequent conduct. (Compl. ¶ 16.) The Brand Law Group in Washington, D.C. — which represents defendants in this matter — also represented Craig before the Senate Ethics Committee. (Compl. ¶ 21; Defs.' Mem. at 11.) In a September 5, 2007 letter to the Senate Ethics Committee, Craig's counsel argued that the Senate Ethics Committee should not exercise jurisdiction over the matter because Craig's arrest and conviction was "'*purely personal conduct unrelated to the performance of official Senate duties*.'" (Compl. ¶ 22 (quoting Letter to the Honorable Barbara Boxer from Stanley M. Brand and Andrew D. Herman (Sept. 5, 2007)).)

On February 13, 2008, the Senate Ethics Committee issued a "Public Letter of

Admonition" unanimously concluding that, among other matters, Craig had not complied with Senate Rule 38.2, which requires Senate Ethics Committee approval of any payments for "legal expenses" paid with funds of a principal campaign committee. (Compl. ¶ 23.) Specifically, the Ethics Committee wrote:

> [T]he *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." . . . 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).

Public Letter of Admonition, United States Senate (Feb. 13, 2008) (Select Committee on Ethics), *available at* http://www.ethics.senate.gov/downloads/pdffiles/craig.pdf (emphasis omitted and second emphasis added); *see* Compl. ¶ 23.

D. FEC Administrative Proceedings

On November 10, 2008, the Commission received an administrative complaint alleging that Craig had violated FECA by spending more than $213,000 in campaign funds to pay legal fees and expenses incurred in connection with his arrest and conviction. (Compl. ¶ 24.) The complaint was designated by the Commission as Matter Under Review ("MUR") 6128 for administrative purposes. Compl. ¶ 24; *see* 2 U.S.C. § 437g(a)(1). By letter dated November 18, 2008, the Commission notified defendants that the administrative complaint had been filed and provided defendants with a copy. Craig responded to the Commission on December 2, 2008. Compl. ¶ 25; *see* 2 U.S.C. § 437g(a)(1).

After reviewing the then available information, on May 19, 2009, the Commission voted 5-0 (with one Commissioner recused) to find "reason to believe" that defendants had violated 2 U.S.C. § 439a(b). Compl. ¶ 26; *see* 2 U.S.C. §§ 437g(a)(1)-(2). Specifically, the Commission adopted a factual and legal analysis (*see* Exh. A (FEC Factual and Legal Analysis (MUR 6128))), and found reason to believe that the use of the Craig Committee's funds to pay for legal fees and expenses Craig incurred in connection with his attempt to withdraw his guilty plea constituted a conversion to personal use (Compl. ¶ 26).

The Commission notified defendants of its reason-to-believe determination by letter dated June 30, 2009. (Compl. ¶ 27.) Defendants responded by letter dated August 10, 2009. (Compl. ¶ 27.) Following an investigation, the Commission's General Counsel notified defendants by letter dated April 8, 2011, that the General Counsel was prepared to recommend that the Commission find "probable cause" to believe that defendants violated 2 U.S.C. § 439a(b). Compl. ¶ 28; *see* 2 U.S.C. § 437g(a)(3). The General Counsel also provided defendants with a brief stating the position of the General Counsel on the legal and factual issues of the case. (Compl. ¶ 28.) The defendants filed a response with the Commission dated April 25, 2011 (Compl. ¶ 28), and counsel for defendants appeared at a probable cause hearing before the Commission on May 25, 2011 (*see* Exh. B (Transcript of Probable Cause Hearing ("Prob. Cause Tr.")).[1] After reviewing the information available, on February 7, 2012, the Commission voted 5-0 to find probable cause to believe that defendants had violated 2 U.S.C. § 439a(b). Compl. ¶ 29; *see* 2 U.S.C. § 437g(a)(4)(A).

The Commission notified all of the defendants of its February 7 findings by letter dated February 22, 2012, and, as FECA requires, for a period of not less than 30 days, endeavored to

[1] Portions of the probable cause hearing transcript have been redacted pursuant to 2 U.S.C. § 437g(a)(4)(B)(i).

correct the violations through informal methods of conference, conciliation and persuasion. Compl. ¶ 30; *see* 2 U.S.C. § 437g(a)(4)(A). Unable to secure acceptable conciliation agreements with the defendants, on May 3, 2012, the Commission voted 5-0 to authorize filing this suit against defendants. Compl. ¶ 30; *see* 2 U.S.C. § 437g(a)(6). The Commission filed this action on June 11, 2012, pursuant to its authority under 2 U.S.C. §§ 437d(a)(6), 437g(a)(6)(A). (Docket No. 1.)

ARGUMENT

Defendants used more than $200,000 in campaign funds donated to the Craig Committee to pay for then-Senator Craig's personal legal expenses. Those personal expenses stem from his choice to try to withdraw his plea of guilty to disorderly conduct in Minnesota. In their motion to dismiss, defendants do not even attempt to argue that Craig's guilty plea or effort to withdraw that plea were connected to his duties as an officeholder. Nor could they. The motion to dismiss should be denied.

I. STANDARDS OF REVIEW

A. Motion to Dismiss

On a motion to dismiss, the Court must "accept the well-pleaded factual allegations set forth in [the] complaint as true for purposes of this stage of the litigation and construe reasonable inferences from those allegations in [the plaintiff's] favor." *Doe v. Rumsfeld*, 683 F.3d 390, 391 (D.C. Cir. 2012). Thus, defendants note as they must that "[f]or the purposes of th[eir] Motion, Defendants accept the facts set forth in the Complaint." (Defs.' Mem. at 3 n.2.) In addition to the facts alleged in the complaint, the Court may consider "any documents attached to or incorporated in the complaint, matters of which the court may take judicial notice, and matters of public record" when deciding a motion to dismiss. *Melson v. Salazar*, 598 F. Supp. 2d 71, 73

(D.D.C. 2009) (citing *Marshall County Health Care Auth. v. Shalala*, 988 F.2d 1221, 1226 (D.C. Cir. 1993) (affirming lower court's reliance on an administrative record when deciding a motion to dismiss, where the court used the record to resolve legal questions and not to test factual allegations in the complaint)), *aff'd*, 377 Fed. Appx. 30 (D.C. Cir. 2010).

To survive the motion, the Commission's complaint need only "'plead[] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *Jones v. Horne*, 634 F.3d 588, 596 (D.C. Cir. 2011) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). "'[T]he burden is on the moving party to prove that no legally cognizable claim for relief exists.'" *Harris v. CitiMortgage, Inc.*, ___ F. Supp. 2d ___, No. 11-cv-1591, 2012 WL 2935594, at *2 (D.D.C. July 19, 2012) (quoting 5B Fed. Prac. & Proc. Civ. § 1357 (3d ed.)).

B. Deference to Commission Interpretations

The Commission's interpretation of FECA's prohibition on the personal use of campaign funds, 2 U.S.C. § 439a(b), is entitled to deference. When Congress has not "directly spoken to the precise question at issue," a court must defer to "a reasonable interpretation made by the administrator of an agency." *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842, 844 (1984). The agency's "view governs if it is a reasonable interpretation of the statute — not necessarily the only possible interpretation, nor even the interpretation deemed *most* reasonable by the courts." *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 218 (2009).

As the Supreme Court has recognized, the FEC "is precisely the type of agency to which deference should presumptively be afforded." *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37 (1981); *United States v. Kanchanalak*, 192 F.3d 1037, 1043, 1049 (D.C. Cir. 1999) ("[T]he FEC's interpretation of the Act should be accorded considerable deference."

(internal quotation marks omitted)). The Commission receives deference when — as it did here — it a makes a legal determination "pursuant to [its] detailed statutory procedures analogous to formal adjudication." *FEC v. Nat'l Rifle Ass'n of Am.*, 254 F.3d 173, 185 (D.C. Cir. 2001) ("[T]he probable cause determination and its underlying statutory interpretation . . . warrant *Chevron* deference."). The Commission also receives deference when it determines in an advisory opinion whether proposed conduct would violate FECA. *Id.* at 184-86 (discussing the "appropriateness of giving FEC advisory opinions *Chevron* deference").

Thus, the Court should give deference to the Commission's determination that Craig's legal fees "lacked the necessary nexus to Craig's campaign activities or his duties as a Federal officeholder" to be permissible under 2 U.S.C. § 439a(a),[2] *see infra* Part II, as well as to its determination that, based on earlier Commission advisory opinions, defendants' use of campaign funds did not qualify for protection under 2 U.S.C. § 437f(c), *see infra* Part III.

II. DEFENDANTS VIOLATED 2 U.S.C. § 439a(b) BY CONVERTING FUNDS DONATED TO CRAIG FOR U.S. SENATE TO USE FOR THEN-SENATOR CRAIG'S PERSONAL LEGAL EXPENSES

A. Craig's Legal Expenses, Which Resulted From His Decision to Plead Guilty and Later Choice to Try to Withdraw that Plea, Would Have Existed Irrespective of His Duties as a Holder of Federal Office

FECA provides that a candidate or federal officeholder may use contributions or donations "for any . . . lawful purpose unless prohibited by" 2 U.S.C. § 439a(b). *See* 2 U.S.C. § 439a(a)(6).[3] Section 439a(b)(1) states that a "contribution or donation . . . shall not be

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[2] FEC Factual and Legal Analysis at 10 (MUR 6128) (attached as Exh. A).

[3] Defendants suggest (Def.'s Br. at 1-2) that the Commission improperly omitted section 439a(a)(2) from its Complaint. *See* 2 U.S.C. § 439a(a)(2) (providing that a candidate or federal officeholder is permitted to use campaign funds "for ordinary and necessary expenses incurred in connection with the duties of the individual as a holder of Federal office"). Despite the significance defendants attempt to place on this paragraph, it adds nothing to section 439a(a), since a catch-all paragraph of that subsection states that campaign funds may also be used "for

converted by any person to personal use." Conversion to personal use occurs when funds from a campaign account are "used to fulfill any commitment, obligation, or expense of a person that would exist *irrespective of the candidate's election campaign or individual's duties as a holder of Federal office*." 2 U.S.C. § 439a(b)(2) (emphasis added); *see* 11 C.F.R. § 113.1(g). Under this test,

> [i]f campaign funds are used for a financial obligation that is caused by campaign activity or the activities of an officeholder, that use is not personal use. However, if the obligation would exist even in the absence of the candidacy or even if the officeholder were not in office, then the use of funds for that obligation generally would be personal use.

Final Rule and Explanation and Justification, Personal Use of Campaign Funds, 60 Fed. Reg. 7862, 7863-64 (Feb. 9, 1995).[4] The Commission determines on a "case-by-case basis" whether using funds from a campaign account for legal expenses is a conversion to personal use. 11 C.F.R. § 113.1(g)(1)(ii). Campaign funds may be used for legal expenses that were caused by a candidate's campaign or officeholder's duties, such as where "a committee . . . incur[red] legal expenses in its capacity as the employer of the campaign staff." 60 Fed. Reg. at 7868. In contrast, campaign funds may not be used for legal expenses that a non-candidate or non-officeholder in the same position also would have incurred — such as "legal expenses associated with a divorce or charges of driving under the influence of alcohol." *Id.* These kinds of legal expenses are "treated as personal, rather than campaign or officeholder related," and it is irrelevant whether "the underlying legal proceedings have some impact on the campaign or the officeholder's status." *Id.*

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any other lawful purpose unless prohibited by [section 439a(b).]" Thus, section 439a(b) contains the only relevant statutory standard in this case.

[4] The statute and its implementing regulation provide a non-exhaustive list of expenses that are *per se* personal use, including "a home mortgage, rent, or utility payment" and "a clothing purchase." 2 U.S.C. § 439a(b)(2)(A)-(I); *see* 11 C.F.R. § 113.1(g)(1)(i).

There can be no doubt that Craig's legal fees of more than $200,000 were personal expenses. Craig's legal expenses resulted from his effort to withdraw his guilty plea to a misdemeanor count of disorderly conduct. (Compl. ¶¶ 12-14, 19-20; *see also* Defs.' Mem. at 3.) Because there is no connection between Craig's choice to plead guilty or his later decision to attempt to withdraw that guilty plea and his duties as a federal officeholder, his resulting legal expenses "would exist irrespective of [Craig's] duties as a holder of Federal office." 2 U.S.C. § 439a(b)(2). Accordingly, defendants violated FECA's bar on converting campaign funds to personal use. 2 U.S.C. § 439a(b).

In their motion to dismiss, defendants do not even argue that Craig's guilty plea and decision to try to withdraw it have anything to do with Craig's duties as a federal officeholder. Nor could they. Instead, defendants focus on the events of Craig's June 11, 2007 arrest and incorrectly claim that "Senator Craig's legal expenses arose during official Senate travel." (Defs.' Mem. at 5-6.) But Craig did not incur any legal expenses during his trip or for any official business that he conducted while on that trip. Nor did the legal expenses at issue here involve a direct defense to the charges resulting from his June 11, 2007 arrest — Craig did not even challenge those charges. Rather, nearly two months *after* his arrest, Craig pled guilty to one charge of disorderly conduct. (Compl. ¶ 12.) Only later still, when Craig attempted to reverse that guilty plea, did defendants spend the campaign funds that are at issue here. (Compl. ¶¶ 13-14, 19-20.)

Those expenses would have existed irrespective of Craig's duties as a federal officeholder. Thus, the Commission has sufficiently pleaded a violation of FECA's bar on converting campaign funds to personal use.

B. Even if Craig's Legal Expenses Had Resulted from Defending Against His Criminal Charges, They Would Have Existed Irrespective of His Duties as a Holder of Federal Office

Even if Craig's legal expenses had arisen during his official Senate travel, as defendants claim (Defs.' Mem. at 5-6), those expenses still would have existed irrespective of Craig's duties as a federal officeholder. Craig was arrested at the Minneapolis-St. Paul International Airport after engaging in conduct in a public restroom. (Compl. ¶ 12; Defs.' Mem. at 3.) Craig *admitted* that he "knew or should have known [that his restroom conduct] tended to arouse alarm or resentment [in] others which conduct was physical (versus verbal) in nature." *Public Letter of Admonition,* United States Senate at 1 (Feb. 13, 2008) (Select Committee on Ethics). Craig was charged under Minnesota law with disturbing the peace-disorderly conduct, and interference with privacy. (Compl. ¶ 12.) Before the Senate Ethics Committee and in the proceedings before the Commission, defendants conceded the obvious: Craig's arrest resulted from "*purely personal conduct unrelated to the performance of [Craig's] official Senate duties*." (Compl. ¶ 22; *see also* Prob. Cause Tr. at 23:15-18 ("Let me state it as clearly as I am able. *Certainly we are not making the allegation that one's conduct in a restroom has any bearing on your duties as an office-holder*.") (emphasis added).

This concession is dispositive. It ends the analysis under section 439a(b). If the legal expense "would exist . . . even if the officeholder were not in office, then the use of funds for that obligation generally would be personal use." 60 Fed. Reg. at 7864. If a non-officeholder had engaged in the same behavior as Craig, that person would also have been arrested and faced charges for disturbing the peace and interference with privacy. Even assuming Craig's travel were required by or related to his duties as a United States Senator, nothing about those duties

also required or was related to his conduct and arrest. Accordingly, those legal expenses would have existed irrespective of Craig's duties as federal officeholder.

This conclusion is consistent with a long line of Commission advisory opinions determining that campaign funds may be used for legal expenses when "incurred in legal proceedings involving *allegations concerning the candidate's campaign activities or duties as a Federal officeholder*." FEC AO 2006-35 (Kolbe), 2007 WL 268223, at *2, *available at* http://saos.nictusa.com/aodocs/2006-35.pdf (emphasis added). For example, and in sharp contrast to this case, legal expenses arising from defending against the following investigations, criminal charges, and civil suit were found by the Commission to be permissible uses of campaign funds:

- A federal government investigation into "campaign contributions allegedly made by [a lobbying firm] and its clients to Representative Visclosky . . . [and] appropriations earmarks purportedly obtained by Representative Visclosky for various [lobbying firm] clients." FEC AO 2009-10 (Visclosky), 2009 WL 1811018, at *3.

- A grand jury investigation into "allegations that Representative Cunningham obtained benefits (i.e., the sale of his house at an above-market price and a rent-free stay on a yacht) from [a federal defense contractor] because of his status as a U.S. Representative and his position on the Permanent Select Committee on Intelligence and the House Appropriations Defense Subcommittee." FEC AO 2005-11 (Cunningham), 2005 WL 2470825, at *3, *available at* http://saos.nictusa.com/aodocs/2005-11.pdf.

- Federal criminal charges that a candidate for federal office made "false reports . . . to the [Federal Election] Commission" and engaged in other fraudulent activity during the course of his campaign for federal office. FEC AO 2003-17 (Treffinger), 2003 WL 21894954, at *4-*5, *available at* http://saos.nictusa.com/aodocs/2003-17.pdf.

- A civil suit by Representative John Boehner against Representative Jim McDermott, alleging that McDermott violated federal law by disclosing an illegally recorded telephone conversation Boehner had with House Republican leaders, which McDermott received and disclosed due to his position as Ranking Minority Member of the House Ethics Committee. FEC AO 2000-40 (McDermott), 2001 WL 136013, at *1-*3, *available at* http://saos.nictusa.com/aodocs/2000-40.pdf.

In each of these cases — unlike in Craig's case — a non-candidate or non-officeholder in the same position would not have engaged in the conduct being investigated and from which the legal expenses arose. *See, e.g.*, FEC AO 2003-17 (Treffinger), 2003 WL 21894954, at *4 (explaining that "[*a*]*bsent Mr. Treffinger's campaign*, the [allegedly criminal] telephone calls at issue would not have been made," and the allegedly fraudulent FEC reports would not have been filed (emphasis added)).

In contrast, the Commission has stated that where a Member of Congress faces an investigation "involv[ing] allegations *not related* to [the Member's] duties as a Federal officeholder," campaign funds may not be used — even where those allegations relate to events that occurred during an official Congressional trip. FEC AO 2006-35 (Kolbe), 2007 WL 268223, at *3 (emphasis added).

Straining to avoid the consequences of their admission that Craig's conduct and arrest were not related to Craig's duties, defendants assert that their expenditures were permissible because Craig was arrested while on "official Senate travel." (Defs.' Mem. at 5.) Defendants' makeweight arguments should be rejected.

First, defendants argue that "legal proceedings arising out of [Craig's] travel are necessarily 'in connection with' Senator Craig's official duties." (Defs.' Mem. at 6.) But Craig's arrest, guilty plea, and attempt to withdraw that plea could not have arisen out of Craig's travel, since Craig was not arrested for traveling. He was arrested for admittedly unlawful personal conduct. Defendants' attempt to conflate Craig's official Senate travel with his arrest are belied by their concessions that Craig was arrested for purely personal conduct unrelated to his Senate duties. (Compl. ¶ 22; Prob. Cause Tr. at 23:15-18.)

Second, defendants assert that the legal expenses would not exist irrespective of Craig's officeholder duties since Craig "was engaged in official, constitutionally-mandated activity at the time of the incident." (Defs. Mem. at 6.) As explained *infra* pp. 15-18, the Constitution did not require Craig's trip. But even if it did, defendants' argument still fails because it continues to conflate Craig's trip with his arrest. Even if Craig's travel expenses (*see* Defs.' Mem., Exh. A) would not have existed irrespective of his officeholder duties, legal expenses arising from his arrest *would*, since, as defendants admit, his arrest resulted from purely personal conduct unrelated to his duties.

Defendants' argument that, but for Craig's official trip, the arrest (and resulting legal expenses) would not exist has no logical stopping point, and thus cannot be the test for a permissible use of campaign funds under section 439a(b). A chain of "but for" causation could be constructed between an individual's election to federal office and virtually *any expense* he or she incurs thereafter. For example, but for an officeholder's election to Congress, he or she might not purchase a home in Washington, D.C. or buy clothing appropriate for a Member of Congress, and thus, under defendants' logic, such expenses should constitute permissible uses of campaign funds. Yet, section 439a(b)(2) states that certain expenses — including mortgage, rent, and clothing payments — are *per se* personal uses. Thus, the Commission has allowed campaign funds to be used to pay legal expenses when the actual conduct giving rise to the allegations occurred *as a direct result of officeholder status or duties*, *see supra* pp. 12-13, but not when the specific conduct was unrelated to such status or duties.

If accepted, defendants' argument would lead to the absurd result that an officeholder could use campaign funds to defend against *any* criminal charge — no matter how unrelated to an officeholder's duties — so long as the alleged crime occurred during official travel.

Such an absurd result flies in the face of the Commission's interpretation of FECA's irrespective test. The Commission has determined, for example, that "legal expenses associated with . . . charges of driving under the influence of alcohol will be treated as personal, rather than campaign or officeholder related." 60 Fed. Reg. at 7868. Under defendants' theory, however, an officeholder could use campaign funds to defend against a charge of driving under the influence so long as the officeholder was driving to or from official Congressional business at the time. Indeed, defendants do not shy away from this extreme position. They embrace it. As defendants' counsel argued at the probable cause hearing: "[I]f a member of Congress was returning from a caucus meeting where alcohol had been served and he was returning to his home from that meeting . . . he would at least have a prima facie argument that these expenses stemming from the DUI would be related to his federal position." (Prob. Cause Tr. at 11:16-22; *see also id.* at 25:7-21 (defendants' counsel claiming campaign funds could also be spent on charges for shoplifting or "get[ing] into a brawl on the street [where] someone is seriously injured or killed" while traveling from Congress).

Congress clearly prohibited campaign funds from being used for such purposes when it stated that expenses that exist "irrespective of the candidate's election campaign or individual's duties as a holder of Federal office" cannot be paid with campaign funds. 2 U.S.C. § 439a(b)(2). And for this additional reason, defendants' motion to dismiss should be rejected.

C. Craig's Trip to Washington, D.C. Was Not Constitutionally Required

While defendants do not allege that the conduct that gave rise to Craig's arrest was required by his officeholder duties, because they could not, they do claim that Craig's travel from Idaho to Washington, D.C. fell "within the ambit" of his official duties because of two clauses of the Constitution. (Defs. Mem. 4-6, 10.) Not so. Nothing in the Constitution required

Craig's travel to Washington, D.C. — or anything that occurred during that travel — on the day of his arrest.

First, defendants assert that "the Constitution's 'Inhabitancy Clause' mandates that Senator Craig reside in his home state while serving as a United States Senator. *See* U.S. Const., Art. I, § 3, cl. 3." Defendants are wrong. Article I, section 3, clause 3 of the Constitution requires that an individual inhabit his or her home state only "when elected" — that is, on election day. Indeed, the clause is more commonly known as the "Qualifications Clause," not the "Inhabitancy Clause," as it governs qualifications for election, not sitting officeholders. It states in full:

> No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, *when elected*, be an Inhabitant of that State for which he shall be chosen.

U.S. Const., Art. I, § 3, cl. 3 (emphasis added); *see also id.*, Art. I, § 2, cl. 2 ("No Person shall be a Representative who . . . shall not, *when elected*, be an Inhabitant of that State in which he shall be chosen." (emphasis added)).

As courts have held, although the Qualifications Clause requires a Member of Congress to inhabit his or her state "at the time of his election to Congress," it "does not require that he shall remain an inhabitant or resident of his State during his term of office." *Howard v. Citizens' Bank & Trust Co.*, 12 App. D.C. 222, 235 (D.C. Cir. 1898); *see Texas Democratic Party v. Benkiser*, 459 F.3d 582, 589-90 (5th Cir. 2006) ("The Qualifications Clause only requires inhabitancy when that candidate is elected. Given this language, [a party official] could not constitutionally find that [sitting Member of Congress Tom] DeLay was ineligible [to run for reelection based on out of state residency] on June 7."); *Strong v. Breaux*, 612 So. 2d 111, 112 (La. Ct. App. 1992) (stating that "[a]s we read the qualifications [clause], an individual shall be

an inhabitant of the state from which he is chosen *when elected*," and holding that a sitting U.S. Senator from Louisiana was not disqualified from running for reelection because he allegedly did not inhabit Louisiana prior to the election); *see also* 2 J. Story, Commentaries on the Constitution of the United States §§ 618-19, pp. 94-95, *available at* http://www.constitution.org/js/js_309.htm (explaining that the Qualifications Clauses "omi[tted] to provide, that a subsequent non-residence [after election] shall be a vacation of the seat" and noting that "it has happened, in more than one instance, that a member, after his election, has removed to another state").

Accordingly, the Qualifications Clause did not require Craig to inhabit Idaho between his reelection to the Senate in November 2002 and election day in November 2008. As a result, the clause also did not require his July 11, 2007 trip from Idaho to Washington, D.C., because the Constitution did not require him to travel to Idaho in the first place.

The second Constitutional provision on which defendants rely is the Speech or Debate Clause (which they call the "Immunity from Arrest" clause). (Defs.' Mem. at 4.) It states in relevant part that "Senators and Representatives shall 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. But the clause does not require any travel by Members of Congress; it merely establishes a right that Members hold while doing so.

Defendants claim, without further citation, that the Speech or Debate Clause shows that the "framers certainly contemplated that a member's interaction with local law enforcement while traveling to and from Congress would fall within the ambit of his or her official duties." (Defs.' Mem. at 4.) But defendants' overbroad and unsupported argument is irrelevant here because Craig was arrested for a *criminal* offense, and the Supreme Court has held that the

Speech or Debate Clause "exempts Members from arrest *in civil cases only*." *Gravel v. United States*, 408 U.S. 606, 614 (1972) (explaining that the "term treason, felony, and breach of the peace . . . excepts from the operation of the privilege all criminal offenses" (internal quotation marks omitted)). Moreover, defendants' argument proves far too much. If correct, a Member's arrest for driving while intoxicated, stealing, assault, or even murder would — under the United States Constitution — be considered part of his or her official duties so long as it occurred while traveling to or from Congress. It is safe to say that this is not what the framers intended.

* * *

In sum, then-Senator Craig incurred legal expenses when he attempted to withdraw his guilty plea to a misdemeanor charge of disorderly conduct in Minnesota. He incurred these expenses irrespective of his duties as a federal officeholder, as Craig had expressly conceded before the Senate Ethics Committee. Accordingly, the Court could draw the reasonable inference that defendants are liable for converting campaign funds to personal use in violation of 2 U.S.C. § 439a(b). The motion to dismiss should be denied.

III. THE COMMISSION'S DETERMINATION THAT DEFENDANTS ILLEGALLY CONVERTED CAMPAIGN FUNDS TO PERSONAL USE IS SUPPORTED BY PRIOR FEC ADVISORY OPINIONS

Under 2 U.S.C. § 437f(c), a person who in good faith relies upon the "provisions and findings" of an FEC advisory opinion involving activity that is "indistinguishable in all its material aspects from" his or her own activity shall not be subject to any sanction in FECA. Contrary to defendants' claims (Defs.' Mem. at 6-10), their conversion of campaign funds to personal use was illegal — not excused — under FEC advisory opinions.

The Commission determined that defendants did not qualify for the safe harbor under section 437f(c) when it found that there was probable cause to believe defendants violated

section 439a(b). (Compl. ¶ 29.) That determination was reasonable — and is entitled to deference — since the advisory opinions on which defendants rely involve transactions that are materially distinguishable from defendants' activities.[5] Indeed, in AO 2006-35 (Kolbe), upon which defendants chiefly rely, the Commission expressly stated that the use campaign funds to defend against criminal allegations regarding conduct not related to officeholder duties would be impermissible, even if that conduct happened to occur while the officeholder was on an official Congressional trip.

Defendants rely upon four advisory opinions (including the Kolbe opinion), but none of them shields defendants from a finding that they violated the personal use prohibition in FECA. First, in AO 2006-35 (Kolbe), the Commission approved the use of campaign funds for legal expenses then-Representative Jim Kolbe incurred while responding to a *preliminary* inquiry by the Department of Justice into "an official congressional trip to the Grand Canyon attended by Representative Kolbe and two former House Pages, among others." *Id.* Because the trip "was part of an official Congressional visit," the Commission concluded that Kolbe's legal expenses in responding to an "inquiry regarding the rafting trip . . . would not exist irrespective of his duties as a Federal officeholder." *Id.*

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[5] The Commission's vote to find probable cause involved an underlying finding that the defendants did not qualify for a safe harbor under 2 U.S.C. § 437f(c) based on prior advisory opinions. Before the Commission, defendants argued that they qualified for the safe harbor because prior advisory opinions have permitted the use of campaign funds in situations that were materially indistinguishable from the circumstances here. (*See, e.g.*, Prob. Cause Tr. at 35:17-22 ("I just would point out, as you know, under 437f(c), we are entitled to rely on this Commission's opinions in terms of conforming our conduct to that guidance and we feel comfortable relying on the language in the Kolbe for our position."); *see also id.* at 24:4-15 (relying on the Cunningham advisory opinion).) There was no factual dispute regarding defendants' conduct before the Commission. (*Id.* at 6:1-11.) The Commissioners discussed the Kolbe advisory opinion at length (*see generally id.* at 18-40) and nevertheless voted to find that there was probable cause to believe defendants violated section 439a(b) (Compl. ¶ 28). Accordingly, the Court should defer to the Commission's determination that its prior advisory opinions involved conduct materially distinguishable from defendants' activity.

News reports that the Kolbe for Congress committee submitted to the Commission with its advisory opinion request indicate that the Department of Justice had yet to officially state *why* it was inquiring into Kolbe's trip, although anonymous and unofficial sources were reporting that the inquiry was due to allegations that Kolbe had engaged in inappropriate behavior with former House pages during the trip. *See* AO Request 2006-35 (Kolbe) and Supporting Documents, *available at* http://saos.nictusa.com/aodocs/569946.pdf. For instance, the New York Times reported that it "was not immediately clear whether [the inquiry into the trip] concerned any contention of improper activity by the retiring Kolbe," and that "[a] Justice Department spokeswoman declined to comment" on the matter. *Id.* (citing *House Page Program Leaders Discuss Trip*, N.Y. Times, Oct. 17, 2006).[6] Accordingly, after concluding that Kolbe could use campaign funds for "the inquiry into his trip," the Commission added a point that is critical here:

> the details of the preliminary inquiry by the Department of Justice *are not public at this time*, and it is possible that the scope of the inquiry could involve *allegations not related to Representative Kolbe's duties as a Federal office holder*. Thus, the Committee may *not* use campaign funds to pay for Representative Kolbe's legal expenses in the preliminary inquiry regarding other allegations, if any, that do not concern the candidate's campaign activities or duties as a Federal officeholder.

AO 2006-35 (Kolbe), 2007 WL 268223, at *3 (emphases added).

Thus, the Kolbe advisory opinion provides defendants no protection because Craig's legal expenses did not arise from an investigation that related to an official trip — let alone from a preliminary investigation whose precise nature was unknown. Craig was arrested and pleaded

[6] *See also* Letter from William H. Kelley, Treasurer, Kolbe for Congress to Federal Election Commission (Oct. 27, 2006) (pointing out that "the details of the preliminary inquiry are unknown"); Jonathan Weisman & James V. Grimaldi, *Kolbe Matter Is Referred to House Ethics Panel*, Washingtonpost.com, Oct. 18, 2006 (citing an unnamed law enforcement official as stating that the inquiry was regarding Kolbe's behavior with pages); *U.S. Prosecutors Targeting GOP Lawmakers*, N.Y. Times, Oct. 24, 2006 (citing no source for its report that the Justice Department was investigating Kolbe for improper conduct with pages).

guilty for behavior that was concededly "purely personal conduct unrelated to the performance of [Craig's] official Senate duties." (Compl. ¶ 22 (emphasis omitted).) Moreover, Craig's legal expenses were not incurred to challenge his arrest, but for his later decision to attempt to withdraw his guilty plea. *See supra* pp. 8-10. Nothing in the Kolbe advisory opinion approves the use of campaign funds for an expense such as Craig's, and the Commission's determination that the opinion does not protect defendants is entitled to deference.[7]

Defendants also rely on three other advisory opinions, but the activities at issue in each are also materially distinguishable from the circumstances here. (*See* Defs.' Mem. at 9 (citing FEC AO 1997-27, 2000-40, and 2005-11).) All three opinions approve the use of campaign funds for legal expenses that, unlike those in this case, were closely related to a Member's official duties.

In FEC AO 1997-27 (Boehner), Representative John Boehner incurred legal expenses arising from his filing of a civil suit against a defendant who allegedly disclosed an intercepted telephone conversation between Boehner and other Members of Congress, which "pertained specifically to the business of the House." 1998 WL 108616, at *2, *available at* http://saos.nictusa.com/aodocs/1997-27.pdf. Because the telephone conversation itself "was in pursuit of his duties as a Member of Congress," the "legal expenses at issue would not [have] exist[ed] irrespective of Mr. Boehner's duties as a Federal officeholder." *Id.*

In FEC AO 2000-40 (McDermott), then-Representative Jim McDermott incurred legal expenses defending against Boehner's lawsuit, which accused him of illegally disclosing

[7] Citing unofficial reports in the news sources, defendants contend that the Kolbe advisory opinion approved of the use of campaign funds to respond to "the underlying allegations about [Kolbe's] conduct on the trip." (Defs.' Mem. at 7-8.) This misreads the advisory opinion. It approves the use of campaign funds only to the extent the preliminary Department of Justice inquiry was "related to Representative Kolbe's duties as a Federal office holder." AO 2006-35, 2007 WL 268223, at *3.

Boehner's intercepted conversation. 2001 WL 136013, at *1. The Commission explained that McDermott received the tape and released it to the media and other Members of Congress only because of his position as the ranking Democratic Member of the House Committee on Standards of Official Conduct. *Id.* at *3. Thus, McDermott faced Boehner's suit due to "activities that [he] engaged in because of [his] position at the time" in Congress, and as a result, his legal expenses did not exist irrespective of his position. *Id.*

Finally, in FEC AO 2005-11 (Cunningham), then-Representative Randall Cunningham incurred legal fees defending against a grand jury investigation regarding "allegations that Representative Cunningham obtained benefits (i.e., the sale of his house at an above-market price and a rent-free stay on a yacht) from [a federal defense contractor] because of his status as a U.S. Representative and his position on the Permanent Select Committee on Intelligence and the House Appropriations Defense Subcommittee." 2005 WL 2470825, at *3. Accordingly, those allegations and legal fees would not have existed irrespective of Cunningham's officeholder duties. *Id.*

In none of these three advisory opinions did the Commission "ignore[] the substance of members' underlying conduct," as defendants' claim (Defs.' Mem. at 9); to the contrary, the Commission determined in each instance that the Member engaged in the activity giving rise to the legal expenses because he was an officeholder.[8]

This is a far cry from the conduct giving rise to Craig's arrest. In no advisory opinion did a requester claim, as defendants do here, that the legal expenses incurred arose from concededly personal conduct unrelated to officeholder duties, but which happened to occur while on an

[8] Defendants' attempt to reduce the activity at issue in each of these advisory opinions to merely "selling one's house, renting a yacht, or intercepting and disclosing cellular telephone calls" (Defs. Mem. at 9), ignores the critical facts underlying the opinions.

official trip. As a result, the Commission reasonably determined that these advisory opinions do not provide defendants a safe harbor from their conversion of funds to personal use, and that determination is entitled to deference.

CONCLUSION

As alleged in the Commission's complaint, defendants spent more than $200,000 in campaign funds on Craig's legal expenses, which defendants concede arose from Craig's purely personal conduct that was unrelated to his duties as a federal officeholder. Thus, the complaint pleads a violation of FECA's bar on converting campaign funds to personal use, 2 U.S.C. § 439a(b), and no FEC advisory opinion shields defendants from being held responsible for that violation. The motion to dismiss should be denied.

Respectfully submitted,

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