

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

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FEDERAL ELECTION COMMISSION,)	
)	
Plaintiff,)	
)	
vs.)	
)	
CRAIG FOR U.S. SENATE,)	
)	Civil Case No. 1:12-CV-0958
)	
KAYE L. O'RIORDAN,)	
in her official capacity as Treasurer)	
of Craig for U.S. Senate,)	
)	
and)	
)	
SENATOR LARRY E. CRAIG)	
)	
Defendants.)	
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MOTION TO DISMISS

Defendants, Craig for U.S. Senate, Kaye L. O'Riordan in her official capacity as committee treasurer, and Larry E. Craig (collectively, "Defendants"), respectfully request that the Court dismiss this matter for failure to support a claim, pursuant to Fed. R. Civ. P. 12(b)(6). In support of this motion, Defendants rely on the accompanying memorandum. A proposed order is attached.

Dated: August 2, 2012

Respectfully Submitted,

Andrew D.
Herman

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Senator Larry E. Craig

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CRAIG FOR U.S. SENATE,)	Civil Case No. 1:12-CV-0958
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KAYE L. O’RIORDAN,)	
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SENATOR LARRY E. CRAIG)	
)	
Defendants.)	
_____)	

MEMORANDUM IN SUPPORT OF DEFENDANTS’ MOTION TO DISMISS

A. INTRODUCTION

Defendants, Craig for U.S. Senate, Kaye L. O’Riordan in her official capacity as committee treasurer, and Larry E. Craig (collectively, “Defendants”), respectfully request that this Court dismiss the above-referenced complaint with prejudice. In its one-cause Complaint, Plaintiff, the Federal Election Commission (the “FEC” or “Commission”) asserts that, by spending campaign funds on legal fees in connection with a matter that arose during his travel to a session of Congress in Washington, D.C., then-Senator Larry Craig converted over \$200,000 to his “personal use” in violation of 2 U.S.C. § 439a. *See* Complaint, ¶¶ 32-34.

Conspicuously absent from the FEC’s Complaint, however, is any mention of the *only*

standard that the Commission has used to differentiate official expenses from personal use. Namely, that the event generating the expenditures occurred during the individual's execution of his or her official duties as a member of Congress. *See, e.g.*, FEC Advisory Opinion ("AO") 2006-35 at 3-4¹ (concluding that because Congressman Jim Kolbe's Grand Canyon trip constituted an "official Congressional visit . . . [his] legal expenses in responding to [DOJ] inquiry into his [conduct on the] trip . . . are ordinary and necessary expenses incurred in connection with his duty as a House member."); *see also* Complaint, ¶ 11 (citing other FEC advisory opinions establishing similar standard).

As the FEC recognized in Kolbe and other advisory opinions, Section 439a expressly authorizes Senator Craig to use privately-raised campaign funds "for ordinary and necessary expenses incurred in connection with duties of the individual as a holder of Federal office." *Id.* § 439a(a)(2). According to both the statute and the FEC's prior analyses, Senator Craig's committee's payments for expenses incurred while on official travel were attendant to his office and did *not* arise "irrespective of . . . [his] duties as a holder of Federal office," *id.* § 439a(b)(2). As such, this Court should dismiss the Complaint.

Aside from its reflection of clear statutory authority, the Kolbe advisory opinion compels dismissal on a separate basis. By statute, Defendants are entitled to rely on FEC analysis in any matter "indistinguishable in all its material aspects from the transaction or activity" approved in prior FEC advisory opinions. 2 U.S.C. § 437f(c)(1)(B). In such a case, Defendants may not "be subject to any sanction provided by [federal campaign finance statutes]." *Id.* § 437f(c)(2). Thus, regardless of its statutory analysis, this Court should dismiss the Complaint because this matter

¹ The FEC maintains a searchable database of advisory opinions and supporting documents at <http://saos.nictusa.com/saos/searchao>.

and the Kolbe advisory opinion are materially “indistinguishable.”

B. ANALYSIS

“A court may dismiss a complaint or any portion of it for failure to state a claim upon which relief may be granted.” *See* Fed. R. Civ. P. 12(b)(6); *see also* *Carroll v. Fremont Inv. & Loan*, 636 F. Supp. 2d 41, 50 (D.D.C. 2009). When deciding a motion to dismiss, a court may consider documents not attached to or referenced in the complaint, but which are fatal to the plaintiff’s claim and attached to a defendant’s motion to dismiss. *Ward v. D.C. Dept. of Youth Rehab. Svcs.*, 768 F. Supp. 2d 117, 119-20 & n.2 (D.D.C. 2011) (dismissing claim after considering administrative determination letter not attached to, or referenced in, the complaint, where the existence of such administrative determination barred plaintiff’s claim). Indeed, a plaintiff may not deliberately omit references to materials in an attempt to “generat[e] complaints invulnerable to Rule 12(b)(6) simply by clever drafting.” *Global Network Comms., Inc. v. City of New York*, 483 F.3d 150, 156-57 (2nd Cir. 2006).

I. Facts²

On June 11, 2007, while using a restroom at the Minneapolis–St. Paul International Airport before taking a connecting flight to Washington, D.C., then-Senator Craig was arrested and charged with misdemeanor violations of Minnesota criminal law. *See* Complaint, ¶ 12. Although Senator Craig pleaded guilty to a misdemeanor count of disorderly conduct, *id.*, he subsequently retained both Washington, D.C. and Minnesota counsel in an effort to withdraw his plea. Senator Craig paid for counsel with privately-raised campaign funds from the Craig for U.S. Senate campaign committee. *Id.*, ¶¶ 13-14, 19-20.

² For the purposes of this Motion, Defendants accept the facts set forth in the Complaint. Defendants’ Memorandum In Support of Motion to Dismiss
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Most importantly – and conspicuously absent from the Commission’s Complaint – when the events occurred, Senator Craig was engaged in *official travel* from his home in Idaho to a session of Congress in Washington, D.C. commencing that evening.³ This material information, contained in documents “outside” the Complaint, is proper for consideration on a motion to dismiss because it is set forth in public records, of which a court may take judicial notice. *Antoine v. U.S. Bank Nat’l Ass’n*, 547 F. Supp. 2d 30, 38 n.3 (D.D.C. 2008); *see also* Fed. R. Evid. 201(b)(2).

Senator Craig’s travel did not simply enable him to return to work in Washington, D.C.; it constituted an integral part of his official duties as established and governed by the United States Constitution. Specifically, 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. Furthermore, the Constitution’s “Immunity from Arrest” clause mandates that members 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 (emphasis added). As such, the Constitution’s 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. *See* U.S. Const., art. I, § 6, cl. 1.

³ 153 Cong. Rec. S7441 (daily ed. June 11, 2007) (roll call vote cast by Senator Craig). As with any official travel, the United States Senate paid for his transportation and *per diem* expenses. *See* Report of the Secretary of the Senate, S. Doc. No. 110-11 at B-826 (Nov. 13, 2007), a copy of which is attached hereto as Exhibit 1.

II. Legal Analysis

1. **The Legal Fees at Issue are an Official Expense Because They Would Not Exist Irrespective of Senator Craig's Duties as a Senator.**

Section 439a allows officeholders to spend campaign funds on all "ordinary and necessary expenses incurred in connection with duties of the individual as a holder of Federal office." *Id.* § 439a(a)(2). Although campaign funds "shall not be converted by any person to personal use," 2 U.S.C. § 439a(b)(1), Senator Craig's payments in this case were not prohibited.

A "personal use" is a payment for "any commitment, obligation, or expense of a person that would exist irrespective of the . . . individual's duties as a holder of Federal office." *Id.* § 439a(b)(2). Payments for legal fees are neither a *per se* personal use nor a *per se* ordinary and necessary expense; rather, the Commission determines on a case-by-case basis whether the payment of legal fees from campaign funds is permissible. *See* 11 C.F.R. § 113.1(g)(1)(ii)(A). Officeholders and candidates, however, "have wide discretion over the use of campaign funds." To meet the "ordinary and necessary" standard a Defendant must "reasonably show that the expenses at issue resulted from campaign or officeholder activities." 60 Fed. Reg. 7862, 7867 (Feb. 9, 1995) ("Personal Use Explanation & Justification").

As detailed above, Senator Craig's legal expenses arose during official Senate travel, an activity that was part of his constitutionally-enumerated "duties as a holder of Federal office." Not only was the trip itself constitutionally required, but Senate rules sanction reimbursement for any cost relating to a Senator's *use of a bathroom* while on official travel. *See* United States Senate Travel Regulations, *reprinted in* 152 Cong. Rec. S11473 (daily ed. Dec. 7, 2006) ("Per diem expenses include all charges for meals, lodging, personal use of room during daytime, *baths . . .*") (emphasis added). Accordingly, Senator Craig's travel and activities on June 11 –

including his use of the restroom where the incident occurred – constituted or were in connection

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with his “duties as a holder of Federal office.” 2 U.S.C. § 439a(b)(2).

The Commission cautions that “legal expenses will not be treated as though they are . . . officeholder related merely because the underlying legal proceedings have some impact on . . . the officeholder’s status.” Personal Use Explanation & Justification, at 7868. The statute provides a non-exclusive list of prohibited uses. *See* 2 U.S.C. § 439a(b)(2)(A-I) (banning use of campaign funds for, *inter alia*, home mortgage payments, clothing purchases, country club memberships, vacations, tuition payments, entertainment tickets, and health club memberships). By way of example, the Commission posits hypothetical legal proceedings involving divorce or driving-under-the-influence, *see* Personal Use Explanation & Justification at 7868, as expenses that would not be payable with campaign funds.

Here, Senator Craig’s legal proceedings created more than a tangential impact on his status as an officeholder. The legal proceedings arose from a matter that occurred during his official Senate travel. Because that official travel is part of his official duties, legal proceedings arising out of that travel are necessarily “in connection with” Senator Craig’s official duties and funds spent on legal fees to deal with those proceedings are similarly spent “in connection with” his duties as an officeholder. *See* 2 U.S.C. § 439a(a)(2); *see also* FEC AO 2006-35 at 3-4. Moreover, the legal expenses at issue here would not “exist irrespective of” Senator Craig’s official obligations, *id.* § 439a(b)(2), because, in contrast to the FEC’s hypothetical divorce or drunk driving expenses, Senator Craig was engaged in official, constitutionally-mandated activity at the time of the incident.

2. Defendants are Immune from Prosecution in This Matter Because Existing Advisory Opinions Sanctioned the Payments of Legal Fees.

The conclusion that the legal fees at issue are “ordinary and necessary” expenses under Section 439a is consistent with the FEC’s statutory analysis. Indeed, the Commission has

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approved the use of campaign funds to pay for legal fees in a matter indistinguishable from this one, FEC Advisory Opinion 2006-35, and in numerous other substantially similar matters. *See* Complaint, ¶ 11. However, even if this Court were to reject this well-established standard and determine that Senator Craig's legal expenses did not satisfy the test for official use, Defendants are entitled to rely on those prior advisory opinions, providing them immunity from this suit. *See* 2 U.S.C. § 437f(c)(1)(B) (authorizing reliance on FEC advisory opinion when "involved in any specific . . . activity which is indistinguishable in all its material aspects from the . . . activity with respect to which such advisory opinion is rendered"); and *id.* § 437f(c)(2) (person "act[ing] in good faith in accordance with the provisions and findings of such advisory opinion shall not . . . be subject to any sanction").

Specifically, in FEC Advisory Opinion 2006-35 retired Congressman Jim Kolbe sought permission from the Commission to use campaign funds to pay legal fees to respond to government inquiries into his 1996 rafting trip to the Grand Canyon. Then-Congressman Kolbe had toured the Grand Canyon with members of his family and several former House pages. *See id.*; *see also* supporting documents submitted by Congressman Kolbe, attached to FEC AO 2006-35, *available at* <http://saos.nictusa.com/aodocs/569946.pdf>. After learning of allegations regarding Congressman Kolbe's improper conduct with the former pages during the trip, the Justice Department launched a preliminary inquiry into the matter. *See* FEC AO 2006-35.

The FEC's procedure in rendering the Kolbe advisory opinion approving the expenditure of committee funds for his legal defense is instructive. After issuing a *sua sponte* inquiry into the nature of his trip, the FEC received confirmation that Congressman Kolbe "*took the trip under the auspices of his [federal] office*" and that "*the trip was part of an official Congressional visit*" funded by tax dollars. *See* Nov. 17, 2006, FEC correspondence with counsel for Kolbe for

Congress committee & Nov. 27, 2006, Kolbe for Congress committee correspondence with FEC, attached to advisory opinion request from Kolbe for Congress committee, *available at* <http://saos.nictusa.com/aodocs/569946.pdf>. Notably, the FEC did not inquire into the nature of the underlying allegations, simply that the trip was official in nature.

Relying solely on this submission from the Congressman, and without additional analysis or debate, the Commission unanimously held that payments of legal fees to respond to the Justice Department inquiry into the trip were “ordinary and necessary expenses incurred in connection with [Kolbe’s] duty as a House member.” FEC AO 2006-35 at 4; *see also* FEC, Minutes of the Open Meeting of Thurs., Jan. 25, 2007 (Approved Feb. 8, 2007), *available at* <http://www.fec.gov/agenda/2007/approve07-04.pdf> (approving Kolbe Advisory Opinion, apparently without debate, by a 4-0 vote of the Commission).

Most importantly, the Kolbe advisory opinion does not assess whether the underlying allegations about the Congressman’s conduct on the trip related to his “duties as a holder of Federal office.” Instead, the Commission simply concludes that because the activities giving rise to the legal expenses occurred *while* Congressman Kolbe was on an official trip, those expenses “are ordinary and necessary expenses incurred in connection with his duty as a House member. 2 U.S.C. 439a(a)(2).” FEC AO 2006-35 at 4.

Simply put, no principled distinction can be drawn between the Kolbe matter and this case. Like Congressman Kolbe, Senator Craig was on official travel when the legal expenses were incurred. Like Congressman Kolbe, the alleged conduct was not strictly official in nature. Like Congressman Kolbe, Senator Craig expended campaign funds on a legal defense relating to those allegations. Because Senator Craig’s payments are “indistinguishable” from the Commission-approved payments made from Congressman Kolbe’s campaign account,

Defendants are entitled to rely upon that decision and receive immunity from prosecution in this case. *See* 2 U.S.C. § 437f(c).

In sanctioning the use of official funds for legal expenses in similar matters, the Commission has likewise ignored the substance of members' underlying conduct and focused simply on whether the allegations occurred during the course of official activity. *See* Complaint, ¶ 11 (citing other FEC advisory opinions ostensibly in support of Commission's claim). For instance, in Advisory Opinions 1997-27 and 2000-40, the Commission approved requests by Congressmen Boehner and McDermott to spend campaign funds on legal fees in connection with litigation concerning the allegedly unlawful interception and disclosure of a cellular telephone call. The Commission concluded that, for Congressman Boehner the subject matter of the litigation "resulted directly from the pursuit of [Boehner's] duties as a Federal officeholder," FEC AO 1997-27 at 3, and for Congressman McDermott "resulted directly from activities [McDermott] engaged in because of [his] position at the time as Ranking Minority Member of the Ethics Committee," FEC AO 2000-40 at 4. Similarly, in FEC Advisory Opinion 2005-11, the Commission approved Congressman Duke Cunningham's use of campaign funds to pay legal fees in connection with a grand jury investigation involving conduct wholly unrelated to Congressman Cunningham's officeholder duties, including "the sale of [Cunningham's] house at an above-market price and a rent-free stay on a yacht." *Id.* at 3.

In none of these three, similar cases did the Commission address whether selling one's house, renting a yacht, or intercepting and disclosing cellular telephone calls were themselves official duties. Rather, the Commission confined its analysis to the question of whether the conduct in question arose as a result of, or in connection with, official duties. As with the Kolbe advisory opinion, a consistent application of this standard compels the conclusion that Senator

Craig's legal expenses arose a result of his official obligations as a member of Congress. Indeed, Senator Craig's expenses, incurred while on official travel, are more closely connected to his official duties than those incurred in the Boehner, McDermott and Cunningham matters.

Yet, in this matter the Commission has elected to abandon its long-standing precedent. Regardless of its puzzling decision, application of the FEC's well-established standard to the facts at hand demonstrate that Senator Craig's official, constitutionally-mandated travel satisfies the FEC's standard for sanctioning the use of campaign funds for his legal expenses. Defendants are entitled to rely on that standard and receive immunity from this suit.

C. CONCLUSION

Because Senator Craig's payments are not a personal use under the statute, and because existing FEC advisory opinions both sanction Defendants' actions and bar prosecution of this case, Defendants respectfully request that this Court dismiss this Complaint with prejudice for failure to state a claim on which relief can be granted.⁴

⁴ As a final defect, Paragraph D of the Complaint's Prayer for Relief improperly requests that this Court assess a civil penalty "against each of the Defendants." However, the Commissions' official policy maintains that a "probable cause finding against a treasurer in his or her official capacity makes clear to a district court in enforcement litigation that the Commission is seeking relief against the committee, and *would only entitle the Commission to obtain a civil penalty from the committee.*" Statement of Policy Regarding Treasurers Subject to Enforcement Proceedings, 70 Fed. Reg. 3, 4 (Jan. 3, 2005) (*citing Kentucky v. Graham*, 473 U.S. 159, 165 (1985)) (emphasis added).

Respectfully submitted this 2nd day of August, 2012.

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Senator Larry E. Craig

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2nd day of August, 2012, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send a notification of such filing (“NEF”) to the following counsel of record:

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