



FEDERAL ELECTION COMMISSION  
Washington, DC 20463

RECEIVED  
FEDERAL ELECTION  
COMMISSION  
SECRETARIAT

2000 JUL 19 P 3:24

July 18, 2000

**MEMORANDUM**

TO: The Commission  
THROUGH: James A. Pehrson *[Signature]*  
Staff Director  
FROM: Lawrence M. Noble *[Signature]*  
General Counsel  
N. Bradley Litchfield *[Signature]*  
Associate General Counsel  
Michael G. Marinelli *[Signature]*  
Staff Attorney

**AGENDA ITEM**  
For Meeting of: 7-20-00

**SUBMITTED LATE**

SUBJECT: Alternative for Draft Advisory Opinion 2000-12

Attached is an alternative draft for the cited (McCain/Bradley) advisory opinion. This alternative permits both presidential campaign committees to pay the proposed convention expenses as part of the winding down expenses of their now inactive presidential campaigns. As such, the expenses would be qualified campaign expenses payable from the mixed pool of Federal and private funds that the committees presently hold in their accounts, and will have in the future as they receive further private contributions and Federal matching funds for the payment of their qualified campaign debts to the extent allowed under the regulations.

If the Commission believes that all the convention expenses (as proposed in the AOR) of these inactive candidates should be payable from their presidential committee funds, the preferable method for doing so is to apply the "winding down costs" regulation. 11 CFR 9034.4(a)(3)(i). This would be a departure from past Presidential audits in prior election cycles, and expand past interpretations of "winding down." However, it would maintain the basic concept of the matching fund system; namely, that matching fund recipients have a mixed or blended pool of campaign funds from which they may incur or pay only qualified campaign expenses, except to the extent a regulation explicitly allows spending for non-qualified expenses. 11 CFR 9034.4(a)(1); see also 26 U.S.C. §9038(b)(3) and Advisory Opinion 1988-05. None does in these circumstances.

The inapplicable regulatory exception does allow a candidate to continue to campaign only if he has become ineligible for further matching payments because of failing to obtain sufficient primary election votes. 11 CFR 9034.4(b)(3) and 9033.5(b). There are several conditions applicable to an ineligible candidate in such a situation: (1) no matching funds may be used to campaign, (2) all claims for further matching funds are based only on qualified debt as of the date of ineligibility, (3) no winding down expenses are qualified expenses until such time as the candidate is no longer actively campaigning, and (4) all private contributions are applied to debt incurred before the candidate's date of ineligibility with future matching fund payments reduced to the extent of those contributions. 11 CFR 9034.4(a)(3)(ii) and 9034.1(b).

Although not precisely an exception, there is one other situation (not presented in this AOR) where the presidential committee of a matching fund recipient is no longer subject to the rule that mixed pool moneys may only be spent for qualified campaign expenses. That is, where all the campaign's repayment obligations to the U.S. Treasury are satisfied and the campaign has remaining funds. See 11 CFR 9038.2(b)(2)(iv). In that circumstance, the residual funds are no longer considered part of the mixed pool and may be used in any manner permitted by 2 U.S.C. §439a; that provision prohibits any personal use of campaign funds, but expressly allows several other uses. See Advisory Opinions 1990-11 and 1988-05 which, in part, considered such situations.

The Office of General Counsel requests that both this alternative draft and the original draft, Agenda Document No. 00-67, be placed on the agenda for July 20, 2000.

Attachment

1 ADVISORY OPINION 2000-12

2  
3 Robert F. Bauer  
4 Perkins Coie LLP  
5 607 14<sup>th</sup> Street, N.W. 8<sup>th</sup> Floor  
6 Washington, DC 20005

7  
8 Trevor Potter  
9 Wiley, Rein & Fielding  
10 1750 K Street, N.W. 7<sup>th</sup> Floor  
11 Washington, DC 20006

12  
13 Dear Mr. Bauer and Mr. Potter:

14  
15 This refers to your letter dated May 24, 2000, requesting an advisory opinion  
16 concerning the application of the Federal Election Campaign Act of 1971, as amended  
17 ("the Act"), the Presidential Primary Matching Payment Act ("the Matching Act") and  
18 Commission regulations to a proposal to use Federal funds to pay for certain expenses of  
19 now inactive Presidential candidates, former Senator Bill Bradley and Senator John  
20 McCain, including those of their campaign staff and volunteers to attend and participate  
21 in the national nominating conventions of their respective political parties.

22 ***FACTUAL BACKGROUND***

23 This request is made on behalf of Bill Bradley for President, Inc. ("the Bradley  
24 Committee") and McCain 2000, Inc. ("the McCain Committee"), the principal campaign  
25 committees of Mr. Bradley and Mr. McCain, respectively.

26 Mr. Bradley and Mr. McCain each sought the nominations of the Democratic  
27 Party and Republican Party, respectively, for President of the United States in 2000. Each  
28 has qualified for and received Federal matching funds. On March 9, 2000, each  
29 separately made a public statement indicating that he would not compete in any other  
30 primaries and caucuses. The Commission thereafter concluded that neither candidate was

**DRAFT**

1 actively seeking nomination for election in more than one State, as provided for in 11  
2 CFR 9033.5. Since then, each candidate's campaign has consistently filed statements  
3 with the Commission showing net outstanding campaign obligations.<sup>1</sup> In the course of  
4 their campaigns, Mr. Bradley earned 419 delegates and Mr. McCain earned 250  
5 delegates.<sup>2</sup>

6 You state that neither former candidate has "released" his delegates.<sup>3</sup> You affirm  
7 that each has preserved the opportunity for a distinctive voice at the convention, and full  
8 participation in convention activities. You explain that both candidates will maintain  
9 contact with and receive continued support from those delegates through the summer  
10 nomination conventions, and will be otherwise active at these conventions, as described  
11 below. The convention activities important to the candidates and their delegates include:

- 12 1. Travel to and from the convention.
- 13
- 14 2. Meetings with delegates and supporters in various state delegations, to thank them for  
15 their support and encourage them to remain active on the issues that initially  
16 motivated their support.
- 17
- 18 3. Attendance at receptions hosted by their campaigns, at which they would have the  
19 opportunity to thank their delegates, supporters and staffs, and maintain dialogue and  
20 debate with them about the direction of their party on important issues.
- 21
- 22 4. Attendance at fundraising events for their campaigns, in order to retire primary  
23 election debts.
- 24

---

<sup>1</sup> The Commission notes that taking together the most recent Statement of Net Outstanding Campaign Obligations filed by each campaign, with the most recent matching fund disbursements to each, the Bradley Committee has net outstanding obligations of \$306,567 (of which the Bradley Committee estimates \$50,000 is convention related expense), while the McCain Committee has net outstanding obligations of \$690,427 (of which \$430,000 is estimated by the McCain Committee to be convention related expense).

<sup>2</sup> In a phone conversation with counsel for Mr. McCain and Mr. Bradley, it was confirmed that neither of them are delegates to the nominating conventions. It was further indicated that none of the staff personnel or volunteers considered in this request are convention delegates.

<sup>3</sup> According to an article in the *Washington Post* on July 14, Mr. Bradley made a public pledge on July 13 to release his delegates to the upcoming Democratic party nominating convention.

1 5. Participation in the official proceedings of the conventions in various ways, including  
2 speeches.

3  
4 You propose that each committee would pay for staff and volunteers to prepare  
5 for and attend the convention, to the extent that their presence is necessary to support the  
6 candidates in these activities. You state that the committees request that the Commission  
7 interpret the Matching Act, 26 U.S.C. §9031 *et seq.*, to allow them to pay costs relating to  
8 their convention activities, or alternatively, to approve other means of lawful payment of  
9 the described expenses. An alternative method you suggest is to have such expenses paid  
10 by "other registered Federal political committees" and treat them as "operating expenses  
11 of the non-Presidential committee."

#### 12 ***ACT AND COMMISSION REGULATIONS***

13  
14 Under the Matching Act and Commission regulations, all contributions received  
15 by an individual from the date of candidate status and all Federal matching payments  
16 received by the candidate shall be used only to defray qualified campaign expenses or to  
17 repay loans or otherwise restore funds (other than contributions which were received and  
18 expended to defray qualified campaign expenses) which were used to defray qualified  
19 campaign expenses. *See* 26 U.S.C §§9032(9), 9038(b)(2), 9042(b)(1); 11 CFR  
20 9034.4(a)(1).

21 A candidate who is no longer actively conducting a campaign, but who has net  
22 outstanding campaign obligations, may continue to receive matching payments provided  
23 that on the date of payment there are remaining net outstanding campaign obligations. 11  
24 CFR 9034.1(b). A candidate who is no longer actively campaigning is considered to have  
25 that status on or as of his date of ineligibility. 11 CFR 9033.5(a). As of that date of

1 ineligible, the candidate may have net outstanding campaign obligations which equal  
2 the difference between the total of all outstanding obligations for qualified campaign  
3 expenses, plus estimated necessary winding down costs, less the total of cash on hand,  
4 capital assets, other assets and receivables. 11 CFR 9034.5(a).<sup>4</sup>

5 A qualified campaign expense is a purchase, payment, distribution, loan, advance,  
6 deposit, or gift of money or of anything of value incurred by a candidate or his authorized  
7 committee in connection with his campaign for nomination for election, the incurring of  
8 which does not constitute a violation of the law. 26 U.S.C. §9032(9). Such an expense  
9 includes the costs to defray the candidates net outstanding campaign obligations and also  
10 includes "winding down" costs of the inactive candidate. 11 CFR 9034.4(a)(3). These  
11 costs are those associated with the termination of political activity, such as the costs of  
12 complying with the post election requirements of the Act and other necessary  
13 administrative costs associated with winding down the campaign, including office space  
14 rental, staff salaries, and office supplies. Such costs are considered qualified campaign  
15 expenses. A candidate may receive and use matching funds for these purposes either  
16 after the candidate has notified the Commission in writing of withdrawal from the  
17 campaign for nomination, or after the date of the party's nominating convention, if he has  
18 not withdrawn before the convention. 11 CFR 9034.4(a)(3)(i).

### 19 ***APPLICATION TO PROPOSAL***

20 The Commission has generally concluded in its audits of past Presidential primary  
21 campaigns that national nominating convention expenses are non-qualified campaign

---

<sup>4</sup> Claims for matching funds to retire outstanding campaign obligations shall not include any accounts payable for non-qualified campaign expenses. 11 CFR 9034.5(b)(1).

1 expenses since they do not relate to seeking the nomination once the candidate is no  
2 longer actively seeking a party's nomination.<sup>5</sup> See 26 U.S.C. §§9032(2), 9033(c)(1),  
3 9033(c)(2).<sup>6</sup> The Commission notes, however, that the conclusions of these past audit  
4 matters do not preclude reconsideration at this time of the issue whether convention  
5 expenses can be qualified campaign expenses in some limited circumstances.

6 The Commission is now of the opinion that, in the circumstances presented here,  
7 the convention expenses of the Bradley and McCain Committees may be viewed as  
8 winding down expenses, and thus as qualified campaign expenses. The attendance of  
9 formerly active Presidential candidates at the nominating conventions that conclude the  
10 nominating process in which they participated is a logical and appropriate closure event  
11 with respect to their Presidential campaigns. Having demonstrated substantial campaign  
12 support by earning delegates, the candidates' presence with their delegates at their party's  
13 nominating conventions in such circumstances would be linked to the prior active  
14 campaign. Accordingly, the expenses to attend and participate in convention related  
15 activities could be viewed as part of the "winding down expenses" of the Presidential  
16 campaigns. The Commission notes that convention expenses are not in the list of

---

<sup>5</sup> For audit matters treating this issue see Final Audit Report for Friends of George McGovern, approved February 6, 1985, p. 5,6; see also, Addendum to Final Audit Report for Friends of George McGovern, approved February 19, 1986, p. 5-7. Final Audit Report for Hollings for President, Inc., approved February 19, 1986, p. 6,7. Final Audit Report for Albert Gore, Jr. for President Committee, Inc., approved July 13, 1989, p. 10-12. Final Audit Report for the Tsongas Committee, Inc., approved December 16, 1994, p. 63. In the audit of Americans for Robertson, Inc., the Commission concluded that convention expenses made in an effort "to assist fundraising and debt retirement efforts" and to "maintain support and enthusiasm of delegates elected on behalf of Dr. Robertson" were non-qualified campaign expenses. Statement of Reasons for Americans for Robertson, approved September 23, 1993, p. 35-38. The Robertson determination was upheld by the Court of Appeals for the D.C. Circuit. *Robertson v. FEC*, 45 F.3d 486, 492 (D.C. Cir. 1995)

<sup>6</sup> Additionally, the Commission's Explanation and Justification for its regulations cites convention expenses as an example of non-qualified campaign expenses. See Explanation and Justification, 11 CFR Parts 9007 and 9038, 50 *Fed. Reg.* 9422 (March 8, 1985) (discussing convention-related expenses as an example of non-qualified campaign expenses in the context of repayment calculations).

1 winding down expenses cited in 11 CFR 9034.4(a)(3). However, this list is not meant to  
2 be exclusive and does not preclude an interpretation that convention related expenses  
3 could, in these circumstances, be viewed as winding down expenses. Therefore, the  
4 Commission concludes that a Presidential candidate who is no longer actively seeking the  
5 nomination of a political party but who, nonetheless, had accumulated supporting  
6 delegates, may use Federal matching funds and private contributions to pay the expenses  
7 associated with travel to and attendance at the nominating convention of the candidate's  
8 political party.<sup>7</sup>

9 Specifically, the Presidential campaign committees of Mr. Bradley and Mr.  
10 McCain may use their funds (including the Federal matching payments therein) to pay the  
11 expenses associated with the convention related expenses delineated in this request.<sup>8</sup> In  
12 addition, such funds may be used for the travel expenses and attendance costs for  
13 campaign staff and campaign volunteers necessary to organize and conduct these  
14 activities.<sup>9</sup>

15 Since the Commission has given an affirmative response to your first proposal,  
16 which is the preferred means of covering these expenses, it need not consider your second  
17 question: that is, whether other permissible sources of funding may be used to pay the

---

<sup>7</sup> The Commission expressly reserves the question whether this conclusion would apply to other former presidential candidates in the 2000 election cycle who did not earn any delegates during their active campaigns. That issue could be addressed in a separate advisory opinion if requested by such a candidate. See 2 U.S.C. §437f and 11 CFR Part 112.

<sup>8</sup> The Commission assumes that the travel expenses would include transportation (e.g. airfare and taxi fare), hotel or other lodging, and per diem subsistence for the two candidates and their spouses, and for their senior campaign staff.

<sup>9</sup> As guidance for which campaign personnel may be considered event organizers, the committees may rely upon the list of individuals considered linked to a campaign as described in 11 CFR 110.6(b)(2)(i) (which delineates those persons who are not considered as conduits for contributions): an individual who is an employee or a full-time volunteer working for the candidate's authorized committee, and those who are expressly authorized by the campaign to engage in fundraising and who hold a significant position within the campaign organization.



