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Washington, DC 20463

AGENDA ITEM
For Meeting of: 7-20-00

SUBMITTED LATE

MEMORANDUM

TO: The Commission

FROM: Commissioner Karl Sandstrom

DATE: July 18, 2000

SUBJECT: Advisory Opinion 2000-12 (McCain/Bradley)

I propose that the draft Advisory Opinion written by the Office of General Counsel (the "blue draft") be amended to more correctly state the questions asked, the applicable law, and the specific facts relevant to this opinion. I offer the attached amended version for the Commission's consideration.

1. The Commission should not change course on whether convention-related expenses are "winding down" costs in the context of this opinion.

The Commission has long taken the position in the past that convention-related expenses are not qualified winding-down costs and may not be paid for with Federal funds. See Robertson v. FEC, 45 F.3d 486, 492 (D.C. Cir. 1995) ("The Commission had previously reasonably rejected the notion that attendance of [sic] a party's convention was a legitimate winding down expense.") (citing Repayments by Publicly Financed Presidential Candidates, 50 Fed. Reg. 9, 422-23 [March 8, 1985]). While it may be the better course as a policy matter for the definition of "winding down" expenses to be broadened to include convention-related costs of primary candidates who drop out of the race, I think that this is the wrong way to announce such a new policy. As I have stated before, I think that advisory opinions are an occasion to apply the plain words of the statute and our regulations to specific factual situations. They are not the place to announce a new reading of the statute and to re-write our regulations. Only five years ago Mr. Robertson's campaign was forced to repay federal funds to the treasury based on our regulatory judgment that convention expenses are not "winding down" costs. We should not change this interpretation of the statute without giving the regulated community and others a chance to comment and inform our decision making on this issue. I would support a rulemaking to overhaul 9034.4 in which this change in policy were proposed, but I would not support doing so in an advisory opinion.

2. The opinion should state that non-matching/non-Federal funds may be used for convention-related expenses.

OGC's original blue draft and their alternate version state that 11 CFR 9034.4(a)(1) means that all contributions received by an individual from the date he becomes a candidate and all Federal matching payments received by the candidate shall be used only to defray qualified campaign expenses. To the extent that this reflects the view that under no circumstances and at no time may a candidate who has participated in the matching program use <u>any</u> contributions for non-qualified purposes, I have serious reservations.

First, this view is inconsistent with the full language of the regulation. Section 9034.4(a)(1) contains an important caveat to the general rule; all contributions and Federal funds must be used only for qualified campaign expenses "[e]xcept as provided at paragraph (b)(3) of [9034.4]."[1] Sub-section (b)(3) states that "Any expenses incurred after [the date of ineligibility] are not qualified..." except for winding-down expenses. 11 CFR 9034.4(b)(3). The opinion as drafted neglects to mention this exception.[2] Reading all the provisions of 9034.4 together, the regulation seems to contemplate that some candidates who have passed the date of ineligibility will incur non-qualified expenses in addition to "winding-down costs." If no candidates are allowed to incur non-qualified expenditures after their date of ineligibility, then the exception at (a)(1) makes no sense. Moreover, the first sentence of 9034.4(a)(3)(ii) – "If the candidate continues to campaign after becoming ineligible due to the operation of 11 CFR 9033.5(b)"[3] – would be rendered meaningless because such a post-ineligibility candidate would not be able to spend money to campaign. Similarly, the third sentence of 9033.9(c) - "Any expenses incurred during the period of ineligibility that would have been considered qualified campaign expenses if the candidate had been eligible during that time may be defrayed with matching payments [after eligibility is reestablished]" - acknowledges that a candidate may incur non-qualified expenses during the period of ineligibility. While Messrs. McCain and Bradley did not become ineligible due to the operation of 9033.5(b), but due to their giving notice that they were dropping out of the race (as provided for in 9033.5(a)), this does not change the fact that the rule as stated in this draft is inaccurate because it does not discuss the exception in 9034.4(a)(1), which clearly applies to the requesters.

Section 9034.4(a)(3)(ii)'s language about candidates continuing to campaign makes it crystal clear to me that candidates who become ineligible because they do not reach a certain percentage threshold in two successive primaries may continue to campaign, incurring non-qualified expenses paid for with non-federal funds. I also think based on the analysis above that the regulations do not preclude candidates who wish to continue to campaign – although they

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[1] The full text of 9034.4(a)(1) is "Except as provided in paragraph (b)(3) of this section, all contributions received by an individual from the date he or she becomes a candidate and all matching payments received by the candidate shall be used only to defray qualified campaign expenses or to repay loans or otherwise restore funds (other than contributions which were received and expended to defray qualified campaign expenses), which were used to defray qualified campaign expenses."

[2] The opinion also cites 26 U.S.C §§9032(9) and 9042(b) as support for the "rule" propounded by OGC, but neither provision of the statute directly states this restriction.

[3] Sub-section 9033.5(b) refers to candidates who become ineligible because they do not poll above a certain percentage in two successive state primaries.

have formally dropped out of the race –from incurring non-qualified expenses paid for with non-matching funds.

The Office of General Counsel apparently relies on Kennedy for President Committee v. FEC, 734 F.2d 1558 (D.C. Cir. 1984) to support the notion that presidential campaign funds of Title 26 matching funds recipients represent a "mixed pool" of both pubic and private moneys. In fact, that case stated nothing more than that private and public moneys are "commingled in the candidates coffers" such that the Commission is entitled to use its expertise to require repayment of public funds used for non-qualified purposes on some sort of pro-rata basis. Id. at 1562. More importantly, the case recognizes that there continues to be a difference between the public matching funds in a candidate's account and the private contributions in that account even after the candidate has submitted contributions for matching. By 26 USC 9038(b)(2)'s terms, the statute "creates a repayment obligation only '[i]f the Commission determines' that matching funds payments were used for unqualified purposes, and expressly limits the repayment obligation to 'such amount.'" Id. at 1588. In light of the plain language of the statute, "We believe that if Congress had intended the total amount of every unqualified expenditure to be repaid, the statute would not have expressly limited the repayment obligation to unqualified expenditures paid out of matching fund sources." Id. at 1588. Thus, non-qualified expenditures are permitted, so long as federal matching funds are not used to fund such expenditures.

I propose that the opinion's discussion of this issue be divided in two parts. First, I would amend OGC's original blue draft to clearly answer requesters' narrow question: would payment of certain convention-related expenses be a "qualified campaign expense" within the meaning of 11 CFR 9034.4(a)(3)(describing qualified "winding-down" costs). As I have argued above, the answer to this question should remain, at this point, "no." Second, the opinion should state that in the narrow factual circumstances presented in the request, contributions that have not been submitted for matching may be used to pay for their non-qualified convention-related expenses. I have consulted with the Audit Division about what steps the candidates would need to take to ease the auditing of such expenditures, and have included their recommendations in the amended version.

3. The opinion should answer the second question put to us: what other committees may pay these costs.

I am concerned that the alternative blue draft written by OGC does not answer a question squarely put to us in the request and addressed in the original blue draft: what other political committees may pay for these candidates' convention expenses? The original blue draft analyzed this question incorrectly, and it simply will not do to let that flawed analysis stand on the public record without some correction by the Commission. My proposed draft addresses the issue, coming to a different conclusion than the original blue draft.

a. The original blue draft's discussion of what other committees may pay for Mr. Bradley to attend the convention must be corrected.

I am also troubled by the blue draft's discussion of what other sources Mr. Bradley may use to pay for his convention-related expenses. Like some other Commissioners, I am especially troubled by the draft's references to Mr. Bradley personally accepting gifts from individuals to

pay for these expenses. OGC's approach seems to be related to their view that Mr. Bradley is no longer a candidate, and that his convention-related expenses would be "personal use." See Blue Draft, fn. 13. Therefore the blue draft concludes that gifts to him for these expenses would not be indirect contributions to his campaign committee. I disagree. I cannot think of activity that is less like "personal use" than a presidential primary candidate – even one who has dropped out – attending his party's convention. No regulation or Advisory Opinion cited by OGC convinces me otherwise.[4] And, as Commissioner Thomas has pointed out, the Commission has long taken the position that funds given to a candidate committee after the candidate has lost are nevertheless still "contributions" to that committee. See FEC v. Ted Haley for Congress, 852 F.2d 1111 (9th Cir. 1988). Thus, Mr. Bradley may not accept personal gifts to attend the convention; such gifts would be contributions to his campaign committee. See AO 2000-08.

This portion of the opinion is answering the question of what other committees may pay for Mr. Bradley's convention-related expenses. Because Mr. Bradley's attendance at the convention would not be per se personal use, I see no reason to prevent the non-connected political committee that is the successor to Mr. Bradley's Senatorial committee from paying these costs. Like Senator McCain (and like the requestor in AO 1996-34, cited by OGC), if Mr. Bradley engages in fundraising and promotion for a political committee at the convention, that committee may pay his costs.

b. Requesters have asked whether Straight Talk America may pay for these costs; lets give them a straight answer.

Requesters' comments on the original blue draft asked whether, if Senator McCain's senatorial campaign committee may pay for his convention costs, his non-connected committee, Straight Talk America, can pay for these expenses. The opinion that I propose says yes, for the same reason that Mr. Bradley's PAC may; they are not personal use expenses.

3. I propose that the Commission adopt the attached version of the opinion.

I have attached to this memo a version of the opinion that I suggest that the Commission adopt. The changes that I propose include (page references are to original blue draft):

1. Clarifying the questions being asked at page 3;
2. Amending the first paragraph of the section summarizing the relevant law to clearly state the law, include the exception at 9034.4(a)(1) at page 4;
3. Streamlining the discussion of the Tsongas and Simon audits at page 7;
4. Clarifying the holding of Robertson v. FEC, 45 F.3d 486, 492 (D.C. Cir. 1995), at page 6-7;
5. Clarifying that past audits of presidential campaign committees are not "precedent" (page 7), and clarifying that the Commission's conclusion in this opinion that travel to the conventions are not generally "qualified" is not dictated by those audits;
6. Clarifying this opinion's holding by rephrasing the blue draft's references to what "Federal and committee funds" may be used for as what is and what is not a "qualified campaign expense," at pages 7, 8, 9, 10 and 11;

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[4] As the requesters have pointed out in their comments on the blue draft, neither candidate has released his delegates, and presidential primary contenders in general play an important part in their party's conventions as a continuation of their campaigns, no matter that they were unsuccessful.

7. Clarifying the rule at 9033.11 (fn. 11);
8. Reducing the discussion of the Robertson case (fn. 12);
9. At page 9 deleting the phrase "held at the convention itself" as that gives the impression that proper fundraising events must be held at the convention;
10. Adding a section stating that Mr. McCain and Mr. Bradley may use non-matching funds for non-qualified convention-related expenses.
11. Clarifying the question that was asked relative to "other political committees" at page 11;
12. Adding that Senator McCain may use funds from his non-connected PAC for convention-related expenses (page 12);
13. Changing the analysis of what other political committees may pay for Mr. Bradley's attendance to allow Time Future, Inc. (Mr. Bradley's non-connected political committee) to pay for these expenses. (Page 13)

1 ADVISORY OPINION 2000-12
2
3 Robert F. Bauer
4 Perkins Coie LLP
5 607 14th Street, N.W. 8th Floor
6 Washington, DC 20005
7
8 Trevor Potter
9 Wiley, Rein & Fielding
10 1750 K Street, N.W. 7th Floor
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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 matching funds to pay for certain
19 expenses of now inactive Presidential candidates, former Senator Bill Bradley and
20 Senator John McCain, including those of their campaign staff and volunteers to attend
21 and participate 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

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

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

1. Travel to and from the convention.

2. Meetings with delegates and supporters in various state delegations, to thank them for their support and encourage them to remain active on the issues that initially motivated their support.

3. Attendance at receptions hosted by their campaigns, at which they would have the opportunity to thank their delegates, supporters and staffs, and maintain dialogue and debate with them about the direction of their party on important issues.

4. Attendance at fundraising events for their campaigns, in order to retire primary election debts.

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

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[1] 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).

[2] 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.

1
2 You propose that each committee would pay for staff and volunteers to prepare
3 for and attend the convention, to the extent that their presence is necessary to support the
4 candidates in these activities. You state that the committees request that the Commission
5 interpret the Matching Act, 26 U.S.C. §9031 *et seq.*, to allow them to pay costs relating to
6 their convention activities as "qualified campaign expenses," or alternatively, to approve
7 other means of lawful payment of the described expenses.

8 ***ACT AND COMMISSION REGULATIONS***
9
10 Under the Matching Act, a "qualified campaign expense" is a purchase, payment,
11 distribution, loan, advance, deposit, or gift of money or of anything of value incurred by a
12 candidate or his authorized committee in connection with his campaign for nomination
13 for election, the incurring of which does not constitute a violation of the law. 26 U.S.C.
14 §9032(9). The Commission's regulations state that all contributions received by an
15 individual from the date he or she becomes a candidate and all Federal matching
16 payments received by the candidate shall be used only to defray qualified campaign
17 expenses or to repay loans or otherwise restore funds (other than contributions which
18 were received and expended to defray qualified campaign expenses) which were used to
19 defray qualified campaign expenses. 11CFR 9034.4(a)(1). Section 9034.4(a)(1) also
20 contains an exception for expenses incurred after a candidate becomes ineligible for
21 matching funds; these expenses are generally not "qualified" campaign expenses, except
22 for certain "winding-down" costs. *See* 11 CFR 9034.4(b)(3) and (a)(3).
23 If on the date of ineligibility a candidate has net outstanding campaign
24 obligations, that candidate may continue to receive matching payments provided that on

1 the date of payment there are remaining net outstanding campaign obligations. 11 CFR
2 9034.1(b). The candidate's net outstanding campaign obligations equal the difference
3 between the total of all outstanding obligations for qualified campaign expenses as of the
4 candidate's date of ineligibility, plus estimated necessary winding down costs, less the
5 total of cash on hand, capital assets, other assets and receivables. 11 CFR 9034.5(a). The
6 amount submitted as the total of outstanding campaign obligations shall not include any
7 accounts payable for non-qualified campaign expenses. 11 CFR 9034.5(b)(1). Matching
8 payments received after the date of ineligibility pursuant to 11 CFR 9034.1(b) may be
9 used to defray the candidate's net outstanding campaign obligations as part of "winding
10 down," but may not be used to continue to campaign unless the candidate reestablishes
11 eligibility. 11 CFR 9034.4(a)(3)(ii).

12 In addition to the costs to defray the candidate's net outstanding campaign
13 obligations, qualified campaign expenses for a candidate past the date of ineligibility
14 include other "winding down" costs. 11 CFR 9034.4(a)(3); 11 CFR 9034.4(b)(3). These
15 are associated with the termination of political activity, such as the costs of complying
16 with the post election requirements of the Act and other necessary administrative costs
17 associated with winding down the campaign, including office space rental, staff salaries,
18 and office supplies. A candidate may receive and use matching funds for these purposes
19 either after the candidate has notified the Commission in writing of withdrawal from the
20 campaign for nomination, or after the date of the party's nominating convention, if he has
21 not withdrawn before the convention. 11 CFR 9034.4(a)(3)(i).

22 Gifts and monetary bonuses to committee employees, consultants and volunteers
23 in recognition for campaign-related activities or services (provided that such gifts do not

1 exceed $150 total per individual and the total of all gifts does not exceed $20,000) are
2 also qualified campaign expenses. 11 CFR 9034.4(a)(5)(i). In the case of monetary
3 bonuses for committee employees and consultants in recognition for campaign-related
4 activities or services, the regulations require that they be awarded pursuant to a written
5 contract made prior to the date of ineligibility and be paid no later than thirty days after
6 the date of ineligibility. 11 CFR 9034.4(a)(5)(ii).

7 Under the Act and Commission regulations, a candidate and the candidate's
8 committee have wide discretion in making expenditures to influence the candidate's
9 election, but may not convert campaign funds to the personal use of the candidate or any
10 other person. 2 U.S.C. §§431(9) and 439a; 11 CFR 113.1(g) and 113.2(d);

11 Commission regulations provide guidance regarding what would be considered
12 personal use of campaign funds. Personal use is defined as "any use of funds in a
13 campaign account of a present or former candidate to fulfill a commitment, obligation or
14 expense of any person that would exist irrespective of the candidate's campaign or duties
15 as a Federal officeholder." 11 CFR 113.1(g), see Advisory Opinions 2000-02 and 1996-
16 34. Under 11 CFR 113.2(a)(2), excess campaign funds may be used to pay any ordinary
17 and necessary expenses incurred in connection with one's duties as a holder of Federal
18 office. Commission regulations list a number of purposes that would constitute personal
19 use. 11 CFR 113.1(g)(1)(i). Where a specific use is not listed as personal use, the
20 Commission makes a determination on a case-by-case basis. 11 CFR 113.1(g)(1)(ii).
21 Travel expenses, including subsistence expenses incurred during travel, are among those
22 expenses to be analyzed on a case-by-case basis. If such travel involves both personal
23 activities and campaign or officeholder related activities, the incremental expenses that

1 result from personal activities are personal use, unless the person benefiting reimburses
2 the campaign within thirty days for the amount of those expenses. 11 CFR
3 113.1(g)(1)(ii)(C).

4 ***APPLICATION TO PROPOSAL***

5 ***Commission policy in previous Presidential primary campaign audits***
6
7 The Commission has generally concluded in its audits of past Presidential primary
8 campaigns that national nominating convention expenses are non-qualified campaign
9 expenses since they do not relate to seeking the nomination when the candidate has
10 withdrawn from the election.[3] *See* 26 U.S.C. §9032(9). In the 1984 presidential cycle,
11 the Commission determined that Friends of George McGovern made non-qualified
12 campaign expenses when it incurred expenditures related to "preparatory [staff] work" for
13 the Democratic National Convention. Final Audit Report for Friends of George
14 McGovern, approved February 6, 1985, p. 5-6; see also, Addendum to Final Audit Report
15 for Friends of George McGovern, approved February 19, 1986, p. 5-7. In that same cycle,
16 the Commission determined that Hollings for President, Inc., should make a repayment
17 for incurring non-qualified campaign expenses related to convention hotel and airline
18 ticket purchases. Final Audit Report for Hollings for President, Inc., approved February
19 19, 1986, p. 6-7. A similar repayment determination for convention-related, non-
20 qualified campaign expenses was issued in the 1988 presidential election cycle for the
21 Albert Gore, Jr. for President Committee, Inc. Final Audit Report for Albert Gore, Jr. for
22 President Committee, Inc., approved July 13, 1989, p. 10-12. In more recent audits, the

[3] 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

1 Commission reaffirmed that convention expenses are non-qualified expenses.[4]

2 Most recently, the D.C. Circuit upheld the Commission's determination that
3 certain convention expenses incurred by Americans for Robertson, Inc. were non-
4 qualified. These expenses included activities to bolster the support and enthusiasm of Dr.
5 Robertson's elected delegates, but which the Robertson campaign claimed as fundraising
6 and debt retirement activities because they were filmed for use in later fundraising videos.
7 *Robertson v. FEC*, 45 F.3d 486, 492 (D.C. Cir. 1995).

8 ***Use of Federal matching funds for specific expenses***

9 *Convention travel*

10 As noted above, the Commission has in past audit matters specifically determined
11 that the expenses necessary to travel to and attend a Presidential nominating convention
12 are non-qualified expenses for candidates who are no longer seeking the party's
13 nomination, which is the case with Mr. Bradley and Mr. McCain. The Commission
14 concludes that, in general, expenses related to the convention travel of the candidate or
15 their staff and volunteers are not qualified campaign expenses. However, there are
16 certain specific situations among the expenses and activities you propose that would

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example of non-qualified campaign expenses in the context of repayment calculations).

[4] See the Final Audit Report for the Tsongas Committee, Inc. approved December 16, 1994, p. 63 which notes the view of the Tsongas committee that while "valid arguments exist that such disbursements are qualified campaign expenses, the [Tsongas] Committee recognizes that the Commission previously has rejected these arguments in the context of other audits." *Id.* Your request also cites the final audit report on Paul Simon for President. In that audit report, the Simon Committee had been asked as an initial matter to produce documentation substantiating its claim that the convention expenses at issue were fundraising expenses. The Simon Committee failed to produce the documentation, and the related expenses were included in the amount which the Commission determined the campaign was obligated to repay to the Treasury. *See* Final Audit Report for Simon for President, approved August 29, 1991, p.4-9. However, on an unrelated procedural issue, the U.S. Court of Appeals for the D.C. Circuit later reversed the Commission's determinations and canceled the Committee's repayment obligation. *Simon v. FEC*, No. 93-1252 (D.C. Cir., May 5, 1995).

1 permit the use of Federal matching funds for the described expenses, including travel to
2 the conventions.[5]

3 *Meetings and receptions to thank delegates*[6]

4 The Commission notes that 11 CFR 9034.4(a)(5) specifically discusses gifts to
5 "committee employees, consultants and volunteers" for "campaign-related activities or
6 services." "Thank-you" receptions and meetings would fall into this category of qualified
7 campaign expenses. The Commission notes that the cited regulation limits the amount
8 expended per individual to $150, and that the total spent for such gifts cannot exceed
9 $20,000 for the entire campaign. 11 CFR 9034.4(a)(5). Therefore, to the extent that such
10 meetings are restricted to attendees who served the Bradley or McCain campaigns in the
11 capacity of a committee employee, consultant or volunteer, the expenses of such meetings
12 and receptions are qualified expenses. This regulation, which is otherwise specific as to
13 the amounts that can be paid, does not allow the payment of travel expenses to attend or
14 organize these events as qualified expenses.

15 *Fundraising events to retire qualified primary election debts*

16 As noted above, as long as the Bradley and McCain committees have remaining
17 net outstanding campaign obligations, they remain qualified to receive matching
18 payments, even though they are no longer seeking the Presidential nominations of their
19 respective parties. Fundraising expenses to retire these campaign obligations are
20 qualified campaign expenses and may be paid from Federal matching funds. The

[5] 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 candidates and their spouses, and for the campaign staff and volunteers.
[6] The Commission finds no difference between expenses for delegate meetings and receptions, as outlined in your request, and so considers them together.

1 Commission concludes that these expenses may be incurred with regard to fundraising
2 events conducted by the Bradley and McCain committees and held at the respective
3 nominating conventions. Further, because fundraising activity denotes a broader area of
4 activity for political campaigns than the specific regulations concerning gift and bonus
5 events to thank delegates, Mr. Bradley and Mr. McCain may use Federal matching funds
6 to pay their travel expenses to attend the specific fundraising events that are held at the
7 convention. Federal matching funds may also be used to pay the travel expenses of
8 campaign staff who participate in the organizing and administration of the fundraising
9 events.[7]

10 There are, however, several limitations which must be emphasized. First, if Mr.
11 McCain or Mr. Bradley or members of their staffs participate in other parts of the
12 convention, expenses allocable to the portion of their attendance for any other part of the
13 convention would be non-qualified expenses.[8] Second, for fundraising expenses to be
14 considered qualified, they must be for specific fundraising events, such as fundraising
15 receptions and fundraising dinners. For example, expenses associated with the
16 attendance of the candidates, and their staff or delegates, at convention events solely
17 because such participation may be featured in video productions or other promotional
18 materials that may be used in campaign fundraising efforts after the conventions are held

[7] 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): 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.

[8] The Commission recognizes that this may require Mr. Bradley and Mr. McCain to allocate their travel expenses in the same manner that Federal candidates are required to allocate their travel expenses on a particular trip between those aspects that are campaign related and those that are personal and not campaign related. By analogy, see 11 CFR 113.1(g)(1)(ii)(C) and Advisory Opinion 1996-19 (Congressman attending convention as delegate must reimburse campaign for non-campaign related portion of his travel

1 are not qualified expenses.[9] Finally, such expenses will be considered qualified if used
2 for this purpose only to the extent that at the time of the convention, the Bradley and
3 McCain committees have outstanding net obligations. If it is determined, either prior to
4 the convention or subsequent to the convention, that at the time of the convention itself
5 the financial situation of either committee was such that there were no outstanding net
6 obligations, then any expenses for the fundraising purposes described above become non-
7 qualified expenses. Federal matching funds already used for these purposes would have
8 to be repaid. *See* 26 U.S.C. §9038(b)(2), 11 CFR 9034.4(a)(1) and 9038.2(b)(2)(A).[10]

9 *Participation in official convention events*
10
11 Unlike the expenses related to holding fundraising events and events organized to
12 thank delegates who are committee employees, consultants or volunteers, expenses
13 related to participation in the official convention proceedings have no relationship to
14 "winding down" expenses. They also do not fall into any other category of qualified
15 campaign expenses, as noted in the preceding discussion. Therefore, expenses incurred
16 by the Bradley and McCain Committees to cover costs specifically related to participating
17 in the official proceedings of the national conventions are not qualified campaign
18 expenses.

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expenses).
[9] *See FEC v. Robertson*, 45 F.3d at 492.
[10] Under 11 CFR 9033.11 Presidential campaign committees have the burden of proving that a disbursement is a qualified campaign expense. As regards possible fundraising expenses at the nominating conventions, both committees should provide, at the time each campaign is audited, documentation that directly links each expense to a specific fundraising event. For example, they should document and describe the role of each individual campaign staffer working for the event and should provide copies of the solicitation materials used in promoting the event (i.e. invitations) as well as any solicitation materials used at the event itself.

1 ***Use of non-matching funds for specific expenses***

2 The Matching Act and the Commission's regulations do not preclude post-
3 ineligibility candidates, including candidates who have voluntarily ended their official
4 campaign for their party's primary under 11 CFR 9033.5(a), from spending private
5 contributions – contributions that have not been submitted for matching – received after
6 the date of ineligibilty for non-qualified expenses. *See* 11 CFR 9034.4(a)(1) (exception
7 from general rule that all contributions must be used for qualified campaign expenses "as
8 provided in paragraph (b)(3)"); 11 CFR 9034.4(b)(3) ("Any expenses incurred after [the
9 date of ineligibility] are not qualified..."). Therefore, the Commission concludes that
10 given the specific factual situation presented by your request, Messrs. McCain and
11 Bradley may use such contributions for the specific non-qualified convention-related
12 expenses detailed in your request. The Commission advises the candidates that they
13 should consult with the Commission's Audit Division (should they decide to spend such
14 funds for these expenses) about how to report these contributions and expenditures and
15 what information and documentation must be maintained to ensure that the candidates
16 will be able to demonstrate that they did not use Federal matching funds for these
17 expenses. The Commission emphasizes that this determination is limited to the specific
18 facts presented in your request.

19 ***Availability of other funds for convention expenses***

20 You ask whether "other political committees" may be allowed to pay the expenses
21 described in your request. You ask for clarification of any issues associated with this
22 proposal, including whether such payments would be regarded as "operating expenses" of
23 such a committee. The Commission can provide only a partial response to this inquiry

1 because you have not provided a complete description of the material and relevant facts.
2 *See* 11 CFR 112.1(c). In this limited response (which should not be taken as a full
3 exploration of all of the possible sources of funding or the issues involved), the
4 Commission must also address each of the candidates separately since each has a
5 different status under the Act and Commission regulations.

6 *Senator McCain*

7 While Mr. McCain has ended his campaign for his party's Presidential
8 nomination, he is still a Federal candidate for election to the U.S. Senate.[11] In Advisory
9 Opinion 1996-34, the Commission considered the situation of a Federal candidate and
10 also a Member of Congress who, though not a delegate, wished to attend his party's
11 national convention. The Commission considered that the candidate would be involved
12 in events which included major donors to his campaign and would otherwise be engaging
13 in fundraising activity related to his Congressional campaign. The Commission also
14 noted that, as a Member of Congress, the candidate would meet with constituents to
15 discuss issues of importance to his district. Considering these circumstances, the
16 Commission concluded that the use of his campaign funds would not constitute personal
17 use since the candidate would be involved in campaign related or office holder related
18 activities. *See* Advisory Opinion 1996-34.

19 If Senator McCain plans to engage in similar activity at the convention, he could
20 use funds from his Senate committee to pay for his convention expenses. Campaign
21 funds could also be used to pay for the expenses of campaign staff members and

[11] According to reports filed with the Commission by Mr. McCain's Senate campaign committee, McCain for Senate '04 has received contributions and made expenditures over $5,000 thereby qualifying Mr. McCain as a Federal candidate under 2 U.S.C. §431(2)(A).

1 volunteers necessary to conduct these activities. *See* Advisory Opinion 1996-20.
2 Contributions, subject to the limitations and prohibitions of the Act, may be made to his
3 Senate campaign to pay for these expenses. Senator McCain could also use funds from
4 his non-connected PAC, Straight Talk America, for these expenses, if he plans to engage
5 in similar activity on behalf of that committee.

6 *Mr. Bradley*

7 Mr. Bradley's position differs from that of Mr. McCain. Like Mr. McCain, Mr.
8 Bradley is no longer actively seeking his party's Presidential nomination and is not
9 himself a delegate. However, unlike McCain, Mr. Bradley is neither a candidate for
10 another Federal office nor is he a current Member of Congress.

11 Commission records indicate that Mr. Bradley has formed a non-connected
12 political committee, Time Future Inc., which originally was his former Senate campaign
13 committee, Bill Bradley for U.S. Senate. The Commission notes that the personal use
14 restrictions would attach to any funds in Time Future Inc., that remained from his former
15 Senate campaign committee. *See* 11 CFR 113.2(e)(5) and Advisory Opinion 1993-22.
16 However, as in AO 1996-34, Mr. Bradley's attendance at the convention could involve
17 events which would include major donors to this committee and Mr. Bradley may be
18 otherwise be engaging in fundraising activity for this committee, and Mr. Bradley's
19 attendance at the convention could promote this committee's goals. If Mr. Bradley plans
20 to engage in similar activity at the convention, he could use funds from Time Future, Inc.
21 for the proposed convention-related expenses, with the same restrictions and provisions
22 as expressed above with regard to Senator McCain.

1 The Commission expresses no opinion regarding application of any rules of the
2 U.S. Senate or the Ethics in Government Act to the described activities, because these
3 issues are not within its jurisdiction. For the same reason, the Commission does not
4 express any views as to any Federal or other tax ramifications.
5 This response constitutes an advisory opinion concerning the application of the
6 Act, the Matching Act, or the regulations prescribed by the Commission, to the specific
7 transaction or activity set forth in your request. See 2 U.S.C. §437f.
8 Sincerely,
9
10
11 Darryl R. Wold
12 Chairman
13
14 Enclosures (AOs 2000-02, 1996-34, 1996-20, 1996-19, , 1993-22, and 1991-21)