

AGENDA ITEM
For Meeting of: 7-20-00

SUBMITTED LATE

1 ADVISORY OPINION 2000-12

2
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7
8 Trevor Potter
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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 Senator
20 John McCain, including those of their campaign staff and volunteers to attend and
21 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 Party
27 and Republican Party, respectively, for President of the United States in 2000. Each has
28 qualified for and received Federal matching funds. On March 9, 2000, each separately
29 made a public statement indicating that he would not compete in any other primaries and
30 caucuses. The Commission thereafter concluded that neither candidate was actively

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

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

- 11 1. Travel to and from the convention.
- 12
- 13 2. Meetings with delegates and supporters in various state delegations, to thank them for
14 their support and encourage them to remain active on the issues that initially motivated
15 their support.
- 16
- 17 3. Attendance at receptions hosted by their campaigns, at which they would have the
18 opportunity to thank their delegates, supporters and staffs, and maintain dialogue and
19 debate with them about the direction of their party on important issues.
- 20
- 21 4. Attendance at fundraising events for their campaigns, in order to retire primary
22 election debts.
- 23
- 24 5. Participation in the official proceedings of the conventions in various ways, including
25 speeches.
- 26

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

7 ***ACT AND COMMISSION REGULATIONS***

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

22 If on the date of ineligibility a candidate has net outstanding campaign obligations,
23 that candidate may continue to receive matching payments provided that on the date of
24 payment there are remaining net outstanding campaign obligations. 11 CFR 9034.1(b).

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

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

21 Gifts and monetary bonuses to committee employees, consultants and volunteers in
22 recognition for campaign-related activities or services (provided that such gifts do not
23 exceed \$150 total per individual and the total of all gifts does not exceed \$20,000) are

1 also qualified campaign expenses. 11 CFR 9034.4(a)(5)(i). In the case of monetary
2 bonuses for committee employees and consultants in recognition for campaign-related
3 activities or services, the regulations require that they be awarded pursuant to a written
4 contract made prior to the date of ineligibility and be paid no later than thirty days after
5 the date of ineligibility. 11 CFR 9034.4(a)(5)(ii).

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

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

1 campaign within thirty days for the amount of those expenses. 11 CFR

2 113.1(g)(1)(ii)(C).

3 ***APPLICATION TO PROPOSAL***

4 ***Commission policy in previous Presidential primary campaign audits***

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

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

2 Most recently, the D.C. Circuit upheld the Commission's determination that certain
3 convention expenses incurred by Americans for Robertson, Inc. were non-qualified.

4 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 certain
16 specific situations among the expenses and activities you propose that would permit the

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

3 *Meetings and receptions to thank delegates⁶*

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 payments,
18 even though they are no longer seeking the Presidential nominations of their respective
19 parties. Fundraising expenses to retire these campaign obligations are qualified campaign
20 expenses and may be paid from Federal matching funds. The Commission concludes that

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

9 There are, however, several limitations which must be emphasized. First, if Mr.
10 McCain or Mr. Bradley or members of their staffs participate in other parts of the
11 convention, expenses allocable to the portion of their attendance for any other part of the
12 convention would be non-qualified expenses.⁸ Second, for fundraising expenses to be
13 considered qualified, they must be for specific fundraising events, such as fundraising
14 receptions and fundraising dinners. For example, expenses associated with the attendance
15 of the candidates, and their staff or delegates, at convention events solely because such
16 participation may be featured in video productions or other promotional materials that
17 may be used in campaign fundraising efforts after the conventions are held are not

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 expenses).

1 qualified expenses.⁹ Finally, such expenses will be considered qualified if used for this
2 purpose only to the extent that at the time of the convention, the Bradley and McCain
3 committees have outstanding net obligations. If it is determined, either prior to the
4 convention or subsequent to the convention, that at the time of the convention itself the
5 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 to
8 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 related
13 to participation in the official convention proceedings have no relationship to "winding
14 down" expenses. They also do not fall into any other category of qualified campaign
15 expenses, as noted in the preceding discussion. Therefore, expenses incurred by the
16 Bradley and McCain Committees to cover costs specifically related to participating in the
17 official proceedings of the national conventions are not qualified campaign 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 ineligibility 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 given
10 the specific factual situation presented by your request, Messrs. McCain and Bradley may
11 use such contributions for the specific non-qualified convention-related expenses detailed
12 in your request. The Commission advises the candidates that they should consult with the
13 Commission's Audit Division (should they decide to spend such funds for these expenses)
14 about how to report these contributions and expenditures and what information and
15 documentation must be maintained to ensure that the candidates will be able to
16 demonstrate that they did not use Federal matching funds for these expenses. The
17 Commission emphasizes that this determination is limited to the specific facts presented in
18 your request.

19 *Availability of other funds for convention expenses*

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

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

6 *Senator McCain*

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

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 necessary to conduct these activities. See Advisory Opinion 1996-20. Contributions,
2 subject to the limitations and prohibitions of the Act, may be made to his Senate campaign
3 to pay for these expenses. Senator McCain could also use funds from his non-connected
4 PAC, Straight Talk America, for these expenses, if he plans to engage in similar activity on
5 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 himself
9 a delegate. However, unlike McCain, Mr. Bradley is neither a candidate for another
10 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 Advisory Opinion 1996-34, Mr. Bradley's attendance at the convention
17 could involve events which would include major donors to this committee and Mr.
18 Bradley may be otherwise be engaging in fundraising activity for this committee, and Mr.
19 Bradley's attendance at the convention could promote this committee's goals. If Mr.
20 Bradley plans to engage in similar activity at the convention, he could use funds from
21 Time Future, Inc. for the proposed convention-related expenses, with the same restrictions
22 and provisions as expressed above with regard to Senator McCain.

