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FEDERAL ELECTION COMMISSION

Washington, DC 20463

AGENDA ITEM
For Meeting of: FEB 8, 1996

February 1, 1996

MEMORANDUM

TO: The Commission

THROUGH: John C. Surina
Staff Director

FROM: Lawrence M. Noble
General Counsel

N. Bradley Litchfield
Associate General Counsel

Jonathan M. Levin
Senior Attorney

Subject: Draft AO 1995-47

Attached is a proposed draft of the subject advisory opinion.

We request that this draft be placed on the agenda for February 8, 1996.

Attachment

1 **ADVISORY OPINION 1995-47**

2
3 **The Honorable Robert A. Underwood**
4 **United States House of Representatives**
5 **424 Cannon House Office Building**
6 **Washington, D.C. 20515-5301**

DRAFT

7
8 **Dear Mr. Underwood:**

9
10 **This responds to your letters dated November 7 and December 14, 1995,**
11 **requesting an advisory opinion concerning application of the Federal Election Campaign**
12 **Act of 1971, as amended ("the Act"), and Commission regulations to the use of campaign**
13 **funds for travel expenses in connection with the 1996 Democratic National Convention.**

14 **You state that you will be "a designated super delegate" to the Democratic**
15 **National Convention which will be held in Chicago on August 26-29, 1996. You plan to**
16 **attend the convention in this capacity, and your wife will travel with you. You propose to**
17 **use your campaign funds, that is, funds of the Committee for Guam's Voice in Congress:**
18 **Robert Underwood ("the Committee"), for all of your travel expenses, and those of your**
19 **wife, in order to attend the convention. You explain: "My attendance as a super delegate**
20 **at the convention is required in connection with my ancillary duties as Member of**
21 **Congress." In addition, you state: "My wife will be accompanying me to campaign at the**
22 **convention."**

23 **You explain that, under Democratic Party rules, Members of Congress qualify as**
24 **unpledged delegates, commonly known as "super delegates." The term "super delegate"**
25 **includes elected officials who, by virtue of their capacity as elected officials, are entitled**
26 **to the status of unpledged delegate. Specifically, the Delegate Selection Rules for the**
27 **convention provide that all Democratic Members of the House of Representatives shall be**
28 **confirmed as unpledged delegates from their respective states and shall be recognized as**
29 **part of their state's delegation. 1996 Delegate Selection Rules, Section 8.A(3).¹ Super**
30 **delegates participate in the same ways as other delegates, voting on the nominations for**

¹ According to Appendix B to the "Call for the 1996 Democratic National Convention," Guam is allocated three unpledged delegate votes, including one to be exercised by the Democratic Member of Congress.

1 President and Vice President, on the party platform, and on other matters which come
2 before the convention.

3 You state that, as an elected official with unpledged delegate status, you will
4 participate "in a manner which includes both campaign-related and official functions."
5 You explain: "As a Member of Congress, I represent my party and constituency on public
6 policy and legislative matters, and will bring that responsibility and perspective to bear
7 on platform deliberations." You also assert that the convention "presents significant
8 political opportunities and demands related to my candidacy for re-election." Further,
9 you note that constituents expect a candidate to attend the party's most significant event
10 and that the convention provides media, fundraising, and other contacts helpful to your
11 candidacy.

12 You state that your wife will accompany you to the events scheduled during the
13 convention week and will participate in them with you. When you cannot attend a
14 meeting due to a scheduling conflict, your wife will attend in your place. You represent
15 that your wife will "generally assist" you in your convention-related activities, including
16 those helpful to your candidacy.

17 Finally, you assert that the travel to and from the convention will not be part of a
18 "mixed trip" elsewhere or for other purposes that might require some sort of allocation of
19 travel expenses. You plan to travel to the convention directly from Washington, D.C. and
20 to return to Washington, D.C. immediately after the convention.

21 Under the Act and Commission regulations, a candidate and the candidate's
22 committee have wide discretion in making expenditures to influence the candidate's
23 election, but may not convert campaign funds to the personal use of the candidate or any
24 other person. 2 U.S.C. §§431(9) and 439a; 11 CFR 113.1(g) and 113.2(d); see also
25 Advisory Opinions 1995-46, 1995-42, and 1995-26. Commission regulations provide
26 guidance regarding what would be considered personal use of campaign funds. Personal
27 use is defined as "any use of funds in a campaign account of a present or former
28 candidate to fulfill a commitment, obligation or expense of any person that would exist
29 irrespective of the candidate's campaign or duties as a Federal officeholder." 11 CFR
30 113.1(g).

1 Commission regulations list a number of purposes that would constitute personal
2 use. 11 CFR 113.1(g)(1)(i). Where a specific use is not listed as personal use, the
3 Commission makes a determination on a case-by-case basis. 11 CFR 113.1(g)(1)(ii).²
4 Travel expenses, including subsistence expenses incurred during travel, are among those
5 expenses to be analyzed on a case-by-case basis. If such travel involves both personal
6 activities and campaign or officeholder related activities, the incremental expenses that
7 result from personal activities are personal use unless the person benefitting reimburses
8 the campaign within thirty days for the amount of those expenses. 11 CFR
9 113.1(g)(1)(ii)(C).

10 In specifically addressing funds used for officeholder duties, the Act and
11 Commission regulations provide that campaign funds “[m]ay be used to defray any
12 ordinary and necessary expenses incurred in connection with the recipient’s duties as a
13 holder of Federal office.” 11 CFR 113.2(a); see 2 U.S.C. §439a. Included in such travel
14 expenses are

15 [t]he costs of travel by the recipient Federal officeholder and an
16 accompanying spouse to participate in a function directly connected to
17 bona fide official responsibilities, such as a fact-finding meeting or an
18 event at which the officeholder’s services are provided through a speech or
19 appearance in an official capacity.

20
21 11 CFR 113.2(a)(1).

22 In the absence of further information as to the particular activities in which your
23 wife and you will participate, the Commission is unable to conclude that the travel
24 expenses incurred by either or both of you results, in whole or in part, from campaign
25 related activities. However, as set out in the Democratic Party’s Delegate Selection rules
26 and the Call to the Convention, your status as a super delegate at the Democratic National

² In explaining the application of the case-by-case approach, the Commission

reaffirm[ed] its long-standing opinion that candidates have wide discretion over the use
of campaign funds. If the candidate can reasonably show that the expenses at issue
resulted from campaign or officeholder activities, the Commission will not consider the
use to be personal use.

1 Convention is derived directly from your position as a Member of Congress. Thus, your
2 travel expenses in connection with the convention (including subsistence expenses) arise
3 as a result of your Federal officeholder position, not irrespective of it. The Committee
4 may therefore pay for such expenses.³

5 The Commission concludes, however, that your status as a super delegate does
6 not permit the use of Committee funds for your wife's travel expenses. As stated above,
7 Commission regulations provide for the use of campaign funds for an accompanying
8 spouse's travel expenses for participation in a function directly connected to "bona fide
9 official responsibilities." In explaining this use of campaign funds, the Commission
10 noted that an officeholder's spouse is often expected to attend such "official function[s]"
11 as described in the regulation, even if the spouse has no "direct role in the activities"
12 during the event. 60 Fed. Reg. 7862, 7872.

13 Although your delegate status is derived from your position as a Member of
14 Congress, your attendance and voting at the convention is not an official duty or
15 responsibility of a Member of Congress. It is instead a privilege or a recognition
16 extended by your political party by virtue of your office. Moreover, the purpose of the
17 convention is to nominate presidential and vice presidential candidates, to adopt a party
18 platform for 1996 election, and to conduct other national party business. It is not an
19 event connected to the performance of your duties as a Member of Congress. In addition,
20 your request does not present sufficient information as to the particular events to be
21 attended by your wife to conclude that any of them would be directly connected to your
22 bona fide official responsibilities.

23 The Commission expresses no opinion regarding the application of any rules of
24 the U.S. House of Representatives or any tax ramifications of the proposed activity,
25 because those issues are not within its jurisdiction.

³ In Advisory Opinion 1980-29, the Commission concluded that the costs that a Congressman would incur by his participation as a delegate to the 1980 Republican National Convention could be defrayed from his campaign funds. The opinion explained that candidates and their committees had wide discretion as to the spending of campaign funds. Because the opinion was issued before repeal of the exemption (for certain Members) from the prohibition on personal use of campaign funds, the Commission notes that it is no longer applicable. The regulations on personal use promulgated in 1995 provide more specific standards governing the use of campaign funds.

