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FEDERAL ELECTION COMMISSION
Washington, DC 20463

March 21, 1996

MEMORANDUM

AGENDA ITEM

For Meeting of: 3-28-96

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: Revised Draft AO 1995-47

At the open meeting of February 8, 1996, the Commission considered an advisory opinion draft in the above-captioned matter (Agenda Document #96-19). At that meeting, the Commission voted to direct the Office of General Counsel to seek clarification from the requester, Guam Delegate Robert A. Underwood, as to the nature of the activities at issue and to prepare an alternative draft advisory opinion.

On February 9, 1996, this office sent questions to Mr. Underwood pertaining to his activities and those of his wife at the upcoming Democratic National Convention. Mr. Underwood sent a response on March 12.

Pursuant to the Commission's direction, the attached draft includes a description of the activities presented in the March response. Unlike Agenda Document #96-19, this draft does not use Mr. Underwood's status as a super delegate to permit the use of his campaign funds for his own travel to the convention. Moreover, the new draft does not analyze the activities as they relate to the concept of "bona fide official responsibilities" under 11 CFR 113.2(a)(1). Following the discussion at the February 8 Commission meeting, the draft takes the approach that the activities described in the March response

and the wife's role in those activities lead to a conclusion that campaign funds could be used to pay the travel expenses of both Mr. Underwood and his wife. In a footnote, the draft also notes an additional basis upon which campaign funds could be used to pay the travel expenses of Mr. Underwood only.

This office requests that the attached draft be placed on the agenda for the open meeting of March 28, 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, as**
11 **supplemented by your letter dated March 12, 1996, requesting an advisory opinion**
12 **concerning application of the Federal Election Campaign Act of 1971, as amended (“the**
13 **Act”), and Commission regulations to the use of campaign funds for travel expenses in**
14 **connection with the 1996 Democratic National Convention.**

15 **You state that you will be “a designated super delegate” to the Democratic**
16 **National Convention which will be held in Chicago on August 26-29, 1996. You plan to**
17 **attend the convention in this capacity, and your wife will travel with you. You state that**
18 **the travel to and from the convention will not be part of a “mixed trip” elsewhere or for**
19 **other purposes that might require some sort of allocation of travel expenses. You plan to**
20 **travel to the convention directly from Washington, D.C. and to return to Washington,**
21 **D.C. immediately after the convention.**

22 **You propose to use your campaign funds, that is, funds of the Committee for**
23 **Guam’s Voice in Congress: Robert Underwood (“the Committee”), for all of your travel**
24 **expenses, and those of your wife, in order to attend the convention. You explain: “My**
25 **attendance as a super delegate at the convention is required in connection with my**
26 **ancillary duties as Member of Congress.” In addition, you state: “My wife will be**
27 **accompanying me to campaign at the convention.”**

28 **You explain that, under Democratic Party rules, Members of Congress qualify as**
29 **unpledged delegates, commonly known as “super delegates.” The term “super delegate”**
30 **includes elected officials who, by virtue of their capacity as elected officials, are entitled**
31 **to the status of unpledged delegate. Specifically, the Delegate Selection Rules for the**
32 **convention provide that all Democratic Members of the House of Representatives shall be**
33 **confirmed as unpledged delegates from their respective states and shall be recognized as**

1 part of their state's delegation. 1996 Delegate Selection Rules, Section 8.A(3).¹ Super
2 delegates participate in the same ways as other delegates, voting on the nominations for
3 President and Vice President, on the party platform, and on other matters which come
4 before the convention.

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

14 You state that your wife will accompany you to the events scheduled throughout
15 the convention week and will participate in them with you. These include functions
16 related to your pending re-election campaign. When you cannot attend a meeting or
17 function due to a scheduling conflict, your wife will attend in your place. You represent
18 that your wife will "generally assist" you in your convention-related activities, including
19 those helpful to your candidacy.

20 Although your schedule for the convention is not yet firmly set, there are
21 categories of meetings and functions that you and your wife are preparing to attend "to
22 accomplish these campaign-related goals." These categories are as follows:

- 23 (1) Delegation meetings, which involve maintaining contacts with Guam delegates
24 who are also prominent in the politics of Guam and who, in some cases, will assist
25 directly with your campaign.
- 26 (2) Receptions to which you are invited, where you will be in contact with individuals
27 actively interested in Democratic congressional politics. You will be able to approach

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 these individuals for contributions, fundraising assistance, and other support for the
2 campaign.

3 (3) Media events, including occasions for press interviews during which you can
4 communicate partisan messages helpful to your campaign.

5 (4) Private meetings with Democratic Party activists who may be approached for
6 political and fundraising support for your campaign.

7 The Act and Commission regulations provide that excess campaign funds may be
8 contributed to any organization described in 26 U.S.C. §170(e), or may be used for any
9 lawful purpose, but may not be converted by any person to any personal use. 2 U.S.C.
10 ~~§439a; 11 CFR 113.2(d)~~, Under the Act and Commission regulations, a candidate and the
11 candidate's committee have wide discretion in making expenditures to influence the
12 candidate's election, but may not convert campaign funds to the personal use of the
13 candidate or any other person. 2 U.S.C. §§431(9) and 439a; 11 CFR 113.1(g) and
14 113.2(d); see also Advisory Opinions 1995-46, 1995-42, and 1995-26. Commission
15 regulations provide guidance regarding what would be considered personal use of
16 campaign funds. Personal use is defined as "any use of funds in a campaign account of a
17 present or former candidate to fulfill a commitment, obligation or expense of any person
18 that would exist irrespective of the candidate's campaign or duties as a Federal
19 officeholder." 11 CFR 113.1(g).

20 Commission regulations list a number of purposes that would constitute personal
21 use. 11 CFR 113.1(g)(1)(i). Where a specific use is not listed as personal use, the
22 Commission makes a determination on a case-by-case basis. 11 CFR 113.1(g)(1)(ii).²
23 Travel expenses, including subsistence expenses incurred during travel, are among those
24 expenses to be analyzed on a case-by-case basis. If such travel involves both personal

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 activities and campaign or officeholder related activities, the incremental expenses that
2 result from personal activities are personal use unless the person benefiting reimburses
3 the campaign within thirty days for the amount of those expenses. 11 CFR
4 113.1(g)(1)(ii)(C).³

5 Your description of your activities at the convention indicate that, throughout the
6 convention, you and your wife will engage in activities that are in furtherance of your
7 campaign for re-election. At events and other meetings, you will attempt to maintain
8 contacts and goodwill with persons who will support your campaign through fundraising
9 assistance and contributions. In addition, you will attempt to communicate with
10 constituents with respect to your campaign. You consider your wife's attendance at these
11 events and meetings, alongside of you or in your place, to be important, and you state that
12 it will enhance your re-election effort. The Commission concludes, therefore, ^{that} the travel
13 expenses for you and your wife in connection with the convention are directly related to
14 your campaign, and Committee funds may be used for them. In making this conclusion,
15 the Commission is mindful of the inherently political nature of the national nominating
16 convention of a political party. Its conclusion as to your general description of the four
17 types of activities in which you and your wife will engage is made in the context of that
18 event.⁴

19 The travel expenses of you and your wife should be reported as an operating
20 expenditure by the Committee, with the purpose noted. 11 CFR 104.3(b)(2)(i) and
21 (b)(4)(i).

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.

⁴ With respect to your travel expenses alone, the Commission notes that the regulations specifically permit a delegate to make expenditures without limit for his or her travel and subsistence with respect to a national nominating convention. 11 CFR 110.14(e). Pursuant to this provision, the use of Committee funds for your convention travel expenses, but not those of your wife, would be permissible.

