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FEDERAL ELECTION COMMISSION

Washington, DC 20463

AGENDA ITEM
For Meeting of: APR 18 1996

April 11, 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 1996-9

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for April 18, 1996.

Attachment

DRAFT

1 **ADVISORY OPINION 1996-9**
2
3 **Greg Pallas, Assistant Treasurer**
4 **Re-Elect Exon for U.S. Senate Committee**
5 **1947 North Calvert Street**
6 **Arlington, VA 22201**

7
8 **Dear Mr. Pallas:**
9

10 **This responds to your letters dated February 23 and March 21, 1996, requesting**
11 **an advisory opinion concerning application of the Federal Election Campaign Act of**
12 **1971, as amended ("the Act"), and Commission regulations to the transfer of excess**
13 **campaign funds by the Re-Elect Exon for U.S. Senate Committee ("the Committee") to**
14 **the Nebraska Democratic Party.**

15 **The Committee is the principal campaign committee of Senator J. James Exon of**
16 **Nebraska. Senator Exon's present term expires on January 3, 1997, and he is not running**
17 **for re-election. In light of Senator Exon's announced retirement, the Committee plans to**
18 **make an unlimited transfer of excess campaign funds to the Nebraska Democratic Party**
19 **("the Party").¹ The Party would apply these funds to the purchase of the building it**
20 **currently uses as its headquarters under a lease agreement with a private individual.**

21 **Following this purchase, it is anticipated that the Party will continue to maintain**
22 **its headquarters in that building. Another part of the structure, however, will be used as a**
23 **library or center to house Senator Exon's Senate papers following his retirement. This**
24 **building would also include a replica of Senator Exon's office for viewing by the public,**
25 **some form of interactive media for public view, and a place for Senator Exon and others**
26 **to work on the library. You anticipate that, before any funds are transferred, the Party**
27 **will sign a binding agreement with the Committee that would stipulate how the Party**
28 **would manage a future library for such purposes.²**

29 **You describe Senator Exon's role with respect to these plans and his use of the**
30 **facility. Senator Exon's papers will be catalogued and ready for transfer to the facility**

¹ According to its 1995 year end report, which covers activity from July 1 to December 31, 1995, the Committee has cash on hand totaling \$201,962. No debts are owed to or by the Committee.

² You state that the Committee and the Party have not produced a draft agreement. An agreement will be drafted and signed after the Commission issues an opinion on this proposal.

1 before being physically placed there. Senator Exon presently has sole discretion and
2 authority with respect to the disposition of his papers and, therefore, will make decisions
3 regarding public access to those papers before leaving office. Once he leaves office and
4 the papers are deposited in the proposed facility, the Party would govern access to the
5 library and to the papers. You state that the Senator will have "no direct control
6 regarding the access of others" to the library facility, and the Party will determine the
7 hours of operation and the admission policy for use of the facility.

8 Because of Senator Exon's intimate knowledge of his papers, he will provide
9 guidance and input regarding the layout, construction, and accuracy of displays, and he
10 will continue to be consulted occasionally on such matters. Once these decisions are
11 made and executed, however, the Party would retain control of the facility with respect to
12 planning, construction, and future use. Moreover, Senator Exon anticipates having no
13 role or power with respect to the employment or supervision of those personnel
14 (including paid staff of the Party) who will have authority to administer and direct the
15 library facility.

16 Your proposal includes the provision of an office within the facility to be used by
17 Senator Exon on an occasional basis, principally with regard to the work of the library.
18 You state that this would be "an office which is available and open to the public, but
19 where he could also work from time to time and greet visitors, etc."

20 You state that neither the Party nor any person acting on behalf of the Party would
21 pay the salary or other compensation of individuals who use the library area or other
22 space in the Party headquarters to perform research, writing, or editorial services for
23 Senator Exon.

24 In view of the proposed arrangements, you ask whether the Committee's funds
25 may be transferred to the Party for the purchase of the building without being considered
26 a personal use by Senator Exon of his campaign funds.

27 The Act and Commission regulations provide that excess campaign funds may be
28 used for any lawful purpose, including, specifically, transfers without limitation to any
29 national, State, or local committee of any political party, but may not be converted to the

1 personal use of the candidate or any other person.³ 2 U.S.C. §439a; 11 CFR 113.2(c) and
2 (d). Commission regulations provide guidance regarding what would be considered
3 personal use of campaign funds. Personal use is defined as “any use of funds in a
4 campaign account of a present or former candidate to fulfill a commitment, obligation or
5 expense of any person that would exist irrespective of the candidate’s campaign or duties
6 as a Federal officeholder.” 11 CFR 113.1(g). See Advisory Opinions 1995-47, 1995-46,
7 and 1995-42. Commission regulations list a number of purposes that would constitute
8 personal use. 11 CFR 113.1(g)(1)(i). Where a specific use is not listed as personal use,
9 the Commission makes a determination on a case-by-case basis. 11 CFR 113.1(g)(1)(ii).⁴

10 Although transfers of funds from a candidate’s authorized political committee
11 may be made without limit to a State party committee, your proposal may also implicate
12 personal use of those funds by Senator Exon. The Commission has previously
13 considered the question of whether a candidate’s campaign committee may donate
14 campaign funds to an entity where the possibility arises that some of those funds may be
15 used to benefit the candidate. Advisory Opinion 1983-27 addressed the donation of
16 campaign funds, remaining after an unsuccessful candidacy, to an educational foundation.
17 The candidate would serve as Chairman of the foundation’s Board of Directors. The
18 Commission concluded that so long as none of the funds donated by the campaign
19 committee would be paid to the candidate for his personal use, the donation would be
20 permissible. The Commission elaborated by stating that the candidate would not be
21 permitted to receive any funds from the foundation, “including, but not limited to, any
22 compensation, loans, awards, grants, or fellowships,” until such time as the foundation
23 expended “for purposes unrelated to [his] personal benefit, the entire amount so donated.”

³ Commission regulations define the phrase “excess campaign funds” to mean “amounts received by a candidate as contributions which he or she determines are in excess of any amount necessary to defray his or her campaign expenditures. 11 CFR 113.1(e).

⁴ 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 If any of the donated funds accrued to his benefit, a prohibited personal use would result.
2 An exception was provided with respect to the foundation's reimbursement of ordinary
3 and necessary expenses incurred by the candidate on behalf of the foundation in his
4 capacity as Board Chairman. Advisory Opinion 1983-27.

5 The Commission has also addressed a situation in which a retiring Member of
6 Congress designated campaign funds to be donated to a charitable foundation bearing his
7 name. He planned to designate himself as the initial trustee of the foundation and in that
8 position would distribute foundation funds to organizations that would qualify under the
9 trust documents. As trustee, he would have absolute discretion in the selection of a
10 recipient organization, to decide not to make a contribution, and to choose a successor. In
11 addition to his power as the initial trustee, he reserved the right to amend and revoke the
12 trust, and the trust property would be used for his benefit if he became disabled. The
13 Commission characterized the proposed use of the donation as personal use. Advisory
14 Opinion 1993-22.

15 Much of your proposal does not entail a personal use by Senator Exon of his
16 campaign funds. The Party, not Senator Exon, will govern access to the library facility
17 and the papers. He will have no role with respect to the employment or supervision of
18 persons who administer the facility. Furthermore, Party funds will not be used to
19 compensate those who use the library or other parts of the headquarters to work on
20 Senator Exon's behalf. Although Senator Exon will make the decisions regarding the
21 disposition of the papers prior to his leaving office, it is assumed that none of the
22 transferred funds are to be used for this process; the funds are to be used to develop the
23 facility itself and to maintain its ongoing operation.⁵ Moreover, his ongoing consultation
24 role with respect to the construction and accuracy of the displays does not entail control
25 of the facility on his part, but is merely the reasonable use of his expertise.

26 Senator Exon's use of an office constructed and maintained with the transferred
27 funds, however, may entail a personal use of campaign funds. You state that this office
28 would be available to Senator Exon, principally for his work on the library (including the

⁵ Senator Exon may use his campaign funds for the disposition of his papers as it relates to winding down his duties as a Senator. 11 CFR 113.2(a). See Advisory Opinion 1993-6.

1 greeting of visitors). This implies the possibility of work on other matters as well. You
2 also state, however, that the office will be available and open to the public. In order to
3 ensure that a personal use of campaign funds does not result, certain rules will have to be
4 set for the use of this office. In particular, Senator Exon's use of the office should be
5 restricted to a certain amount of time that ensures that it does not become his personal
6 office and that the office is genuinely available to the public. Senator Exon's use,
7 including use by his agents or staff, should amount to less than a majority of the time the
8 office is available for use by the public or him. For example, assuming that this office is
9 available on a 40 hour per week basis, or approximately 160 hours per month, his use
10 should total no more than 80 hours per month. The Party should control the schedule
11 with respect to Senator Exon's use of the office. In addition, use of the office by him and
12 his agents or staff should be restricted to matters connected to the operation of the library
13 facility or to other Party business.

14 The Commission expresses no opinion regarding the application of any rules of
15 the U.S. Senate or any tax ramifications of the proposed activity, because those issues are
16 not within its jurisdiction.

17 This response constitutes an advisory opinion concerning the application of the
18 Act, or regulations prescribed by the Commission, to the specific transaction or activity
19 set forth in your request. See 2 U.S.C. §437f.

20 Sincerely,

21
22 Lee Ann Elliott
23 Chairman
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25 Enclosures (AOs 1995-47, 1995-46, 1995-42, 1993-22, 1993-6, and 1983-27)
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