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AGENDA ITEM
For Meeting of: 3-13-97



FEDERAL ELECTION COMMISSION
Washington, DC 20463

March 6, 1997

OK

MEMORANDUM

TO: The Commission

THROUGH: John C. Surina
Staff Director

FROM: Lawrence M. Noble
General Counsel

N. Bradley Litchfield
Associate General Counsel

Michael G. Marinelli
Staff Attorney

SUBJECT: Draft AO 1997-01

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for March 13, 1997.

Attachment

DRAFT

1 ADVISORY OPINION 1997-1

2
3 Susan Bevill Livingston
4 Balch & Bingham LLP
5 Post Office Box 306
6 Birmingham, Alabama 35201

7
8 Dear Ms. Livingston:
9

10 This responds to your letters dated March 4, and January 27, 1997, and
11 August 7, 1996, on behalf of former U.S. Representative Tom Bevill who requests
12 an advisory opinion concerning application of the Federal Election Campaign Act of
13 1971, as amended ("the Act"), and Commission regulations to the use of campaign
14 funds to establish a charitable foundation.

15 Your letters state that Mr. Bevill desires to donate the remaining cash balance of
16 his former principal campaign committee, Friends of Tom Bevill ("the Committee"), to
17 create the Bevill Foundation ("the Foundation").¹ This entity, you explain, will be a
18 charitable foundation which will make grants solely to various educational, charitable,
19 literary, scientific and religious organizations. You affirm that the Foundation funds will
20 not be used to influence any Federal election. Further, you state that the Foundation will
21 not employ any person who was a member of Mr. Bevill's former Congressional staff.²
22 The Foundation will have as its governing body a board of directors consisting of Mr.
23 Bevill, his wife, and Susan B. Livingston, his daughter. You state that you will not be

¹ Mr. Bevill served as the U.S. Representative from the 4th Alabama Congressional District from 1966 until the end of the 104th Congress in 1996. According to the Committee's 1996 year end report, the Committee had no debt and \$304,747 in remaining cash on hand.

² You clarify that one individual, an accountant in private practice in Birmingham, who is not a member of Mr. Bevill's family, will provide accounting services from time to time to the Foundation at his standard rates. He will receive no other form of compensation. This individual has also served as treasurer in Mr. Bevill's more recent campaigns. No other campaign volunteers will receive any form of compensation from the Foundation.

1 compensated for services provided and you are donating legal services to the Foundation
2 free of charge.

3 The Foundation has not yet sought written recognition from the IRS that it has
4 qualified as an organization described in 26 U.S.C. §170(c). However, you explain that
5 you will apply for such status should the Commission determine that campaign funds can
6 be used, as proposed in the request.

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)³; see also
11 Advisory Opinions 1996-45, 1996-40, and 1996-20. Commission regulations list a
12 number of expense categories that would constitute personal use. 11 CFR
13 113.1(g)(1)(i).⁴ Where a specific use is not listed as personal use, the Commission makes
14 a determination on a case-by-case basis. 11 CFR 113.1(g)(1)(ii).⁵

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). Commission regulations define personal use as "any use of funds in a campaign account of a present or former candidate to fulfill a commitment, obligation, or expense of any person that would exist irrespective of the candidate's campaign or duties as a Federal officeholder." 11 CFR 113.1(g).

⁴ These expense categories include, but are not limited to: household food items; funeral, cremation or burial expenses; clothing; tuition payments not associated with training campaign staff; mortgage, rent or utility payments for the personal residence of a candidate; tickets to non-campaign or non-officeholder entertainment; dues, fees or gratuities to nonpolitical organizations, unless related to a specific fundraising event; and salary payments to family members, unless paid for bona fide, campaign-related services.

⁵ 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." Explanation and Justification, Commission Regulations on Personal Use of Campaign Funds, 60 *Fed. Reg.* 7862, 7867 (February 9, 1995).

1 However, the regulations provide that donations from campaign funds (or
2 campaign assets) to organizations described in 26 U.S.C. §170(c) are not personal use,
3 unless the candidate (former or current) receives compensation from the donee
4 organization before that organization has expended, for purposes unrelated to the
5 candidate's personal benefit, the entire amount donated to it.⁶ 11 CFR 113.1(g)(2); see
6 also Advisory Opinion 1996-40.⁷

7 The Commission notes your statement that, while the Foundation does not
8 currently have the status of a section 501(c)(3) organization, it intends to apply for such
9 status in the very near future.⁸ Further, the provisions of the Articles of Incorporation
10 included with your request are consistent with this intention in that they envision the
11 functioning of the Foundation as section 501(3)(c) entity.⁹

12 The Commission also notes your statement that the Foundation will not
13 compensate any person who is a member of Mr. Bevill's family or was a member of his
14 Congressional office staff. The Articles, however, provide that the Corporation is

⁶ 26 U.S.C. §§170(c) and 501(c)(3) contain overlapping qualifications and classifications for tax-exempt status. Therefore, as applied to the Foundation, these sections are used interchangeably.

⁷ Another exemption, not applicable here, is the use of campaign funds to pay any ordinary and necessary expenses incurred in connection with one's duties as a holder of Federal office. See 11 CFR 113.2(a)(1) and (2).

⁸ As noted above, the regulations require that permissible donations of excess campaign should be to entities holding tax exempt status. However, the circumstances in your request are somewhat similar to those considered by the Commission in Advisory Opinion 1983-27. In that opinion, the Commission determined that the donation of campaign funds to a foundation in which the former candidate would serve as its chairman of the board would not be personal use since the application for section 501(c)(3) status was pending at the time of the request and the candidate (or his family) would not receive compensation for his services or any funds or grants from the foundation. While the current regulations extend the prohibition regarding personal use beyond a candidate and his or her family, the Commission notes that the other aspects of this opinion remain relevant.

⁹ For example, Article III states that the Foundation is "organized exclusively for charitable, religious, educational, literary and scientific purposes within the meaning of Section 501(c)(3) of the Internal Revenue Code of 1986 as amended..." The other provisions regarding the operations of the Foundation also reference Federal tax law regarding self dealing, the holding of excess business holdings, investments

1 "authorized and empowered to pay reasonable compensation for services rendered and to
2 make payments and distributions in furtherance of the purposes set forth therein." Article
3 III, section 3.02. The Commission assumes that your representation governs,
4 notwithstanding the above quoted language, and that Foundation funds will not be
5 distributed as compensation or otherwise to any member of the Bevill family, or to any
6 entity that is controlled by or employs any Bevill family member. The Commission
7 further assumes that this same restriction will be followed with respect to any payments,
8 made directly or indirectly from Foundation funds, to any former staff member of Mr.
9 Bevill's Congressional office. In this regard, the Commission emphasizes that the Act
10 and regulations prohibit the personal use of campaign funds not only by the candidate
11 (former or current) and his or her family, but also by "any other person." This means that
12 the Foundation as the recipient of funds from the Committee is under the same statutory
13 prohibition regarding its use of the funds as applies to the Committee. Accordingly, until
14 such date as the Foundation has expended, for any lawful purpose within its governing
15 Articles, an amount equal to the sum it received from the Committee, the Foundation is
16 covered by the prohibition of 2 U.S.C. §439a and 11 CFR Part 113 in the same manner
17 and to the same extent as would be the case if the Committee had retained the funds.
18 Subject to these restrictions, the Commission concludes that the Act and Commission
19 regulations would permit the Committee to donate its remaining cash balance to fund the
20 Bevill Foundation.¹⁰

and taxable expenditures, and prohibitions against political activity. See Foundation Article III, section 3.02; and Article IV, sections 4.02, 4.03 and 4.04.

¹⁰ The Commission cautions you that the conclusions in this opinion are predicated on the Foundation's successful application for tax exempt status as a section 170(c) organization, with the Internal Revenue Service. The Foundation may not rely on this opinion should it fail to obtain or maintain such status.

