

AGENDA DOCUMENT NO. 01-38-A



FEDERAL ELECTION COMMISSION  
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**AGENDA ITEM**  
For Meeting of: 7-12-01

**MEMORANDUM FOR COMMISSION SECRETARY**

**FROM:** VICE CHAIRMAN DAVID MASON *dm*

**SUBJECT:** AO 2001-09

**DATE:** JULY 11, 2001

**SUBMITTED LATE**

I would ask that the attached Draft C of Advisory Opinion 2001-09 be submitted as an agenda document for tomorrow's Open Session.

1 ADVISORY OPINION 2001-09  
2 Robert F. Bauer  
3 Brian G. Svoboda  
4 Perkins Coie LLP  
5 607 14<sup>th</sup> Street, N.W.  
6 Washington, D.C. 20005-2011  
7

DRAFT C

8 Dear Mr. Bauer:

9 This responds to your letter dated June 4, 2001, on behalf of Kerrey for U.S.  
10 Senate ("the Committee"), the principal campaign committee of former United States  
11 Senator J. Robert Kerrey, concerning the 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 the payment of media consulting expenses incurred as a result of media  
14 inquiries pertaining to Senator Kerrey's activity during the Vietnam War.

15 ***Factual Background***

16 Senator Kerrey was elected to the U.S. Senate from Nebraska in 1988 and re-  
17 elected in 1994. The Committee served as his principal campaign committee in both  
18 elections. He was also a candidate for the Democratic Presidential nomination in 1992.  
19 He established a separate committee for that election, which has since terminated with the  
20 Commission.

21 Senator Kerrey was frequently mentioned as a potential candidate for President in  
22 2000. However, in December 1998, he announced that he would not seek that office and  
23 would run for a third term for the Senate instead. The Committee raised and spent funds  
24 for a possible 2000 re-election campaign. However, on January 20, 2000, Senator Kerrey  
25 announced that he would not be a candidate for re-election. He left the Senate on January  
26 3, 2001, and now serves as President of the New School University in New York City.  
27 He is not a candidate for any public office. The Committee remains registered with the  
28 Commission, disclosing \$1,176,586 cash-on-hand on its 2000 Year-End Report.<sup>1</sup>

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<sup>1</sup> You state that the Committee has timely refunded contributions received for the 2000 general election and funds received after Senator Kerrey's withdrawal from the Senate race.

1        You state that each of Senator Kerrey's campaigns for Federal office has involved  
2        public discussion of his service in a United States Navy Sea, Air and Land (SEAL) team  
3        during the Vietnam War. In 1998, while Senator Kerrey was still presumed to be a  
4        candidate for Senate under Commission regulations, Greg Vistica, a *Newsweek* reporter,  
5        began an inquiry related to his Vietnam service.

6        The subject of the inquiry was the nature of Mr. Kerrey's involvement in a  
7        February 1969 SEAL operation in the village of Thanh Phong that resulted in the deaths  
8        of Vietnamese civilians. The reporter interviewed Mr. Kerrey about the operation in late  
9        1998, and, after Mr. Kerrey announced in December 1998 that he would not seek the  
10       Presidency in 2000, *Newsweek* declined to publish Mr. Vistica's story. You note that  
11       subsequent comments by the magazine's assistant managing editor, Evan Thomas  
12       (reported in April 2001), made clear that publication had been contingent on Senator  
13       Kerrey's political plans; specifically, that the story would not be published if he was not a  
14       presidential candidate in 2000. After Mr. Vistica left *Newsweek*, he continued to work on  
15       the story throughout the remainder of Mr. Kerrey's Senate term. He interviewed Mr.  
16       Kerrey several more times for the story, which ultimately became a joint project of *The*  
17       *New York Times Magazine* and CBS News.

18       In April 2001, with publication of the story imminent, former Senator Kerrey  
19       publicly discussed the Thanh Phong incident for the first time in a speech at the Virginia  
20       Military Institute. This triggered a series of news stories disclosing the incident. *The*  
21       *New York Times* then published Vistica's story on its web site on April 25, and in *The*  
22       *New York Times Magazine* on April 29. CBS broadcast an hour-long television version  
23       of the story on May 1, on the program *60 Minutes II*.

24       The *New York Times Magazine* story prompted substantial media attention. You  
25       assert that much of this attention focused not on Mr. Kerrey's conduct as a Navy  
26       lieutenant in 1969, but rather on the manner in which he discussed his war record as a  
27       Federal candidate and officeholder. You cite, for example, a number of statements by  
28       reporters or writers with CNN, Fox News, and *The New York Times* commenting on his  
29       failure to mention the incident, e.g., that he had received a Bronze Star in connection with  
30       the 1969 operation, but had never disclosed the medal on his Senate office web site; that

1 he never renounced the Bronze Star; that he never mentioned the episode over the years,  
2 and he did not want anyone to know about it while he was a Senator. You also state that  
3 much of the questioning of Mr. Kerrey at a news conference he held on April 26 (after the  
4 web publication of the *New York Times Magazine* article), focused on the fact that he had  
5 not discussed the incident when he was a Federal candidate and public official.

6 For advice in dealing with the media attention that had resulted from the late April  
7 story, Mr. Kerrey retained the public relations firm of Westhill Partners. The firm helped  
8 Mr. Kerrey manage the media response to the *New York Times Magazine* story, the *60*  
9 *Minutes II* broadcast, and the accompanying press coverage. The firm responded to  
10 media inquiries on his behalf and advised him on his own communications with media  
11 outlets regarding the story. On May 17, Westhill Partners sent Mr. Kerrey an invoice for  
12 \$59,554.48; reflecting the firm's charge for the aforementioned services. The invoice  
13 remains unpaid.

14 You maintain that the media attention to Mr. Kerrey's activities at Thanh Phong,  
15 and hence his expenses in responding to such attention, would never have arisen if it were  
16 not for the fact that he was a Federal candidate and Federal officeholder. You also assert  
17 that much of the media attention was focused on his conduct as a Federal candidate and  
18 officeholder in failing to disclose the Thanh Phong incident and thus the expenses would  
19 not have arisen but for his candidate and officeholder status. You assert therefore that  
20 Mr. Kerrey may thus use Committee funds to pay the invoiced amount because such  
21 disbursements would not be prohibited as a personal use of campaign funds. (You note  
22 that no relative or family member of Mr. Kerrey is associated in any way with Westhill  
23 Partners.) You ask the Commission to approve such a payment.

24 *Analysis*

25 Under the Act and Commission regulations, a candidate and the candidate's  
26 committee ~~have wide discretion in making expenditures to influence the candidate's~~  
27 ~~election~~ may use excess campaign funds "for any . . . lawful purpose", but may not  
28 convert such funds to the personal use of the candidate or any other person. 2 U.S.C.  
29 §§431(9) and 439a; 11 CFR 113.1(g) and 113.2(d); ~~see also Advisory Opinions 2001-08,~~  
30 ~~2001-03, and 2000-40.~~

1       Commission regulations provide guidance regarding what is considered personal  
2 use of campaign funds. Personal use is defined as "any use of funds in a campaign  
3 account of a present or former candidate to fulfill a commitment, obligation or expense of  
4 any person that would exist irrespective of the candidate's campaign or duties as a Federal  
5 officeholder." 11 CFR 113.1(g). Commission regulations list a number of purposes that  
6 would constitute personal use *per se*. 11 CFR 113.1(g)(1)(i). These purposes do not  
7 include public relations expenses to respond to media inquiries. Where a specific use is  
8 not listed as personal use, the Commission makes a determination, on a case-by-case  
9 basis, whether an expense would fall within the definition of personal use at 11 CFR  
10 113.1(g). 11 CFR 113.1(g)(1)(ii). This list specifically includes legal fees, and meal,  
11 travel, and vehicle expenses, but also provides for the application of the "irrespective"  
12 test to expenses that are not listed.

13       The Commission explained the meaning of the "irrespective test" in its  
14 Explanation and Justification of the regulations on personal use, which it promulgated in  
15 early 1995. See *Explanation and Justification, Expenditures; Reports by Political*  
16 *Committees; Personal Use of Campaign Funds*, 60 Fed. Reg. 7862 (February 9, 1995).  
17 The Commission stated:

18       If campaign funds are used for a financial obligation that is caused by  
19 campaign activity or the activities of an officeholder, that use is not  
20 personal use. However, if the obligation would exist even in the absence  
21 of the candidacy or even if the officeholder were not in office, then the use  
22 of funds for that obligation generally would be personal use.  
23

24 60 Fed. Reg. at 7863-4. Moreover, in explaining the case-by-case approach, the  
25 Commission stated that it:

26 reaffirms its long-standing opinion that candidates have wide discretion  
27 over the use of campaign funds. If the candidate can reasonably show that  
28 the expenses at issue resulted from campaign or officeholder activities, the  
29 Commission will not consider the use to be personal use.  
30

31 60 Fed. Reg. at 7867.

32 ~~Mr. Kerrey is a public figure well-known to the American public. If that factor~~  
33 ~~were the principal reason for the media inquiry, the expenses for consulting expenses~~

1 ~~would not satisfy the irrespective test, even if Mr. Kerrey had formerly held a Federal~~  
2 ~~office or had been a Federal candidate in the past. This situation differs, however. The~~  
3 Commission concludes that the media would not have focused on Senator Kerrey's  
4 activities if he had not been a candidate and strong contender for the Democratic  
5 presidential nomination in 1992, a prominent United States Senator, and a potential  
6 candidate in 2000 for the Senate or the presidency. The Commission views two factors as  
7 demonstrating a direct resultant relationship to his campaigns and officeholder activities.

8 The most significant factor demonstrating the relationship to Senator Kerrey's  
9 candidacy or officeholder activities is the fact that the media inquiry into the Thanh  
10 Phong incident began when Senator Kerrey was still in the Senate, was a Senate  
11 candidate under Commission rules, and was generally viewed as a probable presidential  
12 candidate for the 2000 primary election. Although a *Newsweek* editor indicated that  
13 publication by the magazine was contingent on a presidential candidacy and the story was  
14 still pursued by Mr. Vistica after Mr. Kerrey announced that he would not seek the  
15 presidency in 2000, the editor's statement indicates that the original pursuit of the story  
16 was motivated by a desire to present important information about the fitness for Federal  
17 office of a Federal candidate and officeholder.

18 Also significant in assessing the nature of the media inquiries as directly related to  
19 Mr. Kerrey's Federal campaign and officeholder duties is the focus of some of the ~~media~~  
20 ~~inquiries~~ itself. Mr. Kerrey's service in Vietnam has been the subject of public  
21 discussion in each of his Federal campaigns. Questions and comments by the media as to  
22 why he never discussed the Thanh Phong incident when he ran for president or while he  
23 was a Senator indicate that his behavior as a candidate and Federal officeholder, ~~not~~  
24 ~~merely his status as a public figure which resulted from his Federal candidate and~~  
25 ~~officeholder status, was~~ an important cause of the media activity in April and May of  
26 2001.

27 Although Mr. Kerrey does not have a current campaign or officeholder status to  
28 protect, there is no question that Mr. Kerrey needs to respond to the media inquiries and  
29 cannot let questions remain unanswered. As indicated by the two factors above, the  
30 inquiry that forces him into this position, ~~as well as his status as a public figure~~, would

1 not have occurred if he had not been a prominent Senator and prominent Federal  
2 candidate, particularly one whose campaigns had entailed a discussion of his notable  
3 Vietnam War record. Based on the foregoing analysis, Senator Kerrey may use  
4 Committee funds to pay the amount billed by Westhill Partners. The Commission  
5 acknowledges notes that this is an unusual unique situation and, as indicated above, ~~may~~  
6 ~~not be applicable to other former Federal candidates or officeholders~~ this opinion's  
7 conclusion is based on the case-by-case determination provisions of 11 CFR  
8 113.1(b)(1)(ii). This opinion does not establish any general rule regarding the use of  
9 campaign funds by former candidates or federal officeholders for public affairs expenses.

10 The Committee should report its payment to Westhill Partners under the category  
11 of "Other Disbursements." 2 U.S.C. §434(b)(4)(G) and (6)(A); 11 CFR 104.3(b)(2)(vi)  
12 and (b)(4)(vi). As part of its description of the purpose of the disbursement, the  
13 Committee should make reference to this opinion.

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

17 . . . . . Sincerely,

**22 Enclosures (AOs 2001-08, 2001-03, and 2000-40)**

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