

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

SUBMITTED LATE

FROM: VICE CHAIRMAN DAVID MASON *DM*
SUBJECT: AO 2001-09
DATE: JULY 11, 2001

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

2 Robert F. Bauer
3 Brian G. Svoboda
4 Perkins Coie LLP
5 607 14th Street, N.W.
6 Washington, D.C. 20005-2011
7

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.¹

¹ 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.~~

Commission regulations provide guidance regarding what is considered personal use of campaign funds. Personal use is defined 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). Commission regulations list a number of purposes that would constitute personal use *per se*. 11 CFR 113.1(g)(1)(i). These purposes do not include public relations expenses to respond to media inquiries. Where a specific use is not listed as personal use, the Commission makes a determination, on a case-by-case basis, whether an expense would fall within the definition of personal use at 11 CFR 113.1(g). 11 CFR 113.1(g)(1)(ii). This list specifically includes legal fees, and meal, travel, and vehicle expenses, but also provides for the application of the "irrespective" test to expenses that are not listed.

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

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

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

reaffirms 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.

60 Fed. Reg. at 7867.

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

1 ~~would not satisfy the irrespctive 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~~ ere 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,

18
19 Danny L. McDonald
20 Chairman
21

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