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607 FOURTEENTH STREET, N.W. • WASHINGTON, D.C. 20005-2011  
TELEPHONE: 202 628-6600 • FACSIMILE: 202 434-1690

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June 4, 2001

The Honorable Danny McDonald  
Chairman  
Federal Election Commission  
999 E Street, N.W.  
Washington, DC 20463

AOR 2001-09

**Re: Kerrey for U.S. Senate**

Dear Mr. Chairman:

Pursuant to 2 U.S.C. § 437f, this letter requests an advisory opinion from the Federal Election Commission on behalf of Kerrey for U.S. Senate ("the Committee"), the principal campaign committee of former United States Senator J. Robert Kerrey. The Committee seeks permission to pay \$59,554.48 to Westhill Partners, a public relations firm, for media consulting expenses incurred as a result of media inquiries involving Senator Kerrey.

**FACTUAL DISCUSSION**

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

Senator Kerrey was frequently mentioned as a potential candidate for President in 2000. However, in December 1998, he announced that he would not seek that office and would run for a third term for the Senate instead. See David S. Broder, Kerrey Decides Against Run for President; Neb. Senator Will Seek Third Term in 2000, Not Challenge Gore for Nomination, Wash. Post, Dec. 14, 1998, at A4.

The Committee raised and spent funds for a possible 2000 reelection campaign. However, on January 20, 2000, Senator Kerrey announced that he would not be a candidate for reelection. See C. David Kotok and Jake Thompson, Kerrey Changes

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Paths, Omaha World-Herald, Jan. 21, 2000, at 1. He left the Senate on January 3, 2001 and now serves as President of the New School University in New York City. He is not a candidate for any public office. The Committee remains registered with the Commission, disclosing \$1,176,586 cash-on-hand on its 2000 Year-End Report. As required by Commission regulations, it has timely refunded contributions received for the 2000 general election and funds received after Senator Kerrey's withdrawal from the Senate race.

Each of Senator Kerrey's campaigns for Federal office has involved public discussion of his service in a United States Navy Sea, Air and Land (SEAL) team during the Vietnam War. See, e.g., David Rogers, Kerrey Now Strives to Turn His Service in Vietnam Into a Message for Voters, Wall St. J., Mar. 3, 1992, at A16. In 1998, while Senator Kerrey was still presumed to be a candidate for Senate under Commission regulations, Greg Vistica, a Newsweek reporter, began an inquiry related to his Vietnam service.

The subject of the inquiry was the nature of Senator Kerrey's involvement in a February 25, 1969 SEAL operation in the village of Thanh Phong that resulted in the deaths of several Vietnamese civilians. The reporter interviewed Kerrey about the operation in late 1998, while Kerrey was in the Senate and a candidate for reelection under Commission rules. See Gregory L. Vistica, What Happened in Thanh Phong, N.Y. Times Magazine, Apr. 29, 2001, at 51. See also Howard Kurtz, Newsweek Spiked Kerrey Story in '98; Editors Cite Dropped Presidential Bid, Wash. Post, Apr. 27, 2001, at A4.

In December 1998, after Senator Kerrey announced that he would not seek the Presidency in 2000, Newsweek declined to publish Vistica's story. Later comments by the magazine's assistant managing editor, Evan Thomas, made clear that publication had been contingent on Senator Kerrey's political plans: "We could have run the story . . . We had Kerrey's confirmation. We just didn't want to do it to the guy when he wasn't running for President." Kurtz, at A4. Nonetheless, Vistica, having left Newsweek, continued to work on the story throughout the remainder of Kerrey's Senate term. He interviewed Kerrey several more times for the story, which ultimately became a joint project of The New York Times Magazine and CBS News. See Vistica, at 51.

With publication of the story imminent, Kerrey discussed the Thanh Phong incident for the first time in an April 2001 speech to cadets at the Virginia Military Institute. This triggered a series of news stories disclosing the incident. See, e.g., Kerrey: Divergent Memories, Hotline, Apr. 26, 2001. The New York Times then published Vistica's story on its web site on April 25, and in the New York Times Magazine on April 29. CBS broadcast an hour-long television version of the story on May 1, on the program 60 Minutes II.

The New York Times Magazine story triggered substantial media attention. Much of it focused not on Senator Kerrey's conduct as a Navy lieutenant in 1969, but rather on the manner in which he discussed his war record as a Federal candidate and elected official. A CNN reporter noted that while Senator Kerrey had received a Bronze Star in connection with the 1969 operation, he had never disclosed the medal on his Senate office web site. Inside Politics (CNN television broadcast, Apr. 25, 2001). Columnist Morton Kondracke said: "What's very curious about this whole incident is that for all these years, he has never renounced his Bronze Star. It really does raise questions . . ." Kerrey: Divergent Memories, Hotline, Apr. 26, 2001.<sup>1</sup>

The day after the Internet publication of the New York Times Magazine article, Senator Kerrey held a news conference at a Manhattan hotel on April 26. See Former U.S. Senator Bob Kerrey (D-NE) Holds News Conference to Discuss the Combat Mission He Led in Vietnam That Led to the Death of Innocent Civilians, FDCH Political Transcripts, Apr. 26, 2001. Much of the questioning at the news conference focused on the fact that Senator Kerrey had not discussed the incident as a Federal candidate and public official. One questioner asked him if there was "any moment over the last 30 years that you felt that you should return the Bronze Star, and especially when you were running for President in 1992." Id. Another asked: "what would you say to people who suggest that it says something about your character that over the last 30 years, you didn't come out to heal, but now you are?" Id.

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<sup>1</sup> For examples of similar statements, see also Editorial, The War Within Bob Kerrey, N.Y. Times, Apr. 26, 2001 ("some Americans will question his long silence and his candor about this episode"); The Edge With Paula Zahn (Fox News Channel television broadcast, Apr. 26, 2001) ("He was a two-term senator until he retired from a conservative state. The fact is he didn't bring this out in advance. He didn't want anyone to know about it.").

For advice in dealing with the media frenzy that had resulted from the story, Senator Kerrey retained the public relations firm of Westhill Partners.<sup>2</sup> The firm helped Kerrey manage the media response to the New York Times Magazine story, the 60 Minutes II broadcast, and the accompanying press coverage. The firm responded to media inquiries on his behalf and advised him on his own communications with media outlets regarding the story. On May 17, Westhill Partners sent Senator Kerrey an invoice for \$59,554.48, reflecting the firm's charge for the aforementioned services. The invoice has not yet been paid. Because Senator Kerrey wishes to pay the invoice in a prompt and appropriate manner, the Committee now asks the Commission for its swiftest possible consideration of this request.

### LEGAL DISCUSSION

Commission regulations allow a former Federal candidate like Senator Kerrey to spend his excess campaign funds for a series of enumerated activities, and "for any other lawful purpose . . ." 11 C.F.R. § 113.2(d). Contribution limits aside, the only real restriction on the Committee's spending of funds is that it cannot constitute "personal use." See id. Commission regulations list a series of expenses that are considered per se to be personal use -- none of which applies to the circumstances here. See 11 C.F.R. § 113.1(g)(1)(I)(A)-(H).

The question then becomes whether the proposed use of funds fulfills "a commitment, obligation or expense that would exist irrespective of the candidate's campaign or duties as a Federal officeholder" and thus would be disallowed. 11 C.F.R. § 113.1(g)(1)(ii). While the rules list legal fees, meals, travel and vehicle expenses as types of payments that may qualify as personal use, they do not address expenses associated with public relations. Id. When proposed payments are not specifically addressed by the rules, the Commission reviews them for personal use on a case-by-case basis, often through advisory opinions. Id.

The Committee respectfully submits that the media consulting expense incurred with Westhill Partners is appropriately borne by the Committee. Senator Kerrey would not have incurred the expense but for his recent status as a Federal

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<sup>2</sup> No relative or family member of Senator Kerrey is associated in any way with Westhill Partners.

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candidate and officeholder. As the Commission has noted, "the activities of candidates and officeholders may receive heightened scrutiny and attention in the news media because of their status as candidates and officeholders." Advisory Opinion 1997-12.

Accordingly, the Commission has held that when candidates and officeholders become the subjects of public controversy, expenses relating directly and exclusively to dealing with the press – such as preparing a press release, appearing at a press conference, or meeting and talking with reporters – may be paid 100% with campaign funds. See id. Accord Advisory Opinion 1998-1. It does not matter whether the press inquiry involves conduct that occurred before the individual became a candidate or officeholder. See Advisory Opinion 1998-1.

While Senator Kerrey very recently ceased to be a candidate or officeholder, this should not affect the personal use analysis.<sup>3</sup> The Commission's prior opinions indicate that it is not the need to defend a pending candidacy that allows a committee to pay for public relations expenses incurred in the face of controversy, but rather that candidacy or officeholder status affected the level of press scrutiny:

Although these expenses could be incurred by any person who is both prominent in a given community and the subject of similar allegations, and in that sense could exist irrespective of candidacy or officeholder status, the Commission recognizes that the activities of candidates and officeholders may receive heightened scrutiny and attention because of their status as candidates and officeholders.

Advisory Opinion 1997-12. See also Advisory Opinion 1998-1 (quoting the same language). Significantly, the media investigation that triggered this controversy began before Senator Kerrey entered private life. The reporter in question first interviewed

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<sup>3</sup> Indeed, the Commission has consistently recognized that there are certain expenses that may be related to candidacy or officeholder status, and yet which may be incurred after such status is terminated. See, e.g., 11 C.F.R. § 113.2(a)(2) (excluding costs of winding down a Congressional office from personal use for up to six months). Some of these expenses are arguably far more "personal" in character than those proposed here. See Advisory Opinion 1996-14 (authorizing use of campaign funds to pay for Member's moving expenses).

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Senator Kerrey in 1998, when he was still a United States Senator and a candidate under Commission regulations. Senator Kerrey's activities as a Navy lieutenant in 1969 thus received "heightened scrutiny and attention" because of his status as a candidate and an officeholder, making these expenses properly borne by his principal campaign committee. Advisory Opinion 1997-12.

Moreover, Senator Kerrey was not compelled simply to explain his conduct as a Navy lieutenant in 1969. Rather, he was asked to defend his conduct as a Federal candidate and officeholder in relation to the incident. Specifically, he was criticized by some for having failed to disclose the Thanh Phong incident during his prior Federal campaigns. The examination of Senator Kerrey's past political conduct by several media outlets is a major reason why he felt compelled to incur these expenses.

In short, Senator Kerrey would not have incurred these expenses had he not been a Federal candidate and officeholder. Had he simply remained a former one-term governor of Nebraska, a restaurateur or a pharmacist, instead of seeking Federal office, the New York Times story would not have generated the level of media attention that it did. Indeed, the story might never have been written at all. The story was generated while Senator Kerrey was a candidate and officeholder, and it received the attention it did because of that status.

Accordingly, the Committee respectfully requests the Commission to approve the proposed transaction. As noted above, it seeks the swiftest review possible, so that the expenses in question may be paid in a timely and appropriate manner.

Very truly yours,



Robert F. Bauer  
Brian G. Svoboda  
Counsel to Kerrey for U.S. Senate

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**cc: Vice Chairman David M. Mason  
Commissioner Karl J. Sandstrom  
Commissioner Bradley Smith  
Commissioner Scott E. Thomas  
Commissioner Darryl R. Wold  
N. Bradley Litchfield, Esq.**