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July 10, 2001

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

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FEDERAL ELECTION
COMMISSION
OFFICE OF GENERAL

Re: Advisory Opinion Request 2001-09

Dear Chairman McDonald:

On behalf of Kerrey for U.S. Senate, we write to comment on the two draft advisory opinions that the Office of General Counsel submitted to the Commission on July 5, 2001. It will come as no surprise to the Commission that we prefer Draft B, which recommends approval of the proposed transaction. In any event, we respectfully offer our observations on both drafts, in the hope of assisting the Commission in its deliberations.

It seems to us that the two drafts use very different approaches to reach their separate results. Draft B highlights the test for "personal use" set forth in the rules promulgated by the Commission – specifically, whether an expense would have been incurred "irrespective" of office-holding or candidacy. 11 C.F.R. § 113.1(g). Drawing from the Explanation and Justification, it notes that committees have "wide discretion" in making their spending decisions, and that the Commission normally does not disturb their decisions when reasonably made. Expenditures, Reports by Political Committees; Personal Use of Campaign Funds, 60 Fed. Reg. 7,862 (1995). Thus, it approves the proposed transaction, noting that it involves an "unusual situation" related to Senator Kerrey's past status as an officeholder and candidate.

Draft A takes a much different approach. It focuses less on the rules, and more on the Commission's previous advisory opinions. Looking to those opinions, none of which directly addresses this situation, the draft creates by inference a different test – whether the expense arose from "political necessity." Here, Draft A says, there can be no "political necessity," because Senator Kerrey has no current candidacy to defend. Thus it disapproves the proposed transaction.

[22994-0001/DA011860.044]

Draft B is the sounder approach. It is solidly grounded in the rules, while Draft A develops and applies an entirely different legal standard. Consequently, Draft B is much more consistent with the way in which the Commission views the advisory opinion process. As four Commissioners recently wrote, "the Commission may not use advisory opinions as a substitute for rulemaking. Rulemaking is not simply the preferred method for filling in the gaps. It is the required method." Statement of Reasons of Vice Chairman Darryl R. Wold, Commissioners Lee Ann Elliott, David M. Mason and Karl J. Sandstrom on the Audits of Dole for President Committee, Inc. et al. (June 24, 1999).

By adding the new requirement of establishing "political necessity" through an active candidacy, Draft A misses the fact that, under the rules, it is not candidate or officeholder status alone that governs the personal use analysis, but rather what caused the expense to be incurred in the first place. This is the core of the "irrespective test" set forth in the rules, on which Draft B properly relies.

By applying the wrong standard, Draft A generates a number of anomalous outcomes. It disallows the payment, even while acknowledging a relationship to candidate and officeholder status. It finds itself forced to distinguish Commission precedent that allows the campaigns of former officeholders to make payments for several other purposes. Finally, it places the Commission in the odd situation of approving the use of campaign funds to send flowers to funerals, see Advisory Opinion 1977-11, and pay babysitting expenses, see Advisory Opinion 1995-42, while barring payment for the wholly political purpose of press relations.

There is one additional fact which neither draft discusses at length, and which the Commission may find relevant. It is the short lapse of time between Senator Kerrey's retirement from the Senate and the publication of the Thanh Phong story. It bears noting that these proposed expenses were incurred less than six months after Senator Kerrey had left office, at a time when he remained eligible to use campaign funds to pay for wind-down expenses associated with his Senate office. See 11 C.F.R. § 113.2(a)(2).

There is a reason for this short lapse of time: the New York Times reporter began work on this story while Senator Kerrey was a candidate and officeholder, and did not complete work until just after he had left office. The timing of the story's publication was the product of happenstance. Indeed, as we noted in the original

request, publication was delayed primarily because the magazine that first sponsored the story believed that its relevance depended on the existence of a Federal candidacy. The fact that publication occurred shortly after Senator Kerrey left office does not fundamentally change the candidate-related nature of the story, and therefore of the Senator's response.

The question of timing only further demonstrates that, as Draft B states, this is an "unusual situation" that "may not be applicable to other former Federal candidates and officeholders." Yet however unusual this situation may be, we believe the approval of this transaction to be the outcome that is most consistent with Commission rules. For these reasons, and for those stated in the initial request, we respectfully ask that the Commission approve our request.

Very truly yours,

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

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