



FEDERAL ELECTION COMMISSION

WASHINGTON, D.C. 20463

DISSENT

OF

COMMISSIONER BRADLEY A. SMITH

ADVISORY OPINION 2001-09

I confess that I find it hard to be terribly upset about the majority's decision in this matter. I do not believe that former Senator Kerrey is corrupt or has been in any way corrupted by those who have contributed to his past campaigns, so this Advisory Opinion poses no immediate threat to the public welfare. Nor do I see this particular opinion being relied upon widely. Advisory opinions may be relied upon only by the specific persons involved, or those involved in a specific transaction or activity that is "indistinguishable in all material aspects from the transaction or activity with respect to which such advisory opinion is rendered." 2 U.S.C. §437f (c). I envision few situations in which a non-candidate former Representative or Senator will be the subject of hostile media coverage contingent upon his perceived attractiveness as a future presidential candidate.¹ Thus, by itself, this particular opinion is unlikely to have any major long-term implications.

I write, however, because I am concerned about the drift of Commission advisory opinions relating to the personal use doctrine, as indicated by this opinion and Advisory Opinion 2000-40.² Corruption is often less a function of how funds are raised than of how they are spent. Campaign funds are different from bribes because they are spent on the advocacy of the election of the candidate and/or on promotion of the candidate's political positions. Thus the abilities of donors to contribute to campaigns and of campaigns to spend for speech-related purposes implicate fundamental rights of free speech. Contributions differ from bribes in that they are not used to further the personal financial situation of the candidate or officeholder, except in so far as the candidate benefits from the political victory to which that speech might lead. This crucial

¹ I do not think, for example, that (picking some names at random) former Congressmen Martin Hoke or Henry Gonzales, or former Senators Malcolm Wallop or Wendell Ford will soon be the subject of intense media scrutiny.

² In AO 2000-40 we allowed an officeholder to use his campaign funds to help pay legal bills for a friend who was also an officeholder.

distinction between bribes and contributions begins to break down, however, if officeholders are free to spend contributions for personal enrichment. If officeholders can use their campaign contributions (or retain them for later use, after retirement) for expenditures related in only the most general way to their positions, then campaign contributions begin to look more like personal gifts than an integral part of political speech, and opportunities are created for personal corruption.

Emphasizing again that I believe Mr. Kerrey to be a good and honorable man, my long-term concern lies with the Commission's failure to apply the "irrespective" test provided in our regulations, thereby weakening the personal use doctrine and unwittingly inviting latent or long-range quid pro quos by unscrupulous contributors and candidates alike. Because my application of the test leads me to conclude that Mr. Kerrey's desire to respond exists irrespective of his status as a former candidate and officeholder, I conclude that his proposal would result in a prohibited personal use of his campaign funds.

When Congress passed Section 439a of FECA, it included a provision allowing members elected before January 8, 1980 to keep any excess campaign funds on their departure from office.³ Eventually recognizing the potential for corruption in allowing members to accumulate large amounts of funds that could be transferred to private use upon retirement, in 1989 Congress chose to end this practice with the passing of section 504 of the Ethics Reform Act.⁴ Thus, any previously grandfathered members who returned to Congress beginning in January 1993 gave up the right to convert funds to personal use. It has been well-settled since then that, under the Act and Commission regulations, a candidate and the candidate's committee have wide discretion in making expenditures to influence the candidate's election, but may not convert excess funds to the personal use of the candidate or any other person. 2 U.S.C. §§431(9) and 439a; 11 CFR 113.1(g) and 113.2(d). 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). The regulations list certain uses of campaign funds that will be considered per se personal use. 11 CFR 113.1(g)(1)(i). Other uses of campaign funds will be determined on a case-by-case basis using the general definition of personal use. 11 CFR 113.1(g)(1)(ii). Mr. Kerrey's request does not fall into one of the per se personal-use categories, and must therefore be determined in light of the "irrespective" test of 11 CFR 113.1(g).

As formulated, Mr. Kerrey's request is in conflict with the personal use doctrine of Section 439a and the regulations promulgated thereunder. The request seeks to use campaign funds to correct the record on events that occurred *before* Mr. Kerrey was ever a candidate, and where the need to correct the record was triggered *after* Mr. Kerrey

³ See Explanation and Justification, *Expenditures: Reports by Political Committees: Personal Use of Campaign Funds*, 60 *Fed. Reg.* 7862, 7863 (February 9, 1995).

⁴ Pub. L. No. 101-194, 103 Stat. 1716 (1989).

retired from office.⁵ The subject of the press inquiry was the nature of Mr. Kerrey's involvement in a February 1969 Navy SEAL operation in the village of Thang Phong that resulted in the deaths of Vietnamese civilians. The story was developed but not made public in 1998, and public knowledge of the controversy did not occur until April 2001. Understandably, Mr. Kerrey would like to correct the record and remove all doubt as to his good standing. The question is whether this need to correct the record would exist irrespective of his former candidacy or "irrespective of his campaign or duties as a Federal officeholder." Where the events giving rise to press inquiries occur before an individual becomes a candidate, and where those inquiries are unleashed only after the former candidate and officeholder leaves office and has no plans to run for office, I believe that the expenses exist irrespective of the intervening status as an office holder.

To date the Commission has only allowed campaign funds to be used to respond to press queries involving allegations of improper or wrongful conduct occurring *before* candidacy or incumbency where the allegations were *made about a candidate in a campaign context*. In AO 1996-24, the Commission held that "if allegations of improper or wrongful conduct are made about a *candidate in a campaign context*, the candidate is entitled to use campaign funds for the purpose of publicly responding to those allegations, even if the underlying activities that are the subject of the allegations were not campaign or officeholder related." (Emphasis added). Similarly, in AO 1997-12, the Commission permitted a candidate, and incumbent Congressman, to use campaign funds to address press stories relating to his friendship with a convicted racketeer.

These advisory opinions, however, did not extend to an individual seeking to respond to press questions posed *after* he left office about events that occurred *before* he was ever a candidate. For example, in AO 1996-24, the requestor indicated that the Oregon Secretary of State was investigating certain press allegations. The allegations were that respondent's client, an incumbent candidate in the then-current cycle, distributed a voter pamphlet in the previous cycle that contained inaccuracies about his war record. The Commission held that "since the false statements were made in voter pamphlets Mr. Cooley produced in the course of his campaign for Congress in 1994, he may use campaign funds for any expenses incurred in the course of the investigation." Permission to use campaign funds was granted within the context of two reasons: First, the activity arose out of active misstatements during a past campaign; second, and more importantly, the person making the alleged misstatements was a candidate in a current election cycle. Neither factor exists here.⁶

⁵ The Advisory Opinion Request states that former Senator Kerrey is not currently a candidate for Federal office. See June 4, 2001 Letter Requesting Advisory Opinion of Robert F. Bauer, at p. 2.

⁶ There is a tenuous argument that the first reason is present in this matter, in that some of the current press stories have reported the fact that Mr. Kerrey did not discuss the Thang Phong incident in prior campaigns. There is an important difference, however. There are no allegations of any active misstatements by former Senator Kerrey during any of his campaigns. Kerrey was awarded the Bronze Star, and the record contains no allegations of misstatements on the part of Senator Kerrey or any his campaign subordinates.

The requester suggests that the expenditure is not personal use because it “bears a relationship to candidate and officeholder status.”⁷ The majority agrees, arguing that the Thang Phong incident is relevant to former Senator Kerrey’s days as a candidate and officeholder because “much of the media attention was focused on his ... failing to disclose the Thang Phong incident” during Senate campaigns. But that is not the test adopted by the Commission in the regulations. Rather, we adopted an “irrespective test.” The regulations state that, “[t]he Commission *will determine* ... whether other uses of funds in a campaign account fulfill a commitment, obligation, or expense that *would exist irrespective* of the candidate’s campaign or duties as a Federal officeholder, and therefore are personal use.”⁸ 11 CFR 113.1(g) (emphasis added). The Commission specifically rejected a “primarily related” test, a more lenient test than the “irrespective” test yet one still stricter than the “related to” test that the requester asks us to apply here.⁹

The majority opinion makes a colorable argument for the less restrictive test by latching on to language from the Explanation and Justification, *viz.*, “[C]andidates 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.” See Explanation and Justification, *Expenditures; Reports by Political Committees; Personal Use of Campaign*

⁷ See July 10, 2001 Letter of Robert F. Bauer, p. 2.

⁸ During the open meeting for this request, one Commissioner construed the test to say that the Commission may not prohibit a lawful use of campaign funds unless the Commission can prove that the commitment, obligation or expense *would exist* irrespective of candidacy. The Commissioner’s reading stands the irrespective test on its head by requiring *the Commission to prove* a negative before finding a personal use; to prove that a candidate or officeholder’s motivation for incurring an expense has *nothing to do with any* concern for his (or her) candidacy or officeholder duties, past, present or future. I can think of few uses for funds of any kind by candidates or officeholders that are completely drained of considerations for their candidacy or duties as an officeholder, and can think of no situation where the Commission could *prove* that the use *would exist* irrespective of candidacy or holding office. Even the *per se* personal uses of 11 CFR 113.1(g)(1)(i)(A)-(H) would not be considered “personal” under this reading of the irrespective test, for such *per se* personal uses as rent for a DC apartment, meals at the Caucus Room, and Orioles tickets have some tie to office or candidacy. This requirement to prove a negative would have the effect of limiting the personal use doctrine to the *per se* categories listed in 11 CFR 113.1(g)(1)(i)(A)-(H), and of rendering the provisions for a case-by-case determination of non-*per se* uses, 11 CFR 113.1(1)(ii), a dead letter.

⁹ Another Commissioner ventured that the first step is for the Commission to determine if any given expense is for personal use, presumably through intuition, and if it seems not to be, then to determine if it is for “any other lawful purpose.” See 2 U.S.C. §439a. But this misconstrues the statute, which provides that campaign funds “may be used for any other lawful purpose, ... except that no such amounts may be converted by any person to any personal use.” *Id.* As Section 439a makes clear, the Act’s “any other lawful purpose” language is a further limiting factor beyond the limits on personal use. “Personal use” is *defined* by the irrespective test, precisely to prevent commissioners from determining by intuition whether any particular use would be personal. “Personal use *means* any use of funds in a campaign account ... 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) (emphasis added), and its existence or lack thereof cannot be divined by avoiding or vitiating its very definition. See also Explanation and Justification, *Expenditures; Reports by Political Committees; Personal Use of Campaign Funds*, 60 Fed. Reg. 7862, 7863-64 (February 9, 1995) (stating that “[d]etermining whether an expense would exist irrespective of candidacy can be done more objectively than determining [personal use by means of other tests].”).

Funds, 60 *Fed Reg.* 7862, 7867. (Emphasis added). However, this sentence merely confirms that the Commission has no intention of using the personal use doctrine to micromanage campaign expenditures. Taken in the full context of the E&J, it is clear that this language was not intended to create a weak test allowing campaigns funds to be spent wherever they are in some way “reasonably” related to status as an officeholder or candidate. Rather, it is clear that the Commission rejected such a test:

The irrespective definition is preferable to the alternative [the “primarily related” definition] because determining whether an expense would exist irrespective of candidacy can be done more objectively than determining whether an expense is primarily related to the candidacy. 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 office holder were not in office, then the use of the funds for that obligation generally would be personal use.

In contrast, determining whether an expense is primarily related to a campaign or the duties of an office holder, or instead is primarily related to some other activity, would force the Commission to draw conclusions as to which relationship is more direct or significant. The Commission has been reluctant to make these kind of subjective determinations in the past.

Explanation and Justification, *Expenditures; Reports by Political Committees; Personal Use of Campaign Funds*, 60 *Fed Reg.* 7862, at 7863-64 (February 9, 1995).

Former Senator Kerrey would like to use his excess campaign funds to repair damage to his reputation resulting from the running of news stories. The stories have already run. The “commitment” Mr. Kerrey has is his personal desire to respond to these stories and restore his reputation. The “obligation” was incurred when he was no longer a federal candidate or officeholder. The “expense” Mr. Kerrey would incur is the money he gives Westhill Partners. The question for the Commission is not whether others would have taken the actions they did (running the stories) irrespective of Mr. Kerrey’s status. It is whether—given that the stories are public and do not arise from actions taken during Mr. Kerrey’s political campaigns or office-holding—the desire to respond would exist even if Mr. Kerrey had never run a campaign and had never held Federal office. The answer to this question is yes. As all of Mr. Kerrey’s campaigns have been run and his tenure as a Senator has come to a close, any interest Mr. Kerrey has in addressing such issues has to do with preserving his personal image in private life, not in campaigning for or holding office. Mr. Kerrey’s desire to protect his image is now personal, not candidate or officeholder related, and would exist irrespective of his status as a former candidate and officeholder. Nor is the controversy based on actions taken as a candidate or officeholder.

Of course it is true that the media focus may be more intense because of Mr. Kerrey's former status. But this does not change the fundamental nature of the obligation, or the fact that it would exist irrespective of his status. For while the level of press attention focused on Mr. Kerrey may be unusual, his situation is not unique for prominent individuals. Mr. Kerrey is now a college president. It is not unheard of for college presidents, by virtue of their high profiles, to become embroiled in controversies that yield a level of press scrutiny most Americans prefer to avoid, and which may damage their reputations, fairly or not.¹⁰ And while I can sympathize with Mr. Kerrey, these college presidents cannot use campaign funds to restore their dignity, because they have no such funds.¹¹ I see no fundamental difference in Mr. Kerrey's situation.

Further, the intensity of interest in the story on Mr. Kerrey, it seems to me, is less based on his past status as a Senator than on his potential future status as a presidential candidate.¹² But that status makes him no different than Article III judicial nominees, who are sometimes the recipients of widespread negative press attention. Such nominees usually have never held office, so assuredly their expenses cannot be said to have arisen from being a candidate of holding office. Yet their purpose for wanting assistance in dealing with the press—the purpose of restoring their reputation and dignity, particularly in the case of a battered nominee that goes unconfirmed—is no different than the current interest of former Senator Kerrey. Indeed, this suggests an interesting query. If Mr. Kerry were, some years hence, to be nominated for Secretary of Defense or some other post, causing the press to release another round of stories on his war record, would we hold that the impetus of the stories' existence is inseparable from Mr. Kerrey's status as a former Senator, or that a need to respond could not exist irrespective of his status as a former candidate? Or would the need arise from his nomination? This is just the type of judgment call that the "irrespective" test was designed to avoid.

The test the majority uses would allow Congressmen or Senators to solicit contributions, while in office, to pay a vast array of post-retirement expenses. As prominent individuals, many if not most former officeholders incur unusual expenses due

¹⁰ While skimming a news service, I noticed that one former college president was arrested after having been accused of having sex with a woman he was counseling. "Ex-College Chief Arrested on Sex Charge", *Sun-Sentinel Ft. Lauderdale*, Wednesday, December 6, 1995, p. 17A. Another college president was accused of embezzling \$3 million, and his friends established a trust fund for purposes of his defense. "Supporters Start Defense Fund for Ex-Mississippi College Chief" *The Baton Rouge Advocate*, Tuesday, May 31, 1994, p. 11A. Yet another had his personal life thrown into the public arena and was possibly libeled after the mysterious death of his daughter-in-law led to allegations of an affair between the two of them. See Roger Rapoport, "Mysterious 'Suicide' Deserves Another Look," *Rocky Mountain News*, Jan. 22, 2001, p. A35.

¹¹ This should make abundantly clear—despite the assertions of one Commissioner during the open meeting—that Mr. Kerrey will be personally enriched (in this case to tune of tens of thousands of dollars) by using his campaign funds for this expense.

¹² Of course, if I am correct, then by declaring his candidacy, Mr. Kerrey would presumably be able to use these funds to answer questions about Thang Phong, among other things. Candidates have wide discretion over how to spend their campaign funds. See *infra* note 3, at 7867. But the simple fact is that Mr. Kerrey is not a candidate for office, and declaring himself a candidate would trigger other costs and regulatory burdens.

to their former status. For example, in Advisory Opinion 2001-03, the Commission unanimously and properly determined that a car purchased with campaign funds for Representative Gary Meeks, for campaign purposes, did not violate the personal use doctrine.¹³ Congressman Meeks will one day retire. Under the majority's theory, however, we might then allow Mr. Meeks to spend his leftover campaign funds for a particularly nice car on the theory that the public and press may pay extra attention to Meeks because of his former status as an officeholder. After all, the expenses would be incurred because Meeks was once a Congressman and because he would want to maintain a good public image. Of course, we could find otherwise at that point, but our finding would be based less on any fixed criteria (the "irrespective" test provided for in the regulations) than on the sum of our individual intuitions. To go back to situations closer to Mr. Kerrey's, any allegations of personal scandal involving a former officeholder are likely to draw more press attention than similar allegations about most other citizens, by virtue of the former officeholder's status. Suppose that actions taken *next week* by Mr. Kerrey generated press stories that would not appear for a less-prominent citizen engaged in similar activity? Using the majority's analysis, campaign-funded responses to such stories would not be personal use. But despite the results that flow from the majority's rationale, I do not believe that representatives should be able to retain campaign contributions through retirement as a sort of "safety" fund to pay legal and other fees arising out of behavior that occurs after leaving office—or, as in this case, that occurred before ever becoming a candidate.

Thus, I would hold that like those college presidents, judicial nominees, or other retired officeholders, former Senator Kerrey must now rely on gifts or personal funds for restoring his reputation. As a private individual retired from political life, there is little danger that gifts to Mr. Kerry in retirement will create "the actuality" or the "appearance of corruption," to use the famous formulation of *Buckley v. Valeo*, 424 U.S. 1, 26 (1976). However, to allow sitting Senators to amass contributions to serve as a "contingency" fund for personal expenses incurred in retirement and vaguely related to their former status raises exactly that possibility, while doing little to promote or defend political speech.

¹³ The key question in the opinion was whether Rep. Meeks could use the car for moderate personal use if the campaign were reimbursed for such use.

I would therefore conclude that Mr. Kerrey's obligations exist irrespective of his former candidate or incumbent status in this case, even though a portion of the inquiry may be focused upon Mr. Kerrey's failure to disclose the Thang Phong incident during his tenure as Senator. Thus, with sympathy for Mr. Kerrey's predicament, I would conclude that expenditure of campaign funds on the promotional activities outlined in the request would be considered personal use in violation of 2 U.S.C. 439a.



Bradley A. Smith,
Commissioner

July 18, 2001