FEDERAL ELECTION COMMISSION
Washington, DC 20463

**MEMORANDUM**

**TO:** **The Commission**

**FROM:** **Commission Secretary's Office**

**DATE:** **January 13, 2016**

**SUBJECT:** **Comments on Draft AO 2015-13 (Reid)**

**Attached are comments received from Mr. Marc Elias, Mr. Jonathan Berkon, and Mr. David Lazarus, requestor's counsel. This matter is on the January 14, 2016 Open Meeting Agenda.**

**Attachment**

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The Honorable Matthew S. Petersen, Chairman
Federal Election Commission
999 E. Street N.W.
Washington, D.C. 20463

**Re: Advisory Opinion 2015-13 (Reid)**

Dear Chairman Petersen:

At its December 17, 2015 hearing, the Commission discussed whether adopting Draft B – or a similar draft that disallowed Leader Reid from using campaign funds to pay for an assistant to manage officially-related correspondence, fact-check and draft materials related to his tenure in office, and schedule and organize appearances to discuss his official duties upon leaving office – could be reconciled with Advisory Opinion 2001-09 (Kerrey for U.S. Senate). We are filing these additional comments to explain why the answer is "no."

In the Kerrey AO, the Commission set forth several important principles that have guided the regulated community in the intervening years. First, the Commission affirmed that campaign funds may be used "for any . . . lawful purpose" as long the funds are not converted "to the personal use of the candidate or any other person."[1] Second, the Commission announced that if it can be "reasonably show[n] that the expenses at issue resulted from campaign or officeholder activities, the Commission will not consider the use to be personal use."[2] And third, the Commission held that this standard applies to current officeholders and former officeholders alike.

Employing these rules, the Commission permitted former Senator Kerrey to spend campaign funds to pay a public relations firm to provide "advice in dealing with [] media attention that had resulted from" a story published three months after he left office about a 1969 Navy SEAL operation in Vietnam.[3] The events at the heart of the news article occurred nineteen years prior to former Senator Kerrey's first election to federal office and the story was published after former Senator Kerrey had left office and was no longer a candidate.[4] Recognizing that the "media would not have focused on Senator Kerrey's activities [in Vietnam]" if he had not been a prominent officeholder and candidate – or, put another way, that his status as a candidate and

[1] FEC Adv. Op. 2001-09 (Kerrey for U.S. Senate) (internal quotation marks and citation omitted).
[2] *Id.* (quoting Explanation and Justification, *Expenditures; Reports by Political Committees; Personal Use of Campaign Funds*, 60 Fed. Reg. 7862, 7867 (Feb. 9, 1995)).
[3] FEC Adv. Op. 2001-09 (Kerrey for U.S. Senate).
[4] *Id.*

officeholder was a "but for" cause of the expenses at issue – the Commission allowed him to use campaign funds to pay the expenses.

If the Commission were to apply these principles to Leader Reid's request, it would sanction the use of campaign funds to pay for an assistant to manage officially-related correspondence, fact-check and draft materials related to his tenure in office, and schedule and organize appearances to discuss his officeholder duties. Each of these activities, by definition, arises out of Leader Reid's term in office. Moreover, the request proffers that the assistant "will exclusively engage in tasks arising from [Leader Reid's] tenure in office" and that "all of the conduct that gives rise to the post-retirement expenses occurred during his tenure in office."[5] Because it can be "reasonably show[n] that the expenses at issue resulted from campaign or officeholder activities," the Commission should "not consider the use to be personal use."[6] The fact that Leader Reid will be a former officeholder at the time the expenses are incurred is not a bar to the use of campaign funds, just as the fact that former Senator Kerrey was a former officeholder at the time the expenses were incurred was not a bar to his use of campaign funds.

Draft B proposes to reject the use of campaign funds to pay these expenses on the grounds that "the tasks themselves arise out of the individual's choice to engage in the writing and speaking activities, not out of any 'duties' imposed by virtue of law of officeholder status."[7] But that does not distinguish Leader Reid's request from that of former Senator Kerrey's. Former Senator Kerrey had no obligation to hire a public relations firm to respond to the critical press coverage. He could have handled the response personally or not offered a response at all. It was former Senator Kerrey's choice to engage the public relations firm that gave rise to his request just as much as it is Leader Reid's choice to "engage in the writing and speaking activities" that gives rise to his request. In fact, Leader Reid's case is even stronger than the activities at issue in the Kerrey AO, as all of the events giving rise to Leader Reid's proposed use occurred in the course of Leader Reid's performance of official duties in Congress.

Instead, Draft B proposes an entirely new legal standard: that campaign funds may be used for wind-down activities or activities that the former officeholder is obligated to undertake. Adopting an entirely new standard, after years of enforcing a different one, would create uncertainty in the regulated community and diminish the deference owed to the Commission's advisory opinions in this area. Federal law gives precedential force to advisory opinions beyond the parties involved in the specific transaction in the advisory opinion request; rather, any other person undertaking materially indistinguishable activity may rely on an advisory opinion.[8] As recently as October 2014, the Commission referred to its previous advisory opinions as "relevant

[5] FEC Adv. Op. Request 2015-13 (Reid).
[6] FEC Adv. Op. 2001-09 (Kerrey for U.S. Senate) (quoting Explanation and Justification, *Expenditures; Reports by Political Committees; Personal Use of Campaign Funds*, 60 Fed. Reg. 7862, 7867 (Feb. 9, 1995)).
[7] Draft B, FEC Adv. Op. 2015-13 (Reid)
[8] 52 U.S.C. § 30108(c)(1)(B).

precedent"[9] and courts have frequently accorded deference to the Commission's advisory opinions.[10] However, an interpretation "which conflicts with [an] agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held view."[11] By promulgating a new standard in this contested area of the law, the Commission would make it more difficult for officeholders to rely on the Commission's past guidance in the event they are accused of violating the law.[12]

Finally, granting Leader Reid's request would not have the disruptive effects on the campaign finance system that some commissioners feared at the hearing. The request covers only expenses that arise from a former officeholder's tenure in office and does not allow for campaign funds to be used to personally enrich the former officeholder. Unlike Leader Reid, most officeholders do not have residual, non-pecuniary activities relating to their tenure in office. This allowance would only be used by a small handful of former officeholders, like Leader Reid, whose tenure in office was significant enough to generate activity after it ended.

We appreciate your consideration and request that the Commission approve Draft A.

Sincerely,

Marc E. Elias
Jonathan S. Berkon
David J. Lazarus
Counsel to Leader Reid

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[9] FEC Adv. Op. 2014-11 (Health Care Service Corporation Employees' Political Action Committee); *see also* FEC Adv. Op. 1991-34 (West Virginia Republicans); FEC Adv. Op. 1999-11 (Byrum) (Concurring Opinion of Chairman Thomas and Commissioner McDonald) ("the suggestion that our advisory opinions are not binding legal precedent is ill-founded"); FEC Adv. Op. 1988-21 (Wieder) ("most relevant precedent").

[10] *FEC v. Colo. Republican Fed. Campaign Comm.*, 59 F.3d 1015, 1021 (10th Cir. 1995); *FEC v. Ted Haley Cong. Comm.*, 852 F.2d 1111, 1115 (9th Cir. 1988) (giving deference to FEC regulations and advisory opinions); *Orloski v. FEC*, 795 F.2d 156, 164 (D.C. Cir. 1986) (advisory opinions "entitled to due deference").

[11] *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987) (quoting *Watt v. Alaska*, 451 U.S. 259, 273 (1981)).

[12] *See, e.g.*, Evan Perez, *Case Against John Edwards Turns on 2000 FEC Opinion*, Wall St. J., May 31, 2011, http://blogs.wsj.com/washwire/2011/05/31/case-against-john-edwards-turns-on-2000-fec-opinion/ (depicting parties' disagreement in criminal trial about effect of advisory opinion); Statement of Former FEC Chairman Scott E. Thomas, *available at* http://www.wral.com/asset/news/local/politics/2011/06/04/9683810/185725-thomas.pdf (expert witness statement that advisory opinions do not support government's case).

Comments on 2015-13
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1 Attachment

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**These were filed yesterday, but have not been posted to website. Can you please post ASAP?**

**Many thanks,**

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