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February 15, 2012

Commission Secretary
Federal Election Commission
999 E Street, NW
Washington, DC 20463

**Re: Request For Consideration of Legal Question by Commission Pursuant to
Notice 2011-11**

Dear Commission Secretary,

The following request for consideration of a legal question by the Commission is submitted by the undersigned counsel on behalf of Michael Williams For U.S. Senate Committee (the "Committee"),¹ pursuant to the Commission's Policy Statement designated as Notice 2011-11.

On February 9, 2012, Ms. Nataliya Ioffe of the Reports Analysis Division contacted Thomas J. Josefiak, and notified him that RAD was not fully satisfied with a written response submitted on behalf of the Committee in connection with a RFAI. For purposes of Notice 2011-11, we believe this date, February 9, constitutes the triggering notification to the Committee of a "determination by the Reports Analysis Division ... that a person or entity remains obligated to take corrective action to resolve an issue that has arisen during the report review ... process." Notice 2011-11, *Policy Statement Regarding a Program for Requesting Consideration of Legal Questions by the Commission*, 76 Fed. Reg. 45,798 (Aug. 1, 2011). This request is therefore submitted within the required 15-day time frame.

Legal Question Presented

This request relates to the proper disposition of funds raised and spent in connection with an anticipated special election that did not ultimately occur.

¹ Michael Williams For U.S. Senate Committee changed its name to Michael Williams For Congress in June 2011.

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Specifically, when a candidate raises funds for an anticipated special election that subsequently does not occur, must all funds raised in connection with that election be refunded or redesignated in writing, or is the candidate permitted to spend some or all of those funds in connection with the anticipated special election?

Factual Background

Michael Williams filed FEC Form 2 (Statement of Candidacy) on December 16, 2008, indicating his intention to run for U.S. Senate in Texas in 2010. Michael Williams For U.S. Senate Committee filed Form 1 at the same date. Mr. Williams filed his Statement of Candidacy and authorized a principal campaign committee specifically as a candidate for the anticipated 2010 U.S. Senate special election, and not as a candidate for the regularly-scheduled 2012 election. At the time, it was widely rumored that Senator Kay Bailey Hutchison would resign from the Senate to run for Governor. This seat was otherwise not up for election until 2012. (Texas' other U.S. Senate seat is not subject to election until 2014.) Thus, Mr. Williams declared his intention to run for a seat that many believed would be vacated and filled in 2010 by special election.

The Committee raised funds in connection with this anticipated 2010 special election, pursuant to guidance issued by the Commission. See Advisory Opinion 2009-15 (Bill White For Texas) (authorizing funds to be raised for an anticipated special election). The Committee solicited and received contributions for the 2010 special primary election, 2010 special run-off election, and 2010 special general election.

We note that the "alternative" designation referenced in Question #2 of Advisory Opinion 2009-15 was unnecessary for the Committee because Mr. Williams actually declared himself a candidate for election in 2010, as opposed to Mr. White, whose FEC Form 2 indicated that he was a 2012 candidate. Mr. White's campaign committee subsequently received termination approval from the Commission on November 12, 2010, which very strongly suggests that Mr. White was never actually a 2012 candidate.

From early December 2009 through March 31, 2010, Mr. Williams and the Committee undertook efforts to prepare for a 2010 special election. This included raising and spending funds designated for the 2010 special primary election. On March 31, 2010, Senator Hutchison announced that she would not resign her Senate seat.

Correspondence and Communications With Reports Analysis Division

The Reports Analysis Division sent Requests For Additional Information to the Committee on May 6, 2011,² and June 17, 2011. *See attached.* Both requests indicated:

Your committee has reported receipt of contributions designated for the 2010 Primary and Runoff, elections that did not occur. Within sixty (60) days of the announcement on April 1, 2010 that this election would not be held, contributions designated for this election had to be refunded to the contributors or redesignated to another election. (11 CFR § 110.1(b)(3); Advisory Opinions 2009-15 and 1992-15)

The Committee responded in writing by letter dated July 22, 2011. *See attached.* Roughly seven months later, on February 9, 2012, Mr. Josefiak was contacted by Ms. Ioffe, as noted on the first page of this letter. Ms. Ioffe, who was at all times helpful and pleasant, informed us that RAD had conferred with the Office of General Counsel (pursuant to Directive 69), and OGC's position is that the language in Question #4 of Advisory Opinion 2009-15 indicates that *all* contributions designated for a special election that does not occur must be refunded or redesignated in writing. In other words, according to staff, while funds may be raised for an anticipated special election, no funds may actually be spent in connection with such an election until it becomes certain that the election will actually occur. A committee that spends funds "prematurely" does so at its own risk. Ms. Ioffe acknowledged that neither RAD nor OGC could point to any specific negative authority on this point, but both sections still conclude that the funds at issue must be refunded or redesignated. (We have not received any written materials documenting OGC's position in response to RAD's inquiry. If that position includes any nuances or distinctions that we have omitted, we were not aware of them as of the date of this letter.)

It is our understanding that RAD is prepared to refer this matter to OGC for enforcement consideration. We informed Ms. Ioffe on February 13, 2012, that we would be submitting this request to the Commissioners in the coming days, and that it was our hope that RAD would stay any such referral pending the outcome of this request. On February 14, Ms. Ioffe indicated via e-mail that RAD would in fact stay their referral in light of this request.

Thus, based on our correspondence and communications with RAD, we believe that our communications with Ms. Ioffe on February 9 and February 10 constitute notification to the Committee of legal guidance prepared by OGC at the request of RAD recommending corrective action. After conferring with OGC, RAD's view is that the Committee is obligated to refund or redesignate the contributions in question. Accordingly, the legal question at issue is ripe for Commission consideration pursuant to Notice 2011-11.

² The May 6 RFAI was subsequently removed from the public record.

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Analysis of the Question Presented

As the Commissioners are presumably aware, it is common practice for candidates (or potential candidates) to spend funds in anticipation of a special election. While the legal question may be novel to the Commission, the actual underlying practice is not. This practice is masked to a large extent because incumbent officeholders have the ability to raise and spend funds with an anticipated special election in mind, while simply attributing that activity on their FEC reports to their next upcoming, regularly scheduled election. If and when the special is called, they simply file a few amendments and proceed.

However, when a non-incumbent engages in the same activity, he or she must choose one of two options:

- (1) declare as a candidate for an election that has not yet been called, and risk Commission inquiries should that election not occur; or
- (2) declare as a candidate for the next regularly scheduled election for that seat, raise funds as set forth in AO 2009-15, and in the event the special election never occurs, simply report your efforts as having been in connection with the next regularly scheduled election.

While the Commission may not have specifically addressed this question in the past, prior matters suggest that anticipatory special election spending has at least been contemplated. For example, the facts set forth in Advisory Opinion 2006-22 (Wallace) included pre-special election spending with no Commission suggestion that this might be impermissible.

There are, in fact, situations addressed in Commission materials in which a candidate is permitted to raise and spend funds in connection with an election that never occurs. For example, some states do not hold elections if only one candidate qualifies for the ballot. In this scenario, a candidate is still entitled to the per election limit, and may raise and spend funds in connection with this phantom election up until the date that the election *would have* taken place. See 11 C.F.R. § 110.1(j)(2) – (4); Advisory Opinions 1986-21, 1986-19, 1978-65, 1978-41, 1975-09.

Thus, there is precedent for the practice at issue here, although it apparently has never been specifically addressed. On a more practical level, the Commission recognized the urgency of preparing for the special election in Advisory Opinion 2009-15. There, the Commission specifically noted that:

the likelihood of the occurrence of a special election is *sufficiently real* in this situation. Based on statements from Senator Hutchison and her agents, Mayor White is presented with a *strong possibility* that Senate Hutchison will resign before the gubernatorial

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primary or gubernatorial general election as well as a certainty that she will resign by the end of 2010 if she is elected Governor.

Advisory Opinion 2009-15 (White) at 5 (emphasis added).

Mr. Williams was not faced with a scenario in which a special election was mere speculation and the accumulation of funds was simply a matter of prudence. Rather, there was a "sufficiently real" likelihood and a "strong possibility" that the special election would be conducted in a matter of months, meaning candidates did not have the luxury of sitting around and waiting until the special election became a certainty. It was in this context that the Committee spent funds that had been properly designated to the special primary election. The Commission should also bear in mind that even though the anticipated special election was not ultimately called, between mid-2009 and April 1, 2010, a special election campaign absolutely occurred as far as several candidates were concerned.

In light of the language quoted above from Advisory Opinion 2009-15, we believe that it is entirely reasonable to conclude that the Commission did not intend to prevent individuals who were only candidates for the anticipated 2010 special election from actually spending funds raised for that special election.

Finally, common sense would seem to dictate that if funds may be raised permissibly, they may also be spent permissibly. We are aware of no other set of circumstances in which either the Act or Commission regulations permit raising funds while simultaneously prohibiting the spending of any funds at all. The situation at hand is fundamentally different from simultaneously raising primary and general election funds and quarantining the general election funds until such time as it becomes known that the candidate will participate in that general election. (This rule is necessary to effectively enforce the per election contribution limits.) In the primary/general situation, the candidate always has the ability to spend primary election funds in connection with the primary election (even if he or she is unopposed and state law provides that the primary election need not be held). If the primary/general principle is applied here in the form of OGC's apparent position with regard to anticipated special elections, the candidate is left in legal limbo and unable to spend any funds at all – not even special primary election funds raised in connection with a special primary election.

The principle legal citation in the Requests For Additional Information is 11 CFR § 110.1(b)(3). That provision primarily applies to "[a] contribution designated in writing for a particular election, *but made after that election...*" (emphasis added). The provision details how to dispose of contributions received *after* an election that exceed the committee's net debts outstanding, and also notes that funds raised for a general election in which a candidate is not

participating must be refunded or redesignated. The regulation does not address anticipated special elections, and is therefore inapplicable under its own terms.

As noted in our July 22, 2011, written response to RAD, "the Campaign Committee made expenditures in connection with the anticipated 2010 [special] primary election using only the funds raised for, or properly applied to, the 2010 primary. No funds raised for the run-off or the General Special Election were spent."

Following Senator Hutchison's announcement on March 31, 2010, that she would not resign her U.S. Senate seat, Mr. Williams filed a revised Statement of Candidacy indicating that he was a candidate for U.S. Senate in 2012. Any funds raised after March 31, 2010, were designated to the 2012 elections.

Accordingly, funds raised by the Committee from approximately December 8, 2009, through March 31, 2010, were designated by donors to one of the potential 2010 special elections (primary, run-off, or general). A total of \$43,566 remaining in the 2010 special election account. Of this total, \$32,000 had been initially designated for the 2010 run-off or general election. \$23,300 of that amount was redesignated in writing to the 2012 election, and the remaining \$8,800 was refunded to donors. Thus, all funds designated to the 2010 run-off or general election were disposed of via written redesignation or refund.

Following these refunds and redesignations, a total of \$11,566 remained in the 2010 special primary election account. \$4,004 was owed to vendors. Once the vendors were paid, \$7,562 remained. This amount was used to repay part of the candidate's personal loan of \$100,000 to the 2010 special primary election. The balance in the 2010 special primary election account was thereby extinguished.

The Committee was forthcoming about its fundraising and spending intentions when it made clear on FEC Forms 1 and 2 that it was operating in connection with the 2010 special election. At least one other candidate who informed the Commission of his intention to raise funds and run in the 2010 special election appears to have escaped this same scrutiny simply by reporting that all funds raised and spent during the same time period were in connection with the 2012 regular election. This candidate terminated in November 2010, and we think it fair to conclude that he was never actually a candidate for the 2012 election. This is an inequitable result, and if allowed stand, would provide a very clear disincentive to committees that attempt to accurately disclose their finances.

We urge the Commission to clearly state that committees may legitimately incur expenses in connection with a special election that does not materialize, and that such expenses

do not need to be recouped and refunded or redesignated, or misleadingly attributed to a future, regularly-scheduled election where the candidate was not in fact a candidate for such election.

Conclusion

As a final matter, it is our understanding that the Commission's Policy Statement provides that any Commission consideration of the legal question presented will take place either on written tally or in Executive Session. *See* 76 Fed. Reg. at 45,799 ("After the recommendation is circulated for a Commission vote, in the event of an objection, the matter shall be automatically placed on the next meeting agenda consistent with the Sunshine Act, 5 U.S.C. 552b(g), and applicable Commission regulations, 11 CFR part 2."). If we have misinterpreted this language, and Commission consideration following an objection would take place in Open Session, please consider this request for consideration to be automatically withdrawn.

Thank you for your assistance, and please feel free to contact us if you have any questions or require any additional information.

Sincerely,



Thomas J. Josefiak
Michael Bayes

Counsel to Michael Williams For U.S.
Senate Committee

cc: Caroline C. Hunter, Chair
Ellen L. Weintraub, Vice Chair
Nataliya Ioffe, Authorized Branch Chief, Reports Analysis Division

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FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

RQ-2

May 6, 2011

RICHARD HOWELL COLLINS, TREASURER
MICHAEL WILLIAMS FOR US SENATE
COMMITTEE
PO BOX 717
AUSTIN, TX 78767

Response Due Date
06/10/2011

IDENTIFICATION NUMBER: C00457960

REFERENCE: OCTOBER QUARTERLY REPORT (07/01/2010 - 09/30/2010)

Dear Treasurer:

This letter is prompted by the Commission's preliminary review of the report(s) referenced above. This notice requests information essential to full public disclosure of your federal election campaign finances. **An adequate response must be received at the Senate Public Records Office by the response date noted above. Failure to adequately respond by the response date noted above could result in an audit or enforcement action.** Additional information is needed for the following 1 item(s):

- Your committee has reported receipt of contributions designated for the 2010 Special Primary Election for Texas Senate, an election that did not occur. Within sixty (60) days of the announcement on April 1, 2010 that this election would not be held, contributions designated for this election had to be refunded to the contributors or redesignated to another election (11 CFR § 110.1(b)(3); Advisory Opinions 2009-15 and 1992-15).

To redesignate a contribution, the committee must have obtained signed written documentation from the contributor authorizing the redesignation of the contribution(s) for another election, provided that the new designation did not exceed the limitations on contributions made with respect to that election. A contribution could only be redesignated to a previous election to the extent that the contribution did not exceed net debts outstanding for that election. (11 CFR § 110.1(b)(3)(i) and (5)(ii)(C))

If any of the apparent 2010 Special Primary Election contributions in question were incompletely or incorrectly disclosed, you must amend your original report(s) with the clarifying information.

Please inform the Commission of your corrective action immediately in writing and provide photocopies of any refund checks. Refunds are reported on Line

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MICHAEL WILLIAMS FOR US SENATE COMMITTEE

Page 2 of 2

20 of the Detailed Summary Page and on a supporting Schedule B of the report covering the period in which they are made. (11 CFR § 104.8(d)(4))

Please amend your report(s) to disclose what action will be taken in regard to these 2010 Special Primary Election contributions received by your committee. Although the Commission may take further legal action, prompt action by you to refund these contributions will be taken into consideration.

Please note, you will not receive an additional notice from the Commission on this matter. Adequate responses must be received by the Commission on or before the due date noted above to be taken into consideration in determining whether audit action will be initiated. Failure to comply with the provisions of the Act may also result in an enforcement action against the committee. Any response submitted by your committee will be placed on the public record and will be considered by the Commission prior to taking enforcement action. Requests for extensions of time in which to respond will not be considered.

A written response or an amendment to your original report(s) correcting the above problems should be filed with the Senate Public Records Office. Please contact the Senate Public Records Office at (202) 224-0322 for instructions on how and where to file an amendment. If you should have any questions regarding this matter or wish to verify the adequacy of your response, please contact me on our toll-free number (800) 424-9530 (at the prompt press 5 to reach the Reports Analysis Division) or my local number (202) 694-1166.

Sincerely,



Bradley Matheson
Senior Campaign Finance Analyst
Reports Analysis Division

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FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

RQ-2

June 17, 2011

RICHARD HOWELL COLLINS, TREASURER
MICHAEL WILLIAMS FOR US SENATE
COMMITTEE
PO BOX 717
AUSTIN, TX 78767

Response Due Date
07/22/2011

IDENTIFICATION NUMBER: C00457960

REFERENCE: AMENDED JULY QUARTERLY REPORT (04/01/2010 - 06/30/2010),
RECEIVED 09/30/2010

Dear Treasurer:

This letter is prompted by the Commission's preliminary review of the report(s) referenced above. This notice requests information essential to full public disclosure of your federal election campaign finances. **An adequate response must be received at the Senate Public Records Office by the response date noted above. Failure to adequately respond by the response date noted above could result in an audit or enforcement action.** Additional information is needed for the following 1 item(s):

- Your committee has reported receipt of contributions designated for the 2010 Primary and Runoff, elections that did not occur. Within sixty (60) days of the announcement on April 1, 2010 that this election would not be held, contributions designated for this election had to be refunded to the contributors or redesignated to another election. (11 CFR § 110.1(b)(3); Advisory Opinions 2009-15 and 1992-15)

To redesignate a contribution, the committee must have obtained signed written documentation from the contributor authorizing the redesignation of the contribution(s) for another election, provided that the new designation did not exceed the limitations on contributions made with respect to that election. A contribution could only be redesignated to a previous election to the extent that the contribution did not exceed net debts outstanding for that election. (11 CFR § 110.1(b)(3)(i) and (5)(ii)(C))

If any of the apparent 2010 Primary or Runoff contributions in question were incompletely or incorrectly disclosed, you must amend your original report(s) with the clarifying information.

Please inform the Commission of your corrective action immediately in writing

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MICHAEL WILLIAMS FOR US SENATE COMMITTEE

Page 2 of 2

and provide photocopies of any refund checks. Refunds are reported on Line 20 of the Detailed Summary Page and on a supporting Schedule B of the report covering the period in which they are made. (11 CFR § 104.8(d)(4))

Please amend your report(s) to disclose what action will be taken in regard to these 2010 Primary and Runoff contributions received by your committee. Although the Commission may take further legal action, prompt action by you to refund these contributions will be taken into consideration.

Please note, you will not receive an additional notice from the Commission on this matter. Adequate responses must be received by the Commission on or before the due date noted above to be taken into consideration in determining whether audit action will be initiated. Failure to comply with the provisions of the Act may also result in an enforcement action against the committee. Any response submitted by your committee will be placed on the public record and will be considered by the Commission prior to taking enforcement action. **Requests for extensions of time in which to respond will not be considered.**

A written response or an amendment to your original report(s) correcting the above problems should be filed with the Senate Public Records Office. Please contact the Senate Public Records Office at (202) 224-0322 for instructions on how and where to file an amendment. If you should have any questions regarding this matter or wish to verify the adequacy of your response, please contact me on our toll-free number (800) 424-9530 (at the prompt press 5 to reach the Reports Analysis Division) or my local number (202) 694-1166.

Sincerely,



Bradley Matheson
Senior Campaign Finance Analyst
Reports Analysis Division

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July 22, 2011

Bradley Matheson
Senior Campaign Finance Analyst
Reports Analysis Division
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Re: *Michael Williams For US Senate Committee (Currently registered as Michael Williams For Congress Committee); 2010 July Quarterly Report*

Dear Mr. Matheson,

This letter is submitted by the undersigned counsel on behalf of Michael Williams For US Senate Committee/ Michael Williams For Congress Committee (C00457960) in response to your Request For Additional Information (RFAI) dated June 17, 2011, regarding the Committee's 2010 July Quarterly Report.

The RFAI states, "Your committee reported receipt of contributions designated for the 2010 Primary and Runoff, elections that did not occur." You assert that "[w]ithin 60 days of the announcement on April 1, 2010 that this election would not be held, contributions designated for this election had to be refunded to the contributors or redesignated to another election," citing 11 CFR 110.1(b)(3) and Advisory Opinions 2009-15 and 1992-15.

We respectfully submit, based on our understanding of the appropriate regulatory provisions, the Committee has complied with the Commission's redesignation and refund requirements in conjunction with the Committee's 2010 Senate activity.

Michael Williams filed as a US Senate candidate on December 16, 2008 for the much anticipated and expected Special Election for the seat of Texas Senator Kay Bailey Hutchison, who publicly indicated that she would likely resign her Senate seat to run for Texas Governor in 2010. However, unlike other candidates seeking her seat, including the requestor in Advisory Opinion 2009-15, Mr. Williams filed only as a candidate for the expected 2010 Senate race.

Others, including the requestor in Advisory Opinion 2009-15, filed instead as a candidate for the 2012 Senate election.

Mr. Williams' principle campaign committee solicited and raised funds solely for the 2010 election and did not solicit or raise any contributions for the 2012 election. During this period, Mr. Williams was never a candidate for election in 2012, and accordingly raised no funds for that election. As a result, his 2010 campaign committee began raising contributions that were either specifically designated for the 2010 primary or non-specifically designated for the "next upcoming election," consistent with Commission Regulations and Commission Advisory Opinions, and properly applied by the campaign to the anticipated 2010 primary.

The 2010 campaign also solicited and received designated contributions for a potential 2010 run-off election, since there were multiple candidates and under Texas law a candidate is required to win a majority of the vote (50% plus 1 and not simply a plurality) in order to win the primary nomination. Consistent with Commission Regulations and Advisory Opinions, these run-off funds remained segregated from the 2010 primary funds and were not spent.

The Committee also solicited and received contributions designated for the 2010 General Special Election, and segregated those funds in the same manner as the run-off contributions. During the time before the April 1, 2010 announcement, the Campaign Committee made expenditures in connection with the anticipated 2010 primary election using only the funds raised for, or properly applied to, the 2010 primary. No funds raised for the run-off or the General Special Election were spent.

When Senator Hutchison announced on April 1, 2010, that she would not resign, meaning there would be no 2010 Special Election, Mr. Williams filed a revised Statement of Candidacy indicating that he was now a candidate for the 2012 Senate election. All contributions received from this point on were designated for the Senate primary of 2012 and were reported as such.

As of April 1, 2010 \$43,566 remained in the 2010 Committee account, of which \$32,000 had been designated for the 2010 run-off or general special election. Of that latter total, \$23,200 was appropriately redesignated in writing by contributors for the 2012 election. An additional \$8,800 was refunded to donors. These transactions were reported on the Committee's July 2010 Quarterly Report. After these redesignations/refunds were made, a balance of \$11,566 remained in the 2010 primary account. However, on April 1, the Committee also had outstanding obligations in the amount of \$4,004 that had been incurred during the 2010 primary campaign. This 2010 primary debt was reported on Schedule D of the July 2010 Quarterly Report.

In addition, the campaign carried an outstanding loan from the candidate in the amount of \$100,000. This loan was incurred in connection with the 2010 primary election. Any funds

remaining from the 2010 primary election may therefore be used to satisfy these outstanding obligations incurred in connection with that same election.

As of June 15, 2011, Michael Williams amended his Statement of Candidacy to reflect that he was no longer a candidate for the US Senate in 2012, but rather, is now a 2010 candidate for the US House of Representatives for the newly created 33rd Congressional District in Texas. Mr. Williams' principal campaign committee's Statement of Organization was amended accordingly, reflecting the committee's name change to "Michael Williams For Congress."

To summarize, as a candidate for US Senate for the 2010 Special Election in Texas, the 2010 Michael Williams For Senate Committee raised and spent funds consistent with Commission Regulations and Advisory Opinions. As a candidate for the 2012 Senate race, the Michael Williams for Senate Committee appropriately secured redesignations or refunded contributions remaining in the 2010 account as of the April 1, 2010 announcement. These redesignations and refunds were duly reported by the Committee on its July 2010 Quarterly Report.

The RFAI indicates that the Committee's response to this RFAI should be filed with the Senate Public Records Office. Because the Committee is now the principal campaign for a US House candidate, this response is being filed directly with the Federal Election Commission.

If you have any additional questions or need further clarification, please contact us.

Sincerely,



Thomas J. Josefiak

Michael Bayes

Counsel to Michael Williams For US
Senate/ Michael Williams For Congress

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Federal Election Commission
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