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FEDERAL ELECTION COMMISSION

Washington, DC 20463

MEMORANDUM

JUL - 5 2001

TO: The Commission

THROUGH: James A. Pehrkon  
Staff Director

FROM: Lois G. Lerner  
Acting General Counsel

N. Bradley Litchfield *NBL (RCS)*  
Associate General Counsel

Jonathan Levin *JL*  
Senior Attorney

SUBJECT: Draft AO 2001-09 - Alternative Drafts

**AGENDA ITEM**  
For Meeting of: 7-12-01

Attached are two proposed drafts of the subject advisory opinion. We request that both drafts be placed on the agenda for July 12, 2001.

These drafts address whether former Senator Bob Kerrey of Nebraska may use funds of his principal campaign committee, Kerrey for U.S. Senate ("the Committee"), to pay media consulting expenses incurred as a result of media inquiries in the spring of 2001 pertaining to Senator Kerrey's activities during an incident in the Vietnam War. Draft A concludes that the use of Committee funds would constitute a personal use by Mr. Kerrey and would be prohibited by 2 U.S.C. §439a. The draft notes that Mr. Kerrey is no longer a Federal candidate or officeholder, and that the expenses are being incurred to protect his reputation as a public figure and do not arise out of the conduct of any Federal campaign or officeholder duties. Draft B concludes that the use of Committee funds would not constitute personal use and would therefore be permissible. It states that the media focus was related to his Federal campaigns and officeholder duties, noting that the media inquiry began while he was an officeholder and viewed as a potential presidential candidate, and that the media focused in part on his failure to discuss the incident while in those capacities.

This office recommends the adoption of Draft A. It focuses more precisely on the idea that Senator Kerrey's involvement in the incident at Thanh Phong did not relate to his conduct of a Federal campaign or office and that any need to reply to the media inquiries occurred after he ended his Federal campaigns and after he left Federal office. Unlike instances where the Commission has allowed the use by incumbents of campaign funds to respond to allegations that standing alone did not relate to campaign or officeholder activity, there is no current "political necessity" for Mr. Kerrey to respond.

Attachments

Drafts A and B

2  
3 Robert F. Bauer  
4 Brian G. Svoboda  
5 Perkins Coie LLP  
6 607 14<sup>th</sup> Street, N.W.  
7 Washington, D.C. 20005-2011  
8

9 Dear Mr. Bauer:

10 This responds to your letter dated June 4, 2001, on behalf of Kerrey for U.S.  
11 Senate ("the Committee"), the principal campaign committee of former United States  
12 Senator J. Robert Kerrey, concerning the application of the Federal Election Campaign  
13 Act of 1971, as amended ("the Act"), and Commission regulations to the use of campaign  
14 funds for the payment of media consulting expenses incurred as a result of media  
15 inquiries pertaining to Senator Kerrey's activity during the Vietnam War.

16 ***Factual Background***

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

22 Senator Kerrey was frequently mentioned as a potential candidate for President in  
23 2000. However, in December 1998, he announced that he would not seek that office and  
24 would run for a third term for the Senate instead. The Committee raised and spent funds  
25 for a possible 2000 re-election campaign. However, on January 20, 2000, Senator Kerrey  
26 announced that he would not be a candidate for re-election. He left the Senate on January  
27 3, 2001, and now serves as President of the New School University in New York City.  
28 He is not a candidate for any public office. The Committee remains registered with the  
29 Commission, disclosing \$1,176,586 cash-on-hand on its 2000 Year-End Report.<sup>1</sup>

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<sup>1</sup> You state that the Committee has timely refunded contributions received for the 2000 general election and funds received after Senator Kerrey's withdrawal from the Senate race.

1           You state that each of Senator Kerrey's campaigns for Federal office has involved  
2 public discussion of his service in a United States Navy Sea, Air and Land (SEAL) team  
3 during the Vietnam War. In 1998, while Senator Kerrey was still presumed to be a  
4 candidate for Senate under Commission regulations, Greg Vistica, a *Newsweek* reporter,  
5 began an inquiry related to his Vietnam service.

6           The subject of the inquiry was the nature of Mr. Kerrey's involvement in a  
7 February 1969 SEAL operation in the village of Thanh Phong that resulted in the deaths  
8 of Vietnamese civilians. The reporter interviewed Mr. Kerrey about the operation in late  
9 1998, and, after Mr. Kerrey announced in December 1998 that he would not seek the  
10 Presidency in 2000, *Newsweek* declined to publish Mr. Vistica's story. You note that  
11 subsequent comments by the magazine's assistant managing editor, Evan Thomas  
12 (reported in April 2001), made clear that publication had been contingent on Senator  
13 Kerrey's political plans; specifically, that the story would not be published if he was not a  
14 presidential candidate in 2000. After Mr. Vistica left *Newsweek*, he continued to work on  
15 the story throughout the remainder of Mr. Kerrey's Senate term. He interviewed Mr.  
16 Kerrey several more times for the story, which ultimately became a joint project of *The*  
17 *New York Times Magazine* and CBS News.

18           In April 2001, with publication of the story imminent, former Senator Kerrey  
19 publicly discussed the Thanh Phong incident for the first time in a speech at the Virginia  
20 Military Institute. This triggered a series of news stories disclosing the incident. *The*  
21 *New York Times* then published Vistica's story on its web site on April 25, and in *The*  
22 *New York Times Magazine* on April 29. CBS broadcast an hour-long television version  
23 of the story on May 1, on the program *60 Minutes II*.

24           The *New York Times Magazine* story prompted substantial media attention. You  
25 assert that much of this attention focused not on Mr. Kerrey's conduct as a Navy  
26 lieutenant in 1969, but rather on the manner in which he discussed his war record as a  
27 Federal candidate and officeholder. You cite, for example, a number of statements by  
28 reporters or writers with CNN, Fox News, and *The New York Times* commenting on his  
29 failure to mention the incident, e.g., that he had received a Bronze Star in connection with  
30 the 1969 operation, but had never disclosed the medal on his Senate office web site; that

1 he never renounced the Bronze Star; that he never mentioned the episode over the years,  
2 and he did not want anyone to know about it while he was a Senator. You also state that  
3 much of the questioning of Mr. Kerrey at a news conference he held on April 26 (after the  
4 web publication of the *New York Times Magazine* article), focused on the fact that he had  
5 not discussed the incident when he was a Federal candidate and public official.<sup>2</sup>

6 For advice in dealing with the media attention that had resulted from the late April  
7 story, Mr. Kerrey retained the public relations firm of Westhill Partners. The firm helped  
8 Mr. Kerrey manage the media response to the *New York Times Magazine* story, the *60*  
9 *Minutes II* broadcast, and the accompanying press coverage. The firm responded to  
10 media inquiries on his behalf and advised him on his own communications with media  
11 outlets regarding the story. On May 17, Westhill Partners sent Mr. Kerrey an invoice for  
12 \$59,554.48, reflecting the firm's charge for the aforementioned services. The invoice  
13 remains unpaid.

14 You maintain that the media attention to Mr. Kerrey's activities at Thanh Phong,  
15 and hence his expenses in responding to such attention, would never have arisen if it were  
16 not for the fact that he was a Federal candidate and Federal officeholder. You also assert  
17 that much of the media attention was focused on his conduct as a Federal candidate and  
18 officeholder in failing to disclose the Thanh Phong incident and thus the expenses would  
19 not have arisen but for his candidate and officeholder status. Relying extensively on  
20 Advisory Opinions 1997-12 and 1998-1, in which the Commission permitted the use of  
21 campaign funds by incumbent Members of Congress for media response activities by  
22 their attorneys, you assert that former Senator Kerrey may thus use Committee funds to  
23 pay the invoiced amount because such disbursements would not be prohibited as a  
24 personal use of campaign funds. (You note that no relative or family member of Mr.  
25 Kerrey is associated in any way with Westhill Partners.) You ask the Commission to  
26 approve such a payment.

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<sup>2</sup> You provide two examples of questions referring to Senator Kerrey's failure to return the Bronze Star or publicly disclose the incident. Although one question also makes specific reference to his 1992 presidential race, the Commission notes that the questions refer to his failure to publicly disclose the incident or return the Bronze State over the past 30 years, a period that includes well over fifteen years when he was not a Federal candidate or officeholder.

1 *Analysis*

2 Under the Act and Commission regulations, a candidate and the candidate's  
3 committee have wide discretion in making expenditures to influence the candidate's  
4 election, but may not convert excess campaign funds to the personal use of the candidate  
5 or any other person. 2 U.S.C. §§431(9) and 439a; 11 CFR 113.1(g) and 113.2(d); *see*  
6 *also* Advisory Opinions 2001-08, 2001-03, and 2000-40.

7 Commission regulations provide guidance regarding what is considered personal  
8 use of campaign funds. Personal use is defined as "any use of funds in a campaign  
9 account of a present or former candidate to fulfill a commitment, obligation or expense of  
10 any person that would exist irrespective of the candidate's campaign or duties as a Federal  
11 officeholder." 11 CFR 113.1(g). Moreover, 2 U.S.C. §439a and 11 CFR 113.2(a)  
12 specifically provide that excess campaign funds may be used to pay any ordinary and  
13 necessary expenses incurred in connection with one's duties as a holder of Federal office.

14 Commission regulations list a number of purposes that would constitute personal  
15 use *per se*. 11 CFR 113.1(g)(1)(i). These purposes do not include public relations  
16 expenses to respond to media inquiries. Where a specific use is not listed as personal use,  
17 the Commission makes a determination, on a case-by-case basis, whether an expense  
18 would fall within the definition of personal use at 11 CFR 113.1(g). 11 CFR  
19 113.1(g)(1)(ii).<sup>3</sup> This list specifically includes legal fees, and meal, travel, and vehicle  
20 expenses, but also provides for the application of the "irrespective" test to expenses that  
21 are not listed.

22 On a number of occasions, the Commission has reviewed proposals by Members  
23 of Congress to use campaign funds to respond to press inquiries into matters that  
24 pertained to the conduct of a Federal election campaign or the conduct of Federal office,  
25 as well as press inquiries into matters that occurred outside the conduct of a Federal  
26 campaign or Federal officeholder duties or before the member became a Federal  
27 candidate or officeholder. *See* Advisory Opinions 1998-1 and 1997-12; *see also*  
28 *Advisory Opinion 1996-24.*

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<sup>3</sup> Commission regulations further provide that any use of funds that would be personal use under 11 CFR 113.1(g)(1) will not be considered an ordinary and necessary expense in connection with the duties of a

1 In addressing the use of campaign funds to pay for legal and media response  
2 services of a law firm as to allegations of wrongful conduct that occurred while the  
3 Member was a Federal candidate and officeholder, but that, standing alone, were not  
4 related to campaign or officeholder activity, the Commission stated that the need for  
5 some of the firm's services resulted directly from "the political necessity" for the  
6 Member to respond. Advisory Opinion 1997-12. The Commission further stated that,  
7 although these expenses could be incurred by any person who is both prominent in the  
8 community and the subject of similar allegations and in that sense could exist irrespective  
9 of candidacy or officeholder status, it "recognizes that the activities of candidates and  
10 officeholders may receive heightened scrutiny and attention because of their status as  
11 candidates and officeholders." The Commission concluded that the obvious need for a  
12 candidate to respond to allegations reported by the news media that result from this  
13 elevated scrutiny would not exist irrespective of the candidate or campaign. *Id.*  
14 Consequently, the Commission set out a framework to review the authorized committee's  
15 payment for attorney services that recognized the high level of media attention focused  
16 on the officeholder, as well as the unavoidable overlap between the legal services needed  
17 to respond to the press and in legal proceedings, even when the media reported  
18 allegations are not directly related to campaign or officeholder activity. Advisory  
19 Opinion 1998-1.

20 The framework had three parts:

21 (1) any legal expense that relates directly and exclusively to dealing with  
22 the press, such as preparing a press release, appearing at a press  
23 conference, or meeting or talking with reporters, would qualify for 100%  
24 payment with campaign funds because [the person is] a candidate or  
25 Federal officeholder;

26  
27 (2) any legal expense that relates directly to allegations arising from  
28 campaign or officeholder activity would qualify for 100% payment with  
29 campaign funds;

30  
31 (3) 50% of any legal expense not covered by [1] that does not directly  
32 relate to allegations arising from campaign or officeholder activity can be  
33 paid for with campaign funds because [the person is] a candidate or

1 Federal officeholder and [is] providing substantive responses to the press  
2 (beyond *pro forma* "no comment" statements).  
3

4 Subsequently, the Commission applied part 1 (relating to dealing with the press)  
5 to the activities of an incumbent Member that occurred before the Member was a Federal  
6 candidate or served in the House of Representatives. His attorney's expenses that were  
7 directly and exclusively related to responding to the press as to such activities were 100%  
8 payable with his campaign funds. Advisory Opinion 1998-1. Your request relies  
9 principally on part 1.

10 The Commission acknowledges that the original scrutiny of former Senator  
11 Kerrey's activities at Thanh Phong occurred while he was a Senator, a candidate for re-  
12 election, and a possible presidential aspirant. The Commission also agrees that some of  
13 the media scrutiny was focused on Mr. Kerrey's purported failure to disclose the Thanh  
14 Phong incident while he was a Federal candidate for, or holding, Federal office.  
15 Nevertheless, the fact that Mr. Kerrey is not currently a Federal officeholder, a candidate  
16 for Federal office, nor testing the waters for any Federal office is significant in assessing  
17 the permissibility of the use of campaign funds.

18 As indicated in Advisory Opinion 1997-12, the need for responses to the press  
19 with respect to matters that do not entail the conduct of a campaign or Federal office  
20 arises from a "political necessity." Moreover, the Commission stated that expenses  
21 exclusively relating to dealing with press are payable by the campaign because the  
22 member *is*, meaning currently, a candidate and Federal officeholder. Although interest in  
23 Mr. Kerrey's activities at Thanh Phong is heightened because of his former status as a  
24 candidate or Federal officeholder, the premise of the Commission's approach has been  
25 that the candidate or officeholder involved has a current political necessity. Although  
26 Mr. Kerrey, as a public figure, may rightfully perceive a need to respond to the media  
27 attention to protect his reputation, there is no current status as a candidate or officeholder  
28 to protect and his conduct of a Federal campaign or the duties of Federal office are not  
29 currently or prospectively affected.

30 Moreover, even though the underlying press inquiry into the Thanh Phong  
31 incident began while Mr. Kerrey was in Federal office and still a Senatorial candidate and



1 possible presidential candidate, the activity in question was not disclosed to the public  
2 until just recently. Hence, the circumstances eliciting his decision to make responses to  
3 press inquiries did not arise until after he was no longer a candidate, prospective  
4 candidate for president, or Federal officeholder.

5       You describe the media attention as also pertaining to Mr. Kerrey's purported  
6 failure to disclose the Thanh Phong incident while he was a candidate or holding Federal  
7 office. Superficially, part 2 of the framework in Advisory Opinion 1997-12 might appear  
8 to apply. However, expenses incurred in responding to the press are covered by part 1 of  
9 the framework, which as indicated, allowed incumbent Members to use campaign funds  
10 to defray such expenses to maintain their viability as candidates and officeholders,  
11 whether or not the activity questioned by the media was conducted in connection with  
12 candidacy or officeholders duties. Advisory Opinions 1998-1 and 1997-12. In contrast,  
13 the references to "legal expenses" in the second and third parts of the framework were to  
14 expenses that were more specifically legal in nature, such as representation and research  
15 in connection with governmental or agency investigations, legislative proceedings, court  
16 appearances, and other legal proceedings. The expenses in your proposal are not within  
17 these categories.<sup>4</sup>

18       More significantly, your contention that media questions about Mr. Kerrey's  
19 failure to disclose the Thanh Phong incident during his campaign or time in office is  
20 somehow related to his campaign or officeholder duties is itself highly questionable. Mr.  
21 Kerrey's activities at Thanh Phong themselves have no relation to his campaign or  
22 officeholder duties, and costs he now incurs (after leaving office and after any Federal  
23 candidacy) in discussing the failure to disclose such an activity cannot affect his conduct  
24 of a Federal campaign or office. In addition, there appear to be no potential legal  
25 consequences to such a failure, such as an investigation by the Senate Ethics Committee

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<sup>4</sup> The Commission does not mean to suggest that, for an authorized committee to pay the expenses of involvement in any legal proceeding, the individual must currently be a candidate or holding office. For example, expenses with respect to an investigation by the Federal Election Commission or the Senate Ethics Committee would be, by their very nature, related to the individual's candidacy or officeholder duties. See Advisory Opinion 1998-1. There is no present information known to the Commission suggesting that Senator Kerrey's failure to mention the Thanh Phong incident while he was a Federal candidate or officeholder will become the subject of a legal proceeding.

1 or some State campaign regulatory agency focusing on such a failure to disclose. (See  
2 footnote 4).<sup>5</sup>

3 Based on the foregoing analysis, the Committee's payment of the amounts owed  
4 by Mr. Kerrey to Westhill Partners for media consulting expenses would be a personal  
5 use of campaign funds. Thus, the Committee may not pay such amounts. As indicated  
6 above, the Commission understands that former Senator Kerrey's reputation may have  
7 been damaged and that he may perceive a need, as a public figure, to address the media  
8 inquiry. Nevertheless, these expenses do not arise out of the conduct of his Federal  
9 officeholder duties or of a Federal campaign, nor do these expenses entail winding down  
10 the operations of the Committee or his U.S. Senate office. The expenses are instead for  
11 the purpose of protecting Mr. Kerrey's reputation as a public figure after the end of his  
12 tenure as a U.S. Senator.

13 This response constitutes an advisory opinion concerning the application of the  
14 Act, or regulations prescribed by the Commission, to the specific transaction or activity  
15 set forth in your request. *See* 2 U.S.C. §437f.

16 Sincerely,

17  
18 Danny L. McDonald  
19 Chairman  
20

21 Enclosures (AOs 2001-08, 2001-03, 2000-40, 1998-1, 1997-12, 1996-44, 1996-24 and  
22 1996-14)  
23  
24  
25

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<sup>5</sup> You cite a regulatory section and an advisory opinion for the proposition that there are certain expenses that may be related to candidacy or officeholder status and yet which are incurred after the termination of such status. You state that the expenses covered in the regulation and opinion are arguably more "personal" in character than the expenses at issue in your request. 11 CFR 113.2(a)(2) and Advisory Opinion 1996-14. However, as you note, the expenses covered in the regulation and opinion pertain to the exception to the definition of "personal use" for "the costs of winding down the office of a former Federal officeholder for a period of six months after he or she leaves office." These expenses, such as moving items from the Congressional office to the home where the Member will reside after leaving Congress, are thus specifically covered by a regulation. *See also* Advisory Opinion 1996-44. Moreover, they are a necessary activity in connection with leaving Federal office.

2  
3 Robert F. Bauer  
4 Brian G. Svoboda  
5 Perkins Coie LLP  
6 607 14<sup>th</sup> Street, N.W.  
7 Washington, D.C. 20005-2011  
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9 Dear Mr. Bauer:

10 This responds to your letter dated June 4, 2001, on behalf of Kerrey for U.S.  
11 Senate ("the Committee"), the principal campaign committee of former United States  
12 Senator J. Robert Kerrey, concerning the application of the Federal Election Campaign  
13 Act of 1971, as amended ("the Act"), and Commission regulations to the use of campaign  
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15 inquiries pertaining to Senator Kerrey's activity during the Vietnam War.

16 ***Factual Background***

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

22 Senator Kerrey was frequently mentioned as a potential candidate for President in  
23 2000. However, in December 1998, he announced that he would not seek that office and  
24 would run for a third term for the Senate instead. The Committee raised and spent funds  
25 for a possible 2000 re-election campaign. However, on January 20, 2000, Senator Kerrey  
26 announced that he would not be a candidate for re-election. He left the Senate on January  
27 3, 2001, and now serves as President of the New School University in New York City.  
28 He is not a candidate for any public office. The Committee remains registered with the  
29 Commission, disclosing \$1,176,586 cash-on-hand on its 2000 Year-End Report.<sup>1</sup>

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<sup>1</sup> You state that the Committee has timely refunded contributions received for the 2000 general election and funds received after Senator Kerrey's withdrawal from the Senate race.

1           You state that each of Senator Kerrey's campaigns for Federal office has involved  
2 public discussion of his service in a United States Navy Sea, Air and Land (SEAL) team  
3 during the Vietnam War. In 1998, while Senator Kerrey was still presumed to be a  
4 candidate for Senate under Commission regulations, Greg Vistica, a *Newsweek* reporter,  
5 began an inquiry related to his Vietnam service.

6           The subject of the inquiry was the nature of Mr. Kerrey's involvement in a  
7 February 1969 SEAL operation in the village of Thanh Phong that resulted in the deaths  
8 of Vietnamese civilians. The reporter interviewed Mr. Kerrey about the operation in late  
9 1998, and, after Mr. Kerrey announced in December 1998 that he would not seek the  
10 Presidency in 2000, *Newsweek* declined to publish Mr. Vistica's story. You note that  
11 subsequent comments by the magazine's assistant managing editor, Evan Thomas  
12 (reported in April 2001), made clear that publication had been contingent on Senator  
13 Kerrey's political plans; specifically, that the story would not be published if he was not a  
14 presidential candidate in 2000. After Mr. Vistica left *Newsweek*, he continued to work on  
15 the story throughout the remainder of Mr. Kerrey's Senate term. He interviewed Mr.  
16 Kerrey several more times for the story, which ultimately became a joint project of *The*  
17 *New York Times Magazine* and CBS News.

18           In April 2001, with publication of the story imminent, former Senator Kerrey  
19 publicly discussed the Thanh Phong incident for the first time in a speech at the Virginia  
20 Military Institute. This triggered a series of news stories disclosing the incident. *The*  
21 *New York Times* then published Vistica's story on its web site on April 25, and in *The*  
22 *New York Times Magazine* on April 29. CBS broadcast an hour-long television version  
23 of the story on May 1, on the program *60 Minutes II*.

24           The *New York Times Magazine* story prompted substantial media attention. You  
25 assert that much of this attention focused not on Mr. Kerrey's conduct as a Navy  
26 lieutenant in 1969, but rather on the manner in which he discussed his war record as a  
27 Federal candidate and officeholder. You cite, for example, a number of statements by  
28 reporters or writers with CNN, Fox News, and *The New York Times* commenting on his  
29 failure to mention the incident, e.g., that he had received a Bronze Star in connection with  
30 the 1969 operation, but had never disclosed the medal on his Senate office web site; that

1 he never renounced the Bronze Star; that he never mentioned the episode over the years,  
2 and he did not want anyone to know about it while he was a Senator. You also state that  
3 much of the questioning of Mr. Kerrey at a news conference he held on April 26 (after the  
4 web publication of the *New York Times Magazine* article), focused on the fact that he had  
5 not discussed the incident when he was a Federal candidate and public official.

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7 story, Mr. Kerrey retained the public relations firm of Westhill Partners. The firm helped  
8 Mr. Kerrey manage the media response to the *New York Times Magazine* story, the *60*  
9 *Minutes II* broadcast, and the accompanying press coverage. The firm responded to  
10 media inquiries on his behalf and advised him on his own communications with media  
11 outlets regarding the story. On May 17, Westhill Partners sent Mr. Kerrey an invoice for  
12 \$59,554.48, reflecting the firm's charge for the aforementioned services. The invoice  
13 remains unpaid.

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15 and hence his expenses in responding to such attention, would never have arisen if it were  
16 not for the fact that he was a Federal candidate and Federal officeholder. You also assert  
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18 officeholder in failing to disclose the Thanh Phong incident and thus the expenses would  
19 not have arisen but for his candidate and officeholder status. You assert therefore that  
20 Mr. Kerrey may thus use Committee funds to pay the invoiced amount because such  
21 disbursements would not be prohibited as a personal use of campaign funds. (You note  
22 that no relative or family member of Mr. Kerrey is associated in any way with Westhill  
23 Partners.) You ask the Commission to approve such a payment.

#### 24 ***Analysis***

25 Under the Act and Commission regulations, a candidate and the candidate's  
26 committee have wide discretion in making expenditures to influence the candidate's  
27 election, but may not convert excess campaign funds to the personal use of the candidate  
28 or any other person. 2 U.S.C. §§431(9) and 439a; 11 CFR 113.1(g) and 113.2(d); *see*  
29 *also* Advisory Opinions 2001-08, 2001-03, and 2000-40.

1 Commission regulations provide guidance regarding what is considered personal  
2 use of campaign funds. Personal use is defined as "any use of funds in a campaign  
3 account of a present or former candidate to fulfill a commitment, obligation or expense of  
4 any person that would exist irrespective of the candidate's campaign or duties as a Federal  
5 officeholder." 11 CFR 113.1(g). Commission regulations list a number of purposes that  
6 would constitute personal use *per se*. 11 CFR 113.1(g)(1)(i). These purposes do not  
7 include public relations expenses to respond to media inquiries. Where a specific use is  
8 not listed as personal use, the Commission makes a determination, on a case-by-case  
9 basis, whether an expense would fall within the definition of personal use at 11 CFR  
10 113.1(g). 11 CFR 113.1(g)(1)(ii). This list specifically includes legal fees, and meal,  
11 travel, and vehicle expenses, but also provides for the application of the "irrespective"  
12 test to expenses that are not listed.

13 The Commission explained the meaning of the "irrespective test" in its  
14 Explanation and Justification of the regulations on personal use, which it promulgated in  
15 early 1995. See Explanation and Justification, *Expenditures; Reports by Political*  
16 *Committees; Personal Use of Campaign Funds*, 60 *Fed. Reg.* 7862 (February 9, 1995).  
17 The Commission stated:

18 If campaign funds are used for a financial obligation that is caused by  
19 campaign activity or the activities of an officeholder, that use is not  
20 personal use. However, if the obligation would exist even in the absence  
21 of the candidacy or even if the officeholder were not in office, then the use  
22 of funds for that obligation generally would be personal use.  
23

24 60 *Fed. Reg.* at 7863-4. Moreover, in explaining the case-by-case approach, the  
25 Commission stated that it:

26 reaffirms its long-standing opinion that candidates have wide discretion  
27 over the use of campaign funds. If the candidate can reasonably show  
28 that the expenses at issue resulted from campaign or officeholder  
29 activities, the Commission will not consider the use to be personal use.  
30

31 60 *Fed. Reg.* at 7867.

32 Mr. Kerrey is a public figure well-known to the American public. If that factor  
33 were the principal reason for the media inquiry, the expenses for consulting expenses

1 would not satisfy the irrespective test, even if Mr. Kerrey had formerly held a Federal  
2 office or had been a Federal candidate in the past. This situation differs, however. The  
3 Commission concludes that the media would not have focused on Senator Kerrey's  
4 activities if he had not been a candidate and strong contender for the Democratic  
5 presidential nomination in 1992, a prominent United States Senator, and a potential  
6 candidate in 2000 for the Senate or the presidency. The Commission views two factors as  
7 demonstrating a direct resultant relationship to his campaigns and officeholder activities.

8 The most significant factor demonstrating the relationship to Senator Kerrey's  
9 candidacy or officeholder activities is the fact that the media inquiry into the Thanh  
10 Phong incident began when Senator Kerrey was still in the Senate, was a Senate  
11 candidate under Commission rules, and was generally viewed as a probable presidential  
12 candidate for the 2000 primary election. Although a *Newsweek* editor indicated that  
13 publication by the magazine was contingent on a presidential candidacy and the story was  
14 still pursued by Mr. Vistica after Mr. Kerrey announced that he would not seek the  
15 presidency in 2000, the editor's statement indicates that the original pursuit of the story  
16 was motivated by a desire to present important information about the fitness for Federal  
17 office of a Federal candidate and officeholder.

18 Also significant in assessing the nature of the media inquiries as directly related to  
19 Mr. Kerrey's Federal campaign and officeholder duties is the focus of some of the media  
20 inquiry itself. Mr. Kerrey's service in Vietnam has been the subject of public discussion  
21 in each of his Federal campaigns. Questions and comments by the media as to why he  
22 never discussed the Thanh Phong incident when he ran for president or while he was a  
23 Senator indicate that his behavior as a candidate and Federal officeholder, not merely his  
24 status as a public figure which resulted from his Federal candidate and officeholder  
25 status, were an important cause of the media activity in April and May of 2001.

26 Although Mr. Kerrey does not have a current campaign or officeholder status to  
27 protect, there is no question that Mr. Kerrey needs to respond to the media inquiries and  
28 cannot let questions remain unanswered. As indicated by the two factors above, the  
29 inquiry that forces him into this position, as well as his status as a public figure, would  
30 not have occurred if he had not been a prominent Senator and prominent Federal

1 candidate, particularly one whose campaigns had entailed a discussion of his notable  
2 Vietnam War record. Based on the foregoing analysis, Senator Kerrey may use  
3 Committee funds to pay the amount billed by Westhill Partners. The Commission  
4 acknowledges that this is an unusual situation and, as indicated above, may not be  
5 applicable to other former Federal candidates or officeholders.

6 The Committee should report its payment to Westhill Partners under the category  
7 of "Other Disbursements." 2 U.S.C. §434(b)(4)(G) and (6)(A); 11 CFR 104.3(b)(2)(vi)  
8 and (b)(4)(vi). As part of its description of the purpose of the disbursement, the  
9 Committee should make reference to this opinion.

10 This response constitutes an advisory opinion concerning the application of the  
11 Act, or regulations prescribed by the Commission, to the specific transaction or activity  
12 set forth in your request. See 2 U.S.C. §437f.

13 Sincerely,

14  
15 Danny L. McDonald  
16 Chairman  
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18 Enclosures (AOs 2001-08, 2001-03, and 2000-40)  
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