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AGENDA ITEM
For Meeting of: 08-21-08

August 20, 2008

SUBMITTED LATE

MEMORANDUM

TO: The Commission

FROM: Thomasenia P. Duncan *pch for*
General Counsel

Rosemary C. Smith *RS*
Associate General Counsel

Amy L. Rothstein *AR*
Assistant General Counsel

Jessica Selinkoff *JS*
Attorney

Subject: Draft AO 2008-07

We have been asked to circulate the attached alternative draft B for AO 2008-07.
Please place this draft on the agenda for August 21, 2008.

Attachment

1 ADVISORY OPINION 2008-07

2

3 Jan Witold Baran, Esq.

4 Caleb P. Burns, Esq.

5 Wiley Rein, LLP

DRAFT B

6 1776 K Street, NW

7 Washington, DC 20006

8

9 Dear Messrs. Baran and Burns:

10 We are responding to your advisory opinion request on behalf of Senator David
11 Vitter and David Vitter for U.S. Senate (the “Committee”) concerning the application of
12 the Federal Election Campaign Act of 1971, as amended (the “Act”), and Commission
13 regulations to the use of campaign funds for the payment of certain legal fees and
14 expenses incurred by Senator Vitter. The Commission concludes that the Committee
15 may use campaign funds for all of the expenses identified in the request.

16 ***Background***

17 The facts presented in this advisory opinion are based on your letter received on
18 July 3, 2008, your telephone conversations with Commission staff, your email of July 9,
19 2008, and publicly available information.¹

20 Senator David Vitter of Louisiana is a candidate for reelection in 2010. The
21 Committee is the principal campaign committee of Senator Vitter.

22 Deborah Palfrey was indicted by a Federal grand jury in March, 2007 on criminal
23 charges, including money laundering and racketeering. Media reports in the months
24 following Ms. Palfrey’s indictment indicated that Senator Vitter’s telephone number was
25 one of approximately 15,000 phone numbers that appeared in Ms. Palfrey’s telephone

¹ Although the factual allegations publicly available concerning Senator David Vitter are many and differing, such differences are not material. As such, the Commission relies on the representations of counsel in its recitation of the factual allegations.

1 records. Because of a perception that Ms. Palfrey had a “strategy of dragging public
2 figures into her legal proceedings,” Senator Vitter retained counsel in April, 2007 to
3 monitor the Palfrey criminal proceedings.

4 On July 5, 2007, the court lifted its prohibition against Ms. Palfrey’s release of
5 her telephone records. Media reports indicate that Ms. Palfrey posted her telephone
6 records on the Internet on July 9, 2007. That same day, Senator Vitter issued a public
7 statement concerning the presence of his telephone number in Ms. Palfrey’s records.

8 On July 19, 2007, Citizens for Responsibility and Ethics in Washington requested
9 that the Senate Select Committee on Ethics (“Senate Ethics Committee”) investigate
10 Senator Vitter for possible violation of the Senate Rules of Conduct by allegedly
11 soliciting for prostitution. Senator Vitter retained separate counsel to defend himself
12 against the Senate Ethics Committee complaint.²

13 On November 13, 2007, Ms. Palfrey subpoenaed Senator Vitter to testify at a pre-
14 trial hearing. You state that Senator Vitter and another potential witness were the only
15 witnesses subpoenaed for this hearing whose involvement in the case was limited to the
16 presence of their telephone numbers in Ms. Palfrey’s records. Specifically, of the 15,000
17 phone numbers which appeared in Ms. Palfrey’s records, Senator Vitter was one of only
18 six people called to testify. You note that the Department of Justice considered these
19 subpoenas an attempt “to intimidate potential witnesses by exposing them to publicity.”
20 Anne Gearan, *Bush Official Linked to Call-Girl Probe*, AP, Apr. 28, 2007. Finally, Ms.
21 Palfrey herself conceded that part of her defense strategy was to implicate public figures.

² According to the request, the Senator retained separate counsel to appear before the Senate Ethics Committee and those fees are not the subject of this advisory opinion request.

1 Counsel attempted to quash the subpoena. Ultimately, Senator Vitter never had to testify
2 because the court cancelled the hearing.

3 On March 3, 2008, Ms. Palfrey again subpoenaed Senator Vitter, this time as a
4 trial witness. Although efforts by counsel to quash this second subpoena were
5 unsuccessful, Ms. Palfrey did not call Senator Vitter as a witness. In the attempts to
6 quash both subpoenas, counsel's work included consulting with government attorneys
7 and appearing in court.

8 In addition to work related to monitoring the trial, quashing the subpoenas, and
9 consulting with counsel assisting Senator Vitter in the matter before the Senate Ethics
10 Committee, other counsel also consulted with Senator Vitter and his public relations
11 professional. Senator Vitter also incurred legal fees through counsel's review of press
12 releases.

13 Media coverage of the Senator's involvement with Ms. Palfrey was extensive.
14 The media coverage included scrutiny of Senator Vitter's political and policy positions as
15 a U.S. Senator. The press demanded that Senator Vitter address the matter publicly.³
16 The press also discussed the possible effects of Senator Vitter's involvement in the
17 Palfrey criminal proceeding on his candidacy in 2010.

18 To date, counsel has billed approximately \$85,322 in legal fees for work relating
19 to quashing the subpoenas; \$31,341.25 in legal fees for "consultations with the Senator
20 and his advisors," including legal expenses and a public relations professional;
21 \$75,212.75 in legal fees for monitoring the Palfrey criminal proceeding; and \$15,301.50
22 for miscellaneous expenses such as transportation and photocopying. Senator Vitter has

³ See, e.g., Editorial, *Incomplete Answers*, New Orleans Times Picayune, July 17, 2007, at 6.

1 personally already paid \$70,000 of these expenses. You anticipate that Senator Vitter
2 may incur additional legal fees and expenses related to consultations regarding media
3 relations if the Palfrey criminal proceeding again comes up in the press as Senator
4 Vitter's 2010 reelection campaign progresses.

5 ***Question Presented***

6 *May the Committee use campaign funds to pay counsel for the legal services*
7 *identified in the advisory opinion request related to the proceedings in the Palfrey matter*
8 *and reimburse Senator Vitter for amounts he has already paid for legal services rendered*
9 *in connection with the same matter?*

10

11 ***Legal Analysis and Conclusions***

12 Yes. For the reasons discussed below, the Committee may use campaign funds to
13 pay for, and reimburse Senator Vitter for his prior payment of all of the legal services
14 rendered in connection with the Palfrey matter and the related legal expenses identified in
15 the advisory opinion request.

16 The Act identifies six permissible uses of contributions accepted by a Federal
17 candidate, including otherwise authorized expenditures in connection with the
18 candidate's campaign for Federal office; ordinary and necessary expenses incurred in
19 connection with the duties of the individual as a holder of Federal office; and any other
20 lawful purpose that is not "personal use." *See* 2 U.S.C. 439a(a); *see also* 2 U.S.C.
21 439a(b); 11 C.F.R. 113.2. "[C]andidates have wide discretion over the use of campaign
22 funds." Final Rule and Explanation and Justification, Personal Use of Campaign Funds,
23 60 Fed.Reg. 7867 (Feb. 9, 1995) ("1995 Personal Use E&J").

24 Contributions accepted by a candidate may not be converted to personal use by
25 any person. 2 U.S.C. 439a(b)(1); 11 C.F.R. 113.2(e). "Personal use" is "any use of funds

1 in a campaign account of a present or former candidate to fulfill a commitment,
2 obligation or expense of any person that would exist irrespective of the candidate's
3 campaign or duties as a Federal officeholder." 11 C.F.R. 113.1(g); *see also* 2 U.S.C.
4 439a(b)(2). The Commission analyzes, on a case-by-case basis, whether the use of funds
5 in a campaign account for the payment of legal fees and expenses constitutes personal
6 use. *See* 11 C.F.R. 113.1(g)(1)(ii)(A).

7 The Commission has long recognized that if a candidate "can reasonably show
8 that the expenses at issue resulted from campaign or officeholder activities, the
9 Commission will not consider the use to be personal use." 1995 Personal Use E&J at
10 7,867. Legal fees and expenses, however, "will not be treated as though they are
11 campaign or officeholder related merely because the underlying proceedings have some
12 impact on the campaign or the officeholder's status." *Id.* at 7,868. The Commission has
13 identified legal expenses associated with a divorce or charges of driving under the
14 influence of alcohol as examples of expenses that are personal, rather than campaign or
15 officeholder related. *Id.*

16 Senator Vitter seeks to use campaign funds to pay legal expenses for "(1)
17 monitoring and participating in Ms. Palfrey's trial and quashing the subpoenas issued to
18 him; (2) assisting in the defense of a Senate Ethics Committee complaint; and (3) making
19 informed decisions about how to manage the case and address it publicly." Advisory
20 Opinion Request at 9.

21 1. *Monitoring and Participating in Ms. Palfrey's Trial / Quashing the*
22 *Subpoenas Issued to Senator Vitter*

23

1 Senator Vitter seeks to use campaign funds to pay legal fees and expenses
2 incurred when counsel “monitored” the Palfrey criminal proceeding. Counsel used
3 information obtained through monitoring the Palfrey criminal proceeding in efforts to
4 quash subpoenas in the Palfrey criminal trial, to assist ethics counsel before the Senate
5 Ethics Committee, and to consult with Senator Vitter’s public relations professional.
6 Thus, the monitoring contributed to legal services that the Commission has determined
7 may be paid with campaign funds.

8 The Commission has previously concluded that a political committee may use
9 campaign funds to pay the legal fees and expenses incurred in monitoring a third party’s
10 trial. *See* Advisory Opinion 1997-12 (Costello) (may use campaign funds to pay some
11 legal expenses that include monitoring a third party’s criminal trial, because of political
12 necessity to respond substantively to press on the matter). Similarly, the Committee here
13 may use campaign funds to pay the legal fees and expenses incurred when counsel
14 monitored the Palfrey criminal proceeding.

15 Senator Vitter also seeks to use campaign funds for work relating to quashing the
16 subpoenas in the Palfrey criminal proceeding. This work included consulting with
17 government attorneys and appearing in court.

18 The Commission has permitted the use of campaign funds to pay legal fees and
19 expenses incurred in representing a candidate or Federal officeholder before a non-
20 congressional investigation or legal proceeding, even when the allegations were not
21 directly related to the individual’s campaign activity or duties as a Federal officeholder.
22 *See* Advisory Opinions 1998-01 (Hilliard) (allowing some payment of legal expenses by
23 a campaign committee “for responding to an agency regarding its review or investigation

1 of activities [arising] before . . . candidacy”); 1997-12 (Costello) (allowing payment of
2 some legal expenses by a campaign committee “relating to allegations that . . . do not
3 directly relate to . . . campaign or officeholder activity”); *see also* Advisory Opinion
4 2001-09 (Kerrey) (concluding that questions surrounding Senator Kerrey’s war record,
5 while not relating to campaign activity or official duties, were covered because “pursuit
6 of the story was motivated by a desire to present important information about the fitness
7 for Federal office of a Federal candidate and officeholder”).

8 On the other hand, the Commission has previously concluded that a candidate’s
9 authorized committee may not use campaign funds to pay legal fees and expenses
10 incurred in representing a candidate or Federal officeholder before a non-congressional
11 investigation or legal proceeding regarding allegations that are not related to officeholder
12 duties or campaign activities, such that use of campaign funds may be a conversion to
13 personal use. *See* Advisory Opinions 2006-35 (Kolbe) (may not use campaign funds to
14 pay for legal representation in Department of Justice inquiry if allegations are unrelated
15 to campaign activities or duties as a Federal officeholder); 2005-11 (Cunningham) (may
16 not use campaign funds to pay for legal representation in Federal grand jury investigation
17 if allegations are unrelated to campaign activities or duties as a Federal officeholder);
18 2003-17 (Treffinger) (may not use campaign funds to pay for portion of legal
19 representation in Federal criminal trial pertaining to allegations that do not directly relate
20 to campaign activity); *see also* Advisory Opinion 1996-24 (Cooley).

21 Senator Vitter asserts that Ms. Palfrey would not have focused her criminal
22 defense strategies on him, and would not have subpoenaed him, but for his status as a

1 U.S. Senator.⁴ The facts presented by the requestor support this: Ms. Palfrey is quoted as
2 “vow[ing] not to spend a day in jail ‘because I’m [not] shy about bringing in the deputy
3 secretary of whatever.’” Howard Kurtz, *Madam Story Keeps Mum on Clientele*, Wash.
4 Post, May 5, 2007. While Ms. Palfrey had a list of 15,000 phone numbers, her counsel
5 only subpoenaed six persons, two of whom were high-profile names and the remainder of
6 whom had public relations appeal. Finally, the success of this strategy could not be more
7 apparent: the requestor’s submission lists dozens of articles in various publications
8 focusing on the Senator’s involvement, and internet searches reveal far more coverage of
9 the Senator than witnesses who actually testified at Ms. Palfrey’s trial.

10 For these reasons, the Commission concludes that the Senator would not have had
11 to make the expenditures for quashing the subpoenas and related monitoring were he not
12 an officeholder because the expenses would not exist irrespective of Senator Vitter’s
13 campaign or duties as a federal officeholder. Thus, these expenses may be paid for or
14 reimbursed by the Committee with campaign funds.

15 *2. Assisting in the Defense of a Senate Ethics Committee Complaint*

16 The Commission has previously concluded that efforts to respond to the House
17 Committee on Standards of Official Conduct (“House Ethics Committee”) are directly
18 related to an individual’s duties as a Federal officeholder, and that legal fees and
19 expenses incurred in responding to a House Ethics Committee inquiry or investigation are
20 ordinary and necessary expenses incurred in connection with the duties of a Federal

⁴ As the Commission explained in Advisory Opinion 1996-24 (Cooley): “the Commission recognize[d] that the activities of candidates and officeholders may receive heightened scrutiny and attention because of their status as candidates and officeholders. The obvious need for a candidate to respond to allegations that result from this elevated scrutiny would not exist irrespective of the candidate’s campaign or officeholder status.”

1 officeholder. *See* Advisory Opinions 2006-35 (Kolbe) and 1998-01 (Hilliard).
2 Accordingly, the Commission has concluded that political committees may use campaign
3 funds to pay legal fees and expenses incurred in responding to inquiries by the House
4 Ethics Committee, even if the allegations before the House Ethics Committee concerned
5 activities unrelated to candidacy and the duties of an officeholder and predated candidacy
6 and holding office. *See* Advisory Opinion 1998-01; *see also* Advisory Opinion 2006-35.

7 The Commission concludes that legal fees incurred in responding to the Senate
8 Ethics Committee should be treated no differently. Just as the Committee could use
9 campaign funds to pay counsel for representing Senator Vitter before the Senate Ethics
10 Committee, the Committee could also use campaign funds to pay other counsel for
11 assisting in that endeavor, particularly given the nexus between the Senate Ethics
12 Committee inquiry and the Palfrey matter. Accordingly, the Commission concludes that
13 the Committee may use campaign funds to pay counsel for legal services described above
14 in connection with the Senate Ethics Committee inquiry. *See* Advisory Opinions 2006-
15 35 and 1998-01.

16 3. *Making Informed Decisions about How to Manage the Case and Address it*
17 *Publicly*

18 Senator Vitter wishes to use campaign funds to pay legal fees and expenses
19 incurred when counsel consulted with him and his public relations professional regarding
20 press management and press statements.

21 The Commission has recognized that “the activities of candidates and
22 officeholders may receive heightened scrutiny and attention in the news media because of
23 their status as candidates and officeholders.” Advisory Opinion 1998-01 (Hilliard). The

1 Commission has found that a candidate or officeholder's need to respond to media
2 allegations that result from this elevated scrutiny would not exist irrespective of the
3 candidate's campaign or officeholder status. *Id.* (citing Advisory Opinions 1997-12
4 (Costello) and 1996-24 (Cooley)). Thus, the Commission has determined that a
5 candidate's authorized committee may use campaign funds to pay certain legal fees and
6 expenses⁵ incurred in responding to press inquiries and news stories regarding allegations
7 both related and unrelated to campaign activities and duties as an officeholder. *See*
8 Advisory Opinions 2006-35, 2005-11, 1998-01, 1997-12, and 1996-24.

9 As noted above, the press closely scrutinized Senator Vitter's involvement in the
10 Palfrey criminal proceeding. Although the allegations underlying the media's scrutiny
11 were unrelated to Senator Vitter's duties as an officeholder and status as a candidate, the
12 media scrutinized the Senator's political and policy positions as an officeholder and
13 status as a candidate in 2010 in light of the Palfrey allegations. Senator Vitter's need to
14 respond to the media's demands for public discussion of the Palfrey allegations would
15 not exist irrespective of his campaign or officeholder status. The Commission concludes
16 that the Committee may use campaign funds to pay Senator Vitter's legal fees and
17 expenses incurred in press relations related to the Palfrey criminal proceeding, including
18 the review of press releases and consultations with a public relations professional.

19 *4. Miscellaneous Expenses*

20 Senator Vitter also seeks to use campaign funds to pay certain miscellaneous
21 expenses, including transportation and copying. To the extent that Senator Vitter

⁵ The Commission has allowed a candidate's campaign committee to pay legal fees incurred in preparing press releases, appearing at press conferences, meeting or talking with reporters, reviewing and monitoring media allegations, responding to media requests for comment, and conferring with the candidate or officeholder regarding media allegations. *See* Advisory Opinion 1998-01 (Hilliard).

1 incurred the miscellaneous expenses in connection with legal fees identified in the
2 request, the miscellaneous expenses also may be paid with campaign funds.

3 *5. Reimbursing Senator Vitter*

4 Senator Vitter seeks reimbursement from the Committee for his personal payment
5 to counsel of \$70,000 of the legal fees and expenses encompassed in this advisory
6 opinion request. The Commission concludes that the Committee may reimburse Senator
7 Vitter for his payment of legal fees and expenses because the Commission has
8 determined the Committee could pay the expenses identified in the request with
9 campaign funds. *See, e.g.,* Advisory Opinion 2000-02 (Hubbard).

10 *6. Documentation and Reporting*

11 The Committee must maintain appropriate documentation of any disbursements
12 made to pay legal fees and expenses incurred in connection with counsel's assistance.
13 *See* 2 U.S.C. 432(c)(5); *see also* 11 C.F.R. 102.9(b) and 104.11. The Committee must
14 report all funds disbursed for legal fees and expenses as operating expenditures, noting
15 the payee's full name, address, and a detailed description of the purpose of the payment.
16 *See* 11 C.F.R. 104.3(b)(2) and 104.3(b)(4). For legal fees and expenses paid by Senator
17 Vitter and to be reimbursed by the Committee, the Committee must amend its prior
18 reports for the reporting periods during which Senator Vitter made the payments and
19 report Senator Vitter's payments as entries on Schedule D, describing the nature of the
20 debt and the purpose as legal fees to be reimbursed, and including in that description the
21 name and address of Senator Vitter's payee. When the Committee reimburses Senator
22 Vitter, it must report the expenditures on Schedule B, noting the purpose as
23 reimbursement for legal fees and cross-referencing the descriptions on Schedule D.

1 The Commission expresses no opinion regarding the application of Federal tax
2 law, other law, or the rules of the U.S. Senate to the proposed activities, because those
3 questions are not within the Commission's jurisdiction. The Commission expresses no
4 opinion as to whether Senator Vitter could pay the legal fees and expenses through a
5 legal expense trust established in accordance with the rules of the United States Senate.
6 *See* 11 C.F.R. 113.1(g)(6)(i).

7 This response constitutes an advisory opinion concerning the application of the
8 Act and Commission regulations to the specific transaction or activity set forth in your
9 request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any
10 of the facts or assumptions presented, and such facts or assumptions are material to a
11 conclusion presented in this advisory opinion, then the requestor may not rely on that
12 conclusion as support for its proposed activity. Any person involved in any specific
13 transaction or activity which is indistinguishable in all its material aspects from the
14 transaction or activity with respect to which this advisory opinion is rendered may rely on
15 this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B). Please note that the analysis or
16 conclusions in this advisory opinion may be affected by subsequent developments in the
17 law including, but not limited to, statutes, regulations, advisory opinions, and case law.
18 All cited advisory opinions are available on the Commission's website at
19 <http://saos.nictusa.com/saos/searchao>.

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On behalf of the Commission,

Donald F. McGahn II
Chairman