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January 13, 2016

OFFICE OF GENERAL COUNSEL

The Honorable Matthew S. Petersen, Chairman  
Federal Election Commission  
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Re: Advisory Opinion 2015-13 (Reid)

Dear Chairman Petersen:

We write to formally withdraw Advisory Opinion Request 2015-13 (Reid). Unfortunately, it appears that the recusal of two commissioners and the circulation of four drafts makes reaching the required four votes on this straightforward legal question impossible. Thus, rather than waste further Commission and private resources, we will simply proceed in accordance with past advisory opinions on this subject.<sup>1</sup>

As noted in our prior comments, Drafts B and C create a new legal standard that has no grounding in the law and no precedent in the Commission's opinions. These drafts are manifestly inconsistent with the opinion issued to former Senator Kerrey in 2001.<sup>2</sup> In that opinion, the Commission told former Senator Kerrey that he may use campaign funds to pay a public relations firm to help him with press inquiries about an incident that had occurred nearly twenty years *before* he had ever run for federal office. The Commission permitted former Senator Kerrey to use campaign funds because it "conclude[d] that the media would not have focused on Senator Kerrey's activities if he had not been a candidate and strong contender for the Democratic presidential nomination in 1992, a prominent United States Senator, and a potential candidate in 2000 for the Senate or the presidency."<sup>3</sup> And if the media had not focused on former Senator Kerrey's activities in Vietnam, he would not have had to pay a public relations firm to deal with media inquiries.

The Commission's "but-for" causation analysis was simple and elegant. If A had not occurred, then B would not have occurred; therefore, A is the but-for cause of B. In the Kerrey AO, the Commission confirmed that this is the proper test to apply when former officeholders ask whether they can use campaign funds to pay for an expense. That conclusion was eminently reasonable given that the Commission's regulations permit the use of campaign funds for any lawful expense, unless it "would exist irrespective of the candidate's campaign or duties as a

<sup>1</sup> See FEC Adv. Op. 2001-09 (Kerrey for U.S. Senate).  
<sup>2</sup> See *id.*  
<sup>3</sup> *Id.*

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Chairman  
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federal officeholder.”<sup>4</sup> Applying this standard, there is no question that Leader Reid could use campaign funds here. After all, each of the proposed activities results from his tenure in office. Had he not been *in office*, he would not need an assistant to manage correspondence, draft materials, or schedule appearances *pertaining to his tenure in office*. As a result, we now believe that no further opinion is needed.

We note the zeal some commissioners appear to have found for embracing an expansive view of regulation in this matter. This is a Commission that held that the phrase “Barack Obama’s liberal policies are bad for America” does not “oppose” or “attack” a federal candidate;<sup>5</sup> that a millionaire ferrying a group of donors by private plane to a phone-a-thon at the invitation of a federal campaign was not doing so “on behalf of” said campaign;<sup>6</sup> and that a billionaire donor’s “insist[ence] on parceling out his money project by project” was insufficient to investigate whether that donor was the source of funding behind a particular communication.<sup>7</sup> Indeed, we can only recall one other time that such a broad regulatory impulse seemed to take hold of the Commission in a response to a routine advisory opinion request.<sup>8</sup>

In light of the Kerrey advisory opinion, the statute and Commission regulations, we no longer believe a further advisory opinion is necessary and therefore withdraw our request.

Sincerely,

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

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<sup>4</sup> 11 C.F.R. § 113.1(g)(1)(ii).

<sup>5</sup> Statement of Reasons of Vice Chairman Petersen and Commissioners Hunter & McGahn, FEC Matter Under Review 6113 (Kirby Hollingsworth) (Dec. 18, 2009).

<sup>6</sup> Statement of Reasons of Vice Chairman Petersen and Commissioners Hunter & McGahn, FEC Matter Under Review 5937 (Romney for President Inc.) (March 10, 2009).

<sup>7</sup> Statement of Reasons of Chairman Petersen and Commissioners Hunter & McGahn, FEC Matter Under Review 6002 (Freedom’s Watch, Inc.) (Aug. 13, 2010).

<sup>8</sup> FEC Adv. Op. 2010-01 (Nevada State Democratic Party).