FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

**REVISED DISSENT OF VICE CHAIRMAN POTTER
TO ADVISORY OPINION 1993-6**

The Office of the General Counsel and my fellow Commissioners have labored long to reach the Advisory Opinion that the Commission issues today in AO 1993-6. I regret that I am unable to join in that Opinion. However, the Commission is conducting business as usual when Congress has issued a rare directive for change. Congress clearly intended to change the status quo when it revoked the "grandfather" provision and stated that henceforth current and future Members of Congress could not use excess campaign funds for personal use. See Ethics Reform Act of 1989, Pub. L. 101-194. See also 2 U.S.C. § 59e(d); House Rules 43 and 45; and Senate Rule 38. Congress evidently took these steps in response to public outrage over reports of ex-Members walking away from office with thousands of dollars of campaign contributions. We owe it to Congress to show equal determination when it comes our turn, as it does here, to interpret and enforce these provisions.

This Advisory Opinion Request stems from former Congressman Panetta's appointment as Director of the Office of Management and Budget on January 22, 1993. Prior to that time Mr. Panetta had served as a Member of Congress since January 1977 (the 95th Congress), and was sworn in as a Member of the 103rd Congress on January 5, 1993. Thus, Mr. Panetta is the first Member of the 103rd Congress to leave congressional office and ask us to interpret the new "no personal use" law now applicable to all current and future Members of Congress. Ex-Congressman Panetta and his campaign committee are to be commended for recognizing these as novel issues and raising them with the Commission. Less honorable public servants might have acted first, and sought legal guidance only if questioned.

Ultimately, the question before the Commission is whether we follow past practices of allowing campaign funds to serve as a "slush fund" for former Members, or whether we enforce the new congressional prohibition on converting campaign funds to

personal use once campaigns are completed.[1] Unfortunately, this Advisory Opinion includes language which will serve to allow, perhaps even encourage, the conversion of campaign funds to personal use by former Members of Congress.

First, the Commission here allows a former Member to pay some portion of his own and his family's Inaugural hotel bills on the assertion that the hotel suite was also used for business or campaign meetings. This is a mistake. As noted on page seven of today's majority opinion, the Commission has in the past concluded that "payment of living expenses of a senator-elect and his family would be impermissible because those expenses would have existed whether or not the senator-elect had been elected . . .." Citing Advisory Opinion 1980-138. To me AO 1980-138 is exactly on point. Mr. Panetta and his family would have had hotel expenses in Washington during the Inaugural, whether or not the hotel suite was also used for some campaign committee purposes, or other non-personal business. In my view, former Members should not be permitted to mix expenditures for personal and campaign committee use of facilities, such as hotel suites. There is simply no way for the public or the Commission to monitor such use, or to determine whether the allocation of costs for the suite was fair. Instead, expenses should be separately incurred, and separately paid. Here, for instance, the Commission should have permitted the ex-Member's Committee to pay only for a separate conference or meeting room in the hotel used only for campaign or business purposes. The Committee should not have been allowed to pay for any of the hotel suite actually used personally by the Congressman and his family during the Inaugural.

Secondly, the Commission here allows a former Member's campaign committee to issue checks directly to the former Member as payment for travel. This is also a mistake. There will be no way to adequately monitor such expenditures and it will

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1. This case presents none of the complexities inherent in the regulation of the use of campaign funds by current, on going, campaigns. Ex-Members of Congress who are not currently candidates (such as Mr. Panetta) cannot avail themselves of a candidate's usual "wide discretion" to determine what is campaign related. However, some on-going campaign activities also have the clear potential to undermine public confidence in the federal political system. I note that the National Association of Business Political Action Committees has recently called for campaign finance reforms, including "tightening the definition of campaign expenditures to eliminate questionable spending and all personal use." NABPAC Position Statement, April 23, 1993, Summary Page, item 4. Accordingly, I agree with those of my colleagues who believe that the Commission should engage in a Rulemaking on the entire question of personal use by candidates.

promote the appearance of the personal use of excess campaign funds. How will the Commission or the public know whether the travel was for a single day's legitimate political event, such as a local party fundraiser, or for a two week family ski vacation? What happens if there is arguably some political purpose to the two week ski vacation? Instead of the misguided approach taken in this Advisory Opinion, I would prefer the method already provided by the Act and Commission regulations. See 2 U.S.C. § 439a, 11 C.F.R. 114.2(c). Under these provisions candidates may transfer campaign funds to any national, State, or local committee of a political party. Those funds then may be used by the recipient committee, in its discretion, to pay for any former Member's travel to attend party fundraisers, etc. Under this approach the public record will reflect the transfer to an entity independent of the ex-Member, and may also show the expenditure by the party committee for a stated purpose. Such an arms-length transaction, and the accompanying reporting, would go far to reassure the public that the travel was not a prohibited conversion of excess campaign funds to personal use.

I hope my colleagues will reverse course on these two issues if we conduct a rulemaking on the issue of personal use. To leave this precedent on the books will only invite mischief.

Finally, I agree with those of my colleagues who argued that committees of former Members should have a definite ending point. Unless the Committee has ongoing tax or legal matters, this ending point should be within a period of a few months following departure from Congress. This too, should be included in any Commission Rulemaking concerning the personal use of campaign funds.

Trevor Potter

Trevor Potter
Vice Chairman

Dated: May 14, 1993