



FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

*E. Elliott*  
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SECRETARIAT

93 APR 15 PM 5:05

April 15, 1993

MEMORANDUM

TO: The Commission

THROUGH: John C. Surina  
Staff Director *JS*

FROM: Lawrence M. Noble  
General Counsel *LN*

N. Bradley Litchfield  
Associate General Counsel *NBL*

Rita A. Reimer *RR*  
Staff Attorney

SUBJECT: Draft AO 1993-6

Attached is a proposed draft of the subject advisory opinion.

We request that this draft be placed on the agenda for April 22, 1993.

Attachment

**AGENDA ITEM**  
For Meeting of: APR 22 1993

93 APR 15 PM 5:06

**DRAFT**

1  
2  
3 ADVISORY OPINION 1993-6

4 J. Breck Tostevin, Treasurer  
5 Citizens for Congressman Panetta  
6 Post Office Box 2703  
7 Monterey, CA 93940

8 Dear Mr. Tostevin:

9 This responds to your letters dated March 15 and 25,  
10 1993, that request an advisory opinion concerning application  
11 of the Federal Election Campaign Act of 1971, as amended  
12 ("FECA" or "the Act"), to certain uses of excess campaign  
13 funds by Citizens for Congressman Panetta ("the committee"),  
14 the authorized campaign committee of Leon E. Panetta.

15 You are the treasurer of the committee, which was  
16 designated as Mr. Panetta's principal campaign committee for  
17 the 1992 election cycle. Mr. Panetta served as a Member of  
18 Congress from January 1977 (the 95th Congress) through  
19 January 21, 1993 (a portion of the 103d Congress). He is  
20 currently Director of the Office of Management and Budget  
21 ("OMB").

22 You ask whether excess campaign funds held by the  
23 committee may lawfully be used for certain purposes. These  
24 include: (1) hotel lodging in Washington, D.C., for two  
25 weeks surrounding President Clinton's inauguration on January  
26 20, 1993; (2) transportation to and from political party  
27 events in Mr. Panetta's former congressional district; (3)  
28 certain payments to non-profit tax exempt organizations; (4)  
29 salaries of those hired to prepare and file committee reports  
30

3  
4 with the Commission; and (5) expenses incurred to maintain  
5 committee archives and for the storage of papers. These  
6 proposed expenditures will be considered in turn.

7 (1) Your letters state that, during the month of Janu-  
8 ary, 1993, Mr. Panetta stayed with his family at a Washing-  
9 ton, D.C. hotel for two weeks during the presidential inau-  
10 gural period. (His family does not reside in the Washington,  
11 D.C. area.) On January 21, 1993, Mr. Panetta resigned from  
12 the office of U.S. Representative in order to be sworn in to  
13 his current position. The swearing in occurred on January  
14 22, 1993. He remained with his family at the same hotel  
15 until January 29, 1993.

16 You explain that, prior to his being sworn in as  
17 Director of OMB, Mr. Panetta shared a rented townhouse with  
18 three other Members of Congress. Because the OMB legal  
19 counsel advised Mr. Panetta that a conflict of interest would  
20 arise if he were to continue to reside with members of the  
21 legislative branch, Mr. and Mrs. Panetta immediately began to  
22 look for other permanent living arrangements for him. Mr.  
23 Panetta was able to move to new housing on January 29, 1993,  
24 when he vacated his lodging at the hotel.

25 You further explain that Mr. Panetta was required to  
26 vacate his office in the House of Representatives when he was  
27 sworn in as Director of OMB, that is, on January 22, 1993.  
28 He was not provided with transitional office space either by  
29 President Clinton's transition office or by OMB before his  
30

*add  
data*

*Jan 15<sup>th</sup>  
11/29*

✓

3 nomination as Director of OMB was approved.

4 The hotel space where Mr. Panetta stayed afforded him  
5 office space during the transition in order to hold necessary  
6 meetings as well as to have space in which to work during the  
7 transition period. This work included both OMB work, final  
8 elements of work from his congressional office, and work on  
9 the logistics of the move from the congressional office to  
10 OMB. The space was also used to entertain and meet with  
11 residents of the 17th Congressional District of California  
12 who visited Washington, D.C. during this two week time-frame.

13 You ask whether the committee may pay the costs of the  
14 hotel space for the second week of use, i.e., from January 22  
15 through January 29, 1993. As of January 22, Mr. Panetta no  
16 longer qualified as a holder of or candidate for Federal  
17 office. However, the space was used in part to wind down  
18 congressional business and to entertain constituents from Mr.  
19 Panetta's congressional district.

20 The applicable provision of the Act, 2 U.S.C. §439a,  
21 "Use of contributed amounts for certain purposes," states:

22 Amounts received by a candidate as contribu-  
23 tions that are in excess of any amount necessary to  
24 defray his expenditures, and any other amounts con-  
25 tributed to an individual for the purpose of sup-  
26 porting his or her activities as a holder of  
27 Federal office, may be used by such candidate or  
28 individual, as the case may be, to defray any ordi-  
29 nary and necessary expenses incurred in connection  
30 with his or her duties as a holder of Federal  
office, may be contributed to any organization  
described in section 170(c) of title 26, or may be  
used for any other lawful purpose, including trans-  
fers without limitations to any national, State, or  
local committee of any political party; except that

4 no such amounts may be converted by any person to  
5 any personal use, other than to defray any ordinary  
6 and necessary expenses incurred in connection with  
7 his or her duties as a holder of Federal office.

8 "Excess campaign funds" are defined in Commission regulations  
9 as "amounts received by a candidate as contributions which he  
10 or she determines are in excess of any amount necessary to  
11 defray his or her campaign expenditures." 11 CFR 113.1(e).  
12 The Commission has issued numerous advisory opinions that  
13 emphasize the wide discretion candidates and their agents may  
14 exercise in making expenditures for the purpose of influen-  
15 cing the candidate's nomination or election. See Advisory  
16 Opinion 1988-13 and opinions cited therein.

*These  
2  
things  
do NOT  
go  
together  
replace*

17 "Federal office" for purposes of the FECA is defined as  
18 "the office of President or Vice President, or of Senator or  
19 Representative in, or Delegate or Resident Commissioner to,  
20 the Congress." 2 U.S.C. §431(3), 11 CFR 100.4. Thus Mr.  
21 Panetta's current position, Director of OMB, is not con-  
22 sidered a "Federal office" for purposes of 2 U.S.C. §439a.

23 The Commission notes that Mr. Panetta was a Member of  
24 Congress on January 8, 1980. Had he not served in the 103d  
25 Congress, he would have qualified as a "grandfathered" Member  
26 and thus been eligible to convert excess campaign funds to  
27 personal use.<sup>1/</sup> His service in the 103d Congress means that

*OK*

28 1/ The Federal Election Campaign Act Amendments of 1979, Pub.  
29 L. 96-187, amended 2 U.S.C. §439a to prohibit any candidate  
30 or Member of Congress not in office on January 8, 1980 from  
converting any excess campaign funds to personal use, but  
allowed uses of such funds for the purposes set out in the

3 he no longer qualifies under the "grandfather" provision and  
4 therefore may not convert any campaign funds to personal use.  
5 The question thus becomes which of the proposed expenditures  
6 are permissible under 2 U.S.C. §439a, and which would  
7 constitute a prohibited personal use.

8  
9 In Advisory Opinion 1981-2, the Commission concluded  
10 that a Member of Congress could pay from campaign funds the  
11 costs of a reception held for constituents on the day of the  
12 Member's swearing-in to office. The standard applied was  
13 whether the described activity had "an election influencing  
14 purpose, either retrospective or prospective." Also, in  
15 Advisory Opinion 1978-43, the Commission held that a former  
16 Member of Congress who had not sought re-election could use  
17 excess campaign funds to employ staff and pay incidental  
18 expenses for duties which were imposed by virtue of her  
19 having been a Member of Congress.

20 In Mr. Panetta's case, however, the space at issue was  
21 also used to provide lodging for his family, and for start-up  
22 activities in connection with his new position at OMB. In  
23 Advisory Opinion 1980-138, the Commission held that a non-  
24 grandfathered Senator-elect could not use campaign funds to

25  
26 (Footnote 1 continued from previous page)  
27 statute. The Ethics Reform Act of 1989, Pub. L. 101-104,  
28 further amended this section to prohibit any Member of  
29 Congress who serves in the 103d or a later Congress from  
30 converting excess campaign funds to personal use as of the  
first date of such service. Mr. Panetta was sworn in as a  
Member of the 103d Congress on January 5, 1993.

*Thomson  
suspects*

*no...  
...*

*prohibited  
personal  
use*

*See Miller's cap*

3 pay personal living expenses incurred during the period  
4 between the election and the date he would assume his Senate  
5 office. Such expenses were considered as not "incidental" to  
6 the election since they would exist regardless of the  
7 outcome.

8 Applying these precedents, the Commission concludes that  
9 the committee may use excess campaign funds to pay for  
10 one-half of the cost of the hotel space used by Mr. Panetta  
11 for the period January 22-29, 1993. This conclusion reflects  
12 the use of this space both to entertain residents of the 17th  
13 Congressional District of California, and to carry out a  
14 portion of Mr. Panetta's congressional duties.

*NOTE 2*

15 The Commission notes that these same precedents control  
16 expenditures from excess funds to pay for the initial week's  
17 cost, when the space was similarly used to lodge Mr. Panetta  
18 and his family, as well as to entertain constituents and for  
19 transition work on both congressional and OMB matters. Thus,  
20 the committee may use excess funds to pay one-half of Mr.  
21 Panetta's total hotel expenses during the overall two-week  
22 period.

23 (2) Your second question involves certain costs of  
24 travel by Mr. Panetta. You ask whether committee funds may  
25 be used to cover the costs of Mr. Panetta's travel to and  
26 from events such as a Democratic party event held in his  
27 former district to honor him for his past congressional  
28 service.  
29  
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3 The Act allows unlimited contributions or transfers of  
4 excess campaign funds to any national, State, or local com-  
5 mittee of any political party. See 11 CFR 113.2(c). The  
6 Commission notes that the events at which Mr. Panetta is  
7 asked to appear may be fundraisers for the party organization  
8 that invites him. If so, expenses incurred in connection  
9 with his attendance would qualify as contributions or dona-  
10 tions to the appropriate party committee(s), and may  
11 appropriately be paid from excess campaign funds.

12 There may be other events, however, where Mr. Panetta's  
13 appearance is either not connected with political party  
14 fundraising, or where he combines fundraising, OMB (or other  
15 Governmental) business, and personal activity on the same  
16 trip. Based on the particular circumstances involved,  
17 expenses incurred for these trips could be characterized as  
18 personal or mixed use. If the trip is for mixed purposes,  
19 campaign funds may be used to pay no more than the percentage  
20 of the travel costs that reflects the time Mr. Panetta spends  
21 in connection with political party activity as compared to  
22 that spent on other activities. For purposes of determining  
23 this ratio, any day on which Mr. Panetta spends a significant  
24 amount of time on political party activities qualifies as a  
25  
26  
27  
28  
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3 non-personal use day.2/

4 (3) Your third question involves providing money to  
5 charitable non-profit organizations that are tax exempt under  
6 26 U.S.C. §501(c)(3). You state the money would be used for  
7 such things as fundraising events, drives and membership  
8 fees.

9 The Act at 2 U.S.C. §439a specifically states that  
10 excess campaign funds may be contributed to any organization  
11 described in §170(c) of title 26. Since section 170(c) in-  
12 cludes tax exempt §501(c)(3) organizations, excess campaign ?  
13 funds may be freely donated to such organizations.3/

14 The Commission concludes, however, that charitable  
15 contributions, as referred to in 2 U.S.C. §439a, does not  
16 include the payment of dues or other membership fees on  
17 behalf of a person who is not a Federal candidate or  
18 officeholder. Members of Congress and candidates for Federal  
19 office may join various organizations in an effort to  
20 maintain contact with constituents and to stay current with  
21

22  
23 2/ The Commission notes that its campaign travel allocation  
24 regulations would not govern the situation you pose since Mr.  
25 Panetta is not a candidate for Federal office and since the  
26 described travel by him would not be on behalf of any Federal  
27 candidate. See 11 CFR 106.3. Furthermore, the exemption for  
28 travel expenses on behalf of a political party committee is  
29 not implicated here since Mr. Panetta's expenses would be  
30 reimbursed by the committee and not paid from his personal  
funds. See 2 U.S.C. §431(8)(B)(iv), 11 CFR 100.7(b)(8).

31 3/ The Commission notes that some of your proposed recipients ?  
32 e.g., chambers of commerce, may not qualify as §501(c)(3)  
33 organizations.  
34

3 their interests. Paying these dues on behalf of a person who  
4 is not a Federal candidate or officeholder under the FECA, 7  
5 however, would be a personal use in contravention of the Act.

6 (4) You next ask whether, since the "campaign remains  
7 intact," committee funds can be used to hire individuals to  
8 compile and complete campaign finance reports required under  
9 the FECA. Since complying with FECA reporting requirements  
10 is appropriately considered to be an operating expenditure of  
11 the committee, the Commission concludes that excess campaign  
12 funds may be utilized for this purpose. → *defray from*

13 (5) Your final question involves committee expenses  
14 incurred in maintaining campaign archiving and storage of  
15 papers, files and other materials, along with the telephone  
16 and clerical costs of winding down previous campaign  
17 activity.

18 The Act requires campaign treasurers to retain copies of  
19 each statement and report, together with original back-up  
20 records, for three years after the report or statement is  
21 filed. 2 U.S.C. §432(d); 11 CFR 102.9(c), 104.14(b)(2) and  
22 (3).

23 These activities are operating expenses required by the  
24 Act that can be funded with excess funds. As the three year  
25 period for records expires, however, the retention and stor-  
26 age costs will no longer be necessary to comply with the Act.  
27 Accordingly, the payment of such costs would reflect a pur-  
28 pose unrelated to the 1992 congressional campaign or any  
29  
30

*NO!*

*NO!*

3  
4 other election. In addition, the costs of maintaining and  
5 archiving earlier material, and other material not required  
6 to be preserved under the FECA, is not a permitted use of  
7 campaign funds in the circumstances presented.

8 The Commission expresses no opinion as to the possible  
9 state and Federal tax ramifications presented by this request  
10 since those issues are not within its jurisdiction. For the  
11 same reason the Commission expresses no views as to the  
12 possible application of other Federal statutes or regulations  
13 to the proposed activity.

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

17 Sincerely,

18  
19 Scott E. Thomas  
20 Chairman

21 Enclosures (AO's 1978-43, 1980-138, 1981-2, 1988-13)  
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