



FEDERAL ELECTION COMMISSION  
WASHINGTON, D C 20463

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May 5, 1993

**SUBMITTED LATE  
AGENDA ITEM**  
For Meeting of: MAY 6 1993

MEMORANDUM

TO: The Commission

THROUGH: John C. Surina  
Staff Director

FROM: Lawrence M. Noble  
General Counsel

N. Bradley Litchfield  
Associate General Counsel

Rita A. Reimer  
Attorney

SUBJECT: Alternative Revised Draft AO 1993-6

Attached for the Commission's consideration on the agenda of May 6, 1993, is an alternative revised draft of AO 1993-6.

The upper right corner of each page is marked with the letter "A" to distinguish this document from Agenda Document #93-44-A which was previously circulated.

Attachment

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**DRAFT**

ADVISORY OPINION 1993-6

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

Dear Mr. Tostevin:

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

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

You ask whether committee funds received during the 1992 election cycle may lawfully be used for certain purposes.<sup>1/</sup> These include: (1) hotel lodging in Washington, D.C., for two weeks surrounding President Clinton's inauguration on

<sup>1/</sup> The committee's most recent report includes activity through December 31, 1992 and indicates that it has \$100,773 in cash on hand and \$2930 in outstanding debts and obligations. The committee also reported total receipts of \$280,134 and total disbursements of \$396,295 for calendar year 1992; its reported cash on hand January 1, 1992, was \$216,923.

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4 January 20, 1993; (2) transportation to and from political  
5 party events in Mr. Panetta's former congressional district;  
6 (3) certain payments to non-profit tax exempt organizations;  
7 (4) salaries of those hired to prepare and file committee  
8 reports with the Commission; and (5) expenses incurred to  
9 maintain committee archives and for the storage of papers.  
10 These proposed expenditures will be considered in turn.

11 (1) Your letters state that, during the month of Janu-  
12 ary, 1993, Mr. Panetta stayed with his family at a Washing-  
13 ton, D.C. hotel for two weeks during the presidential inau-  
14 gural period. (His family does not reside in the Washington,  
15 D.C. area.) On January 21, 1993, Mr. Panetta resigned from  
16 the office of U.S. Representative in order to be sworn in to  
17 his current position. The swearing in occurred on January  
18 22, 1993. He remained with his family at the same hotel  
19 until January 29, 1993.

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

29 You further explain that Mr. Panetta was required to  
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3 vacate his office in the House of Representatives when he was  
4 sworn in as Director of OMB, that is, on January 22, 1993.  
5 He was not provided with transitional office space either by  
6 President Clinton's transition office or by OMB before his  
7 nomination as Director of OMB was confirmed.

8 The hotel space where Mr. Panetta stayed afforded him  
9 office space during the transition in order to hold necessary  
10 meetings, as well as to have space in which to work during  
11 the transition period. This work included both OMB work,  
12 final elements of work from his congressional office, and  
13 work on the logistics of the move from the congressional  
14 office to OMB. Since Mrs. Panetta, as the unpaid district  
15 administrator for Mr. Panetta for 16 years, was quite  
16 familiar with his office files and systems, she worked with  
17 him "on the closure of the congressional office" and on his  
18 transition to OMB. The hotel space was also used to  
19 entertain and meet with residents of the 17th Congressional  
20 District of California who visited Washington, D.C. during  
21 this two week time-frame.

22 You ask whether the committee may pay the costs of the  
23 hotel space for the second week of use, i.e., from January 22  
24 through January 29, 1993. As of January 22, Mr. Panetta no  
25 longer qualified as a holder of or candidate for Federal  
26 office. However, the space was used in part to wind down  
27 congressional business and to entertain constituents from Mr.  
28 Panetta's congressional district.  
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Several provisions of the Act and Commission regulations are applicable to the proposed uses of committee funds.

Firstly, the disclosure provisions contemplate that authorized candidate committees will make payments "to meet a candidate or committee operating expense" and for "any other disbursements." 2 U.S.C. §§434(b)(5)(A), 434(b)(4)(G), 434(b)(6)(A). Secondly, the Act, 2 U.S.C. §439a, regulates the "Use of contributed amounts for certain purposes" and states:

Amounts received by a candidate as contributions that are in excess of any amount necessary to defray his expenditures, and any other amounts contributed to an individual for the purpose of supporting his or her activities as a holder of Federal office, may be used by such candidate or individual, as the case may be, to defray any ordinary and necessary expenses incurred in connection 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 transfers without limitation to any national, State, or local committee of any political party; except that no such amounts may be converted by any person to any personal use, other than to defray any ordinary and necessary expenses incurred in connection with his or her duties as a holder of Federal office.

Under this language, a narrow exception to the "personal use" prohibition is carved out for "defray[ing] any ordinary and necessary expenses incurred in connection with . . . duties as a holder of Federal office." However, "Federal office" for purposes of the FECA is defined as "the office of President or Vice President, or of Senator or Representative in, or Delegate or Resident Commissioner to, the Congress."

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3 2 U.S.C. §431(3), 11 CFR 100.4. Thus Mr. Panetta's current  
4 position, Director of OMB, is not considered a "Federal  
5 office" for purposes of 2 U.S.C. §439a.

6 Commission regulations define the phrase "excess  
7 campaign funds" to mean "amounts received by a candidate as  
8 contributions which he or she determines are in excess of any  
9 amount necessary to defray his or her campaign expenditures."  
10 11 CFR 113.1(e). The Commission notes that Mr. Panetta was a  
11 Member of Congress on January 8, 1980. Had he not served in  
12 the 103d Congress, he would have qualified as a  
13 "grandfathered" Member and thus been eligible to convert  
14 excess campaign funds to personal use.<sup>2/</sup> His service in the  
15 103d Congress means that he no longer qualifies under the  
16 "grandfather" provision and therefore may not convert any  
17 "excess campaign funds" to personal use.

18 The question thus becomes which of the proposed  
19 expenditures are permissible under the Act, and which would  
20 be prohibited pursuant to the personal use ban of 2 U.S.C.  
21 §439a. If the use of committee funds for the proposed  
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24 <sup>2/</sup> The Federal Election Campaign Act Amendments of 1979, Pub.  
25 L. 96-187, amended 2 U.S.C. §439a to prohibit any candidate  
26 or Member of Congress not in office on January 8, 1980 from  
27 converting any excess campaign funds to personal use, but  
28 allowed uses of such funds for the purposes set out in the  
29 statute. The Ethics Reform Act of 1989, Pub. L. 101-104,  
30 further amended this section to prohibit any Member of  
Congress who serves in the 103d or a later Congress from  
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.

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4 purposes does not constitute a "personal use" and is not  
5 otherwise "unlawful," it is permissible under the statute.

6 In several past advisory opinions the Commission has  
7 indicated that some payments by a principal campaign  
8 committee would constitute permissible operating expenditures  
9 while others would be a prohibited personal use of campaign  
10 funds. See Advisory Opinion 1988-13 and opinions cited  
11 therein.

12 In Advisory Opinion 1980-138 the Commission concluded  
13 that payment of living expenses of a senator-elect and his  
14 family would be impermissible because those expenses would  
15 have existed whether or not the senator-elect had been  
16 elected and such expenses were not merely "incidental" to his  
17 election.<sup>3/</sup> In Advisory Opinion 1983-27 the Commission

18 <sup>3/</sup> The Commission notes that Advisory Opinion 1980-113  
19 considered, in part, the use of excess campaign funds to pay  
20 certain expenses of a State officeholder. The facts involved  
21 an elected State officeholder who was concurrently a Federal  
22 candidate in the 1980 Federal election cycle and proposed to  
23 use excess campaign funds "in carrying out his official State  
24 duties." The Commission viewed this use as a "lawful  
25 purpose" under the Act, and in doing so implicitly recognized  
26 that its regulations define an "office account" to include  
27 those established for an individual who was both a candidate  
28 for Federal office and who held an elected public office at  
29 the State level, or for one who held a Federal office as  
30 defined by the Act. 11 CFR 113.1(b), 113.1(d). Such office  
accounts are no longer permitted for Members of either house  
of Congress, and since its issuance 12 1/2 years ago the Com-  
mission has never relied on this opinion for the proposition  
that excess campaign funds can be used for the expenses of  
holding any public office such as an appointed office in the  
Executive Branch of the Federal Government. Accordingly, the  
Commission expressly concludes here that Advisory Opinion  
1980-113 is superseded to the extent it held that 2 U.S.C.  
§439a permits a former candidate for Federal office to spend

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3 indicated that a defeated House candidate could donate excess  
4 campaign funds to an educational foundation, but he "would  
5 not be permitted to receive any funds from [the foundation],  
6 including, but not limited to, any compensation, loans,  
7 awards, grants, or fellowships, until such time as [the  
8 foundation] has expended, for purposes unrelated to [his]  
9 personal benefit, the entire amount so donated." Only  
10 ordinary and necessary expenses incurred on behalf of the  
11 foundation as chairman of the board of directors could be  
12 reimbursed to the former candidate. Similarly, in Advisory  
13 Opinion 1986-39, the Commission concluded that a defeated  
14 candidate's donation of excess campaign funds to a trust for  
15 a child would not be a prohibited personal use because it  
16 would "not benefit [him] in any apparent financial respect."

17 In Mr. Panetta's case, the space at issue was also used  
18 to provide lodging for himself and his family, and for  
19 start-up activities in connection with his new position at  
20 OMB. As already noted, in Advisory Opinion 1980-138, the  
21 Commission held that a non-grandfathered Senator-elect could  
22 not use campaign funds to pay personal living expenses  
23 incurred during the period between the election and the date  
24 he would assume his Senate office. Such expenses were  
25 considered as not "incidental" to the election since they  
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28 (Footnote 3 continued from previous page)  
29 campaign funds for expenses related to that person's position  
30 as a holder of State office or any office which is not a  
Federal office as defined in the Act.

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would exist regardless of the outcome.

4 Applying these precedents, the Commission concludes that  
5 the committee may pay for some portion of the cost of the  
6 hotel space used by Mr. and Mrs. Panetta for the period  
7 January 22-29, 1993. This conclusion reflects the use of  
8 this space by Mr. Panetta and by Mrs. Panetta, to the extent  
9 she assisted in this activity, to wind down Mr. Panetta's  
10 congressional duties. The percentage chosen should reflect  
11 the amount of time and hotel space devoted to these  
12 congressional duties, compared to that devoted to OMB duties  
13 and personal activities.

14 The Commission notes that these same precedents control  
15 disbursements from committee funds to pay for the initial  
16 week's cost, when the space was similarly used to lodge Mr.  
17 Panetta and his family, as well as to entertain constituents  
18 and for transition work on both congressional and OMB  
19 matters. Thus, the committee may use its funds to pay the  
20 percentage of Mr. Panetta's total hotel expenses for that  
21 week that reflects the amount of time and hotel space devoted  
22 by him and Mrs. Panetta to his congressional duties during  
23 this period.

24 (2) Your second question involves certain costs of  
25 travel by Mr. Panetta. You ask whether committee funds may  
26 be used to cover the costs of Mr. Panetta's travel to and  
27 from events such as a Democratic party event held in his  
28 former district to honor him for his past congressional  
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service.

The Act allows unlimited contributions or transfers of excess campaign funds to any national, State, or local committee of any political party. 2 U.S.C. §439a, 11 CFR 113.2(c). The Commission notes that the political party events at which Mr. Panetta is the honored guest (or speaker) may also be fundraisers for the party organization that invites him. Expenses incurred in connection with his attendance at such events (with or without a fundraising purpose) would qualify as contributions or donations to the appropriate party committee(s), and may be paid from excess campaign funds. The fact that the committee proposes to reimburse Mr. Panetta directly for these travel costs, instead of making a transfer to the hosting party committee for this purpose, does not alter the application of the Act in this situation. In either case the party committee would incur the same expenses (and realize the same benefit) incident to Mr. Panetta's appearance, and committee funds would be spent in the same amount to defray such expenses (and confer the same benefit).

There may be other situations, however, where Mr. Panetta's appearance is either not as an invited honoree or speaker at a political party event, or where he combines attendance at the party event and personal activity on the same trip. Based on the particular circumstances involved, expenses incurred for these trips could be characterized as

personal or mixed use.

4 If the trip is for mixed purposes, however, campaign  
5 funds may be used to pay no more than the transportation  
6 costs to and from the event, and any related lodging or per  
7 diem costs (generally no more than one day and/or one night  
8 per event). Expenses for the days Mr. Panetta spends on  
9 personal or other non-party activity cannot be paid out of  
10 campaign funds, because this would be a prohibited personal  
11 use of these funds.4/

12 (3) Your third question involves providing money to  
13 charitable non-profit organizations that are tax exempt under  
14 26 U.S.C. §501(c)(3). You state the money would be used for  
15 such things as fundraising events, drives and membership  
fees.

17 The Act at 2 U.S.C. §439a specifically states that  
18 excess campaign funds may be contributed to any organization  
19 described in §170(c) of title 26. Since §170(c) includes tax  
20 exempt §501(c)(3) organizations, excess campaign funds may be  
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24 4/ The Commission notes that its campaign travel allocation  
25 regulations would not govern the situation you pose since Mr.  
26 Panetta is not a candidate for Federal office and since the  
27 described travel by him would not appear to be on behalf of  
28 any Federal candidate. See 11 CFR 106.3. Furthermore, the  
exemption for travel expenses on behalf of a political party  
committee is not implicated here since Mr. Panetta's expenses  
would be 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).  
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3 freely donated to such organizations.<sup>5/</sup>

4 The Commission concludes, however, that charitable  
5 contributions, as referred to in 2 U.S.C. §439a, does not  
6 include the payment of dues or other membership fees on  
7 behalf of a person who is not a Federal candidate or office-  
8 holder. Paying these dues or membership fees on behalf of  
9 Mr. Panetta, who is not a Federal candidate or officeholder  
10 under the FECA, would benefit him in an apparent financial  
11 respect and would be a personal use of committee funds in  
12 contravention of the Act. See Advisory Opinions 1986-39 and  
13 1983-27.

14 (4) You next ask whether, since the "campaign remains  
15 intact," committee funds can be used to hire individuals to  
16 compile and complete the 1993 midyear report required under  
17 the Act. In its Informational Letter responding to Advisory  
18 Opinion Request 1976-101, the Commission specifically  
19 authorized the use of excess campaign funds to pay the costs  
20 incurred for "staff, headquarters, and supplies in order to  
21 file Federal Election Commission reports." The Commission  
22 here reiterates that it is appropriate to use campaign funds  
23 for this purpose. However, since you have not proposed or  
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25 <sup>5/</sup> The Commission notes that some of your proposed recipients  
26 e.g., chambers of commerce, may not qualify as §501(c)(3)  
27 organizations. Donations to such other recipients may still  
28 qualify as transfers to §170(c) organizations, while others  
29 would be permissible under the "any other lawful purpose"  
30 clause of §439a. However, tax treatment of such contribu-  
tions may differ from that accorded donations to §501(c)(3)  
organizations.

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4 described any winding down or other committee activity beyond  
5 July 31, 1993, the filing date for the midyear report, the  
6 Commission does not reach any issues that may be raised if  
7 the committee's financial activity continues beyond that  
8 date.

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

14 The Commission concluded in Advisory Opinion 1978-43  
15 that a former Member of Congress who had not sought  
16 re-election could use excess campaign funds to employ staff  
17 and pay "incidental expenses" for duties which were imposed  
18 by virtue of her having been a Member of Congress. While  
19 that opinion did not elaborate on what constitutes  
20 "incidental expenses" for this purpose, other Advisory Opin-  
21 ions, issued to Members who were making the transition into  
22 (rather than out of) office, provide some guidance in this  
23 area. These costs have been held to include such things as  
24 staff salaries, office supplies, rent, postage, telephone,  
25 and telegraph expenses. See Re: Advisory Opinion Request  
26 1976-101, and Advisory Opinions 1980-138 and 1982-57. The  
27 circumstances raised in your request are comparable to those  
28 addressed in these opinions, and the Commission concludes  
29 that you may similarly use campaign funds to pay these costs

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3 at least until July 31, 1993, the filing date for the 1993  
4 midyear report. The Commission would need to review the  
5 facts and circumstances pertaining to committee activity  
6 after July 31 in order to consider whether further  
7 disbursements for similar purposes are permitted. Another  
8 advisory opinion request may be submitted to present any  
9 factual situation which arises at that time.

10 The Commission notes that all committee payments for  
11 those purposes allowed by this opinion are required to be  
12 reported by the committee as either other disbursements (for  
13 payments covered in questions one, two, and three), or as  
14 operating expenditures (for payments covered by questions  
15 four and five). 11 CFR 104.3(b)(2), 104.3(b)(4)(i),  
16 104.3(b)(4)(vi).

17 The Commission expresses no opinion as to the possible  
18 state and Federal tax ramifications presented by this request  
19 since those issues are not within its jurisdiction. For the  
20 same reason the Commission expresses no views as to the  
21 possible application of other Federal statutes or regulations  
22 to the proposed activity.  
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4 This response constitutes an advisory opinion concerning  
5 application of the Act, or regulations prescribed by the Com-  
6 mission, to the specific transaction or activity set forth in  
7 your request. See 2 U.S.C. §437f.

8 Sincerely,

9 Scott E. Thomas  
10 Chairman

11 Enclosures (AO's 1988-13, 1986-39, 1983-27, 1982-57,  
12 1980-138, 1978-43 and Re: AOR 1976-101)  
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