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ADVISORY OPINION 1993-6

AGENDA ITEM

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

For Meeting of: MAY 6 1993

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.^{1/} These include: ~~the~~ hotel lodging in Washington, D.C., for two weeks surrounding President Clinton's inauguration on

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^{1/} 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.

December 31

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

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

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

28 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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3 Several provisions of the Act and Commission regulations
4 are applicable to the proposed uses of committee funds.

5 Firstly, the disclosure provisions contemplate that
6 authorized candidate committees will make payments "to meet a
7 candidate or committee operating expense" and for "any other
8 disbursements." 2 U.S.C. §§434(b)(5)(A), 434(b)(4)(G),
9 434(b)(6)(A). Secondly, the Act, 2 U.S.C. §439a, regulates
10 the "Use of contributed amounts for certain purposes" and
11 states:

12 Amounts received by a candidate as contributions
13 that are in excess of any amount necessary to
14 defray his expenditures, and any other amounts con-
15 tributed to an individual for the purpose of sup-
16 porting his or her activities as a holder of
17 Federal office, may be used by such candidate or
18 individual, as the case may be, to defray any ordi-
19 nary and necessary expenses incurred in connection
20 with his or her duties as a holder of Federal
21 office, may be contributed to any organization
22 described in section 170(c) of title 26, or may be
23 used for any other lawful purpose, including trans-
24 fers without limitation to any national, State, or
25 local committee of any political party; except that
26 no such amounts may be converted by any person to
27 any personal use, other than to defray any ordinary
28 and necessary expenses incurred in connection with
29 his or her duties as a holder of Federal office.

30 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."

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

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

19 The question thus becomes which of the proposed
20 expenditures are permissible under the Act, and which would
21 be prohibited pursuant to the personal use ban of 2 U.S.C.
22 §439a. If the use of committee funds for the proposed

23
24 ^{2/} 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.

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

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

In Advisory Opinion 1980-138 the Commission 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 and such expenses were not merely "incidental" to his election.^{3/} In Advisory Opinion 1983-27 the Commission

^{3/} The Commission notes that Advisory Opinion 1980-113 considered, in part, the use of excess campaign funds to pay certain expenses of a State officeholder. The facts involved an elected State officeholder who was concurrently a Federal candidate in the 1980 Federal election cycle and proposed to use excess campaign funds "in carrying out his official State duties." The Commission viewed this use as a "lawful purpose" under the Act, and in doing so implicitly recognized that its regulations define an "office account" to include those established for an individual who was both a candidate for Federal office and who held an elected public office at the State level, or for one who held a Federal office as 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 Commission 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

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

- insert] →
ON
NEXT
2 pages.

In Mr. Panetta's case, the space at issue was also used to provide lodging for himself and his family, and for start-up activities in connection with his new position at OMB. As already noted, in Advisory Opinion 1980-138, the Commission held that a non-grandfathered Senator-elect could not use campaign funds to pay personal living expenses incurred during the period between the election and the date he would assume his Senate office. Such expenses were considered as not "incidental" to the election since they

(Footnote 3 continued from previous page)
campaign funds for expenses related to that person's position as a holder of State office or any office which is not a Federal office as defined in the Act.

[insert on p 7 after "financial respect."]

therein.

In Advisory Opinion 1980-138 the Commission 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 and such expenses were not merely "incidental" to his election. In Advisory Opinion 1983-27 the Commission indicated that a defeated House candidate could donate excess campaign funds to an educational foundation, but he "would not be permitted to receive any funds from [the foundation], including, but not limited to, any compensation, loans, awards, grants, or fellowships, until such time as [the foundation] has expended, for purpose unrelated to [his] personal benefit, the entire amount so donated." Only ordinary and necessary expenses incurred on behalf of the foundation as chairman of the board of directors could be reimbursed to the former candidate. Similarly, in Advisory Opinion 1986-39, the Commission concluded that a defeated candidate's donation of excess campaign funds to a trust for a child would not be a prohibited personal use because it would not benefit [him] in any apparent financial respect.

wide
[~~DELETION~~ Some] ^{latitude} has been given to persons to use [excess] ^{operating} campaign funds for what could be termed [~~campaign~~ ^{expenditures} "related" purposes] such as: (1) winding down a campaign headquarters (Advisory Opinion 1980-138); (2) sending holiday

greeting cards to thank former campaign staff (Advisory
Opinion 1980-123); and (3) establishing a fund for a possible
future campaign for Federal or non-Federal office (Advisory
Opinion 1980-113) [3/ Furthermore] in Advisory Opinion 1981-2,
the Commission ^{ind. fund} [concluded] that [a Member of Congress could pay
from campaign funds the costs of a reception held for
constituents on the day of the Member's swearing-in to
office.] The standard [applied] was whether the described
activity had "an election influencing purpose, either
retrospective or prospective." [Also] ^{The Commission also has addressed expenses of} in Advisory Opinion ^{winding down}
1978-43, the Commission held that a former Member of Congress ^{the James of}
who had not sought re-election could use excess campaign ^{a holder of}
funds to employ staff and pay "incidental expenses" for ^{Federal office}

good

~~[[FOOTNOTE DELETED] Advisory Opinion 1980-113 also
considered other uses of excess campaign funds. It involved
an elected State officeholder who was concurrently a Federal
candidate in the 1980 Federal election cycle and proposed to
use excess campaign funds "in carrying out his official State
duties." The Commission viewed this use as a "lawful
purpose" under the Act, and in doing so implicitly recognized
that its regulations define an "office account" to include
those established for an individual who was both a candidate
for Federal office and who held an elected public office at
the State level, or for one who held a Federal office as
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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
campaign funds for expenses related to that person's position
as a holder of State office or any office which is not a
Federal office as defined in the Act.]]~~

3 duties which were imposed by virtue of her having been a
4 Member of Congress. [END DELETION]

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to page 7*

5
6 ~~In Mr. Panetta's case, the space at issue was also used~~
7 ~~to provide lodging for himself and his family, and for~~
8 ~~start-up activities in connection with his new position at~~
9 ~~OMB. As noted, in Advisory Opinion 1980-138, the Commission~~
10 ~~held that a non-grandfathered Senator-elect could not use~~
11 ~~campaign funds to pay personal living expenses incurred~~
12 ~~during the period between the election and the date he would~~
13 ~~assume his Senate office. Such expenses were considered as~~
14 ~~not "incidental" to the election since they would exist~~
15 ~~regardless of the outcome.~~

16 Applying these precedents, the Commission concludes that
17 the committee may [use excess campaign funds to] pay for some
18 portion of the cost of the hotel space used by Mr. and Mrs.
19 Panetta for the period January 22-29, 1993. This conclusion
20 reflects the use of this space by Mr. Panetta and by Mrs.
21 Panetta, to the extent she assisted in this activity, to wind
22 down Mr. Panetta's congressional duties. The percentage
23 chosen should reflect the amount of time and hotel space
24 devoted to these congressional duties, compared to that
25 devoted to OMB duties and personal activities.

26 The Commission notes that these same precedents control
27 disbursements from committee [excess] funds to pay for the
28 ~~initial week's cost, when the space was similarly used to~~

would exist regardless of the outcome.

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

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

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

any
congressional
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(attached)

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 ^{pay} [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, *in effect,* 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).

pg we don't have a word for that 81-1

sometimes not always - put it through

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.

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

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

The Act at 2 U.S.C. §439a specifically states that excess campaign funds may be contributed to any organization described in §170(c) of title 26. Since §170(c) includes tax exempt §501(c)(3) organizations, excess campaign funds may be

^{4/} The Commission notes that its campaign travel allocation regulations would not govern the situation you pose since Mr. Panetta is not a candidate for Federal office and since the described travel by him would not appear to be on behalf of 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).

freely donated to such organizations.^{5/}

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

(4) You next ask whether, since the "campaign remains intact," committee funds can be used to hire individuals to compile and complete the 1993 midyear report required under the Act. In its Informational Letter responding to Advisory Opinion Request 1976-101, the Commission specifically authorized the use of excess campaign funds to pay the costs incurred for "staff, headquarters, and supplies in order to file Federal Election Commission reports." The Commission here reiterates that it is appropriate to use campaign funds for this purpose. However, since you have not proposed or

limited

^{5/} The Commission notes that some of your proposed recipients e.g., chambers of commerce, may not qualify as §501(c)(3) organizations. Donations to such other recipients may still qualify as transfers to §170(c) organizations, while others *might* [would] be permissible under the "any other lawful purpose" clause of §439a. However, tax treatment of such contributions may differ from that accorded donations to §501(c)(3) organizations. See Advisory Opinion 1986-39

OK

^{6/} The Commission does not intend to imply herein whether or not the use of campaign funds for dues or other membership fees on behalf of someone who is a candidate or Federal officeholder is a personal use under §439a. This is a question similar to ones on which the Commission has been divided in the past. See, e.g., concurring opinions regarding Advisory Opinions 1992-1 and 1992-8.

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

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

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

*good
deletion*

Cross reference to IRS

at least until July 31, 1993, the filing date for the 1993
midyear report. ^{See Informational Letter responding to Advisory Opinion Request 1992-13.} The Commission would need to review the

and Adv. Opinion - 1992-13 and 1992-15.

facts and circumstances pertaining to committee activity after July 31 in order to consider whether further disbursements for similar purposes are permitted. Another advisory opinion request may be submitted to present any factual situation which arises at that time.

** I think we can handle this*

as necessary

RIA Mike said bank check

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

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

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

Sincerely,

Scott E. Thomas
Chairman

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

*- add citation to
leg. authority - out of 1991 on p4*
*- suggest somewhere
trans. must refer to 439a
(part of app. process)
or transfer p9 or 13.*

- take a look