FEDERAL ELECTION COMMISSION
WASHINGTON, D C 20463

**DISSENTING OPINION OF
COMMISSIONER LEE ANN ELLIOTT
TO ADVISORY OPINION 1993-15**

I disagree with the majority's decision in Advisory Opinion 1993-15 as being unsupported by Commission precedent and unduly harsh to the requester.

In my opinion, the majority has misused precedent in deciding that money raised to defray the Tsongas Committee's legal expenses in connection with the DOJ and IRS investigations of Nicholas A. Rizzo, Jr. must be treated as "contributions" to the Committee. The majority's decision is based on the assumption that today's case is similar to Advisory Opinion 1981-16. The majority cites that opinion for the proposition that all legal issues which "emanate not only out of the election, but also from matters clearly within the scope of the Act" must be defrayed with contributions subject to the limits and prohibitions of the Act.

Advisory Opinion 1981-16 did not, however, involve a non-Commission investigation of a third party on a myriad of charges, many unrelated to election law. Instead 1981-16 only said:

> The Commission is of the opinion that while a Special Fund may be established to defray the costs of post-election defensive litigation in connection with compliance actions of the Commission and Commission audits, the Fund would merely be an arm of the Committee. ... [C]ompliance and audit matters, clearly emanate not only out of the election, but from matters clearly within the scope of the Act. ... [M]onies raised to defray the cost of litigation regarding compliance with the Act, and chapters 95 and 96 of Title 26, which includes both enforcement and audit matters are contributions ... (emphasis added)

Clearly, Advisory Opinion 1981-16 only stands for the proposition that donations to defray legal expenses related to the FEC's enforcement, audit and litigation

matters must count as "contributions" under the Act. [1] In my opinion, it is a real stretch for the majority to equate the Committee's legal costs surrounding another agency's investigation of a third party with Commission-generated MURs and audits. I do not believe it is within our mandate to say the committee must use its contributions (which are given for the "purpose of influencing an election" 2 U.S.C. §431(8)(A)(i)) to cooperate with the Department of Justice in a criminal investigation in which the Committee isn't even a party.

Second, I think the majority's answer is rather harsh to the requester. Quite properly, the Tsongas Committee wants to cooperate with the Justice Department's investigation. But many of their contributors have already given the maximum allowable contribution. The majority's requirement that the Committee must use its remaining campaign dollars to cooperate with the Justice Department investigation may inhibit their ability to fully cooperate because they literally can't afford to. The committee may have to hoard their remaining money for their own defense before the Commission.

In my opinion, the Commission should not encourage committees to not cooperate with federal investigations by inhibiting their ability to pay. Otherwise, we will frustrate the ability of the Justice Department to fully investigate these allegations.

I would have preferred th Commission adopt a more reasonable "allocation" approach which would have allowed the Committee to set up two funds: one within the limits of the FECA for Commission-generated matters, and one outside the FECA for other legal issues, or investigations by other agencies. That way, the Committee could properly budget its resources, and still cooperate fully with federal authorities.

August 24, 1993

Lee Ann Elliott
Commissioner

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1. See also Advisory Opinion 1990-17 (citing Advisory Opinion 1981-16)(donations to defray legal costs related to an FEC enforcement matter will count as "contributions" since that action "emanates from activities clearly within the scope of the Act").