



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

SEP 23 9 02 AM '94

September 23, 1994

MEMORANDUM

TO: The Commission

THROUGH: John C. Surina
Staff Director

FROM: Lawrence M. Noble
General Counsel

N. Bradley Litchfield
Associate General Counsel

Michael Marinelli *m.m.*
Staff Attorney

SUBJECT: Draft AO 1994-31

Attached is a proposed draft of the subject advisory opinion.

We request that this draft be placed on the agenda for September 29, 1994.

Attachment

**SUBMITTED LATE
AGENDA ITEM**
For Meeting of: SEP 29 1994

1
2 CERTIFIED MAIL
3 RETURN RECEIPT REQUESTED

4 ADVISORY OPINION 1994-31

5 Warren J. Leshner, Treasurer
6 Dean Gallo for Congress Committee
7 1711 Route 46
8 Parsippany, New Jersey 07054

DRAFT

9 Dear Mr. Leshner:

10 This refers to your letters of September 12, and August
11 30, 1994, on behalf of Dean Gallo for Congress Committee
12 ("the Committee") concerning the application of the Federal
13 Election Campaign Act of 1971, as amended ("the Act"), to the
14 Committee's proposed use of general election contributions.

15 The Committee is the principal campaign committee of
16 Dean Gallo, a member of the U.S. House of Representatives
17 from New Jersey's Eleventh Congressional District. Mr. Gallo
18 filed a Statement of Candidacy on November 3, 1993, and won
19 the Republican primary election on June 7, 1994. However on
20 August 23, Mr. Gallo announced that he would not seek
21 re-election in November for reasons of health^{1/}

22 During the course of the 1994 campaign, until Mr.
23 Gallo's withdrawal on August 23, you state that the Committee
24 received \$103,612 in general election contributions. Of this
25 amount, \$48,000 was received before the primary and \$55,612
26 was received after primary, up to the date of Mr. Gallo's
27 withdrawal from the campaign. You also state that during the
28 period of time between June 7 and August 23, the Committee

1/ You state in your request that Mr. Gallo will complete his term in the 103rd Congress and then retire.

made \$47,632 in general election expenditures. An additional \$9,930 in general election expenditures were made in the period from August 24, 1994, to September 12, 1994.^{2/}

The Committee now seeks to use the general election contributions to pay for the general election expenses already incurred. If the general election contributions exceed these expenses, the Committee will use the remaining general election funds for the purposes allowed by a multi-candidate committee, which you state the Committee expects to become in the near future. You ask whether this proposed plan is permissible under the Act and Commission regulations.

Commission regulations at 11 CFR 102.9(e)(2) state that if a candidate is not a candidate in the general election, any contributions made for the general election shall be refunded to the contributors, redesignated in accordance with 11 CFR 110.1(b)(5), or 110.2(b)(5), or reattributed in accordance with 11 CFR 110.1(k)(3), as appropriate.

In the past, the Commission has applied this regulation to situations where a candidate who withdrew from a primary election race sought to retain general election contributions (received before the primary) to pay for expenses of the primary election, or for other purposes. In these cases, the Commission has required the refund of all general election

^{2/} Informally, you have told the Commission that these latter expenditures represent amounts owed, now due, from prior consulting services rendered at the time Mr. Gallo was still a general election candidate.

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2 contributions. See Advisory Opinion 1988-41; see also
3 Advisory Opinions 1992-15 and 1989-26. While the expenses
4 discussed in Advisory Opinion 1988-41 were not divided
5 between primary and general election expenses, the Commission
6 concluded that the fact that general election contributions
7 were used during the primary to pay for anticipated general
8 election expenses did not alter the obligation to refund
9 those contributions once that candidate withdraws from, or is
10 defeated in, the primary. See Advisory Opinions 1992-15 and
11 1986-17.

12 Your request, however, is distinguishable from these
13 past situations. Mr. Gallo won the primary and was the
14 Republican party's candidate for the general election for
15 approximately 11 weeks. Even though he will not be a
16 candidate on the date of the actual general election, he did
17 campaign as a general election candidate and incur expenses.
18 Your situation is, therefore, comparable to that of primary
19 election candidates who withdraw from primary races, but wish
20 to retain primary election contributions made prior to their
21 withdrawal, in part, to pay for primary campaign expenses.
22 In these circumstances, the Commission has concluded that the
23 candidate may use previously received primary election
24 contributions. See Advisory Opinions 1988-41 and 1986-12.

25 In your circumstance, the Commission likewise concludes
26 that the Committee may retain the general election
27 contributions made after Mr. Gallo's June 7, 1994, primary
28 victory (as well as any made before the primary) and before

his August 23, 1994, withdrawal from the general election.^{3/}
These contributions may be used to pay any general election expenditures.

The Commission has previously stated that, under the Act and Commission regulations, excess campaign funds may be contributed to any organization described in section 170(c) of Title 26, or may be used for any other lawful purpose but may not be converted by any person to any personal use. 2 U.S.C. §439a; 11 CFR 113.2(d), and Advisory Opinion 1993-22.^{4/}
The Commission has concluded, however, that excess campaign funds may be retained or transferred to finance the creation of a multicandidate committee and its subsequent contributions. See Advisory Opinions 1993-22, 1988-41 and

^{3/} 11 CFR 102.8(a) provides that the date of receipt for a contribution received by a committee is the date the committee treasurer, or any person acting for the committee, obtains possession of the contribution. However, Commission regulations at 11 CFR 110.1(b)(6) and 110.2(b)(6) also provide that a contribution mailed to the candidate, or to the political committee or its agent, shall be considered to be made on the date of the postmark. Therefore, any general election contribution mailed to the campaign with a postmark after the August 23, 1994, date must be returned.

Of course, contributions that would be considered as made for the general election include not only those specifically designated for the general election, but also those undesignated contributions made after the date of the primary. See 11 CFR 110.1(b)(2)(ii).

^{4/} A limited exception to this prohibition exists for those persons who were Members of Congress on January 8, 1980, and did not serve in the 103rd Congress. Since Mr. Gallo served in the 103rd Congress, the exception would not apply to the circumstances in your request. See 11 CFR 113.2(e).

The Commission is currently engaged in a rulemaking to offer guidance on what constitutes personal use of campaign funds. See 58 Fed. Reg. 45463 (August 30, 1993).

3 1985-30. Therefore, you may also use the remaining general
4 election contributions to create a multicandidate committee.^{5/}

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

9 For the Commission,

10
11 Trevor Potter
12 Chairman

13 Enclosures (AOs 1993-22, 1992-15, 1989-29, 1988-41, 1986-17
14 1986-12 and 1985-30)

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^{5/} The simplest option available to the Committee, and approved in past opinions, is to have Mr. Gallo's principal campaign committee convert its status to a multicandidate committee. See Advisory Opinions 1988-41 and 1985-30. For guidance as to the issues presented by the change in the Committee's reporting and filing status, see Advisory Opinion 1993-22.