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FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

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**DISSENTING OPINION OF  
COMMISSIONER TREVOR POTTER  
TO ADVISORY OPINION 1994-31**

The request in this matter comes before the Federal Election Commission as the result of Congressman Dean Gallo's withdrawal from the New Jersey Eleventh Congressional District general election contest. Despite winning the June 7, 1994 Eleventh District Primary, Congressman Gallo announced on August 23, 1994 that he would complete his present term, but not seek re-election due to prostate cancer. Until that August announcement the Dean Gallo for Congress Committee ("the Gallo Committee") had received and deposited approximately \$103,612 in contributions designated for the general election. In addition, the Gallo Committee incurred liabilities and made expenditures of about \$57,563 toward the general election in anticipation of Congressman Gallo's active participation. The Committee has thus requested the Commission's opinion on the legitimacy of its plan to pay-off all remaining general election expenses with contributions designated for the general election. The Gallo Committee has also asked whether it may utilize any excess funds beyond its general election related expenses to establish a multicandidate committee.

I read the Commission's regulations at 11 CFR 102.9(e)(2) to state clearly on their face the following:

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.

My colleagues' vote to remove a reference to this provision from the Advisory Opinion does not alter its existence or, I believe, its applicability. In past applications of this regulation to situations in which primary election candidates received general election designated contributions, but then failed to participate in the general election, the Commission has required the refund of all general election contributions. See Advisory Opinion 1988-41; Advisory Opinion 1992-15 and Advisory Opinion 1989-26. I am not persuaded that Congressman Gallo's nomination in the primary election alters the clear import of the Commission's regulations. He was not "a candidate in the

general election" either at the time he asked for the Advisory Opinion or at the time the Commission considered it, nor will he be a candidate "in the general election" on election day. After paying off bills incurred as a result of the brief period as the party's nominee, I believe the remainder of Congressman Gallo's general election funds should be returned to his contributors, as provided for by 11 CFR 102.9(e)(2).

I also am not persuaded by past advisory opinions that the transfer of excess campaign funds from a candidate's principal campaign committee to create a multicandidate political committee is not in contradiction to the restriction against using such funds for "personal use" found at 2 U.S.C. § 439a. For authority on this position the Commission's Opinion cites Advisory Opinions 1993-22; 1988-41; and 1985-30. These past opinions involve candidates who were members of Congress prior to January 8, 1980, and who did not serve in the 103rd Congress. Such members were until recently specifically exempted by Congress from the restriction on converting campaign funds to personal use, and thus had few constraints on their use of excess funds. See Pub. L. 101-194, § 504(b), 103 Stat. 1755 and 11 CFR 113.2(e). There is little justification outlined in those opinions, or in this one, for the position that candidates may divert excess funds to their own personal PACs, to contribute in \$5,000 increments to other candidates as they see fit. Further, we are also in the midst of a Rulemaking to delineate permissible uses of excess campaign funds. Therefore, I cannot agree with the majority of my colleagues that Commission precedent allows any excess campaign funds not utilized toward the Gallo Committee's general election expenses to be transferred to create a multicandidate committee.

  
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Trevor Potter

September 29, 1994