FEDERAL ELECTION COMMISSION
Washington, DC 20463

May 14, 1993

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

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.[1/] These include: (1) hotel lodging in Washington, D.C., for two weeks surrounding President Clinton's inauguration on January 20, 1993; (2) transportation to and from political party events in Mr. Panetta's former congressional district; (3) certain payments to non-profit tax exempt organizations; (4) salaries of those hired to prepare and file committee reports with the Commission; and (5) expenses incurred to maintain committee archives and for the storage of papers. These proposed expenditures will be considered in turn.

(1) Your letters state that, during the month of January, 1993, Mr. Panetta stayed with his family at a Washington, D.C. hotel for two weeks during the presidential inaugural period. (His family does not reside in the Washington, D.C. area.) On January 21, 1993, Mr. Panetta resigned from the office of U.S. Representative in order to be sworn in to his current position. The swearing in

occurred on January 22, 1993. He remained with his family at the same hotel until January 29, 1993.

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

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

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

You ask whether the committee may pay the costs of the hotel space for the second week of use, i.e., from January 22 through January 29, 1993. As of January 22, Mr. Panetta no longer qualified as a holder of or candidate for Federal office. However, the space was used in part to wind down congressional business and to entertain constituents from Mr. Panetta's congressional district.

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

Commission regulations define the phrase "excess campaign funds" to mean "amounts received by a candidate as contributions which he or she determines are in excess of any amount necessary to defray his or her campaign expenditures." 11 CFR 113.1(e). The Commission notes that Mr. Panetta was a Member of Congress on January 8, 1980. Had he not served in the 103d Congress, he would have qualified as a "grandfathered" Member and thus been eligible to convert excess campaign funds to personal use.[4/] His service in the 103d Congress means that he no longer qualifies under the "grandfather" provision and therefore may not convert any "excess campaign funds" to personal use.

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

Latitude has been given to persons to use campaign funds for what could be termed operating expenditures 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). In Advisory Opinion 1981-2, the Commission indicated that the standard was whether the described activity had "an election influencing purpose, either retrospective or prospective."

The Commission also has addressed expenses of winding down the duties of a holder of Federal office. In Advisory Opinion 1978-43, the Commission held 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.

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 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 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 transfers (in kind) to the appropriate party committee(s), and may be paid from excess

campaign funds. The fact that the committee proposes to pay 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).

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 activity cannot be paid out of campaign funds, because this would be a prohibited personal use of these funds.[5/]

(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 freely donated to such organizations.[6/]

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.[7/]

(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 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 concludes that you may use campaign funds to pay these costs at least until July 31, 1993, the filing date for the 1993 midyear report. See Re: Advisory Opinion Request 1976-101 and Advisory Opinions 1980-138, 1980-123, and 1980-113. Other committee disbursements that are indistinguishable in all material aspects from those permitted by this opinion are also permissible. 2 U.S.C. 437f(c)(1). The Commission would review the facts and circumstances pertaining to committee activity after July 31 in order to consider whether further disbursements for similar purposes are permitted. The committee may submit another advisory opinion request to present any questions it may have with respect to disbursements it proposes to make after July 31, 1993.

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). In addition, the itemized disclosure of the committee's payments (i.e. other disbursements) for Mr. Panetta's travel to political party events (covered in question two) should describe the purpose of the payments as "travel expenses/transfer (in-kind) to party committee of excess funds." 11 CFR 104.3(b)(4)(i)(A).

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. See, for example, IRS Reg. 1.527-5(c)(1) and IRS training manual, Exempt Organizations, 1992, at 469, 470 (principal campaign committee of former candidate not allowed to remain in existence for longer time period than reasonably necessary to wind up affairs of past campaign). 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,

(signed)

Scott E. Thomas
Chairman

Enclosures (AO's 1992-4, 1992-1, 1988-13, 1986-39, 1983-27, 1982-57, 1981-2, 1980-138, 1980-123, 1980-113, 1978-43 and Re: AOR 1976-101)

ENDNOTES

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 on January 1, 1992, was $216,923.

2/ The Commission notes that the Legislative Branch Appropriations Act, 1991, codified a pre-existing House rule into law governing both Houses. The cited act generally bars the use of campaign contributions (and other funds not appropriated by the Congress) to maintain an "unofficial office account" or to defray "official" expenses. 2 U.S.C. 59e(d). See also House Rules 43 and 45, and Senate Rule 38.

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 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.

4/ The Federal Election Campaign Act Amendments of 1979, Pub. L. 96-187, amended 2 U.S.C. 439a to prohibit any candidate or Member of Congress not in office on January 8, 1980 from converting any excess campaign funds to personal use, but allowed uses of such funds for the purposes set out in the statute. The Ethics Reform Act of 1989, Pub. L. 101-194, 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.

5/ 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).

6/ 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 be permissible under the "any other lawful purpose" clause of 439a. See Advisory Opinion 1986-39. However, tax treatment of such contributions may differ from that accorded donations to 501(c)(3) organizations.

7/ 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 1992-4.