



FEDERAL ELECTION COMMISSION
Washington, DC 20463

February 7, 1992

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1991-39

Robert S. Royer
Royer, Mehle & Babyak
1747 Pennsylvania Avenue, N.W.
Washington, D.C. 20008

Dear Mr. Royer:

This responds to your letters of December 4, 1991 and November 26, 1991, requesting an advisory opinion on behalf of the Friends of Senator D'Amato (the "Committee") concerning application of the Federal Election Act of 1971, as amended ("the Act"), to the refund of several contributions previously received by Senator D'Amato's 1986 and 1992 Senate campaigns. You also provided supplementary information and comments in your letter dated February 4, 1992.

Your request includes a copy of a letter, dated November 5, 1991, that the Committee received from the U.S. Department of Justice. The letter indicates that several contributions the Committee reported in its 1986, 1987 and 1988 reports as made by various individuals were actually made by only one individual, Eduardo Lopez-Ballori. Mr. Lopez-Ballori ("the accused") is currently under grand jury indictment in the Eastern District of New York for causing the Committee to file false statements with the Federal Election Commission (the "Commission").

You state that, immediately upon receiving the Department of Justice letter, the Committee determined that there was a basis for the appearance of illegality and then segregated the funds in question. An amount sufficient to cover the questioned contributions was deposited in a separate account so that such amount will be available for disbursement "if and when the Commission determines a disbursement is warranted." At this time, the Committee also contacted counsel for the accused in an attempt to determine whether the contributions were indeed illegal and was informed that the accused asserts his innocence of the charges made against him. The Committee then decided that further contact would be inappropriate given the nature of the criminal proceeding.

Your request asks for clarification and guidance as to when the obligation to make any refunds arises. You state that the Committee takes no position as to what course of action should be required and that the Committee will pursue any course of action recommended by the Commission, including continuing to hold the funds in a segregated account or making refunds. You cite Advisory Opinion 1984-52, however, to indicate your belief that, when judicial proceedings are involved, there is a requirement that there be a conviction of a person or entity making the contribution before the obligation to make refunds emerges. You explain that, given the circumstances, the treasurer is not in a position to make a determination as to whom to refund the monies until the accused has had the benefit of due process. You add that if the Commission believes that the monies should be refunded before that time, the Committee needs clear guidance as to whom the monies should be refunded and when.

The Act prohibits the making of a contribution by one person in the name of another person and prohibits knowingly accepting such a contribution. 2 U.S.C. 441f and 11 CFR 110.4(b). Under Commission regulations, if the treasurer of a political committee determined at the time a contribution was received and deposited that it did not appear to be made in the name of another, but later discovers that it was so made based on new evidence not available at the time of the receipt and deposit, the treasurer is required to refund the contribution to the contributor within thirty days of the date on which the illegality is discovered. 11 CFR 103.3(b)(2).

In several opinions, the Commission has reviewed situations involving the requirement to subsequently refund contributions made in the names of others. See Advisory Opinions 1989-5 and 1984-52.¹ While these advisory opinions addressed the specific circumstances in which the guilty pleas of the contributors had put committees on notice that certain contributions were suspect, these opinions did not limit the circumstances in which a refund obligation can be said to arise. The language of section 103.3 itself refers only to "evidence not available to the political committee at the time of receipt" which, once presented, indicates that the contribution was prohibited by the Act.

The Commission notes that under federal case law, the evidentiary test applied by a grand jury in voting an indictment is whether there is probable cause to believe that the accused has committed the crime. See United States v. Calandra, 414 U.S. 338 (1974). Therefore, the Commission concludes that the criminal indictment, along with the cited Department of Justice letter, provided sufficient basis to question the lawfulness of the contributions under the Act pursuant to 11 CFR 103.3(b). You have indicated that the Committee would like to "protect the integrity of the political process" and therefore will remove these funds from its accounts, if the Commission can advise the Committee as to whom the funds can be paid.

The Commission determines that these funds, in the unusual circumstances present in this advisory opinion request, where the Committee cannot at this point determine the identity of the original contributor, shall be disbursed by the Committee for a lawful purpose unrelated to any Federal election, campaign, or candidate. An appropriate payee would include the Federal Government, any state or local government entity, or a qualified charitable organization described in 26 U.S.C. 170(c). A disbursement by the Committee that equals the total amount of the questioned contributions and is made to one or more of the above-listed payees will be timely

if made within ten days after receipt of this opinion. The payment should be disclosed as an itemized disbursement (offset to contributions) in the next report required to be filed by the Committee after the payment is made.²

This response constitutes an advisory opinion concerning the 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)

Joan D. Aikens
Chairman for the Federal Election Commission

Enclosures (AOs 1989-5 and 1984-52)

ENDNOTES:

1/ Both these matters also involved violations of 2 U.S.C. S441b since the entities making the contributions using the names of others were corporations. In Advisory Opinion 1984-52, Congressman Marty Russo requested an opinion regarding the obligation to refund contributions made by the Board of Trade Clearing Corporation using the names of corporate employees. In that situation, the corporation and two of its officers entered pleas of guilty to criminal violations of section 441b. The Commission concluded that under these circumstances a duty to refund the contributions in question existed.

In Advisory Opinion 1989-5, the Richard Ray for Congress Committee received information that a contributor had pleaded guilty to allowing his name to be used by Unisys corporation to make contributions using his name. Concluding on its own that a refund was necessary, the Committee requested guidance from the Commission as to whom the refund should be made, the conduit or the corporation. The Commission concluded that the refund should be made to the corporation.

2/Commission regulations require authorized committees to itemize contribution refunds or offsets and to identify the person who receives such disbursements. 11 CFR 104.3(b)(4)(v). The Committee should note when reporting the disbursement that it is made pursuant to this opinion.