BEFORE THE FAIR POLITICAL PRACTICES COMMISSION

In the Matter of:	)	
	)	
Opinion Requested by:	)	No. 89-006
Joseph B. Montoya, Senator	)	November 7, 1989
California Legislature	)	
	)	
	)	

BY THE COMMISSION: We have been asked the following question by Joseph B. Montoya, Senator, 26th District, California Legislature.

QUESTION

Are funds received by Senator Joseph B. Montoya to defend against a federal indictment alleging violations of federal criminal statutes considered contributions and, thus, subject to the limits on contributions provided for in the Political Reform Act (the "Act")?[1] If they are not contributions, are they considered to be gifts, reportable pursuant to the disclosure provisions of the Act?

CONCLUSION

Funds received by Senator Montoya to defend against a federal indictment alleging violations of federal criminal statutes are contributions and, thus, are subject to the limits on contributions provided for in the Act.

FACTS

A federal indictment filed in the United States District Court, Eastern District, charges Senator Montoya with 12 counts of violations of federal criminal statutes. In Count one Senator Montoya is charged with a violation of 18 U.S.C. Section 1962(c), conducting the affairs of an enterprise through a pattern of racketeering. Count one alleges that the object of the

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[1] Government Code Sections 81000-91015. All statutory references are to the Government Code unless otherwise indicated. Commission regulations appear at 2 California Code of Regulations Section 18000, et seq. All references to regulations are to Title 2, Division 6 of the California Code of Regulations.

racketeering activity was to improperly use the office of state senator as a vehicle to obtain payments in the form of campaign contributions and other payments. Count one further alleges eleven acts of racketeering in that Senator Montoya, or his agent, is alleged to have asked for, received, agreed to receive, or attempted to induce under color of official right, a payment or other thing of value or advantage with the understanding that it would influence his action on matters pending before the Legislature.

Counts two through twelve similarly allege various illegal acts in connection with matters under consideration by the Legislature. Senator Montoya is attempting to raise funds for legal fees to defend against the federal indictment. Senator Montoya states that the funds will be received by a defense fund which will be in the nature of trust under his control for his benefit and administered through intermediaries or agents.

ANALYSIS

The Political Reform Act, as amended by Propositions 68 and 73,[2] imposes limits on the amounts of gifts and contributions which a candidate may accept. The question before us is whether funds received by Senator Montoya, to defend against the federal indictment filed against him, constitute "contributions" within the meaning of the Act. This question is somewhat different from the one in the recently issued opinion, In re Johnson (1989) 12 FPPC Ops. 1, which concerned whether donations received by an elected officer to defend against a civil action were contributions subject to the Act's contribution limits. In Johnson, the civil action alleged illegal activities at election precincts and challenged the results of an election. The Commission concluded that the donations to the elected officer's legal defense fund were contributions and therefore subject to the contribution limits.

Propositions 68 and 73 did not modify the definition of the term "contribution" which was found in Section 82015 prior to

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[2] In In re Bell (1988) 11 FPPC Ops. 1, we advised that most of the provisions in Proposition 68, including the gift and contribution limitation provisions therein, were not valid because of their conflict with Proposition 73. In a recent ruling in Taxpayers to Limit Campaign Spending v. Fair Political Practices Commission (1989) ___ Cal. App. 3d ___, 89 Daily Journal D.A.R. 9863, the appellate court found some of the contribution limitation provisions to be valid. The appellate court noted that the decision was not in effect until the decision was final as to both itself and the California Supreme Court. The Commission has filed a petition for review of the appellate court's decision in the California Supreme Court, and the decision on the petition is now pending. Accordingly, the provisions found to be valid by the appellate court are not in effect at this time.

their adoption. Thus, that definition applies in determining whether funds received by a candidate are contributions and, therefore, subject to the contribution limits in Propositions 68 and 73.

Section 82015 defines a "contribution" as a payment[3] made for political purposes, except to the extent that full and adequate consideration is received. Commission regulations further clarify that a payment is made for political purposes if it is received by:

> A candidate, unless it is clear from surrounding circumstances that the payment was received ... for personal purposes unrelated to his or her candidacy or status as an office holder.
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> Regulation 18215(a)(2)(A) (emphasis added).

Similarly, Section 82025 defines an "expenditure" as any payment made for political purposes. As in the definition of contribution, the Commission, by regulation, has further clarified that expenditures include any payment made by:

> A candidate, unless it is clear from surrounding circumstances that the payment was made for personal purposes unrelated to his or her candidacy or status as an office holder.
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> Regulation 18225(a)(2)(A) (emphasis added).

In Thirteen Committee v. Weinreb (1985) 168 Cal. App. 3d 528, the First District Court of Appeal was called upon to decide whether attorney fees incurred and paid by a candidate, Weinreb, constituted a reportable political expenditure under the Act. In response to a pamphlet accusing her of dishonesty in connection with the disclosure of her economic interest, the candidate filed a defamation action prior to the election. (Id., at 531.) Thereafter, plaintiffs Thirteen Committee filed a lawsuit to compel the candidate to disclose attorney fees incurred and paid in connection with the defamation action. The trial court determined that disclosure was required.

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[3] Section 82044 defines a payment as:

> [A] payment, distribution, transfer, loan, advance, deposit, gift or other rendering of money, property, services or anything else of value, whether tangible or intangible.

The appellate court, quoting a Commission opinion, In re Buchanan (1979) 5 FPPC Ops. 14,[4] with approval, agreed. (Id., at 532.) It rejected the argument that the term "contribution" was not intended to cover expenditures made for private litigation. (Id., at 533.) The court also rejected the argument that disclosure should be limited to attorney fees paid before the election. The court noted that the statutory definition of expenditure focuses on the date that payment is made or consideration is received, whichever is earlier, and then added:

> [T]he lawsuit retained its political purpose even after the election insofar as the attorney fees could be properly characterized as political "expenditures." After Jiminez and his campaign manager were dismissed, the suit was pursued against the Howells alone. The evidence suggests that Weinreb sought to deter the Howells from preparing future "hit pieces" and to protect her reputation against similar attacks in future political contests. Even such subordinate aims bear some reasonable relationship to her "status as an officeholder" within the requirement for reportable expenditures.
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> Thirteen Committee v. Weinreb, supra, 168 Cal. App. 3d at 536.

Thus, the court focused on the Commission's regulation clarifying the definition of the term "expenditure," and the relationship between the purpose of the expenditure of funds and Weinreb's status as an officeholder.

The federal indictment alleges unlawful activities in connection with various bills pending in the Legislature. For example, Senator Montoya is alleged to have asked for, received, or agreed to receive $3,000 with the understanding that his vote and other action would be influenced in connection with Assembly Bill 4203. Senator Montoya is attempting to raise funds to defend against this indictment. The funds expended by Senator Montoya to defend against the indictment are payments made by a "candidate."[5] If the funds are expended for purposes related to his status as an

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[4] In Buchanan the Commission held that funds expended by a candidate for litigation expenses in order to retain his name on the ballot are reportable as expenditures on his campaign statement.

[5] Senator Montoya has filed a statement of intention to run for the Senate in 1990, and has established an account to raise funds for that purpose. Accordingly, pursuant to Section 82007, he is a candidate and will continue to be one until such time as that status is terminated.

officeholder, they will be deemed to be "expenditures" within the meaning of Regulation 18225(a)(2)(A).

Unlike payments made by a candidate for legal expenses in a personal lawsuit, for example, a divorce case, the funds Senator Montoya seeks to raise and spend in defending against the indictment have more than "some reasonable relationship to [his] 'status as an officeholder.'" (Thirteen Committee v. Weinreb, supra.) The funds thus raised and spent will have a direct relationship to his status as an officeholder, since the illegal activities alleged in the indictment all concern Senator Montoya's conduct in his capacity as a member of the Legislature. Therefore, the funds expended by Senator Montoya to defend against the indictment are "expenditures," and the funds received by him for those expenditures are "contributions." (Regulations 18225(a)(2)(A) and 18215(a)(2)(A).)[6]

Buchanan and Weinreb dealt with legal fees in connection with civil lawsuits. In this case the focus is on the legal fees in connection with a criminal indictment. That distinction, however, does not alter our conclusion. In Buchanan and Weinreb the decision was based on the relationship between the lawsuit and the office sought or held by the public official. The same rationale dictates that, where, as here, the funds are raised in connection with activities related to an official's "status as an

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[6] Senator Montoya has attached to his opinion request a copy of an opinion by the Legislative Counsel. The opinion was in response to a question by Assemblyman Ross Johnson. In the opinion, the Legislative Counsel concluded that contributions to a defense fund for litigation expenses incurred in defending against a criminal indictment were not reportable as campaign contributions, nor subject to the limits on contributions, under the provisions of the Act. The criminal indictment alleged that a member of the Legislature forged an election campaign document used in a campaign mailer to support another candidate in another Assembly district. The conclusion appears to have been based on the belief that the defense against the charges noted above would be undertaken without regard to his or her status as an elected officeholder or candidate and would not be for the purpose of influencing or attempting to influence the action of the voters for or against the nomination or election of a member.

Without responding to the specific issue presented to the Legislative Counsel, we believe the analysis misinterprets the scope of the phrase "for political purposes" in Regulations 18215 and 18225. In addition, unlike the allegations against Senator Montoya, the facts presented to the Legislative Counsel were probably perceived to require a minimal focus on the candidate's "status as an office holder." Therefore, we do not believe the analysis addresses the specific issues presented in this case.

office holder," the funds received are contributions. (Regulation 18215(a)(2)(A).)[7]

We recognize that when Buchanan and Weinreb were decided, the focus of those cases was whether certain contributions and expenditures should be reported. In view of the fact that Propositions 68 and 73 did not impose merely additional reporting requirements, but also imposed limits on contributions, it has been suggested that the conclusion should be changed. The Commission recently addressed the issue in In re Johnson (1989) 12 FPPC Ops. 1. After examining the purpose of the limitations on contributions imposed by Proposition 73 and the ballot pamphlet accompanying Proposition 73, the Commission concluded that Proposition 73 did not intend to alter the existing interpretation of the term "contribution." Nothing in Proposition 68 and the ballot pamphlet accompanying it causes us to change that conclusion.

Senator Montoya states that the funds he receives to defend against the criminal indictment will be received by a defense fund, which will be in the nature of a trust under his control for his benefit, and administered through intermediaries or agents. Receiving the funds into a defense fund, which will be in the nature of a trust for his legal defense, will not alter the character of the funds received.

In Buckley v. Valeo (1976) 424 U.S. 1, 96 S.Ct. 612, the Supreme Court found that the need to prevent corruption or the appearance of corruption is a compelling state interest which sustains the burden imposed on First Amendment rights by contribution limitations. (Buckley, supra, 424 U.S. at 26, 96 S.Ct. at 638.) Receiving the funds into a defense fund will not minimize the concerns raised by the receipt of large financial contributions and the impact of such contributions on candidates' positions and their actions when elected to office. The need to

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[7] We have not found any opinion issued by the Attorney General of California which specifically addresses this issue. However the Attorney General's office has issued letters in response to questions regarding the use of campaign funds pursuant to the personal use laws (Elections Code, Sections 12400 - 12404). In letters to Kenneth E. Roberson (SB 42, No. 86-29) and to Carl E. Douglas (SB 42, No. 89-65), the Attorney General's office concluded that the use of campaign funds for the payment of attorney fees in connection with the defense of criminal charges which involve the performance of the official's governmental duties is not prohibited; payment of attorney fees in the defense of those charges bears a "reasonable relationship to a political, legislative or governmental purpose" within the meaning of Elections Code Section 12402. This is consistent with our conclusion that the funds received for the defense fund are contributions.

prevent corruption or the appearance of corruption is a compelling state interest which is not alleviated by receiving the funds into a defense fund in the nature of a trust for legal defense. Accordingly, funds received by the defense fund to defend against the federal indictment filed against Senator Montoya are contributions and, therefore, subject to the limits on contributions contained in the Act.[8] .

We are mindful of the fact that such a conclusion may limit the funds that Senator Montoya may raise to defend against the indictment. It has been suggested that by concluding that such funds are contributions, we are impinging on Senator Montoya's right to counsel under both the United States Constitution and the California Constitution. (U.S. Const., 6th Amend.; Cal. Const., Art. 1, Section 15.)

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[8] Section 85309(a), as added by Proposition 68, provides that a legislative candidate, or a controlled committee of such candidate, shall not accept any contributions in any year in which the legislative candidate is not listed on the ballot as a candidate for legislative office. Regulation 18215(a)(2)(A) states, in part, that the term "payment" in the definition of "contribution" includes a candidate's own money or property used on behalf of his or her candidacy. Therefore, it may be argued that, should Section 85309 eventually be determined to be valid and enforceable, it would prevent a legislative candidate from using his own funds "for political purposes," within the meaning of Section 82015, in any year in which the candidate is not listed on the ballot since such funds would constitute a contribution, thus violating Section 85309(a).

In Buckley v. Valeo (1976) 424 U.S. 1, 96 S.Ct. 612, the United States Supreme Court held that limits on a candidate's use of personal funds in furtherance of his own candidacy were unconstitutional. A general principle of statutory construction states that a statute should be construed if reasonably possible to preserve its constitutionality, and avoid the constitutional issue inherent in a contrary construction. (Department of Corrections v. Workers' Comp. Appeals Board (1979) 23 Cal. 3d 197, 207.) Nothing in Section 85309 or the ballot pamphlet accompanying Proposition 68 indicated that Section 85309 was intended to apply to a candidate's use of personal funds in furtherance of his own candidacy. Accordingly, applying the above general principle, we conclude that Section 85309 does not prevent a legislative candidate from using his own funds "for political purposes," within the meaning of Section 82015, in any year in which the candidate is not listed on the ballot.

In People v. Courts (1985) 37 Cal. 3d 784, the California Supreme Court articulated the scope of this aspect of the right to counsel as follows:

> The right to effective assistance of counsel "encompasses the right to retain counsel of one's own choosing." ... [¶]Both this court and the United States Supreme Court have emphasized that trial courts have the responsibility to protect a financially able individual's right to appear and defend with counsel of his own choosing. ... [¶]Any limitations on the right to counsel of one's choosing are carefully circumscribed.
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> People v. Courts, supra, at 789-790 (emphasis added, citations omitted).

It would appear that the scope of the right to counsel of one's choosing is limited to the extent that an individual is able to afford such counsel with his or her personal funds. In Caplin and Drysdale, Chartered v. U.S. (1989) ___U.S.___, 109 S.Ct. 2646, and United States v. Monsanto (1989) ___U.S.___, 109 S.Ct. 2657, the United States Supreme Court discussed this aspect of the Sixth Amendment's protection of an individual's right to retain counsel.

In Caplin and Drysdale, supra, a criminal defendant was charged with running a massive drug importation and distribution scheme. The government sought forfeiture of specific assets in the defendant's possession. The U.S. District Court entered a restraining order forbidding the defendant from transferring any of the listed assets that were potentially forfeitable. Despite the restraining order, the defendant transferred $25,000 to his attorneys and the money was placed in the attorneys' escrow account.

Subsequently, the defendant entered into a plea agreement and agreed to forfeit all of the specified assets listed in the indictment. Thereafter the district court entered an order forfeiting all of the specified assets. The defendant's attorneys filed a petition claiming an interest in $170,000 of the defendant's assets for services they had provided, in addition to the $25,000 they held in the escrow account. The petitioner argued, inter alia, that the forfeiture statute infringed on a criminal defendant's Sixth Amendment right to counsel of choice.

The Supreme Court rejected this argument. It noted that the Sixth Amendment protection of an individual's right to retain counsel of his or her choosing does not go beyond the individual's right to spend his own money to obtain the advice and assistance of counsel. The Court then added:

> A defendant has no Sixth Amendment right to spend another person's money for services

> rendered by an attorney, even if those funds are the only way that the defendant will be able to retain the attorney of his choice.
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> Caplin and Drysdale, Chartered v. U.S., supra, 109 S.Ct. at 2652.

In United States v. Monsanto, supra, the defendant was accused of directing a large-scale heroin distribution enterprise and charged with related offenses. The U.S. District Court granted the government's motion to freeze certain specified assets potentially forfeitable. The defendant moved to vacate the court's order so that he could use the assets to retain an attorney. The Supreme Court rejected defendant's argument that such forfeiture violated defendant's right to counsel of choice as protected by the Sixth Amendment. The Court referred to its decision in Caplin and Drysdale, supra, and the discussion therein, as disposing off defendant's constitutional claim.

The petitioner in Caplin and Drysdale, supra, also argued that the burden placed on defendant's Sixth Amendment right outweighs the government's interest in forfeiture. The Court rejected the argument and concluded that the limited burden placed by the forfeiture statute on defendant's Sixth Amendment rights was overridden by the government's strong interest in obtaining full recovery of all forfeitable assets. (Caplin and Drysdale, supra, 109 S.Ct. at 2655.)

The limits on contributions, as added by Propositions 68 and 73, may impose a burden on Senator Montoya's exercise of his Sixth Amendment right to counsel. However, in Buckley v. Valeo (1976) 424 U.S. 1, 96 S.Ct. 612, the Supreme Court found that the need to prevent corruption or the appearance of corruption is a compelling state interest which sustains the burden imposed on First Amendment rights by contribution limitations. (Buckley, supra, 424 U.S. at 26, 96 S.Ct. at 638.) To the extent that the limitations on campaign contributions may burden an accused's right to counsel, the prevention of actual or apparent corruption is a compelling state interest which we conclude can justify restrictions on his Sixth Amendment right to counsel of choice.

We have concluded above that funds received by Senator Montoya to defend against the federal indictment are contributions and, therefore, subject to the limitations on contributions provided for in the Act. To the extent this conclusion limits his ability to raise funds to defend against this indictment, it does not violate his right to counsel.

Approved by the Commission on November 7, 1989.
Concurring: Chairman Larson, Commissioners Fenimore, Rattigan and Vial.
Dissenting: Commissioner Aparicio

John H. Larson
Chairman