

RAVI MEHTA  
CHAIRMAN



FAIR POLITICAL PRACTICES COMMISSION

May 22, 1995

Mr. Joel Kuperberg  
Rutan and Tucker  
Bank of the West, Suite 1400  
611 Anton Boulevard  
Post Office Box 1950  
Costa Mesa, California 92628-1950

Re: Your Request for Advice  
Our File No. A-95-133

Dear Mr. Kuperberg:

This is in response to your request for advice regarding the honoraria provisions of the Political Reform Act (the "Act").<sup>1</sup>

QUESTION

Is the Section 89501(a) ban on accepting honoraria valid and enforceable in light of the decision in United States v. National Treasury Employees Union, \_\_\_ U.S. \_\_\_, 115 S.Ct. 1003, 130 L.Ed.2d 964 (1995)? Specifically, is Mr. Klein, a member of the City of Irvine's Transportation Commission and a designated employee in the city's conflict of interest code, prohibited from receiving honoraria for "op-ed" articles he writes for local newspapers?

CONCLUSION

The Commission is prohibited by Article 3, Section 3.5 of the California Constitution from declaring a state statute unconstitutional or unenforceable. Section 89501(a) of the Act prohibits designated employees of a local government agency from accepting any honorarium. Therefore, Mr. Klein may not accept honoraria for "op-ed" pieces he writes.

<sup>1</sup> 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, Sections 18000-18954. All references to regulations are to Title 2, Division 6 of the California Code of Regulations.

FACTS

The City of Irvine is a chartered municipality. In accordance with its charter, the city has established certain commissions to serve in advisory roles, and provide recommendations to the Irvine City Council on matters within the subject matter jurisdiction of the commissions, in order to enable the city to more efficiently carry out its governmental duties. Under the city's conflict of interest code, members of city commissions are considered "designated employees" subject to the disclosure and reporting requirements of the Political Reform Act.

One of the city's commissions is the Transportation Commission. The Transportation Commission consists of five members, appointed by the city council. The Transportation Commission is vested with the authority to advise the city council on matters pertaining to transportation, including public and quasi-public transit, riding and hiking trails, auto traffic, air transportation, and school and pedestrian safety.

Mr. Howard Klein is a resident of the city, and also has a law office in the City of Irvine. Mr. Klein has been appointed to, and currently sits as a member of, the city's Transportation Commission. Mr. Klein has in the past, in his personal capacity (rather than as a Traffic Commissioner or attorney) occasionally written "op-ed" articles in the local newspapers. These articles address issues of national, statewide or local politics, government or policy. To your knowledge, he has never written an article pertaining either to transportation issues or any project that has or might come before the Transportation Commission, or to issues pertaining to the law, the legal profession or the practice area in which Mr. Klein specializes.

It is your understanding that the local newspapers for which Mr. Klein occasionally writes articles pay all contributors a flat fee of \$50 per article. Mr. Klein has historically accepted such fees, and desires to continue to do so in the future. It is possible that Mr. Klein could receive in excess of \$300 in a calendar year from a single newspaper, in consideration for the articles that he writes.

ANALYSIS

Section 89501 of the Political Reform Act provides that:

(a) No local elected officeholder, candidate for local elected office, elected, appointed, or candidate for, member of the governing board of a special district, or designated employee of a local government agency shall accept any honorarium, as defined in subdivisions (b), (c), and (e) of Section 89502.

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The Supreme court in National Treasury held that a provision of the Federal Ethics Reform Act prohibiting all rank and file executive branch employees from receiving honoraria violated their First Amendment right of free speech.<sup>2</sup> The decision upheld the constitutionality of the honorarium ban as applied to high-level employees of the Executive Branch, members of Congress, and judges. In addition, the Supreme Court suggested that a narrower honorarium ban for federal employees that included a nexus between the individual's governmental employment and the subject matter of the expression or the identity of the payor, might be constitutional.

The Fair Political Practices Commission is presently reviewing whether the decision in National Treasury would have any effect on the prohibitions and restrictions on the receipt of honoraria contained in Sections 89501-89503 of the Political Reform Act. We note, however, that the Act's provisions regarding honoraria are significantly narrower in scope than those that were invalidated by the Court.

Further, the Commission is prohibited by the State Constitution from declaring a statute unenforceable or unconstitutional. Article 3, Section 3.5 of the California Constitution provides that:

An Administrative agency, including an administrative agency created by the Constitution or an initiative statute, has no power:

(a) To declare a statute unenforceable, or refuse to enforce a statute, on the basis of it being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional;

(b) To declare a statute unconstitutional;

(c) To declare a statute unenforceable, or to refuse to enforce a statute on the basis that federal law or federal regulations prohibit the enforcement of such statute unless an appellate court has made a determination that the enforcement of such statute is prohibited by federal law or federal regulations.

(Emphasis added.)

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<sup>2</sup> The provisions of the Ethics Reform Act of 1989 governing outside income and honoraria are codified at 5 U.S.C. App. Section 501 et seq. (1988 ed. Supp. V.).

For your information, prior to the Supreme Court decision in National Treasury two Senate bills were introduced which, among other things, would modify the Act's honoraria provisions: Senate Bill 704 introduced by Senator Beverly, and Senate Bill 701 introduced by Senator Craven. Both bills would maintain a total ban on the receipt of honoraria by elected state officers; elected officers of local government agencies; other individuals specified in Section 87200; candidates for elective state office; and candidates for elective office in a local government agency.

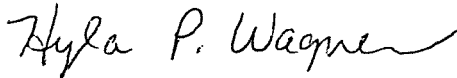
Both bills would, however, conform the existing prohibition on receipt of honoraria by designated employees of local agencies to that applicable to designated employees of state agencies. The bills provide that no member of a state board or commission and no designated employee of a state or local government agency could accept an honorarium from any source if the member or employee would be required to report the receipt of income or gifts from that source on his or her statement of economic interests.

The Senate recently passed SB 704 and SB 701 and sent both bills on to the Assembly. Unrelated to the Supreme Court's recent decision, the Commission has taken a position in support of both bills. Copies of these bills are enclosed for your reference.

If you have any further questions regarding this matter, please contact me at 916/322-5660.

Sincerely,

Steven G. Churchwell  
General Counsel



By: Hyla P. Wagner  
Counsel, Legal Division

Enclosures