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Lawrence H. Norton, General Counsel
Office of the General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Re: AOR 2003-17

Dear Mr. Norton:

On behalf of the Political Law Group of Perkins Coie, I am writing to comment on Advisory Opinion Request 2003-17 (AOR 2003-17). When this request was published, it appeared that prior advisory opinions adequately answered the question posed. The comments filed by the Department of Justice (DOJ), however, urge the Commission to revisit and distinguish those prior opinions from the opinion, and the draft prepared by the Office of General Counsel (OGC) has now followed suit. For the reasons given below, the Commission, should it adopt OGC's view, would depart from the clear language and intent of the statute and, in so doing, abandon sound precedent.[1]

[1] We respectfully request that the Commission take account of these comments, and place them on the public record, though we have submitted them after the close of the formal comment period. We do not expect to make a habit of out-of-time comments, but having followed this matter closely, we concluded that this was one instance when the development of comments would benefit from review of the OGC draft. It is that draft, after all, that will largely frame the Commission's discussion at its Thursday meeting.

[09901-0001/DA031900.004]

AOR 2003-17 was submitted by the law firm of Klingeman, Turano on behalf of its client, James Treffinger. In 2000 and then again in 2002, Mr. Treffinger was a candidate for United States Senate from New Jersey. At the time of the request, Mr. Treffinger was under indictment for various criminal offenses related to his campaign for the Senate. Since his request, he has pled guilty to two of the offenses for which he was charged. Mr. Treffinger through counsel asks the Commission whether he may defray the costs of his legal defense with funds remaining in his campaign account.

It goes without saying – but it is stated here nonetheless – that these comments do not reflect or imply support, much less sympathy, for Mr. Treffinger's conduct or legal position. The only question, and thus our only concern, is whether in issuing an opinion on these facts, the Commission will uphold standing precedent that governs the use of campaign funds to pay legal expenses. Bad facts often encourage the creation of bad law, and there appears in the OGC draft an understandable but unfortunate temptation, on these facts, to reconfigure existing precedent to deny Mr. Treffinger's request. We urge the Commission to resist that temptation.

The Commission has long recognized in its regulations that the statute gives candidates and officeholders wide discretion in the use of campaign funds to defray expenses incurred in connection with their campaigns or in connection with their duties as Federal officeholders. The test is whether the expense "would exist irrespective of the candidate's campaign or duties as a Federal officeholder," at 11 CFR 113.1(g)(1)(ii), to be determined on a case-by-case basis. 11 CFR 113.1(g)(1)(A). In Advisory Opinion 1998-1, the Commission elaborated on the regulation, holding that the test is whether the legal expense would exist absent candidacy or Federal officeholder status.

This is the legally dispositive question: whether there is an unbreakable link between the legal expense incurred, on the one hand, and the office held or candidacy maintained, on the other. Neither the statute nor the regulation requires further inquiry. Whether a legal expense arises in a criminal, civil or ethics proceeding is immaterial. Nor does it matter whether the officeholder or candidate incurs the expense as a witness, respondent, target or defendant. And, of particular importance here, the outcome of the proceeding – favorable or unfavorable to the officeholder or candidate – has no bearing whatever on the question.

There are sound reasons for keeping the inquiry simple in this way. There is no intelligible or fair framework for judging the variables that should count in favor of, or against, the use of campaign funds. It does not make sense, more specifically, to distinguish a civil from a criminal proceeding. Apart from the fact that there is no statutory basis for this distinction, there is likewise no basis for it in either logic or sound policy. A distinction that turns on the type of legal exposure faced by the candidate, invites arbitrary results, allowing the use of campaign funds to defend against a civil action, but not a criminal action, based on the same set of underlying facts. Consider, for example, claims arising out of an alleged theft of campaign materials, or the interception of wireless campaign communications: these may be pursued civilly or criminally, while the use of

campaign funds to defend against them would depend on the form and forum in which they were brought. If a candidate or officeholder were required to defend the claims in both forums, criminal and civil, a rule that distinguished between the two would allow for the payment of the "civil" but not the "criminal" portion of the expenses, presumably requiring some cumbersome allocation and generating additional legal exposure.

The attempt to make a special case of criminal proceedings fares no better on some sort of "public policy" argument. On one level, such an argument would be wildly over-inclusive, applying to expenses incurred by candidates or officeholders who were merely witnesses, or who may for some period have been subjects but persuaded the government that further action was unwarranted. There is still a broader, more fundamental problem with such an argument: that it leaves officeholders and candidates without recourse to campaign funds for their defense in precisely the circumstances when such access is most consistent with the purposes of the rule.

Recent years have demonstrated beyond question that political disputes are regularly "criminalized."[2] Even with the demise of the "Independent Counsel," there is no cause for the happy but deluded conclusion that committed political adversaries, in the pursuit of their political objectives, will now refrain from casting their political differences into the form of criminal claims. To prohibit the use of campaign funds for a defense in this context is to do so precisely when the statute specifically authorizes it – in intensely political circumstances, directly related to officeholding or candidacy. A "public policy" argument worth the name leads a conclusion the very opposite of the one advanced by OGC.[3]

For these purposes, it entirely beside the point that at some point the officeholder or candidate might enter a plea to some charges or, after trial, suffer a conviction. Those who defend against

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[2] See generally, Benjamin Ginsberg and Martin Shefter, Politics by Other Means: Politicians, Prosecutors, and the Press from Watergate to Whitewater (1999).

[3] In comparable circumstances, the Internal Revenue Service has rejected just such a "public policy" argument made to deny the deductibility of legal expenses incurred in the defense of criminal claims. In *Commissioner of Internal Revenue v. Tellier*, 383 U.S. 687 (1966), the question was presented to the Supreme Court whether expenses incurred in the unsuccessful defense of a criminal prosecution are deductible as ordinary and necessary business expenses. The Court concluded that the expenses were deductible and there was no "public policy" exception to the plain provision of the statute. 383 U.S. at 688. It is exactly the same type of public policy exception, which the government argued for in that case, that DOJ urges upon the Commission in this matter. There is no basis in any event for concluding that Congress intended the wide discretion accorded candidates in the use of campaign funds be subject to a public policy exception.

criminal charges or claims in the political context need access to the available resources, including campaign funds, from the beginning of the process, not only at its conclusion. A rule that conditioned that access to campaign funds on a demonstration of "innocence" puts all officeholders and candidates, the guilty or the innocent, at a disadvantage – simply for want of resources. The rule therefore forces the candidate-officeholder into the circular dilemma that to access the resources, they must prove their innocence; but to prove their innocence, they may require these resources.

As noted, the facts of this matter are undoubtedly unattractive, and there would be nothing surprising about a reluctance, based on the facts alone, to approve a post-plea use of campaign funds for Mr. Treffinger's legal defense. It is perhaps for this reason that the OGC draft makes a valiant effort to argue that the expenses at issue in this AOR are not election-related. To arrive at this conclusion, the OGC draft suggests that the criminal proceedings against Mr. Treffinger must be "viewed in their entirety," and that when so viewed, will be seen to "overwhelmingly relate to alleged breaches of the public trust and public fraud." OGC concedes a relationship to Mr. Treffinger's candidacy, but not a "direct" relationship, and it claims that the "primary wrong" lies elsewhere.

With all due respect to OGC, this characterization is wrong. The charges against Mr. Treffinger relate "overwhelmingly" to fundraising, reporting and an alleged scheme of concealment.Artful characterization should not control the result here or in like cases. In the past, election-related claims have been brought under a variety of theories other than the FECA: false statements (18 USC § 1001); mail and wire fraud (18 USC §§ 1341, 1343), and conspiracy to defraud the United States (18 USC § 371). Commission adoption of OGC's theory invites prosecutors to style an indictment in such a fashion as to deprive the accused from access to campaign funds. This is particularly problematic since often the characterization of the legal claim – who is the victim, what the motive is, etc. – is mere surplusage in the indictment. It serves merely the prosecutorial effort to make the case more attractive to a jury, but is not legally required to be included. The position urged by OGC would place a premium on such extra-legal characterizations, rather than the objective facts establishing whether the charges are related to candidacy or officeholding.

The high cost of campaigns is already a substantial disincentive to people considering running for office. The legal risks of candidacy and officeholding are all the more discouraging. The Commission has in place rules that allow candidates and officeholders to draw on campaign expenses when related to candidacy or office; and Congress, when enacting the Bipartisan Campaign Reform Act of 2002, codified the personal use rules without narrowing the availability of campaign funds for these types of legal expenses. Hence there is neither a basis in the statute, nor any sound reason of policy, for an adjustment in these rules to the detriment of officeholders and candidates. Should the Commission conclude otherwise, then it should present that conclusion to the Congress, for its own consideration, in the agency's next set of legislative recommendations.

For these reasons, we urge the Commission to approve the use of campaign funds as proposed in AOR 2003-17.

Very truly yours,

Robert F. Bauer

RFB:mjs

cc: Ellen Weintraub, Chair, FEC
Bradley A. Smith, Vice Chairman, FEC
Michael E. Toner, Commissioner, FEC
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