

**STATE OF HAWAII
CAMPAIGN SPENDING COMMISSION**

ADVISORY OPINION NO. 09-01

This Advisory Opinion responds to a federal elected official who asks whether the official's Hawai'i candidate committee ("Committee") may accept funds transferred to the Committee from the official's federal campaign committee.

We respond in the negative. Hawai'i law does not permit the Committee to accept the transfer of the federal campaign funds. These funds are neither "surplus funds" nor the official's "own funds," as urged by the official.

I. SUMMARY

The official was reelected to federal office in 2008. In his opinion request of May 27, 2009, the official said that the federal campaign committee "holds a substantial amount of ...funds" consisting of contributions made for federal elections that occurred prior to 2009 that exceed the federal committee's authorized expenses. These funds were raised in accordance with federal campaign finance laws. The official registered with the Campaign Spending Commission ("Commission") by filing an organizational report for a Hawai'i candidate committee on March 9, 2009.¹ The official is seeking election to the office of Governor according to information in the organizational report.

Hawai'i's campaign finance statutes specify that a Hawai'i candidate, including the federal elected official, may accept financial support for an election campaign only from contributions, loans, surplus funds, or the candidate's own funds.² The official urged that the excess federal funds are either surplus funds or the official's own funds. The official's excess federal campaign funds, however, are neither surplus funds nor the candidate's own funds for the reasons set forth below.

The excess federal campaign funds, therefore, cannot be accepted by the official's Hawai'i candidate committee; except that the official's Hawai'i candidate committee may accept a contribution in an aggregate amount up to \$6,000 during the applicable election period because the federal committee is registered as a Hawai'i noncandidate committee.³

¹ §11-194 Registration. (a) Each candidate or noncandidate committee shall register with the commission by filing an organizational report as set forth in section 11-196 or 11-196.5 as applicable.

(b) Each candidate shall file an organizational report within ten days of:

(1) Filing the nomination papers for office; or

(2) The date the candidate or candidate's committee receives contributions or makes expenditures that amount to more than \$100 in the aggregate during the applicable election period, whichever occurs first.

² There is an exception for public funds that may be received by a candidate applying for either partial public financing or a Hawai'i county council candidate for election in 2010 applying for comprehensive public financing.

³ Alternatively, the federal campaign committee may make refunds to persons who made federal contributions and solicit contributions to the Hawai'i candidate committee. The Federal Election Commission specifically approved a plan to refund excess federal campaign funds to individuals and resolicit those individuals for contributions to a New Jersey gubernatorial campaign committee. See, Opinion No. 1996-52.

II. HAWAII'S LAW DETERMINES WHETHER THE FEDERAL ELECTED OFFICIAL'S HAWAII CANDIDATE COMMITTEE MAY ACCEPT THE TRANSFER OF FEDERAL EXCESS CAMPAIGN FUNDS

A. Federal campaign statutes do not preempt Hawai'i law

The Federal Election Campaign Act of 1971⁴ ("FECA") specifies that federal contributions may be used for "donations to State and local candidates subject to the provisions of State law."⁵ (Emphasis added). In a number of opinions, the Federal Election Commission ("FEC") discussed that FECA does not preempt state laws.⁶ For example in FEC Advisory Opinion 1993-10, a Federal elected official asked whether he could use his federal contributions for his race for Governor of Puerto Rico. The FEC advised that he could use his Federal contributions for the Governor's race, but emphasized:

[T]hat if any provisions of Puerto Rican law are applicable to your proposed transfers or donations, such provisions would not be pre-empted by 2 U.S.C. 453⁷ and 11 Code of

⁴ 2 U.S.C § 431 et seq.

⁵ 2 U.S.C. § 439a Use of contributed amounts for certain purposes. (a) Permitted uses. A contribution accepted by a candidate, and any other donation received by an individual as support for activities of the individual as a holder of Federal, may be used by the candidate or individual-

(1) for otherwise authorized expenditures in connection with the campaign for Federal office of the candidate or individual;

(2) for ordinary and necessary expenses incurred in connection with duties of the individual as a holder of Federal office;

(3) for contributions to an organization described in section 170(c) of Title 26;

(4) for transfers, without limitation, to a national, State, or local committee of a political party;

(5) for donations to State and local candidates subject to the provisions of State law; or

(6) for any other lawful purpose unless prohibited by subsection (b) of this section.

(b) Prohibited use

(1) In general. A contribution or donation described in subsection (a) of this section shall not be converted to personal use.
(Emphasis added)

....

⁶ FEC Advisory Opinion 1986-5 addressed the question of a Federal candidate who sought to transfer his Federal contributions to his local campaign committee for Prosecutor. The FEC opined that the transfer was permissible under 2 USC § 439a as long as it was lawful under Indiana law. The FEC emphasized:

[T]hat if any provisions of Indiana law are applicable to the proposed transfer, such provisions would not be preempted by 2 U.S.C. 453 and 11 CFR 108.7. Thus, the application of any Indiana law concerning, for example, the amount of such a transfer or the reporting of it by the transferee committee would not be superseded or preempted by the Act or regulations of the Commission.

⁷ 2 USC § 453. State laws affected. (a) In general. Subject to subsection (b), the provisions of this Act, and of rules prescribed under this Act, supersede and preempt any provision of State law with respect to election to Federal office. (Section 103(b)(2) of the Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155. amended section 453 to redesignate the existing subsection as (a) and add subsection (b). This amendment is effective as of November 6, 2002.)

Federal Regulations (“CFR”) 108.7.⁸ Thus, the application of any Puerto Rican law concerning, for example, the amount of such transfers of donations, or their reporting by any transferee entity, would be not superseded or pre-empted by the Act or regulations of the Commission. (Emphasis added.)

States are “free to enforce their own restrictions on the financing of state electoral campaigns.”⁹

B. The Hawai’i Constitution specifies that contribution limitations within Hawai’i are determined by state law

Contribution limitations within the State are determined by Hawai’i’s laws:

Limitations on campaign contributions to any political candidate, or authorized political campaign organization for such candidate, or for any election office with the State shall be provided by law.¹⁰

III. THE ELECTED OFFICIAL’S EXCESS FEDERAL CAMPAIGN FUNDS ARE NOT SURPLUS FUNDS

The federal elected official urges that the official’s Hawai’i candidate committee may accept the excess federal campaign funds because those funds are “surplus funds.” Under Hawaii law “surplus funds” are defined as “unspent money from contributions held by a candidate or committee after a general or special election and after all campaign expenditures have been paid for the election period.”¹¹ The federal elected official’s excess campaign funds are not “surplus funds” under Hawai’i law because the federal elected official was not a “candidate” for “election” to a Hawai’i “office” when he raised those federal campaign funds.

⁸ 11 CFR § 108.7. Effect on State Law. (a) The provisions of the Federal Election Campaign Act of 1971, as amended, and rules and regulations issued thereunder, supersede and preempt any provision of State law with respect to election to Federal office.

(b) Federal law supersedes State law concerning the—

- (1) Organization and registration of political committees supporting Federal candidates;
- (2) Disclosure of receipts and expenditures by Federal candidates and political committees; and
- (3) Limitations on contributions and expenditures regarding Federal candidates and political committees.

(c) The Act does not supersede State laws which provide for the—

- (1) Manner of qualifying as a candidate or political party organization;
- (2) Dates and place of elections;
- (3) Voter registration;
- (4) Prohibition of false registration, voting fraud, theft of ballots, and similar offenses;
- (5) Candidate’s personal financial disclosure; or
- (6) Application of State law to the funds used for purchase or construction of a State or local party office building to the extent described in 11 CFR 300.35.

⁹ Michael A. Rosenhouse, J.D., Validity, Construction, and Application of Campaign Finance Law, Campaign Finance, 19 A.L.R. Fed 2d 19 (2007).

¹⁰ Hawai’i Constitution, Article II, Section 6.

¹¹ HRS § 11-191.

- A “candidate” is defined as “an individual who seeks nomination for election, or seeks election, to office.”¹²
- “Election” means any election for office or for determining a question or issue provided by law or ordinance.¹³ (Emphasis added).
- “Office” is defined as...”any elective public or constitutional office excluding county neighborhood board and federal elective offices.”¹⁴ (Emphasis added.) Of particular significance is the evolution of this definition. The Hawai’i legislature previously considered this issue and amended the definition of “office” to specifically exclude a federal office.¹⁵

Notably, a candidate who raised campaign funds pursuant to Hawai’i law may use surplus funds -- “unspent money from contributions held by candidate or committee after a general or special election and after all campaign expenditures have been paid for the election period”¹⁶ -- for expenditures in the next subsequent election upon registration for the election.¹⁷ The funds may be expended only for the purposes enumerated in the statute.¹⁸

¹² HRS § 11-191.

¹³ HRS § 11-191

¹⁴ HRS § 11-191.

¹⁵ The campaign finance statutes were first enacted in Act 185, SLH 1973, and included a definition of “office” which read as follows:

‘Office’ means any public or constitutional office, including but not limited to the following: U.S. president, U.S. vice-president, U.S. senator, U.S. representative, governor, lieutenant governor, state senator and representative, board of education official, delegates to the constitutional convention, and county officers.

Act 146, SLH 1975, amended the definition to read as follows:

‘Office’ means any elective public or constitutional office excluding federal elective offices.

Act 10, Special Session of 1995, amended the definition of “office” to its current form.

¹⁶ HRS § 11-191.

¹⁷ HRS § 11-214(c) provides that “An elected official who is seeking reelection to the same office in successive elections shall not be required to file an organizational report under this section unless the candidate is required to report a change in information pursuant to section 11-196(b); provided that the candidate has not sought election to any other office during the period between elections.”

¹⁸ HRS § 11-206 Campaign contributions; restrictions as to surplus.

.....

- (c) Surplus funds may be used after a general or special election for:
- (1) Any fundraising activity;
 - (2) Any other politically related activity sponsored by the candidate;
 - (3) Any ordinary and necessary expenses incurred in connection with the candidate's duties as a holder of an elected state or county office; or

In 1993, the Federal Election Commission determined it would be necessary to examine the underlying contributions for compliance with federal law and noted in denying the transfer the difficulty in linking specific funds to be transferred to particular fundraising disbursements. Additionally, there would be significant practical difficulties for the Federal Election Commission to review each and every state contribution for compliance with federal law.¹⁹

IV. THE EXCESS FEDERAL CAMPAIGN FUNDS ARE NOT THE OFFICIAL'S "OWN FUNDS"

The federal elected official argues that the excess federal campaign funds are the official's "own funds" which may be accepted by the official's Hawai'i candidate committee. This argument misses its mark.

A "contribution" does not include a candidate's "own funds."²⁰ This is because the prevention of actual and apparent corruption of the political process does not support limitation on expenditures of a

(4) Any contribution to any community service, educational, youth, recreational, charitable, scientific, or literary organization; provided that in any election cycle, the total amount of all contributions from surplus funds shall be no more than twice the maximum amount that one person or other entity may contribute to that candidate pursuant to section 11-204(a); provided further that no contributions from campaign funds shall be made from the date the candidate files nomination papers to the date of the general election.

.....

¹⁹ 58 Fed. Reg. 3474 (January 8, 1993).

²⁰ HRS § 11-191 provides, in pertinent part, that "Contribution":

(1) Means:

(A) A gift, subscription, deposit of money or anything of value, or cancellation of a debt or legal obligation and includes the purchase of tickets to fundraisers for the purpose of:

- (i) Influencing the nomination for election, or election, of any person to office;
- (ii) Influencing the outcome of any question or issue that appears or is reasonably certain to appear on the ballot at the next applicable election described in clause (i); or
- (iii) Use by any party or committee for the purposes set out in clause (i) or (ii);

(B) The payment, by any person, political party, or any other entity other than a candidate or committee, of compensation for the personal services or services of another person that are rendered to the candidate or committee without charge or at an unreasonably low charge for the purposes set out in subparagraph (A); or

(C) A contract, promise, or agreement to make a contribution; provided that notwithstanding this subparagraph and subparagraphs (A) and (B), the term "contributions" shall not include services or portions thereof voluntarily provided without reasonable compensation by individuals to or in behalf of a candidate or committee.

Notwithstanding subparagraphs (A), (B), and (C), a candidate's expenditure of the candidate's own funds or the making of a loan or advance in the pursuit of the candidate's campaign shall not be a contribution for the purpose of this subpart but shall nevertheless be reportable as a campaign receipt;

The term "own funds" also appears in the definitions of "committee;" "expenditure" and "private contributions" in HRS § 11-191.

candidate's personal funds."²¹ "...[T]he use of personal funds reduces a candidate's dependence on outside contributions and thereby counteracts the coercive pressures and attendant risks of abuse to which the Act's contribution limitations are directed."²²

The excess federal campaign funds are not the official's "own funds" based upon the Commission's consideration of:

- The ordinary meaning of the term;
- The law's purpose and policy;
- The context of the entire statute; and
- The consequences that would result from construing the law as the official urges.

Moreover, the application in this opinion request of the ordinary meaning of the term "own funds" is consistent with the FEC's approach.

A. HRS § 1-14: The ordinary meaning of the term "own funds" does not include the official's excess federal campaign funds

While the term "own funds" is not defined under Hawai'i's campaign finance statutes, applying the most common, general, or popular meaning to these words dictates that the funds must be owned by the candidate. When "construing or interpreting any statute, the one and only quest is to ascertain the intent of the legislature" and that "[t]o that end the words of a statute normally are to be taken in their popular sense [...] ... the words of statutes ... should be interpreted where possible in their ordinary, everyday senses[]..."²³ Words of a statute are to be generally understood in their most common, general, or popular definition.²⁴

The courts have said that "[w]here a term is not statutorily defined ... we may rely upon extrinsic aids to determine such intent. Legal and lay dictionaries are extrinsic aids which may be helpful in discerning the meaning of statutory terms."²⁵

²¹ Buckley v. Valeo, 424 U.S. 1, 52-54; 96 S.Ct. 612, 651-52 (1976). The Court, among other things, struck down section 608(a)(1) of the Federal Election Campaign Act of 1971 which limited expenditures by a candidate "from his personal funds, or the personal funds of his immediate family in connection with his campaigns during any calendar year."

A candidate's own funds, therefore, are not subject to the financial limits on contributions in HRS § 11-204(a); and source limits (e.g., HRS § 11-204(i) prohibits contributions from foreign nationals (individuals who are not citizens of the United States), except for green card holders; certain state and county contractors are prohibited from making contributions by HRS § 11-205.5; contributions by nonresident individuals and persons are limited by HRS § 11-204.5).

²² Buckley at 424 U.S. at 52; 96 S.Ct. at 651; Davis v. Federal Election Commission, 128 S.Ct. 2759, 2771 (2008).

²³ In re Taxes, Hawaiian Pineapple Co., Ltd., 45 Haw. 167, 178 (1961).

²⁴ HRS § 1-14, entitled "Words have usual meaning," states that "[t]he words of a law are generally to be understood in their most known and usual signification, without attending so much to the literal and strictly grammatical construction of the words as to their general or popular use or meaning.

²⁵ Olelo: The Corporation for Community Television v. Office of Information Practices, 116 Hawai'i 337 (2007); See also Singleton v. Liquor Com'n, County of Hawai'i, 111 Hawai'i 234, 244 (2006); Leslie v. Board of Appeals of

Black's Law Dictionary defines "own" as "[t]o have good legal title; to hold as property; to have a legal or rightful title to; to have; to possess."²⁶ Black's also defines "ownership" as "[t]he collection of rights allowing one to use and enjoy property, including the right to convey it to others. Ownership implies the right to possess a thing, regardless of any actual or constructive control. Ownership rights are general, permanent, and inheritable."

The elected official urges that the excess federal campaign funds are the official's "own funds" because the official has the discretion to determine how the funds are spent, subject to the admonition that "a contribution or donation described in subsection (a) shall not be converted by any person to personal use."²⁷ The federal law's limits on the excess federal campaign funds, however, cannot be reconciled with the ordinary definition of the term "own funds."

B. HRS § 1-15(2): "Own funds" do not include the official's excess federal campaign funds based upon the law's policy and purpose

The Commission may consider "the reason and spirit of the law, and the cause which induced the legislature to enact it to discover its true meaning."²⁸ We presume that our legislature intended for the term "own funds" to be applied in a logical manner consistent with the statute's underlying policy and purpose.

County of Hawaii, 109 Hawai'i 384, (2006) (The court "may resort to legal or other well accepted dictionaries as one way to determine the ordinary meaning of certain terms not statutorily defined;") State v. Nomura, 79 Hawai'i 413, 416, 903 P.2d 718, 721 (App.1995) (stating that "resort to legal or other well accepted dictionaries is one way to determine the ordinary meanings of certain terms not statutorily defined").

²⁶ Black's Law Dictionary 1105 (6th ed.1990).

²⁷ 2 U.S.C.A. § 439a(b)(1)

This section defines personal use as follows:

[T]o fulfill any commitment, obligation, or expense of a person that would exist irrespective of the candidate's election campaign or individual's duties as a holder of Federal office, including –

- (A) a home mortgage, rent, or utility payment;
- (B) a clothing purchase;
- (C) a noncampaign-related automobile expense;
- (D) a country club membership;
- (E) a vacation or other noncampaign-related trip;
- (F) a household food item;
- (G) a tuition payment;
- (H) admission to a sporting event, concert, theater, or other form of entertainment not associated with an election campaign; and
- (I) dues, fees, and other payments to a health club or recreational facility.

Additionally, 11 CFR § 113.1(g) (2009) provides further explanation of expenses that are prohibited with federal excess campaign funds.

²⁸ HRS § 1-15(2).

While the legislative history of the term “own funds” provides little guidance, the legislature must have been aware that the principle excluding these funds from the restrictions that are applicable to contributions has its genesis in Buckley, where the United States Supreme Court stated that:

“Manifestly, the core problem of avoiding undisclosed and undue influence on candidates from outside interests has lesser application when the monies involved come from the candidate himself or from his immediate family.” (Citations omitted)...[T]he use of personal funds reduces a candidate's dependence on outside contributions and thereby counteracts the coercive pressures and attendant risks of abuse to which the Act's contribution limitations are directed.²⁹ (Emphasis added).

In Davis, the United State Supreme Court made numerous and interchangeable references to the terms “own funds” and personal funds.” One example of this language follows:

In his brief, Davis discloses having spent \$1.2 million, principally his own funds, on his 2004 campaign. Brief for Appellant 4. He reports spending \$2.3 million in 2006, all but \$126,000 of which came from personal funds.” Davis, at *5. (Emphases added.)

In the Brief for Appellant, Jack Davis, on page 4, it states, “Mr. Davis funded his 2004 campaign primarily, though not exclusively, with personal expenditures. Mr. Davis spent over \$1.2 million, but lost the 2004 election to Mr. Reynolds.” Further, on page 13 of the Davis Brief, it states, “During the same election, Mr. Davis reported spending about \$2.3 million on the primary and general elections, with his personal expenditures accounting for all but about \$126,000 of that total.³⁰ (Emphases added.)

Based upon the foregoing, a “wealthy candidate”³¹ is not dependent on the receipt of “outside contributions” from “outside interests.” The candidate may use his “own funds” or “personal funds” to make “personal expenditures” in the election campaign. The “own funds” or “personal funds” of a wealthy candidate are clearly distinguishable from the official’s excess federal campaign funds, which were provided by “outside” contributors (less the payment of campaign expenditures).

C. HRS § 1-16: “Own funds” do not include the official’s excess federal campaign funds when this term is construed together with HRS section 11-202

“Laws in pari materia, or upon the same subject matter, shall be construed with reference to each other. What is clear in one statute may be called upon in aid to explain what is doubtful in another.”³²

The term “own funds” must be read in context with HRS section 11-202, entitled False Name, which provides as follows:³³

²⁹ 424 U.S. at 52; 96 S.Ct. at 651; Davis v. Federal Election Commission, 128 S.Ct. 2759, 2770 (2008).

³⁰ Davis v. Federal Election Commission, 128 S.Ct. 2759, 2768 (2008).

³¹ Davis v. Federal Election Comm’n, 128 S.Ct. 2759, 2771, 2773 (2008).

³² HRS § 1-16.

³³ This section was originally enacted in Act 185, SLH 1973 as follows:

No person shall make a contribution of the person's own money or property, or money or property of another person to any candidate, party, or committee in connection with a nomination for election, or election, in any name other than the true name of the person who owns the money or who supplied the money or property. All contributions made in the name of a person other than the true or established name of the actual owner of the money or property shall escheat to the Hawaii election campaign fund. (Emphasis added).

It would be incongruous if one Hawai'i campaign statute allowed the excess federal campaign funds to be used as the official's "own funds" and another statute prohibited the false reporting of the excess campaign funds.

D. HRS § 1-15(3): The argument that the excess federal campaign funds are the official's "own funds" must be rejected to avoid an absurd result

"[T]he legislature is presumed not to intend an absurd result, and legislation will be construed to avoid, if possible, inconsistency, contradiction, and illogicality."³⁴ "Every construction which leads to an absurdity shall be rejected."³⁵

The Commission must reject the official's argument that the excess federal campaign funds are his "own funds" to avoid absurd and unjust results. That argument assumes that the legislature blindly intended that the "mother's milk of politics" could suddenly be "dropped in" to a Hawaii campaign without being subject to prior reporting and other requirements of Hawai'i law.

E. The ordinary meaning of "own funds" is consistent with the approach of the FEC

The ordinary meaning of the term "own funds" is also consistent with the FEC's approach. An FEC opinion to Senator Corzine, who later was elected as the Governor of New Jersey is instructive.³⁶ The

§ 11-202 Anonymous contributions; unlawful. No person shall make a payment of his own money or of another person's money to any candidate, party, or committee in connection with a nomination or election in any other name than that of the person who in truth supplies such money; nor shall any candidate, party, or committee knowingly receive such payment or enter or cause the same to be entered in his accounts in another name than that of the person by whom it was actually furnished.

Act 146, SLH 1975, enacted a new section as follows:

§ 11-202.1 False Name which provides in pertinent part as follows:

(a) No person shall make a contribution of his own money or property or money or property of another person to any candidate, party, or committee in connection with a nomination for election, or election, in any other name than the name of the person owning the money or who supplied the money or property. (Emphasis added.)

House Journal Stand. Comm. Rep. No. 176, 1009, 1975 Sess. (Haw. 1975) provides that new section 11-202.1 False Name "is recommended to augment section 11-202 which forbids anonymous contributions which aggregate less than \$250. New section 11-202.1 will prevent (prevent) contributions given by one person to be attributed to another."

³⁴ Zanakis-Pico v. Cutter Dodge, Inc., 98 Hawai'i 309, 316, 47 P.3d 1222, 1229 ()

³⁵ HRS § 1-15(3)

FEC concluded that he could make certain uses of his personal funds without the restrictions in the federal law³⁷ because his personal funds could be distinguished from campaign funds.

The purpose of these sections is not furthered...by restricting an individual who happens to be a Federal candidate or officeholder from donating his or her own personal funds, when acting solely at his or her own discretion. Such funds have not been solicited or received from others at the behest of Federal candidate...(citation omitted)...Thus, because the funds Senator Corzine plans to donate would not be solicited or received from others, he would not, through his donation of such personal funds, incur an obligation toward any other person that would raise concerns regarding corruption or the appearance thereof. (Emphases added)

V. A DETERMINATION THAT EXCESS FEDERAL CAMPAIGN FUNDS CANNOT BE ACCEPTED BY THE OFFICIAL'S HAWAII'I CANDIDATE COMMITTEE IS SUPPORTED BY NUMEROUS POLICIES

Several policies support the Commission's determination that Hawai'i law does not permit the official's Hawai'i candidate committee to accept the excess federal campaign funds because the funds are not surplus funds nor the official's own funds.

The Commission would be abdicating its responsibility to administer the campaign laws "within the State" if only the prohibitions and limits of another jurisdiction (federal, state, or county) were applicable; this would allow excess campaign funds to be "dropped in" to a Hawaii campaign without being subject to Hawai'i law. We reject that approach.

Hawai'i's interest in preventing corruption and the appearance of corruption is not limited to the elimination of quid pro quo, cash-for-votes exchanges (Buckley v. Valeo, 424 U.S.1, 28, 96 S.Ct. 612, (1976)), but extends also to "undue influence on an officeholder's judgment, and the appearance of such influence." Federal Election Comm'n v. Colorado Republican Federal Campaign Comm., 533 U.S. 431, 441, 121 S.Ct. 2351, 2358 (2001) (Colorado II). The sale of access to office-holders gives rise to the appearance of corruption. McConnell v. Federal Election Com'n, 540 U.S. 93, 154, 124 S.Ct. 619, 666. "[A]ll Members of the Court agree that circumvention is a valid theory of corruption..." Colorado II, 533 U.S. at 456, 121 S.Ct. at 2366. Hawai'i's interest in preventing corruption and the appearance of corruption, therefore, is sufficient to justify not only contribution limits and prohibitions themselves, but also laws or an interpretation of the laws preventing the circumvention of such limits and prohibitions.

Transparency would be lacking if the official's Hawai'i candidate committee were allowed to accept the excess federal campaign funds as his own funds or surplus funds. In that instance, the official's Hawai'i candidate committee would have one entry in the disclosure report for a substantial sum of funds from

³⁶ FEC Advisory Opinion 2004-25.

³⁷ 2 U.S.C. § 441i (e) provides as follows:

A candidate [or] individual holding Federal office...shall not

(A) solicit, receive, direct, transfer, or spend funds in connection with an election for Federal office, including funds for any Federal election activity, unless the funds are subject to the limitations, prohibitions, and reporting requirements of this Act...

one transferor (the official's federal candidate committee). Transparency is imperative to the integrity of the campaign spending law because "disclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity."³⁸ In Buckley, the Supreme Court identified three compelling rationales for disclosure. "First, disclosure provides the electorate with information as to where political campaign money comes from and how it is spent by the candidate, in order to aid voters in evaluating those who seek federal office." 424 U.S. at 66-67 (internal quotation omitted). "Second, disclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity." *Id.* at 67. "Third, and not least significant, recordkeeping, reporting, and disclosure requirements are an essential means of gathering the data necessary to detect violations of ... contribution limitations" *Id.* at 67-68.

Even federal law prohibits the transfer of contributions from other jurisdictions to a federal campaign. The FEC's rationale for prohibiting the transfer is equally applicable to support the Commission's determination in this opinion request. The rationale of the FEC is set forth as follows:

- "(Federal law) places certain limitations and prohibitions on the sources and amounts of contributions to federal election campaigns;"
- "Committees...(would have)... to demonstrate that the funds they wished to transfer were raised with funds that are permissible under...(federal law)";
- "Linking specific funds to be transferred to particular fundraising disbursements will be difficult for committees in the best of circumstances; and
- "This process would be difficult for the (FEC) to monitor and enforce."³⁹

Thus, all of these policy reasons support the Commission's determination. Hawai'i law does not permit the official's Hawai'i candidate committee to accept the excess federal campaign funds because the funds are not surplus funds nor the official's own funds.

VI. THE DOCTRINE OF CONSTITUTIONAL AVOIDANCE DOES NOT APPLY

The elected official has argued, at length, that permitting the official's Hawai'i candidate committee to accept funds from the official's federal campaign committee will avoid the risk of offending the official's rights under the United State Constitution's First Amendment or the equal protection clause of the Fourteenth Amendment. His argument is based upon the doctrine of constitutional doubt, another canon of statutory construction.⁴⁰

This doctrine is not without limits. The United States Supreme Court cautioned that "[s]tatutes should be interpreted to avoid serious constitutional doubts, not to eliminate all possible contentions that the statute might be unconstitutional."⁴¹ "The constitutional doubt doctrine does not apply mechanically whenever there arises a significant constitutional question the answer to which is not obvious."⁴²

³⁸ Buckley v. Valeo, 424 U.S. 1, 67, 96 S.Ct. 612, 657 (1976) quoting Grosjean v. American Press Co., 297 U.S. 233, 250, 56 S.Ct. 444, 449 (1936).

³⁹ 58 Fed.Reg. 3474 (January 8, 1993).

⁴⁰ Other canons of statutory construction are codified in HRS chapter 1.

⁴¹ Reno v. Flores, 507 U.S. 292 314, n. 9 (1993).

The doctrine is not applicable in this request. The Commission is not opining that the elected official is barred from access to the excess federal campaign funds. Our determination that the federal excess campaign are not the official's "surplus funds" or his "own funds" will only inconvenience the official and require additional steps to obtain access to those funds for his Hawai'i campaign. The official's federal campaign committee could make refunds to persons who made federal contributions and solicit contributions from these persons to the official's Hawai'i candidate committee. In view of this alternative, the issues raised by the official do not rise to the level of "serious constitutional doubt."

The determination that the doctrine is not applicable finds further support in an opinion in which the FEC specifically approved a plan to refund excess federal campaign funds to individuals and resolicit those individuals for contributions to a New Jersey gubernatorial campaign committee.⁴³ That candidate requested the FEC's approval of a plan to return and resolicit contributions, rather than raising "possible contentions that the statute might be unconstitutional."⁴⁴

Throughout this entire process, the elected official has been informed of the option to return the excess federal campaign funds and resolicit contributions, first by the Commission's staff and by the Commission in this opinion.

⁴² Almendarez-Torres v. United States, 523 US. 224, 239 (1998)

⁴³ FEC Opinion No. 1996-52. That opinion request, according to the FEC, was "slightly different" from the approach in Opinion No. 1993-10, relating to the use of "excess campaign funds to finance state campaign directly." (Emphasis added)

Opinion No. 1993-10 involved a Federal elected official who asked whether he could use his federal contributions for his race for Governor of Puerto Rico. The FEC advised that he could use his Federal contributions for the Governor's race, but emphasized:

[T]hat if any provisions of Puerto Rican law are applicable to your proposed transfers or donations, such provisions would not be pre-empted by 2 U.S.C. 453 and 11 Code of Federal Regulations ("CFR") 108.7. Thus, the application of any Puerto Rican law concerning, for example, the amount of such transfers of donations, or their reporting by any transferee entity, would be not superseded or pre-empted by the Act or regulations of the Commission.

⁴⁴ Similarly, the FEC's rules specifically allow a candidate's state committee to refund excess state campaign funds and make arrangements with the candidate's Federal committee for solicitation of the same contributors, though the transfer of contributions from state committee to a federal committee is prohibited.

11 CFR § 110.3 (d) provides as follows:

(d) Transfers from nonfederal to federal campaigns. Transfers of funds or assets from a candidate's campaign committee or account for a nonfederal election to his or her principal campaign committee or other authorized committee for a federal election are prohibited. However, at the option of the nonfederal committee, the nonfederal committee may refund contributions, and may coordinate arrangements with the candidate's principal campaign committee or other authorized committee for a solicitation by such committee(s) to the same contributors. The full cost of this solicitation shall be paid by the Federal committee.

VII. CONCLUSION

The official has chosen to be a Hawai'i gubernatorial candidate and must comply with Hawai'i statutes applicable to all Hawai'i gubernatorial candidates, including an aggregate contribution limit of \$6,000 during the applicable election period. The official's Hawai'i candidate committee, therefore, may receive a \$6,000 contribution from the federal committee because the federal committee is registered as a Hawai'i noncandidate committee.⁴⁵

Additionally, the federal campaign committee may make refunds to persons who made federal contributions. Contributions may be solicited from these persons by the Hawai'i candidate committee.⁴⁶

Hawai'i's law does not permit the official's Hawai'i candidate committee to accept funds transferred from the official's federal campaign committee, except as noted above. These funds are neither surplus funds nor the official's own funds as urged by the official.

The Commission provides this Advisory Opinion as a means of stating its current interpretation of the Hawai'i Election Campaign Contributions and Expenditures laws⁴⁷ and the administrative rules of the Commission.⁴⁸ The Commission may adopt, revise, or revoke this Advisory Opinion upon the enactment of amendments to the Hawaii Revised Statutes or the adoption of administrative rules by the Commission.

DATED: Honolulu, Hawaii, August 11, 2009.

CAMPAIGN SPENDING COMMISSION

Paul T. Kuramoto, Chairperson

Steven E. Olbrich, Vice Chairperson

Gino Gabrio, Commissioner

Dean Robb, Commissioner

Michael E. Weaver, Commissioner

⁴⁵ The elected official registered a Hawaii noncandidate committee and reported making contributions to Hawaii candidates in the 2002, 2004, 2006, and 2008 elections.

⁴⁶ In Advisory Opinion No. 1996-52, the FEC approved a plan to refund excess federal campaign funds to individuals and resolicit those individuals for contributions to a state campaign committee.

⁴⁷ HRS § 11-191, et seq.

⁴⁸ Chapter 2-14, Hawai'i Administrative Rules.