THE FEDERAL ELECTION COMMISSION
Washington, DC 20463

DISSENTING OPINION OF CHAIRMAN DAVID M. MASON IN ADVISORY OPINION REQUEST 2007-32

Draft Advisory Opinion 2007-32 for SpeechNow.org ("SpeechNow") proposed to conclude that SpeechNow would satisfy the statutory definition of a "political committee" and would be required to register as such. I agree with the analysis of the Office of General Counsel as set forth in the draft advisory opinion as to SpeechNow's statutory status and its obligation to register and file reports with the Commission. The draft also recommended concluding that donations received by SpeechNow would constitute "contributions" and would be subject to the Act's amount limitations on individuals' contributions to political committees, including the individual biennial aggregate contribution limit. I do not believe the Commission may, consistent with the Constitution and with Supreme Court decisions on independent political spending, enforce the FECA's $5,000 limit on contributions to political committees which limit their activities exclusively to independent spending, nor may we apply the individual aggregate limit to such contributions. I write separately to express my views on the authority of the Commission to make constitutional determinations in such matters and on issue of contribution limits.

I. Constitutional Questions

Certain commentors have expressed the concern that advisory opinions are not for the purpose of declaring portions of the Federal Election Campaign Act (the "Act") unconstitutional. It is black letter law that "adjudication of the constitutionality of congressional enactments [is] beyond the jurisdiction of administrative agencies." *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 215 (1994) (quoting *Johnson v. Robison*, 415 U.S. 361, 367-68 (1974)). However, an agency may be "influenced by constitutional considerations in the way it interprets or applies statutes." *Branch v. FCC*, 824 F.2d 37, 47 (C.A.D.C. 1987). Indeed, the Commission makes these considerations every day in carrying out its statutory obligations.[1]

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[1] *See, e.g.*, Advisory Opinion (AO) 1998-20 (*Fulani*) (F.E.C. Nov. 4, 1998) (relying on *Buckley v. Valeo*, 424 U.S. 1 (1976), to make a constitutional distinction between a candidate's funds and contributions from others); AO 2003-02 (*Socialist Workers Party*) (F.E.C. April 4, 2003) (Commission applied disclosure exemption based on constitutional principles); AO 2003-33 (*Cantor*) (F.E.C. April 29, 2003) (citing Commission's earlier

In the past, the Commission has exempted certain organizations from disclosure requirements due to constitutional concerns. In *Buckley v. Valeo*, 424 U.S. 1, 71-72 (1976), the United States Supreme Court recognized that some disclosure requirements under the Act would be unconstitutional as applied to minor parties because of the possibility of threats, harassment, or reprisals. *See also Brown v. Socialist Workers '74 Campaign Committee*, 459 U.S. 87 (1982). Because of those constitutional concerns, the Commission undertook constitutional considerations and exempted minor parties from disclosure requirements. *See* AO 2003-02, *Socialist Workers Party* (F.E.C. April 4, 2003).[2] In a similar manner, and as discussed more thoroughly in Part II below, because of well-stated concerns about the unconstitutional burden made by limiting contributions to organizations engaged in speech wholly independent of candidates, the Commission is empowered to grant a similar exemption here.

SpeechNow seeks the Commission's advice on the application of the law to particular activities. It does not ask the Commission to declare a statute unconstitutional – an action beyond the jurisdiction of this Commission. It comes as no surprise that the Commission makes these types of constitutional applications as a matter of regular course. By engaging in rulemaking, providing answers to advisory opinion requests, and ruling on

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rulemaking as basis for constitutional concern); AO 2006-32 (*Progress for America*) (F.E.C. Nov. 21, 2006) (dismissing matter, but noting the importance of the major purpose test as a constitutional consideration). *See also* Statement of Reasons (SOR) by Commissioners Darryl P. Wold, Lee Ann Elliott, and David M. Mason in Matter Under Review (MUR) 4250 (*Republican National Committee*) (F.E.C. Feb. 11, 2000) (directing the Commission to read the Act narrowly because it impinges on protected First Amendment liberties); SOR by Commissioner Sandstrom in MUR 4620 (*The Coalition*) (F.E.C. Sept. 6, 2001) ("the Commission must be mindful of constitutional constraints); Additional SOR by Commissioner Michael E. Toner in MUR 4735 (*Bordonaro for Congress*) (F.E.C. Dec. 1, 2003) (indicating the Commission has a duty to be sensitive to constitutional concerns when interpreting and enforcing the Act); SOR by Commissioner David M. Mason in MUR 4741 (*Mary Bono Committee*) (F.E.C. April 7, 1999) (expressing concern over the constitutionality of 2 U.S.C. § 441d(a)); Additional SOR by Commissioner David M. Mason in MUR 4766 (*Phillip Morris Companies, Inc.*) (F.E.C. May 5, 2000) (raising the issue of the speech or debate clause as a matter of constitutional immunity); SOR by Commissioner Bradley A. Smith in SOR 5275 (F.E.C. March 30, 2004) (advising the Commission to tread lightly on the matter of anonymous speech under the First Amendment); SOR of Commissioner Weintraub in MURs 5540, 5545, 5562, 5570 (*CBS Broadcasting, Inc.*) (F.E.C. July 12, 2005) ("merely investigating" allegations of fairness or accuracy "would intrude upon Constitutional guarantees of freedom of the press").

[2] Likewise, some commissioners have expressed doubt over the constitutionality of applying 2 U.S.C. § 441d(a) against citizens of modest means who act independently of a candidate. *See* SOR of Commissioner Darryl R. Wold in MUR 5156 (*Morton*, et al.) (F.E.C. March 22, 2002).

enforcement matters, the Commission makes constitutionally-governed decision making in its day-to-day operations. *See Electioneering Communications*, 72 Fed. Reg. 72899 (F.E.C., Dec. 26, 2007); Advisory Opinion 1990-13, *Socialist Workers Party* (F.E.C., Aug. 21, 1990) MUR 5754; MoveOn.org Voter Fund (F.E.C., Dec. 13, 2006).

Moreover, commissioners take an oath to support and defend the Constitution. In doubtful cases of law, the Commission is instructed to "err on the side of protecting political speech rather than suppressing it." *FEC v. Wisconsin Right to Life, Inc.* (*WRTL II*), 127 S. Ct. 2652, 2659 (2007). Indeed, in *Shays v. FEC*, the district court required that the Commission undertake a *more thorough* analysis of First Amendment concerns to survive review. 337 F. Supp. 2d 28, 79, 86-87 (D.D.C 2004). The Commission is mindful of these instructions when considering the application of the Act to matters before it.

Under the Act, the Congress established the Commission with specifically enumerated powers as an independent agency to perform just the type of constitutional determination that SpeechNow requests. *See* 2 U.S.C. §§ 437d, 437f, 437g, 438. It is not only within the discretion of the Commission to make such determinations; the Commission possesses an independent obligation to do so. As President Lincoln reminded citizens of this nation in his first inaugural address:

> I do not forget the position assumed by some that constitutional questions are to be decided by the Supreme Court, nor do I deny that such decisions must be binding in any case upon the parties to a suit as to the object of that suit, while they are also entitled to very high respect and consideration in all parallel cases by all other departments of the Government. And while it is obviously possible that such decision may be erroneous in any given case, still the evil effect following it, being limited to that particular case, with the chance that it may be overruled and never become a precedent for other cases, can better be borne than could the evils of a different practice. At the same time, the candid citizen must confess that if the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made in ordinary litigation between parties in personal actions the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal.

Lincoln's First Inaugural Speech (Mar. 4, 1861), in Bartleby's Great Books Online, available at http://www.bartleby.com/124/pres31.html

The Commission is equally mindful that courts are not the sole mechanism through which constitutional determinations may be made. It is the duty of this

Commission, pursuant to its statutory grant of authority by Congress, to consider these very questions.

II. Contribution Limits Applied to Grassroots Organizations Engaged Solely in Independent Speech are Inapplicable Under the First Amendment

The United States Supreme Court recognizes that speech like that made by SpeechNow – citizens banded together in grassroots organizations – is protected at the very core of the First Amendment. *FEC v. Massachusetts Citizens for Life (MCFL)*, 479 U.S. 238, 256 (1986) n.9 (independent spending is "core political speech protected under the First Amendment"). SpeechNow is but one manifestation of this phenomenon where "individual members seek to make more effective the expression of their own views." *NAACP v. Alabama*, 357 U.S. 449, 459 (1958). Here, money given to SpeechNow funds the expression of members' views; it does not facilitate candidates' views. *See California Medical Ass'n v. FEC* (*Cal-Med*), 453 U.S. 182, 196 (1981). Placing limits on the money given to independent organizations serves only to limit speech – an unjustifiable result in a Republic with a profound commitment to the principle that debate should be "uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

The distinction between candidate coordinated speech and independent speech is of constitutional significance. The Supreme Court has recognized government interests in limiting corruption, or its appearance, only when that spending is connected or coordinated with candidates for public office or, in a very limited manner, because of the corporate form. *See Buckley*, 424 U.S. 1; *MCFL*, 479 U.S. 238; *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990).

Limiting the contribution limits given to an organization like SpeechNow would impose an intolerable, and constitutionally unjustifiable, burden on the independent spending of this citizen organization. *See Buckley,* 424 U.S. at 47-48 (while the "independent expenditure ceiling thus fails to serve any substantial governmental interest in stemming the reality or appearance of corruption in the electoral process, it heavily burdens core First Amendment expression"); *Citizens Against Rent Control v. City of Berkeley,* 454 U.S. 290, 299 (1981) (restrictions on expenditures "plainly impair[] freedom of expression").

This organization operates autonomously without connection or coordination with candidates, political party committees, other political committees or their agents. It does not make any contributions to candidates. Limiting donations to organizations that are wholly independent of candidates and political party committees serves no recognizable government interest. *See Cal-Med*, 453 U.S. at 203 (Blackmun, J., concurring) ("contributions to a committee that makes only independent expenditures pose no such

threat [of actual or perceived corruption]").[3] Hindering contributions to SpeechNow furthers no interest in preventing real or apparent corruption – for the organization is autonomous and does not make political contributions. *See FEC v. NCPAC*, 470 U.S. 480, 498 (1985) ("the absence of prearrangement and coordination undermines the value of the expenditure to the candidate, and thereby alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate"). In addition, SpeechNow has not assumed the corporate form and cannot be said to have amassed wealth through that special status. *MCFL*, 479 U.S. at 257.

The reasoned basis of *California Medical Association* was to avoid circumvention of direct limits on contributions to candidates. *See Cal-Med*, 453 U.S. at 203, Blackmun, J., concurring ("contributions to multicandidate political committees may be limited to $5,000 per year as a means of preventing evasion of the limitations on contributions to a candidate or his authorized campaign committee upheld in *Buckley*"). Applying a rule intended to prevent circumvention of direct contributions to a group which does not make direct contributions is precisely the sort of "prophylaxis-upon-prophylaxis" rationale that *WRTL II* held unconstitutional. *WRTL II*, 127 S.Ct. at 2672. While mindful of the judiciary's expertise concerning such matters, the Commission is obligated to avoid the unconstitutional application of the Act.[4] *See* SOR for MUR 4305, *Forbes for President, et al.* (F.E.C. May 27, 1999) (recognizing the importance of construing the Act to avoid unconstitutional results).

As the Supreme Court indicated in *MCFL*, 479 U.S. at 262, organizations whose independent spending "bec[a]me so extensive that the organization's major purpose may be regarded as campaign activity," political committee registration and regulation would be required. That is the case here. However, nowhere in the holding or dicta of *MCFL* did the Court specifically explain that contribution limits would apply to such organizations.

In short, the contribution limits at hand would place a direct restraint on associational and expressive activity simply because citizens have decided to band together. Individual members of SpeechNow are free to spend as much, and make as many, independent expenditures as they like acting as individual citizens. It is only when they join together that the contribution limits at hand are applicable. Those contribution

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[3] Justice Blackmun's concurrence in *Cal-Med* is the controlling holding of the Court. When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." *Marks v. United States*, 430 U.S. 188, 193 (1977) (internal citations omitted).

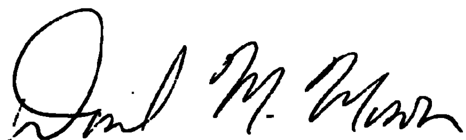
[4] The Commission does not undertake constitutional considerations lightly. *See* AO 1998-17 (*Daniels-Cablevision*) (F.E.C. Sept. 10, 1998) (refusing to undertake a constitutional analysis pursuant to clear statutory guidance "clearly drawn with the First Amendment in mind"; AO 2003-34 (*Showtime*) (F.E.C. Dec. 19, 2003) (declining to engage in constitutional considerations when a satisfactory statutory basis was available).

limits then place restrictions on the ability of citizens to associate and amplify their voices in direct contradiction of the First Amendment. *See Buckley*, 424 U.S. at 22 (recognizing that "amplifying the voice" of association members is "the original basis for the recognition of First Amendment protection of the freedom of association"); *see also NAACP*, 357 U.S. at 460 ("Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association"). Just as the Commission enjoys no basis upon which to restrain the expression of individuals, it may not do so just because they band together to speak more robustly.

In sum, "limitations on independent expenditures are less directly related to preventing corruption, since '[t]he absence of prearrangement and coordination of an expenditure with the candidate ... not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate.'" *Colorado Repub. Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 615 (1996). SpeechNow plans to engage in one of the essential features of democracy: "the presentation to the electorate of varying points of view." *NCPAC* at 488. Placing limits on such speech quells vibrant discussion and does nothing to prevent corruption or its appearance. Thus, lacking a constitutionally permissible reason to apply the contribution limits at hand, the Commission must decline to do so.

Under this analysis, the $5,000 contribution amount limitation in 2 U.S.C. 441a(a)(1)(C) and 11 CFR 110.1(d) would not apply to SpeechNow. Likewise, these donations would not count towards the individual biennial aggregate contribution limits. *See* 2 U.S.C. 441a(a)(3); 11 CFR 110.5(b)(1).

January 25, 2008



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