

Comment on AOR 2012-32

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OFFICE OF GENERAL
COUNSEL

October 3, 2012

By Electronic Mail

Anthony Herman, Esq.
General Counsel
Federal Election Commission
999 E Street NW
Washington, DC 20463

Re: Comments on Advisory Opinion Request 2012-32 (Raese, Bielat, Tea Party Leadership Fund)

Dear Mr. Herman:

These comments are filed on behalf of the Campaign Legal Center and Democracy 21 with regard to Advisory Opinion Request (AOR) 2012-32, a request submitted on behalf of federal candidates John Raese and Sean Bielat and the Tea Party Leadership Fund.

AOR 2012-32 was made public by the Commission on September 25, 2012. Federal law provides that “[b]efore rendering an advisory opinion, the Commission shall accept written comments submitted by any interested party within the 10-day period following the date the request is made public.” 2 U.S.C. § 437f(d); *see also* 11 C.F.R. § 112.3(e). The Commission correctly noted on its website calendar that comments regarding AOR 2012-32 are due Friday, October 5. Yet the agenda for the Commission’s meeting Thursday, October 4, indicates that the Commission will be considering and likely rendering an advisory opinion in response to AOR 2012-32 on October 4, before the public comment period has expired. Deliberating on this AOR at a public meeting prior to close of the public comment period disrespects public commenters and renders the public comment process illusory. Rendering an advisory opinion on this matter prior to the close of the comment period will violate 2 U.S.C. § 437f(d) and 11 C.F.R. § 112.3(e).

Regarding the merits of AOR 2012-32, notwithstanding the fact that the Tea Party Leadership Fund has not met the “registered . . . for a period of not less than 6 months” requirement for “multicandidate political committee” status under 2 U.S.C. § 441a(a)(4), requestors ask the Commission whether the Tea Party Leadership Fund may make, and whether candidates Raese and Bielat may accept, contributions exceeding the \$2,500 limit applicable to non-multicandidate political committees, up to the \$5,000 limit applicable to multicandidate political committees. AOR 2012-32 at 2.

Requestors acknowledge that the Supreme Court in *Buckley v. Valeo*, 424 U.S. 1, 35-36 (1976), reviewed the six month requirement and upheld it as a constitutionally permissible means

of “preventing individuals from evading the applicable contribution limitations by labeling themselves committees.” AOR 2012-32 at 2-3 (quoting *Buckley*, 424 U.S. at 35-36). Nevertheless, requestors argue that the statutory six month requirement for multicandidate political committee status is an “intolerable prior restraint . . . bearing a heavy presumption against its constitutional validity.” AOR 2012-32 at 3-4. Requestors imply that the Commission should conclude that the six month requirement is unconstitutional and, on this basis, issue an advisory opinion declaring the statutory requirement unconstitutional and promising not to enforce it.

Advisory opinions are for the purpose of addressing questions “concerning the application of the [Federal Election Campaign] Act,” 11 C.F.R. § 112.1(a), not for declaring portions of the Act unconstitutional. Federal law is clear here and the Commission has no authority to declare this statutory six month requirement unconstitutional. It is well-settled 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)); see also *Wainberger v. Salfi*, 422 U.S. 749, 764 (1975). As the Court of Appeals for the D.C. Circuit said in *Branch v. FCC*, 824 F.2d 37 (D.C. Cir. 1987), an “agency may be influenced by constitutional considerations in the way it interprets . . . statutes [but] it does not have jurisdiction to declare statutes unconstitutional.” *Id.* at 47. The request made here to do so is particularly remarkable given that the Supreme Court in *Buckley* directly addressed and specifically upheld the provision at issue.

Requestors cite no authority that would authorize the Commission to declare a statutory provision unconstitutional and unenforceable. Furthermore, the “prior restraint” cases cited by requestors are inapposite to the six month requirement for multicandidate political committee status. Unlike the book ban at issue in *Bantum Books, Inc. v. Sullivan*, 372 U.S. 58 (1963), or the restraining order prohibiting labor union organizing at issue in *Thomas v. Collins*, 323 U.S. 516 (1945), or the law prohibiting door-to-door advocacy without first registering with the mayor and receiving a permit at issue in *Watchtower Bible & Tract Soc’y of N.Y., Inc. v. Vill. Of Stratton*, 536 U.S. 150 (2002)—requestors here are not prohibited by the six month requirement from making and accepting contributions.

Indeed, the Tea Party Leadership Fund has already contributed \$2,500 each to Mr. Raese and Mr. Bielat. AOR 2012-32 at 1. The Tea Party Leadership Fund has freely associated with and expressed its support of Messrs. Raese and Bielat. The six month requirement for multicandidate political committee status has not operated as a prior restraint on First Amendment activity. As the *Buckley* Court explained:

[A] limitation upon the amount that any one person or group may contribute to a candidate or political committee entails only a marginal restriction upon the contributor’s ability to engage in free communication. A contribution serves as a general expression of support for the candidate and his views The quantity of communication by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing. . . . A limitation on the amount of money a person may give to a candidate or campaign organization thus involves little direct

restraint on his political communication, for it permits the symbolic expression of support evidenced by a contribution but docs not in any way infringe the contributor's freedom to discuss candidates and issues.

Buckley, 424 U.S. at 20-21 (emphasis added).

The Commission has no choice in this matter but to opine that the six month requirement for multicandidate political committee status established by section 441a(a)(4) remains in full force and effect—and that if requestors make and accept contributions exceeding \$2,500 before meeting all of the statutory requirements for multicandidate political committee status, they will violate federal law. The Commission cannot decide the law is unconstitutional. Indeed, the Commission's obligation is to defend the constitutionality of campaign finance laws enacted by Congress. When requestors file the inevitable lawsuit for which this AOR is the obvious predicate, the Commission must meet requestors in court and defend the law once again.

We appreciate the opportunity to submit these comments.

Sincerely,

/s/ J. Gerald Hebert

/s/ Fred Wertheimer

J. Gerald Hebert
Paul S. Ryan
Campaign Legal Center

Fred Wertheimer
Democracy 21

Donald J. Simon
Sonosky, Chambers, Sachse
Endreson & Perry LLP
1425 K Street NW – Suite 600
Washington, DC 20005

Counsel to Democracy 21

Paul S. Ryan
The Campaign Legal Center
215 E Street NE
Washington, DC 20002

Counsel to the Campaign Legal Center

Copy to: Each Commissioner
Ms. Shawn Woodhead Werth, Secretary & Clerk of the Commission
Mr. Kevin Deeley, Acting Associate General Counsel, Policy
Ms. Amy L. Rothstein, Assistant General Counsel
Mr. Robert M. Knop, Assistant General Counsel