DRAFT FOR RELEASE

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 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 “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.

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 Advisory Opinion 2003-02, Socialist Workers Party (F.E.C. April 4, 2003). 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
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.,
2006).

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,

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. 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 Assoc. v. FEC*, 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; *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986); *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 California Medical Ass'n*, 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]").

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1 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).
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.

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).

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Chairman