

**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 commentators 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

1 contributions to organizations engaged in speech wholly independent of candidates, the
2 Commission is empowered to grant a similar exemption here.

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4 SpeechNow seeks the Commission's advice on the application of the law to particular
5 activities. It does not ask the Commission to declare a statute unconstitutional – an action
6 beyond the jurisdiction of this Commission. It comes as no surprise that the Commission
7 makes these types of constitutional applications as a matter of regular course. By
8 engaging in rulemaking, providing answers to advisory opinion requests, and ruling on
9 enforcement matters, the Commission makes constitutionally-governed decision making
10 in its day-to-day operations. *See Electioneering Communications*, 72 Fed. Reg. 72899
11 (F.E.C., Dec. 26, 2007); Advisory Opinion 1990-13, *Socialist Workers Party* (F.E.C.,
12 Aug. 21, 1990) Matter Under Review 5754; *MoveOn.org Voter Fund* (F.E.C., Dec. 13,
13 2006).

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

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

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

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43 The Commission is equally mindful that courts are not the sole mechanism
44 through which constitutional determinations may be made. It is the duty of this
45 Commission, pursuant to its statutory grant of authority by Congress, to consider these
46 very questions.

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2 **II. Contribution Limits Applied to Grassroots Organizations Engaged Solely**
3 **in Independent Speech are Inapplicable Under the First Amendment**
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5 The United States Supreme Court recognizes that speech like that made by
6 SpeechNow – citizens banded together in grassroots organizations – is protected at the
7 very core of the First Amendment. *FEC v. MCFL*, 479 U.S. 238, 256 (1986) n.9
8 (independent spending is “core political speech protected under the First Amendment”).
9 SpeechNow is but one manifestation of this phenomenon where “individual members
10 seek to make more effective the expression of their own views.” *NAACP v. Alabama*,
11 357 U.S. 449, 459 (1958). Here, money given to SpeechNow funds the expression of
12 members’ views; it does not facilitate candidates’ views. *See California Medical Assoc.*
13 *v. FEC*, 453 U.S. 182, 196 (1981). Placing limits on the money given to independent
14 organizations serves only to limit speech – an unjustifiable result in a Republic with a
15 profound commitment to the principle that debate should be “uninhibited, robust, and
16 wide-open.” *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).
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18 The distinction between candidate coordinated speech and independent speech is
19 of constitutional significance. The Supreme Court has recognized government interests
20 in limiting corruption, or its appearance, only when that spending is connected or
21 coordinated with candidates for public office or, in a very limited manner, because of the
22 corporate form. *See Buckley*, 424 U.S. 1; *FEC v. Massachusetts Citizens for Life*, 479
23 U.S. 238 (1986); *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990).
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25 Limiting the contribution limits given to an organization like SpeechNow would
26 impose an intolerable, and constitutionally unjustifiable, burden on the independent
27 spending of this citizen organization. *See Buckley*, 424 U.S. at 47-48 (while the
28 “independent expenditure ceiling thus fails to serve any substantial governmental interest
29 in stemming the reality or appearance of corruption in the electoral process, it heavily
30 burdens core First Amendment expression”); *Citizens Against Rent Control v. City of*
31 *Berkeley*, 454 U.S. 290, 299 (1981) (restrictions on expenditures “plainly impair[]
32 freedom of expression.”
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34 This organization operates autonomously without connection or coordination with
35 candidates, political party committees, other political committees or their agents. It does
36 not make any contributions to candidates. Limiting donations to organizations that are
37 wholly independent of candidates and political party committees serves no recognizable
38 government interest. *See California Medical Ass’n*, 453 U.S. at 203 (Blackmun, J.,
39 concurring) (“contributions to a committee that makes only independent expenditures
40 pose no such threat [of actual or perceived corruption]”).¹ Hindering contributions to

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).

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

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

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21 Under this analysis, the \$5,000 contribution amount limitation in 2 U.S.C.
22 441a(a)(1)(C) and 11 CFR 110.1(d) would not apply to SpeechNow. Likewise, these
23 donations would not count towards the individual biennial aggregate contribution limits.
24 *See* 2 U.S.C. 441a(a)(3); 11 CFR 110.5(b)(1).

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28 David M. Mason
29 Chairman