

August 18, 2008

**By Electronic Mail**

Thomaseia Duncan, Esq.  
General Counsel  
Federal Election Commission  
999 E Street, NW  
Washington, DC 20463

**Re: Comments on Advisory Opinion Request 2008-09**

Dear Ms. Duncan:

These comments are filed on behalf of the Campaign Legal Center and Democracy 21 in regard to AOR 2008-09, an advisory opinion request submitted by Senator Frank Lautenberg and the Lautenberg for Senate committee (“Sen. Lautenberg”), requesting that the Commission “confirm that as a result of [the ruling in *Davis v. FEC*], the Commission no longer will seek to enforce the provision in the Millionaire’s Amendment that pertains to loan repayment.” AOR 2008-09 at 1. Specifically, Sen. Lautenberg urges the Commission to announce in the context of an advisory opinion that it will no longer enforce the federal law limit on post-election repayment of personal loans established by 2 U.S.C. § 441a(j). *See id.*

The Commission should decline Sen. Lautenberg’s request that it unilaterally invalidate a provision of federal law. The statutory \$250,000 limit on post-election repayment of personal loans established by section 441a(j) was not even challenged, let alone invalidated, in *Davis v. FEC*, 128 S. Ct. 2759 (2008). Indeed, the Supreme Court did not even mention section 441a(j) in its *Davis* decision.

What Sen. Lautenberg really seeks is a declaration that the post-election loan repayment limit is unconstitutional. But that is a determination the Commission should not, indeed cannot, make. 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 Gilbert v. National Transportation Safety Board*, 80 F.3d 364, 366-67 (9th Cir. 1996). As the D.C. Circuit has stated, “[A]dministrative agencies . . . cannot resolve constitutional issues.” *American Coalition for Competitive Trade v. Clinton*, 128 F.3d 761, 766 n.6 (D.C. Cir. 1997);

*see also Branch v. FCC*, 824 F.2d 37, 47 (D.C. Cir. 1987). This is particularly the case in the context of issuing an advisory opinion, as advisory opinions are meant to address questions “concerning the application of the [Federal Election Campaign] Act,” 11 C.F.R. § 112.1(a), not to declare portions of the Act unconstitutional when no court has so held. To put it bluntly, for this Commission to “confirm” Sen. Lautenberg’s suggestion that the *Davis* decision *sub silentio* abrogated a provision of law that was neither challenged, nor invalidated, nor even mentioned in the *Davis* case would be an unwarranted *ultra vires* act contrary to law.

Sen. Lautenberg readily concedes that the *Davis* Court did not consider the constitutionality of 2 U.S.C. § 441a(j). Sen. Lautenberg describes the Millionaire’s Amendment as being comprised of three parts:

*First*, it provided for increased contribution and party spending limits for opponents of self-financing candidates who spend significant personal funds on their campaigns. ...

*Second*, ... the amendment required the self-financing candidate to comply with more onerous disclosure rules. ...

*Third*, the amendment treated the personal funds loaned to a campaign by a self-financing candidate differently from other debts. Specifically, it allowed a candidate committee to repay personal loans made by the candidate in excess of \$250,000 only from contributions made *before* the election date.

AOR 2008-09 at 2-3 (internal citations omitted) (emphasis in original).

After this description, the AOR notes: “In *Davis*, the Supreme Court considered two of the above provisions—the contribution limits and disclosure requirements . . . .” AOR 2008-09 at 3. Thus, the AOR acknowledges that the *Davis* Court *did not even consider*, much less rule on, what Sen. Lautenberg describes as the third part of the Millionaire’s Amendment—the post-election loan repayment provision.

The Court in *Davis* did invalidate on First Amendment grounds the increased contribution and party spending limits, as well as the disclosure rules that facilitated the operation of the increased limits. The claim in *Davis* was that a self-financed candidate’s First Amendment rights are violated when such candidate’s spending triggers the “asymmetrical regulatory scheme” of different contribution limits. 128 S. Ct. at 2763. First, the Court examined the increased contribution and party spending limits to determine whether the provision does in fact burden activity protected by the First Amendment. Second, having found that the increased limits did burden First Amendment activity, the Court examined whether any government interest justified the burden.

With respect to the *Davis* Court’s “burden” analysis, the Court noted that in *Buckley v. Valeo*, 424 U.S. 1 (1976), it had rejected a cap on candidate expenditure of personal funds as violative of the First Amendment. *See Davis*, 128 S. Ct. at 2771. The Court went on to find that, though the increased contribution and party spending limits did “not impose a cap on a

candidate’s expenditure of personal funds,” they nevertheless “impose[d] an unprecedented penalty on any candidate who robustly exercises that First Amendment right.” *Id.* In the Court’s view, these provisions burdened First Amendment activity because they “require[d] a candidate to choose between the First Amendment right to engage in unfettered political speech and subjection to *discriminatory fundraising limitations.*” *Id.* (emphasis added). The Court continued: “Under [the Millionaire’s Amendment], the vigorous exercise of the right to use personal funds to finance campaign speech produces *fundraising advantages* for opponents in the competitive context of electoral politics.” *Id.* at 2772 (emphasis added).

The provisions invalidated in *Davis*, operated asymmetrically on candidates by increasing the contribution limits for some candidates but not others. By contrast, the post-election personal loan repayment limit established by section 441a(j) applies equally to all candidates. The loan repayment limit does not penalize any candidate for exercising her First Amendment right because the limit does not impose “discriminatory fundraising limitations” or produce “fundraising advantages” for any candidate. *Id.* at 2771-72. For this simple and obvious reason, the *Davis* Court’s invalidation of the asymmetrical contribution and party spending limits in the Millionaire’s Amendment has no bearing on the constitutionality of section 441a(j).

With respect to the “government interest” analysis, the *Davis* Court rejected the government’s claim that the asymmetrically increased limits were justified by the government interest in eliminating corruption—noting that the Court had found in *Buckley* that a candidate’s “reliance on personal funds *reduces* the threat of corruption” posed by private contributions and that by discouraging the use of personal funds, the Millionaire’s Amendment deserves the anticorruption interest.<sup>1</sup> *Davis*, 128 S. Ct. at 2773 (emphasis added).

By contrast, the post-election personal loan repayment limit established by section 441a(j) directly serves the government’s anti-corruption interest. Sen. Hutchinson, who was responsible for the incorporation of the loan repayment provision into the Millionaire’s Amendment, explained the anti-corruption rationale behind the provision:

Under our Constitution, it is very clear that we cannot keep people from spending their own money however they wish to spend it. I will not argue that point ever. That is their constitutional right. They have a constitutional right to try to buy the office, *but they do not have a constitutional right to resell it.* That is what my part of this amendment attempts to prevent, so a candidate can spend his or her own

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<sup>1</sup> The *Davis* Court also rejected two other asserted government interests, neither of which is applicable to the analysis of 2 U.S.C. § 441a(j). In addition to the anti-corruption interest, the Court rejected the government’s argument that the Millionaire’s Amendment’s “asymmetrical limits are justified because they ‘level electoral opportunities for candidates of different personal wealth,’” noting that the Court’s prior decisions “provide no support for the proposition that this is a legitimate government objective.” *Davis*, 128 S. Ct. at 2773. Finally, the Court rejected the government’s claim that the asymmetrical limits are justified because they “ameliorate[] the deleterious effects” of existing contribution limits that “make it harder for candidates who are not wealthy to raise funds and therefore provide a substantial advantage for wealthy candidates.” *Id.* at 2774. Without judging the merits of this argument, the Court concluded that the “obvious remedy is to raise or eliminate those limits,” not to burden the speech of self-financed candidates through asymmetrical treatment under the law. *Id.*

money but there would be a limit on the amount that candidate could go out and raise to pay himself or herself back.

147 Cong. Rec. S2451 (daily ed. Mar. 19, 2001) (statement of Sen. Hutchinson) (emphasis added).

Unlike the provisions reviewed in *Davis*, which the Court found do not serve any anti-corruption purpose, the post-election personal loan repayment limit serves an important anti-corruption interest by limiting the most directly corrupting contributions: those given to an officeholder and then deposited by that officeholder into his or her personal bank account in the form of a personal loan repayment.

For those wishing to use dollars to sway elected officials, a post-election contribution to an officeholder who will use the money to repay personal debt – and thus who will receive a direct personal benefit from the money – is the easiest, most efficient target. Whereas a pre-election contribution has an uncertain future influence because the candidate may or may not be elected, the post-election contribution to an elected officeholder is virtually a sure thing. And whereas a pre-election contribution will likely be used to pay campaign expenses and may not be converted to personal use, *see* 2 U.S.C. § 439a, a post-election contribution to an officeholder with outstanding personal loan debt is of direct *personal* value to the officeholder because it may be transferred from the recipient campaign account directly to the officeholder’s personal bank account—*i.e.*, lawfully converted to personal use—in the form of a loan repayment. Transactions of this sort present the clearest threat of corruption achievable under existing federal law. The personal loan repayment limit established by section 441a(j) serves to restrain the potential for such corruption by imposing a limit on the conversion by officeholders of such post-election contributions to personal income.

We appreciate the opportunity to submit these comments.

Sincerely,

*/s/ Fred Wertheimer*

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