FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

TO: The Commission

FROM: Commission Secretary's Office

DATE: August 21, 2013

SUBJECT: Comment on Draft AO 2013-09
(Special Operations Speaks PAC and
Col. Robert Maness)

Attached is a timely submitted comment from Dan Backer, counsel for the requestors.

This matter is on the August 22, 2013 Open Meeting Agenda.

Attachment

DB CAPITOL STRATEGIES
PAC • CAMPAIGN • NON-PROFIT • POLITICAL LAW

August 21, 2013

Ms. Lisa Stevenson
Deputy General Counsel
Federal Election Commission
999 E Street, NW
Washington, D.C. 20463

RE: Comment on Draft AO 2013-09 (Special Operations Speaks PAC/Col. Robert Maness)

Dear Ms. Stevenson:

DB Capitol Strategies PLLC ("DBCS") submits this comment regarding Advisory Opinion Request (AOR) 2013-09 submitted by DBCS on behalf of Special Operations Speaks PAC ("SOS") and Col. Robert L. Maness. This AOR requests guidance from the Federal Election Commission ("FEC") as to whether SOS may contribute to Col. Maness, a candidate for Senate from Louisiana, up to the non-corrupting amount of $5,000[1] under 2 U.S.C. § 441a(a)(4). AOR 2013-09 at 1. DBCS submits this public comment as a law firm that represents SOS, Col. Maness, and other political committees, and regularly advises clients on compliance with the Federal Election Campaign Act ("FECA"). This comment represents our own views on the law, not those of any particular client.

SOS is a non-connected hybrid political action committee ("PAC") that meets all requirements for multicandidate committee status of 2 U.S.C. § 441a(a)(4) but one: SOS has not contributed to five candidates. Instead, SOS has chosen to contribute to only three candidates, including $2,600 to Col. Maness, to whom SOS now wishes to contribute an additional $2,400, and which Col. Maness wishes to accept. But unless and until SOS contributes to two additional candidates whom it does not support, the FEC refuses to permit SOS to contribute in amount available to other PACs. Draft Advisory Opinion (Draft AO) 2013-09 at 2. As a result, the highly-protected speech and association rights of SOS and all similarly situated PACs - and of candidates without ready access to the coffers of long-established PACs - are stifled by a statutory provision that no longer serves any valid government purpose.

The FEC contends imposing a burden that serves to restrain an entire class of speakers is dictated by the result in *Buckley v. Valeo*, where the Supreme Court held requirements for multicandidate committees were a permissible means of preventing individuals from circumventing base contribution limits. 424 U.S. 1, 35-36 (1976); Draft AO 2013-09 at 3. As a direct response to *Buckley*, however, Congress enacted *additional* contribution limits and preventative measures to thwart any possibility of circumvention. FECA Amendments of 1976, Pub. L. 94-283, Title I, 90 Stat. 486 (May 11, 1976). The 1976 Amendments entirely foreclosed any possibility of lawfully circumventing the base contribution limits, rendering the five-candidate requirement useless to preventing corruption. AOR 2013-09 at 4. Now, because no compelling or even valid reason exists to

[1] *See* 2 U.S.C. 441(a)(2)(A); *see also Buckley v. Valeo*, 424 U.S. 1, 35-36 (1976) (upholding the $5,000 limit on contributions from PACs to candidates).

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justify forcing PACs to contribute to five or more candidates before attaining multicandidate committee status, the five-candidate requirement is unconstitutional, both facially and as applied.

As it has in the past, the FEC should take account of shifts in campaign finance law to assess their effect on existing law. *See* AO 2010-09 (Club for Growth); *see also* AO 2010-11 (Commonsense Ten). The 1976 Amendments eliminated any possibility of circumventing contribution limits. Thus, while *Buckley*'s reasoning remains, its' result is now invalid in this instance as there is no valid anti-corruption interest supporting the five-candidate requirement.

The FEC suggests that, even if the requirement is unconstitutional and unjustifiably burdens First Amendment freedoms, the FEC is obligated to enforce the law. *See* Draft AO 2013-09 at 4. As support for its contention that it must give "full force" to even facially unconstitutional statutory provisions, the FEC first cites to a case concerning veterans' benefits. *See id.* Notwithstanding the fact that Supreme Court precedent sharply distinguishes between political speech and property rights, offering the former highest protection while providing much lesser safeguards for the latter, *Johnson v. Robison* is inapposite for other reasons. 415 U.S. 361 (1974).

In *Robison*, when a plaintiff brought a constitutional challenge to the definition of "veteran," the Court considered whether it had jurisdiction to hear the claim, or whether a Congressional statute prohibited judicial review of all decisions reached by the Administrator of Veterans' Affairs. 415 U.S. at 364. Notably, the Veterans' Administration moved to dismiss, arguing that only it had authority to assess the plaintiff's constitutional challenge. *Id.* at 365. The Court disagreed: the statute did not explicitly bar judicial review of constitutional claims. *Id.* at 367. The Court also observed that "adjudication of the constitutionality of congressional enactments has *generally* been thought beyond the jurisdiction of administrative agencies." *Id.* at 368 (emphasis added). Nowhere did the Court hold that all administrative agencies are conclusively barred from considering constitutional claims, particularly those involving the fundamental rights to political speech and association. *See id.*

As additional support for the premise that it is bound to enforce even unconstitutional law, the FEC presents a case where the FEC proposed it *did* have authority to hear constitutional challenges to the FECA. AO 2013-09 at 4. In *Robertson v. FEC*, petitioner filed suit challenging the constitutionality of the FEC's composition. 45 F.3d 486, 489 (D.C. Cir. 1995). The FEC argued that petitioner's challenge was "not properly raised because it was not brought before the Commission." *Id.* The court disagreed, observing that "[i]t was hardly open to the Commission, an administrative agency, to entertain a claim that the statute which created it was in some respect unconstitutional." *Id.* But the petitioner challenged the constitutionality of the FEC's current composition, which then included two non-voting members. *See id.* The petitioner did not challenge, as is the case here, a facially unconstitutional provision of the FECA that operated to gravely harm his First Amendment rights.

The longer the FEC refuses to refrain from enforcing an unconstitutional statutory provision, the more this requirement unreasonably exacts a substantial burden on First Amendment freedoms.

Putative speakers, like SOS, are forced either to engage in unwanted association with candidates they do not support, or associate to a far lesser extent with those they do.

For the aforementioned reasons as well as those in our Advisory Opinion request, the FEC cannot simply throw its hands in the air and ignore the constitutionality – or lack thereof – of discrete provisions of the FECA and ought to refrain from enforcing unconstitutional statutory provisions.

Sincerely,

Dan Backer
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