AGENDA DOCUMENT NO. 08-18

FEDERAL ELECTION COMMISSION
Washington, DC 20463

AGENDA ITEM
For Meeting of: 08-21-08

SUBMITTED LATE

MEMORANDUM

TO: The Commission

FROM: Thomasenia P. Duncan pch for
General Counsel

Rosemary C. Smith RCS
Associate General Counsel

Robert M. Knop RMK 8/12
Assistant General Counsel

Joanna Waldstreicher JSW
Attorney

Subject: Draft AO 2008-09

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for August 21, 2008.

Attachment

ADVISORY OPINION 2008-09

Marc E. Elias, Esq. **DRAFT**
Perkins Coie LLP
607 Fourteenth Street, NW
Washington, DC 20005-2011

Dear Mr. Elias:

We are responding to your advisory opinion request on behalf of Senator Frank Lautenberg and Lautenberg for Senate ("the Committee"), concerning the severability of a provision of the Bipartisan Campaign Reform Act of 2002 ("BCRA") dealing with the repayment of personal loans made by a candidate to his or her authorized campaign committee. The Commission concludes that the Supreme Court did not address the constitutionality of the loan repayment provision in *Davis v. Federal Election Commission*, 554 U.S. ___, 128 S. Ct. 2759 (2008) ("*Davis*"), and that the loan repayment provision is severable from the provisions of the Millionaires' Amendment found to be unconstitutional in *Davis*. Therefore, the loan repayment provision applies to Senator Lautenberg and the Committee's proposed repayment of Senator Lautenberg's loans.

Background

The facts presented in this advisory opinion are based on your letter received on July 25, 2008, as well as publicly available information, including reports filed with the Commission.

The Committee is the principal campaign committee for Senator Frank Lautenberg, who is a United States Senator from the State of New Jersey. Senator Lautenberg has loaned the Committee a total of $1,650,000.00 in connection with his June 3, 2008 primary election. The Committee has reported these loans to the

Commission. As of the closing date of the 2008 July Quarterly Report, the Committee has not yet repaid these loans to Senator Lautenberg.[1]

On June 26, 2008, the Supreme Court issued its decision in *Davis*, which struck down as unconstitutional certain provisions of BCRA pertaining to increased campaign contribution limits for opponents of self-financing candidates and related disclosure requirements.

Question Presented

Does the loan repayment provision of BCRA apply to Senator Lautenberg and the Committee, in light of the Supreme Court's ruling in Davis*?*

Legal Analysis and Conclusions

Yes, the provision of BCRA concerning repayment of candidates' personal loans applies to Senator Lautenberg and the Committee. *Davis* did not address this provision, and it is severable from the Millionaires' Amendment provisions that were struck down as unconstitutional.

Under the loan repayment provision of BCRA and the Commission's implementing regulations, if a candidate makes a personal loan to his or her authorized campaign committee in connection with an election, the committee "shall not repay (directly or indirectly), to the extent such loans exceed $250,000, such loans from any contributions made to such candidate or any authorized committee of such candidate after the date of such election." 2 U.S.C. 441a(j); 11 CFR 116.11, 116.12. In *Davis*, the Supreme Court addressed only "the constitutionality of federal election law provisions

[1] *See* Report of Receipts and Disbursements for Lautenberg for Senate, Inc., filed July 15, 2008, available at http://images.nictusa.com/cgi-bin/fecimg/?C00382457.

that, under certain circumstances, impose different campaign contribution limits on candidates competing for the same congressional seat" and related disclosure requirements in BCRA sections 319(a) and (b).[2] *Davis* at 2766; *see also Davis*, Appendix. The *Davis* ruling did not address the constitutionality of the loan repayment provision of BCRA section 304, codified at 2 U.S.C. 441a(j). The loan repayment provision applies equally to all candidates, regardless of whether they or their opponents have triggered the increased campaign contribution limits.

The Commission notes your contention that even if the loan repayment provision is not independently unconstitutional, it is an inseparable part of BCRA section 304(a)[3] and therefore unenforceable. BCRA's severability provision, however, explicitly states that the invalidation of one provision of BCRA will not affect the validity of any other provisions of BCRA nor the application of such provisions to other persons and circumstances. BCRA section 401, codified at 2 U.S.C. 454. It is a well-settled principle of statutory construction that "[u]nless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." *Buckley v. Valeo*, 424 U.S. 1, 108 (1976) (quoting *Champlin Refining Co. v. Corporation Commission*, 286 U.S. 210, 234 (1932)). In *Buckley*, the Supreme Court struck down

[2] The Commission intends to initiate a rulemaking shortly to conform its regulations to the Supreme Court's decision in *Davis*.

[3] Because the *Davis* decision stuck down the contribution limits and related disclosure requirements for House candidates in BCRA sections 319(a) and (b), it also effectively precluded enforcement of the corresponding contribution limits and related disclosure requirements for Senate candidates in BCRA sections 304(a) and (b). *See* Press Release, Public Statement on the Supreme Court's Decision in *Davis v. FEC*, July 25, 2008, *available at* http://www.fec.gov/press/press2008/220080725millionaire.shtml.

certain provisions of section 202 of the Federal Election Campaign Act of 1971, but expressly upheld other provisions within the same subsection of the statute.

In the present case, it is not at all "evident" from the text, function, or legislative history of the Millionaires' Amendment that Congress intended the loan repayment provision to be inextricably tied to the increased contribution limits of BCRA section 304(a). Although the loan repayment provision and the unconstitutional provisions regarding increased contribution limits are both part of the same statutory subsection, BCRA section 304(a), in fact, was codified in two separate provisions of 2 U.S.C. 441a: one provides for the increased contribution limits and the other limits repayment of personal loans. Functionally, the loan repayment provision can operate effectively without the provisions invalidated by *Davis*. Because the loan repayment provision's operation does not depend upon the invalidated increased contribution limits or reporting provisions, its validity is not affected by their invalidation. Indeed, in several instances Congress addressed the loan repayment provision separately from the unconstitutional provisions regarding increased contribution limits. *See, e.g.*, 147 Cong. Rec. S2450-51 (daily ed. Mar. 19, 2001) (statement of Sen. Domenici); 147 Cong Rec. S2461-62 (daily ed. Mar. 19, 2001) (statement of Sen. Domenici).

Accordingly, the loan repayment provision of BCRA is severable from the Millionaires' Amendment provisions that were struck down as unconstitutional in *Davis*. The loan repayment provision, therefore, applies to Senator Lautenberg and the Committee.

This response constitutes an advisory opinion concerning the application of the Act and Commission regulations to the specific transaction or activity set forth in your

request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any of the facts or assumptions presented and such facts or assumptions are material to a conclusion presented in this advisory opinion, then the requester may not rely on that conclusion as support for its proposed activity. Any person involved in any specific transaction or activity which is indistinguishable in all its material aspects from the transaction or activity with respect to which this advisory opinion is rendered may rely on this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B). Please note the analysis or conclusions in this advisory opinion may be affected by subsequent developments in the law including, but not limited to, statutes, regulations, advisory opinions and case law.

On behalf of the Commission,

Donald F. McGahn II
Chairman