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11/19/2008 05:21 PM

To millionairerepeal@fec.gov
cc
bcc
Subject Public Comments: Notice 2008-11

Dear Mr. Knop,

Please see the pdf document attached to this e-mail, which I submit to the Commission pursuant to Notice 2008-11.

Best Regards,

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Cooper_-_FEC_Cmts_-_Campaign_Finance_-_11.19.08.pdf

November 19, 2008

By Electronic Email
(millionairerepeal@fec.gov)

Mr. Robert M. Knop
Assistant General Counsel
Federal Elections Commission
999 E. Street, NW.
Washington, DC 20463

Re: Notice 2008-11: Increased Contribution and Coordinated Party Expenditure Limits for Candidates Opposing Self-financed Candidates

The Commission requests public comments on the proposed deletion of 11 C.F.R. § 400—its rules regarding increased contribution limits and coordinated party expenditure limits for Senate and House of Representatives candidates facing self-financed opponents. *See* NPRM 2008-11, 73 Fed. Reg. 62224 (October 20, 2008). The author of these comments submits them to the Commission on his own behalf as a voting citizen and attorney. The Commission is strongly urged to delete current 11 C.F.R. § 400 because the statutory foundation for such rules has been declared unconstitutional by the U.S. Supreme Court in *Davis v. FEC*, 128 S.Ct. 2759 (2008).

In *Davis v. FEC*, the Supreme Court held that Section 319(a) of the Bipartisan Campaign Reform Act of 2002 (BCRA) impermissibly placed different contribution and coordinated party expenditure limits on candidates vying for the same Congressional seat. Section 319(a) is part of the so-called "Millionaires Amendment." The Supreme Court similarly struck down Section 319(b)'s asymmetrical disclosure requirements designed to implement Section 319(a). It concluded that both sections violated the First Amendment.

Under Section 319(a), when a candidate spent personal funds on his or her campaign that exceeded by $350,000 the "oppositional personal funds amount (OFPA)" statistic set in the statute, that candidate's opponent could obtain special privileges under campaign finance laws. In such situations, the non-self-financing candidate could receive individual campaign contributions three times larger than the $2,300 individual limit under existing law as well as unlimited coordinated party expenditures. Importantly, when its provisions were triggered by a candidate spending more than the threshold amount in personal funds, Section

319(a) raised the limits only for the non-self-financing candidate. In striking down this unequal regulation of political speech by candidates, the Supreme Court declared that "[w]e have never upheld the constitutionality of a law that imposes different contribution limits for candidates who are competing against each other, and we agree with Davis that this scheme impermissibly burdens his *First Amendment* right to spend his own money for campaign speech." *Davis*, 128 S.Ct. at 2771. The Court asserted that "[w]hile BCRA does not imposes a cap on a candidate's expenditure of personal funds, it imposes an unprecedented penalty on any candidate who robustly exercises that *First Amendment* right. *Section 319(a)* requires a candidate to choose between the *First Amendment* right to engage in unfettered political speech and subjection to discriminatory fundraising limitations."

Section 319(b) required self-financing candidates who had exceeded the $350,000 OFPA mark to file a series of special campaign finance disclosures. By contrast, non-self financing candidates and their respective committees were subjected to lessened disclosure requirements. Observing that Section 319(b)'s unequal disclosure requirements implemented the unconstitutional provisions of Section 319(a), the Supreme Court likewise struck down those disclosure requirements. *See Davis*, 128 S.Ct. at 2775.

In affirming the First Amendment right of candidates for federal office to spend their own money on political speech, the Court rejected the Commission's proffered justification for Section 319(a)'s campaign contribution limits. Specifically, it rejected the notion that Section 319(a)'s burdens on the expenditure of personal funds by candidates furthered any governmental interest in eliminating corruption or the appearance of corruption in light of *Buckley v. Valeo*'s reasoning that reliance on personal funds reduces the threat of corruption. If anything, the Court observed in *Davis* that Section 319(a) "disserves the anticorruption interest." 128 S.Ct. at 2773 (citing 424 U.S. 1 (1976)). It also rejected the argument that reducing the natural advantage of wealthy individuals in campaigning for federal offices was justified by a compelling state interest in light of *Buckley*'s holding that "[t]he interest in equalizing the financial resources of candidates' did not provide a justification for restricting candidates overall campaign expenditures, particular where equalization might serve to handicap a candidate who lacked substantial name recognition or exposure of his views before the start of the campaign." *Id*. (quoting 424 U.S. at 56-57). Rather, the Court held in *Davis* that restricting a candidate speech in order to "level electoral opportunities" has "ominous implications" because it would involve "making and implementing judgments about which strengths should be permitted to contribute to the outcome of an election." *Id*. at 2773-2774. As the Court concluded, "it is a dangerous business for Congress to use the election laws to influence the voters' choices." *Id*. at 2774.

Importantly, the Court's analysis in *Davis* states in unmistakable terms that the constitution forbids any asymmetrical burdening of a candidate's First Amendment right to spend money on his or her own campaign. The Court insisted that "imposing different contribution and coordinated party limits on candidates vying for the same seat is antithetical to the First Amendment." *Davis*, 128 S.Ct. at 2774. The Court's analysis recognizes a constitutional rule barring contribution limits as well and disclosure requirements that discriminate between candidates competing for the same seat.

Undoubtedly, the actual disposition of the Court's ruling in *Davis* was limited to the BCRA campaign speech limits directed to House of Representatives candidates. The Court only notes in passing during its discussion of Section 319(a) that "BCRA § 304 "similarly regulates self-financed Senate bids." *Davis*, 128 S.Ct. at 1267 n.4. At one point the Court even discusses in particular the ability of voters to choose the Members of the House of Representatives as part of its analysis. *See id*. at 2773-2774. Regardless, the constitutional prohibition of discriminatory campaign finance limits and disclosure requirements recognized in *Davis* should apply with equal force to candidates for all federal offices.

As a constitutional matter, the Court's opinion in *Davis* vindicates a "candidate's First Amendment right to spend money on his or her own campaign" in general and unqualified terms. The First Amendment right vindicated in *Davis* was described by the Court as a right belonging to "candidates vying for the same seat." Nowhere in *Davis* did the court ever express that the underlying constitutional right is limited in scope to House of Representatives candidates. The logic and express terms by which the Court made its ruling in *Davis* should apply with equal vigor to Senate candidates.

The Court's reasons for rejecting the Commission's proffered justification for Section 319(a)'s campaign contribution limits for House of Representatives candidates are equally pertinent with respect to Senate candidates. Senate candidates pose no greater threat of corruption or the appearance of corruption through self-financing than House of Representatives candidates. Moreover, the constitutional right of voters to choose the Members of the Senate is on par with the constitutional right of voters to choose Members of the House of Representatives. The concerns expressed by the Court in *Davis* about election laws being manipulated through "leveling electoral opportunities" to influence voter choices are equally applicable in the Senatorial context. Accordingly, the clearest and most straightforward inference and application of the Court's ruling in *Davis* suggests that Section 304's campaign finance regulations for Senate candidates are unconstitutional.

To be sure, "adjudication of the constitutionality of congressional enactments [is] beyond the jurisdiction of administrative agencies." *Thunder Basin Coal Co. v. Reich*, 401 U.S. 200, 215, (1994) (quoting *Johnson v. Robinson*, 415 U.S. 361, 367-367 (1974). Because BCRA Sections 304(a) and –(b) were *not* before the Court in *Davis*, the Commission does *not* have the constitutional authority to strike down those statutory provisions. However, the Court's ruling in *Davis* strongly suggests that the Commission is barred from enforcing the regulations contained 11 CFR § 400, which implement both Sections 319 and 304.

In the NPRM the Commission expresses its belief that *Davis* precludes enforcement of 11 CFR § 400. *See* 73 Fed. Reg. at 62225. The NPRM thereby reiterates the Commission's previous conclusion that *Davis* "effectively precluded enforcement of the corresponding contribution limits and related disclosure requirements for Senate candidates in BCRA sections 304(a) and (b)." Advisory Opinion 2008-09 (Lautenberg) at 2, n.3 (August 21, 2008). In the NPRM, the Commission goes on to assert that "[t]here is no basis to conclude that the constitutional implications would be different for similarly situated candidates in Senate elections" governed under those provisions than in House of Representative elections governed by the provisions struck down by the Court in *Davis*. 73 Fed. Reg. at 62225. The Commission therefore proposes to delete 11 CFR § 400 entirely. For the reasons stated above, the Commission's beliefs about the unenforceability of 11 CFR § 400 are entirely correct and its proposal to delete those regulations are compelled by the Court's ruling in *Davis*.

The Commission should delete 11 C.F.R. § 400.

Respectfully submitted,

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November 19, 2008