



FEDERAL ELECTION COMMISSION

WASHINGTON, D.C. 20463

Advisory Opinion 1998-20
Concurring Opinion of Commissioner Karl Sandstrom

I concur with the Commission's interpretation of the Federal Election Campaign Act in denying Dr. Fulani an exemption from the statutory contribution limits which apply to presidential primary candidates who must repay federal matching funds to the United States Treasury. However, I write this concurrence to clarify what I believe is the extent of the Commission's statutory duty to respond to a requester's constitutional claims in the Advisory Opinion context.

In her request for an advisory opinion, Dr. Fulani asked three questions regarding the Act's contribution limits for presidential primary candidate committees which have an obligation to repay matching funds to the U.S. Treasury. Specifically, Dr. Fulani asked the Commission if, pursuant to the Commission's interpretation of the Act, she could receive contributions, loans and/or gifts in excess of the Act's contribution limitations. Dr. Fulani further wrote:

"The third basis for the Commission to answer the three Questions in the affirmative, is that to do otherwise would violate the first and fifth amendments of the United States Constitution. The exceptions that have been expressly recognized in the Commission's regulations and advisory opinions benefit candidates from wealthy families, and incumbent Senators and Congressmen. Once the Commission begins to exercise its discretion to make exceptions to the Act's contribution limitations, or to interpret the Act to find that some categories of receipts are not "contributions" at all, it may not refuse to extend the same (or analogous) exceptions to other candidates absent a compelling and nondiscriminatory governmental purpose" [internal citations omitted]. Fulani A.O. Request, 1998-20 at 6.

Although her argument does not elucidate the underlying basis of this "constitutional" claim, Dr. Fulani seems to suggest that: (1) the Commission has carved out invalid exceptions to the Act's contribution limitations, thereby favoring wealthy individuals and incumbents over other candidates, and (2) by refusing to make an

exception to the Act's contribution limits in her case, the Commission will somehow violate Dr. Fulani's constitutional rights.

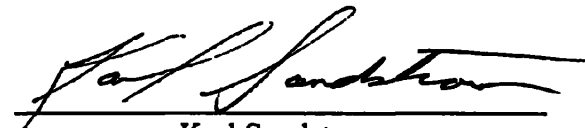
The Commission responds by reference to previous advisory opinions and United States Supreme Court precedent: "Generally, federal administrative agencies are without power or expertise to pass upon the constitutionality of legislative action." Advisory Opinion 1992-35; *see also*, Advisory Opinion 1978-18, *Johnson v. Robison*, 415 U.S. 361-368 (1974). I believe our rationale on this point requires further elaboration.

Although I agree with the notion that independent federal agencies are ill-equipped to pass on *legislative* action, I also believe that this Commission should refrain from addressing Dr. Fulani's constitutional claims in the Advisory Opinion context. The Advisory Opinion process is inappropriate for the adjudication of specific factual scenarios which, as in this case, have not yet occurred.

The Commission's statutory duty in responding to Advisory Opinion requests is to interpret the meaning of the FECA by answering "a written request *concerning the application of this Act . . . or a rule or regulation prescribed by the Commission*, with respect to a specific transaction or activity by the person." 2 U.S.C. § 437f (a)(1) (emphasis added). Through the Advisory Opinion process, Congress granted the Commission the authority to assist individuals in complying with existing regulations, rather than promulgate new rules or adjudicate rights and duties under the Act. Clearly, Congress intended our Advisory Opinions to be *interpretive* rather than legislative or adjudicatory.

Further, the Commission may not sit as judge and jury to its own decisions. In her request, Dr. Fulani urges the Commission to decide that its own regulations are unconstitutional. However, our statutory mandate specifically states that the Advisory Opinion process is designed for the purpose of statutory interpretation and interstitial policy making, not constitutional adjudication.

Second, assuming we had the statutory authority to adjudicate constitutional claims, we could not guarantee a satisfactory hearing within the Advisory Opinion context. Most Advisory Opinion requests, like Dr. Fulani's, are based on a future factual scenario – an intent to act. Dr. Fulani has not yet, to our knowledge, engaged in the impermissible activity suggested in her request. She simply asked the Commission whether she may raise money above and beyond the Act's contribution limits without running afoul of the current regulations. It is well-settled that Article III courts shall not issue advisory opinions based on constitutional claims. The same tenet should apply to this Commission.



A handwritten signature in black ink, appearing to read 'Karl Sandstrom', is written over a horizontal line.

Karl Sandstrom
Commissioner