FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

TO: The Commission

FROM: Commission Secretary's Office

DATE: October 4, 2012

SUBJECT: Comment on Draft AO 2012-32
Tea Party Leadership Fund, Bielat, and Raese

Attached is a timely submitted comment from Stephen M. Hoersting and Dan Backer, counsel for Tea Party Leadership Fund, Sean Bielat, and John Raese, regarding the above-captioned matter.

Draft AO 2012-32 is on the agenda for Thursday, October 4, 2012.

Attachment

DB CAPITOL STRATEGIES

PAC • CAMPAIGN • NON-PROFIT • POLITICAL LAW

October 3, 2012

Anthony Herman, Esq.
General Counsel
Federal Election Commission
999 E Street, NW
Washington, D.C. 20463

Re: Comment on Blue Draft, of Advisory Op. Request, 2012-32, Messrs. John Raese and Sean Bielat, and the Tea Party Leadership Fund

Dear Mr. Herman

Requestors Mr. John Raese, Mr. Sean Bielat and the Tea Party Leadership Fund respectfully disagree with the Commission's Blue Draft, issued at 5:20 PM on October 3, 2012. Specifically, requestors refute the notion and legal authority that the Commission cites to in failing to lift the six-month waiting period on constitutional grounds and that it is somehow required to knowingly and unreasonably enforce an unconstitutional statutory construct.

The Commission cites *Robertson v. FEC*, 45 F.3d 486 (D.C. Cir. 1995) and *Johnson v. Robison*, 415 U.S. 361 (1974) for the proposition that the Commission cannot entertain constitutional arguments while ruling on advisory opinions. This is incorrect.

The *Robertson* case on which the Commission relies is a case of estoppel and not nearly as helpful as the Commission believes. There, Presidential candidate Pat Robertson received $10,000,000 in matching funds, then later challenged the constitutionality of the very Commission that awarded him the funds when the Commission determined Robertson had to repay more than $200,000 for non-qualified campaign expenses. *Id. Robertson* does not apply.

First, the Tea Party Leadership Fund is not asking the Commission to determine whether the provisions creating the Commission are unconstitutional, whereas Mr. Robertson tried to declare the entire scheme unconstitutional: "It was hardly open to the Commission, an administrative agency, to entertain a claim that the statute which created it was in some respect unconstitutional." *Robertson*, 45 F.3d at 489-90 (internal citation omitted).

Second, the Tea Party Leadership Fund does not seek and has not received a benefit from the Commission. It asks only whether the six-month waiting period is an unconstitutional burden on the Tea Party Leadership Fund's speech. This is different from *Robertson*, where the Court that Mr. Robertson's receipt of a benefit estopped him from challenging the Commission's constitutionality.

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> [P]etitioner is estopped from challenging the Commission's constitutionality. *See Fahey v. Mallonee*, 332 U.S. 245, 255, 91 L. Ed. 2030, 67 S. Ct. 1552 (1947) (where a party has enjoyed benefits from agency under a statutory scheme, courts will not entertain challenges to agency's existence); *Brockert v. Skornicka*, 711 F.2d 1376, 1380 (7th Cir. 1983) (constitutional estoppel "most appropriate when a party seeks to retain the benefits of a governmental act while attempting to invalidate its burdens").
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> Petitioner, after all, voluntarily accepted over $ 10 million in public funds disbursed at the Commission's direction. It is hardly open to it now, after having taken the money, to claim that the very statutory instrumentality by which the funds are dispensed may not seek reimbursement because its composition is unconstitutional.

45 F.3d at 490.

Even the *Robertson* court noted that the "doctrine of constitutional estoppel...has its limits." *Id.* at 490. For instance, the court held that "The government may not interpose the doctrine as a defense if a party wishes to challenge an unconstitutional condition which is imposed on the receipt of federal funds. *See Kadrmas v. Dickinson Pub. Schools*, 487 U.S. 450, 456-57, 101 L. Ed. 2d 399, 108 S. Ct. 2481 (1988)." Likewise, the Tea Party Leadership Fund, which receives no benefit but is encumbered by burdens from the Commission, is not estopped to request and receive relief from the Commission even if that relief is granted on constitutional grounds.

An agency may be "influenced by constitutional considerations in the way it interprets or applies statutes." *Branch v. FEC*, 824 F.2d 37, 47 (C.A.D.C. 1987). And the Commission has been known to make constitutionally-guided decisions when it engages in rulemakings, answers advisory opinion requests and rules on enforcement matters. *See* Advisory Opinion (AO) 2007-32 p. 1 n.1 (*SpeechNow.org*) (dissenting opinion, Jan. 28, 2008). As Chairman Mason noted in dissent, the FEC in fact makes these types of constitutional decisions on a regular basis, including AO 1998-20, which looked to *Buckley v. Valeo*, 424 U.S. 1 (1976) to make a constitutional distinction between a candidate's funds and contributions from others. In AO 2003-02 the Commission applied a disclosure exemption based on constitutional principles; in AO 2003-03 it stated that "The Commission is also mindful of relevant constitutional principles;" and AO 2006-32, it noted the importance of the major purpose test as a constitutional consideration. Furthermore, the FEC is charged with, and commissioners take an oath to, support and defend the Constitution.

While *Robison* says that "adjudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies," it also states the "when faced with a problem of statutory construction, this Court shows great

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deference to the interpretation given the statute by the officers or agency charged with its administration." *Johnson v. Robison*, 415 U.S. at 367-68, *citing Udall v. Tallman*, 380 U.S. 1, 16 (1965). Thus, the court readily acknowledges that agencies have the authority to interpret the statutes they are charged to enforce, and that discretion includes not enforcing a statute that is unconstitutional in its application.

At a minimum, the Commission must consider whether the relief sought would address a constitutional infirmity and whether such infirmity exists. *See* SOR of Commissioner Michael E. Toner in MUR 4735 (*Bordonaro for Congress*) (Dec. 1, 2003) ("Many aspects of the nation's campaign finance laws raise serious constitutional concerns, and I believe the Commission has the responsibility and duty to be sensitive to these concerns when it interprets and enforces the law."); SOR by Commissioner Sandstrom in MUR 4624 (*The Coalition*) (Sept. 6, 2001) ("the Commission must be mindful of constitutional constraints"). That the Commission fails to address the constitutional implications of making the requestors wait six-months before they may engage fully in non-corrupting political association is only slightly less unreasonable than its enforcing a statute that, upon such consideration, it cannot but find to be violaitve of the first amendment.

Respectfully submitted,

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