FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

COMMON CAUSE and ADDY v. FEC

STATEMENT FOR THE RECORD

VICE CHAIRMAN JOHN WARREN MCGARRY
COMMISSIONER SCOTT E. THOMAS
COMMISSIONER DANNY LEE MCDONALD

In MUR 3204, the FEC split 3-2 and failed to act upon the General Counsel's recommendations that the National Republican Senatorial Committee and the Burns Committee violated the political party expenditure limits and the contribution limits of the FECA. We voted to approve the General Counsel's legal recommendations while Commissioners Aikens and Elliott voted against. The complainants challenged the Commission's failure to act and filed suit in United States District Court under 2 U.S.C. § 437g(a)(8). The district court upheld the Commission's failure to act on certain issues and ruled against the Commission on three other issues. The plaintiffs have now appealed those issues on which the district court deferred to the Commission's failure to act. For the following reasons, we voted against Commissioner Aikens' argument that the Commission should appeal those issues on which the district court ruled against the Commission.

First, we find ourselves in basic agreement with the district court's decision regarding the three issues which Commissioner Aikens wishes to appeal and for which there is no agency position as a result of the 3-2 split.[1] With respect to the Knudson salary issue, we agree with the district court's conclusion that "Aikens and Elliott's decision to dismiss this portion of the complaint is contrary to the plain language of the regulation and inconsistent with Commission precedent." Slip op. at 12. With respect to the Montana Republican Party's ("MRP") payments to Foster and Associates, we again

[1] It is important to understand the context in which we decide whether to appeal these issues. This litigation arises out of a 3-2 split. This is not a case where the Commission has, by a majority vote of four members, exercised any of its duties or powers and taken a substantive position on the contested issues. See 2 U.S.C. §437c(c). As a result, there is no official agency position at stake in this appeal. See *Common Cause v. FEC*, 842 F.2d 436, 449 n.32 (D.C. Cir. 1988)(An opinion of less than four Commissioners is "not binding legal precedent or authority for future cases. The statute clearly requires that for any official Commission decision there must be at least a 4-2 majority.").

agree with the district court's finding that "[a]s Aikens' and Elliott's position on the alleged violation is premised on an apparently unsupported assumption that the MRP used volunteers in this activity, the Court cannot find that the Commission's determination was the product of reasoned decisionmaking." Slip op. at 10. Finally, with respect to the solicitation costs issue, we accept the judgment of the district court that the Commission should pursue the National Republican Senatorial Committee for violating 2 U.S.C. §§441a(h) and 434(b).

Second, we do not agree with Commissioner Aikens' arguments for appealing this matter. Commissioner Aikens argues that "[t]o put ourselves in a position where we can only lose seems very illogical." Yet, this is precisely the position in which Commissioner Aikens placed the Commission by her votes against appealing cases the Commission had lost in recent litigation. See *FEC v. GOPAC*, C.A. No. 94-0828 (LFO)(D.D.C. Feb 29, 1996) and *Chamber of Commerce v. FEC*, 69 F.3d 600 (D.C.Cir. 1995), *reh'g denied* 76 F.3d 1234 (D.C.Cir. 1996). As a result of her votes, the Commission was unfairly placed in a one-sided "sudden death" situation--if the Commission lost, the litigation was over; if the other side lost, however, they would be able to appeal and fight another day.

Significantly, the *GOPAC* and *Chamber* decisions rejected official Commission positions adopted by a majority of the Commission pursuant to §437c(c)--unlike the current litigation where no official agency position has been placed in jeopardy because there were only 3-2 votes. It seems odd to argue, on the one hand, that the Commission should appeal a decision adverse to only two Commissioners but then, on the other hand, argue and vote against the appeal of judicial decisions adverse to an official agency position supported by at least four Commissioners. We believe it should be the other way around. It is "illogical" not to appeal adversely decided cases which represent an official agency position, but perfectly appropriate and understandable to vote against appealing issues and positions which have not been endorsed by a majority of the Commission.

We are also unpersuaded by Commissioner Aikens' argument that her "Democratic colleagues" might want to appeal and address the court's statements in footnote 9 of its decision. First, the court ruled in favor of Commissioner Aikens and Elliott on the issue referenced in footnote 9, so there is no basis for appeal. Second, as Commissioner Aikens knows, the court's statement in footnote 9 is dicta and not

appealable. It is well established that appellate courts "review judgments, not statements in opinions." *Black v. Cutter Laboratories*, 351 U.S. 292, 297 (1956) *citing Morrison v. Watson*, 154 U.S. 111, 115 (1894).

For all these reasons, we voted against an appeal in this matter.

6/18/96
Date

John Warren McGarry
Vice Chairman

6/18/96
Date

Scott E. Thomas
Commissioner

6-18-96
Date

Danny Lee McDonald
Commissioner