FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

ADDITIONAL STATEMENT OF VICE CHAIRMAN JOHN WARREN McGARRY AND COMMISSIONERS DANNY L. McDONALD AND SCOTT E. THOMAS

Re: FEC v. GOPAC

We submit this additional statement concerning the failure of our colleagues to appeal the district court decision in FEC v. GOPAC only to correct the record. In particular, Commissioner Aikens' recent statement mischaracterized the circumstances of an earlier matter where there were not four votes in favor of appealing a district court ruling. Her reference to that matter provides no rationale for her vote here. The GOPAC matter still stands as the only time in the FEC's history that a case brought by the FEC at the district court level was not appealed because of a partisan split.

The case Commissioner Aikens cites began with a complaint alleging that funds raised by the National Republican Senatorial Committee (NRSC) on behalf of particular candidates should be subject to the NRSC's $17,500 contribution limit. The law allowed committees such as the NRSC to act as conduits for individuals' contributions earmarked for specific candidates, but treated the amounts passed on to candidates as those of the conduit if it exercised "any direction or control over the choice of the recipient candidate." The only issue in this regard was whether the NRSC's role amounted to "direction or control" such that the money passed on to candidates was subject to the NRSC's $17,500 limit.

Regrettably, the Commission was divided on this question. We three, in agreement with our General Counsel, thought that because the NRSC's solicitations indicated which candidates would receive any money sent in response and offered no other options to donors, "direction or control over the choice of the recipient candidate" by the NRSC was established. Our colleagues, Commissioners Aikens and Elliott and former Commissioner Josefiak, disagreed and voted against finding probable cause to believe this aspect of the case presented a violation. As a result of this deadlock, there was no majority view of the matter.

The complainant sued the FEC alleging that the failure to find the NRSC's actions to be "direction or control" was contrary to law. The district court agreed with the complainant (and, accordingly, with the undersigned) on this point. Common Cause v. FEC, 729 F.Supp. 148 (D.D.C. 1990). When the General Counsel dutifully recommended that the agency appeal the district court "loss" (even though it followed his earlier legal analysis), we three declined to vote for an appeal. We took this position because there was not a majority vote supporting the failure to find a violation, and we consistently had taken the position elaborated by the district court.

Commissioner Aikens now suggests the issue of whether to appeal in that earlier case had something to do with whether the funds raised by the NRSC were "earmarked" and that we should have voted to appeal because the district court judge opined that the method used by the NRSC did not involve earmarked contributions. While Commissioner Aikens cannot be accused of a short memory, we suggest, using her own words, that she has "failed to recollect" the facts and distinctions of the prior case. Though the district court believed that the contributions in question would not qualify as "earmarked," it went on to hold that the NRSC nonetheless exercised "direction or control" and that the contributions forwarded to candidates should be subject to the NRSC's $17,500 contribution limit. The latter issue was the heart of the matter, and the district court's approach was the approach we had taken all along. To hold as well that the NRSC's methods denied donors any meaningful opportunity to provide a designation, instruction, or encumbrance was a slightly different way of getting to that point-- the funds passed on should be subject to the NRSC's contribution limit.

While the district court's holding on the "earmarking" issue was a different approach-- one that even suggested reporting violations by the NRSC which the FEC had not pursued-- we had no reason for appealing that aspect of the decision since it was plainly in accord with the contribution limit violation at hand. Similarly, we can only assume Commissioner Aikens wanted to appeal the district court decision because it resulted in a $2.7 million contribution limit violation by the NRSC. Her discomfort at being labeled "arbitrary and capricious" by the district court on the "earmarking" issue was not shared by us.

Ultimately, the FEC pursued the NRSC on the "direction or control" theory. The resulting enforcement lawsuit was successful at the district court level, but unsuccessful at the court of appeals level. FEC v. National Republican Senatorial Committee, 761 F.Supp. 813 (D.D.C. 1991), reversed, 966 F.2d 1471 (D.C. Cir. 1992).

The point missed by Commissioner Aikens is that a failure to appeal an adverse district court decision where a majority of commissioners voted to initiate the suit in the first place (as in the GOPAC case) is dramatically unlike a failure to appeal a district court decision in a matter where there was no majority position at the outset.[1] Never in the FEC's 21 year history had the commissioners split 3-3 on whether to

[1] In the latter situation, if a district court reaches a legal conclusion that the agency's failure to find a violation was contrary to law, as occurred in the NRSC matter, the normal appeal process can be utilized in the resulting enforcement litigation. As it turned out, for example, because the NRSC appealed the second district court ruling, Commissioner Aikens' position was upheld at the court of appeals level. By the same token, if the district court in the first suit had held that the agency's failure to find a violation was not contrary to law, those of us who felt otherwise would have had no recourse to appeal, but the complainant who brought the suit could have appealed. Thus, in these 3-3 vote situations, there is a rough balance in place through reliance on the district court ruling and subsequent appeals by the respondent or complainant affected adversely.

In truth, the commissioners who vote against finding a violation have a decided advantage in that their view is reviewed on an "arbitrary or capricious" standard and complainants rarely have the

appeal a district court decision in a case brought pursuant to a majority vote-- until the GOPAC case. Our earlier statement expressed our exasperation at the failure of our colleagues to uphold the agency's majority vote position throughout the litigation process. Commissioner Aikens' subsequent reference to an irrelevant aspect of the distinguishable NRSC matter where there was a 3-3 vote does not alter our bewilderment.[2]

Perhaps the best course for all concerned at this point is to step back and apply the "political committee" test that makes sense. If a group's major purpose is influencing elections (whether federal or non-federal) and it spends more than $1,000 to influence federal elections, it is a "political committee" required to register and report its federal activity. This would exclude groups whose major purpose is issue advocacy (like Massachusetts Citizens for Life). It would exclude Native American tribes (cf. Advisory Opinion 1978-51, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5343), law firms (see Advisory Opinion 1984-18, 2 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5762), and other groups whose primary activity is commercial in nature. At the same time, it would include groups like GOPAC (which now reports to the FEC), other PACs, and party organizations if their federal election influencing activity exceeds $1,000 in a calendar year. These types of groups have election influencing as their primary purpose, and they should report their federal activity at the federal level.

The FEC has devised rules that allow such groups to separate out their non-federal electioneering and only report their federal receipts and disbursements. 11 C.F.R. § 102.5. We also have rules clarifying how to allocate their generic electioneering activity that doesn't name specific federal candidates so that the full amount does not have to be subject to federal restrictions. 11 C.F.R. §§ 106.5 and 106.6. This framework makes sense and prevents the wholesale evasion of disclosure that would result if the district court's test in the GOPAC case were followed. It is fully consonant with the constitutional considerations noted in the cases cited by all parties in the GOPAC litigation.

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wherewithal to pursue an adverse district court decision. See, e.g., Stark v. FEC, 683 F.Supp. 836 (D.D.C. 1988). In those rare 3-3 vote situations where district courts have found the 'no violation' commissioners arbitrary or capricious, either the respondent has won on an eventual appeal (the NRSC matter) or the complainant has not pursued further litigation after the court of appeals ordered statements of reasons to be issued by the 'no violation' commissioners (Democratic Congressional Campaign Committee v. FEC, 645 F.Supp. 169 (D.D.C. 1986), affirmed in part and modified in part, 831 F.2d 1131 (D.C. Cir. 1987)). Given the historical outcome of 3-3 votes at the FEC, Commissioner Aikens should not be heard to complain.

[2] Commissioner Aikens has voted against further appeals in other matters where a Commission majority decision is at stake. Years before the NRSC matter she mentions, Commissioner Aikens voted not to seek Supreme Court review of an adverse court of appeals ruling. FEC v. National Right to Work Committee, 501 F.Supp. 422 (D.D.C. 1980), rev'd, 665 F.2d 371 (D.C.Cir. 1981), rev'd, 459 U.S. 197 (1982). Similarly, she voted against filing a Supreme Court appeal of an adverse three judge court decision in Common Cause v. Schmitt, 512 F.Supp. 489 (D.D.C. 1980), aff'd by an equally divided court, 455 U.S. 129 (1982). At least there was a majority able to outvote her in those situations-- something not present in the GOPAC matter. Given Commissioner Aikens' voting record, her protestations about the NRSC case ring hollow.

We rest.

4/10/96
Date

Vice Chairman John Warren McGarry

4/10/96
Date

Commissioner Danny L. McDonald by F.J.O.

4/10/96
Date

Commissioner Scott E. Thomas