

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)
) MUR 5275
Unknown Respondents)

**STATEMENT OF REASONS OF CHAIRMAN BRADLEY A. SMITH,
VICE CHAIR ELLEN L. WEINTRAUB, AND
COMMISSIONERS DAVID M. MASON AND MICHAEL E. TONER**

On February 24, 2004, the Commission rejected the Office of the General Counsel’s recommendations to find reason to believe that unknown persons violated 2 U.S.C. §§ 441d(a) and 2 U.S.C. § 438(a)(4). Instead, the Commission voted 6-0 to take no action with respect to these recommendations and closed the file.

This matter involved an anonymous communication that described David Fink, a candidate running for Congress in 2002 in Michigan, as running a race “virtually impossible to win” and urged recipients to redirect their resources to “candidates who can win like the Levin brothers and others.” The complaint presents the novel legal issue of whether this communication should be treated in the same manner as a solicitation for the purposes of Section 441(d)(a)’s disclaimer requirement and Section 438(a)(4)’s prohibition on the use of information derived from reports filed with the Commission “for the purposes of soliciting contributions.”

The Commission did not agree with the General Counsel’s conclusion that an appeal to support “candidates who can win” in races other than Fink’s amounts to express advocacy of Fink’s defeat. Indeed, it is a reasonable inference from the text of the mailing that the author(s) may have intended to vote for Fink and hoped eligible recipients would vote for Fink as well.

While the mailing did refer to “the Levin brothers” (presumably Michigan Senator Carl Levin and Michigan 12th District Representative Sander Levin, both of whom were up for re-election in 2002), they were identified as representatives (“and other”) of the class of candidates “who can win,” and thus the general exhortation to support such candidates cannot be read in this context as a solicitation for either Carl or Sander Levin. Important to this conclusion is the fact that the mailing did not contain any return envelope, reply device or even a mailing address to which contributions could be sent. The very general nature of the appeal, coupled with the absence of any indication of specifically to whom or where contributions should be sent, makes

it difficult for the Commission to conclude that the mailing was a solicitation for purposes of Section 438(a)(4).

Moreover, while rejecting the General Counsel's substantive recommendations, the Commission agreed with the report's conclusion that further investigation into the identity of the communication's unknown author(s) and the circumstances under which it was sent would not be the best use of the Commission's resources. Accordingly, in an exercise of its prosecutorial discretion, the Commission unanimously decided to take no action on the recommended reason to believe findings and close the file. *See Heckler v. Chaney*, 470 U.S. 821 (1985) (authorizing the use of prosecutorial discretion).

Bradley A. Smith, Chairman

Date

Ellen L. Weintraub, Vice Chair

Date

David M. Mason, Commissioner

Date

Michael E. Toner, Commissioner

Date