FEDERAL ELECTION COMMISSION

WASHINGTON [illegible]

DISSENTING OPINION OF COMMISSIONER LEE ANN ELLIOTT TO ADVISORY OPINION 1993-24

On February 3, 1994, the Federal Election Commission did more damage to the National Rifle Association than any of its ideological opponents could ever dream of inflicting. The Commission reduced the NRA by two-thirds, by deleting two million of its members for federal election law purposes. The Commission took this action, in my opinion, without regard for the law, the limits of our authority, the constitutional rights of private membership associations or the legitimate interest all citizens have in voluntarily joining an association to hear its views.

More specifically, this case involves the first application of the Commission's new regulatory definition of the word "member" 1/ and whether the NRA is violating 2 U.S.C. §441b(a) by communicating with, and soliciting PAC contributions from, the "non-voting members" of its association. A majority of the Commission believes the NRA is violating the law, and I think they are wrong. To prove this point, a review of the Commission's history on this subject is in order. I apologize for the sometimes lengthy quotes contained in this dissent, but I feel a complete analysis of this subject is necessary to fairly understand the gravity of the Commission's error.

1. The Law

The Federal Election Campaign Act (or "FECA") of 1971, as amended, governs federal election campaigns by imposing restrictions on political contributions and expenditures. For example, the FECA allows membership organizations such as the NRA to only make partisan communications to, and solicit political contributions from, their "members". 2 U.S.C. §§431(9)(B)(iii),

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1/ The new membership regulations were published on August 30, 1993 (58 Fed. Reg. 45770). The Commission voted to make these regulations effective November 10, 1993 (Commissioner Elliott dissenting)(58 Fed. Reg. 59641). The rules are codified in the 1994 edition of the Code of Federal Regulations at 11 C.F.R. §§100.8(b)(4)(iv); 114.1(e) and 114.7(k).

441b(b)(4)(C). 2/ FEC v. National Right to Work Committee, 459 U.S. 197, 202 (1982) ("NRWC")("the effect of this proviso is to limit solicitation by nonprofit corporations to those persons attached in some way to it by its corporate structure.")

"Partisan communications" are the constitutionally-protected method corporations, labor organizations and membership associations use to speak to their members about political issues and candidates. See, e.g., United States v. Congress of Industrial Organizations, 335 U.S. 106, 121 (1948); 2 U.S.C. §431(9)(B)(iii), 11 C.F.R. §114.3. Corporations, unions and membership organizations may also lawfully solicit voluntary political contributions from these same members for their separate segregated fund (often called a "PAC") that makes contributions to political candidates. Pipefitters v. United States, 407 U.S. 385, 414-417 (1972); Buckley v. Valeo, 424 U.S. 1, 28, n. 31 (1976); FEC v. Massachusetts Citizens for Life, Inc., 479 U.S. 238, 260 (1986)("It was thus wholly reasonable for Congress to require the establishment of a separate political fund to which persons can make voluntary contributions.").

If an incorporated membership organization makes a partisan communication or PAC solicitation beyond its "members," the organization violates the general prohibition of 2 U.S.C. §441b(a). That section prohibits any incorporated entity from making a contribution or expenditure "in connection with" a federal election. Violations of §441b are subject to the enforcement powers of the Commission, with civil penalties of up to 200% of the amount of the prohibited expenditures. 2 U.S.C. § 437g(a)(6)(C).

2/ The FECA does not define "member" or "membership organization."

Section 431(9)(B)(iii) provides, in relevant part, that an "expenditure" does not include "any communication by any membership organization or corporation to its members, stockholders, or executive or administrative personnel."

Similarly, §441b(b)(4)(C) states that the FECA does "not prevent a membership organization, cooperative or corporation without capital stock, or a separate segregated fund established [by such organizations] from soliciting contributions to such a fund from members of such organization."

In today's Advisory Opinion, the NRA asked whether, under the Commission's new membership rules, 3/ it would violate §441b if it continued to solicit political contributions from all its members. The NRA asked the question because the Commission specifically decided in an enforcement matter under our old regulations 4/ that the NRA could lawfully solicit all its members. MUR 1765 (National Rifle Association, Oct. 23, 1984).

In answering their request, I am mindful of the important First Amendment interests at the heart of any controversy surrounding construction or application of the Federal Election Campaign Act. While the First Amendment clearly protects solicitations, political expression and group association, See, e.g., NAACP v. Button, 371 U.S. 415 (1963), those protections are not absolute and may be regulated if a sufficiently important interest has been

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3/ The Commission's new regulations in this area define both "membership association" and "member."

"Membership Association" is defined, in part, as a membership organization that (i) expressly provides for "members" in its articles and bylaws; (ii) expressly solicits members; and (iii) expressly acknowledges the acceptance of membership ..." 11 C.F.R. §114.1(e)(1).

A "Member" must meet one of the four tests:

"(i) Have some significant financial attachment to the membership association, such as a significant investment or ownership stake (but not merely the payment of dues);

(ii) Are required to pay on a regular basis a specific amount of dues that is predetermined by the association and are entitled to vote directly either for at least one member who has full participatory and voting rights on the highest governing body, or for those who select at least one member of those on the highest governing body of the membership association;

(iii) Are entitled to vote directly for all of those on the highest governing body of the membership association." 11 C.F.R. §114.1(e)(2), or

(iv) on a "case by case" basis for those who do not fit the precise definition of the general rule. 11 C.F.R. §114.1(e)(3).

4/ Previously, 11 C.F.R. §114.1(e) provided that: "'members' means all persons who are currently satisfying the requirements for membership in a membership organization ... [but] a person is not considered a member under this definition if the only requirement for membership is a contribution to a separate segregated fund."

articulated with carefully drawn rules that avoid unnecessary abridgment of associational rights. Buckley v. Valeo, 424 U.S. 1, 25 (1976).

In fact, the Supreme Court has stated that Congress and the Commission have the authority to regulate this very question of what constitutes a "member." NRWC at 207 ("we conclude that the associational rights asserted by respondent may be and are overborne by the interests Congress has sought to protect in enacting §441b"); FEC v. Massachusetts Citizens for Life, Inc., 479 U.S. 238, 269 (1986)(Rehnquist, J. concurring and dissenting)("the judgment of Congress to regulate corporate political activity was entitled to 'considerable deference.'").

The harder question remains, however, whether our new membership regulations as applied to the NRA go beyond our statutory authority and impermissibly defeat legitimate associational rights. I think the FEC has, once again, gone too far. See, e.g., Faucher v. FEC, 928 F.2d 468 (1st Cir. 1991); FEC v. CLITRIM, 616 F.2d 45 (2d Cir. 1980)(en banc); FEC v. National Organization for Women, 713 F. Supp. 428 (D.D.C. 1989).

2. The NRWC Case

In 1982, the Supreme Court unanimously decided a "relatively easy" case involving the National Right to Work Committee's solicitation of political contributions from individuals who "were insufficiently attached to the corporate structure of NRWC to qualify as 'members' under the statutory proviso [of 2 U.S.C. §441b]." NRWC at 203, 206.

The NRWC, like the NRA, is a nonprofit corporation without capital stock which, among other things, solicits contributions from its so-called members to a separate segregated fund for use in federal elections. Unlike the NRA, the bylaws of NRWC stated that the organization "shall not have members." NRWC at 199. Also unlike the NRA, NRWC's members play no part in the operation of the association and there are no membership meetings for them to attend. NRWC at 206

To attract members, NRWC regularly:

> mails messages to millions of individuals and businesses whose names have found their way onto commercially available mailing lists that the organization has purchased or rented. The letters do not mention membership in the NRWC ... A person who,

> through his response evidences an intention to support NRWC in promoting voluntary unionism, qualifies as a member. A person who responds without contributing financially is considered a supporting member; a person who responds and also contributes is considered an active member. NRWC sends an acknowledgment and a membership card to both classes. ... In [NRWC's] view, both categories satisfy the membership requirement of §441b(B)(4)(C).

NRWC at 200, 202-03.

The Supreme Court totally disagreed, saying NRWC's view:

> would virtually excise from the statute the restriction of solicitation to "members." ... The Court of Appeals determination that NRWC's "members" include anyone who has responded to one of the corporation's essentially random mass mailings would, we think, open the door to all but unlimited corporate solicitation and thereby render meaningless the statutory limitation to "members."

NRWC at 203, 204.

In reaching its decision, the Court acknowledged the Commission's regulations, reviewed the FECA's legislative history, and concluded:

> "members" of nonstock corporations were to be defined, at least in part, by analogy to stockholders of business corporations and members of labor unions. The analogy to stockholders and union members suggests that some relatively enduring and independently significant financial or organizational attachment is required to be a member under §441b(b)(4)(C).

NRWC at 204 (emphasis added).

The Court also stated it was "entirely permissible for the Commission in this case to look to NRWC's corporate charter under the laws of Virginia and the bylaws adopted in accordance with that charter ... which explicitly disclaimed the existence of members." NRWC at 205, 206. Accord Greenwood Trust Co. v. Commonwealth of Massachusetts, 971 F.2d 818, 828-29 (1st Cir. 1992)

Further, the Court noted NRWC's:

> solicitation letters themselves make no reference to members. Members play no part in the operation or administration of the corporation; they elect no corporate officials, and indeed there are apparently no membership meetings.

NRWC at 206.

In my opinion, the NRWC decision was not about which of NRWC's two classes of members could be solicited under the FECA. It was about whether NRWC, itself, was a membership organization that could have any "members" at all. The Court found NRWC wasn't a membership organization that could avail itself of §441b(b)(4)(C) because its bylaws did not provide for members, all of its members lacked rights in the governance of the organization, and that NRWC considered anyone who merely answered one piece of mail [illegible] could be solicited for political contributions.

While the Court's rationale in NRWC is obviously quite sound, its result has been misused by the Commission in denying "membership" to different classes of members in associations that qualify as membership organizations. This error has been perfected by the FEC's substituting the word "and" for "or" in the Supreme Court's opinion, and by taking the extreme facts of NRWC and applying it to all associations.

The Commission's error is a particularly bitter pill for the NRA, since we told them in an enforcement case after the NRWC decision that their members could be solicited under §441b(b)(4)(C).

3. The NRA Enforcement Case

A year and a half after the Supreme Court's decision in NRWC, a complaint was filed with the Federal Election Commission alleging the National Rifle Association "was soliciting political contributions from almost two million persons who were not entitled to vote for its Board of Directors." The complaint alleged this solicitation of non-voting members was in violation of 2 U.S.C. §441b(b)(4)(C). MUR 1765, Complaint at paras. 4, 6, (Aug. 22, 1984).

The Commission disagreed. After reviewing the NRWC case and Advisory Opinion 1977-67, 5/ the Commission concluded:

> the apparent obligation of NRA "members" to pay minimum dues on an annual basis should be considered to be the "significant ... financial attachment required to be a "member" under §441b(b)(4)(C)." See FEC v. NRWC, 103 S. Ct. at 557.

MUR 1765, First GC Report at p. 14 (Oct. 15, 1984) (ellipsis in original).

Regarding the allegedly ineligible non-voting members of the NRA, the General Counsel also noted the:

> requisite "enduring ... organizational attachment" (see FEC v. NRWC, 103 S. Ct. at 557) between purported [redacted] of the NRA and the NRA itself also appears to exist in the view of this office.

Id at 14-15 (ellipsis in original).

Accordingly, the Commission analyzed all of NRA's dues-paying members as having the requisite "significant financial attachment" and any non-voting members as having an "enduring organizational attachment." Both groups met the test for membership. Importantly, there were not two tests, but one test that could be met in either of two ways.

Because the NRA's non-voting members in MUR 1745 are identical to the non-voting members in today's Advisory Opinion, 6/ more of the General Counsel's analysis of them bears repeating:

> although only lifetime and annual members have the right to cast a vote in NRA affairs, the record in this matter evidences that all members of the NRA have certain other rights vis-a-vis the corporation, NRA. See AO 1977-67. Of significance is the fact

[redacted]

5/ Advisory Opinion 1977-67 held that a Virginia membership organization could solicit its members, even though they lacked any voting rights, because they paid a predetermined minimum amount of dues.

6/ In today's Advisory Opinion, the majority concedes NRA's membership structure has "not changed substantially since the Commission's resolution of MUR 1765." Advisory Opinion 1993-24 at 2.

> that all members of the NRA are allowed to hold membership on any committee of the NRA which "consider, debate, and recommend policies, strategies, programs, rules, and activities to the NRA Board of Directors." Equally important is the fact that all members have the right to attend all meetings of the Board of Directors, Executive Committee, and standing and special committees of the Association. All members have the "privilege" of attending and being heard at all official meetings of members. Finally, all members of the NRA have the right to circulate and submit petitions for nominating Directors. Based on the above facts it appears that the non-voting members of the NRA can be considered to exercise some control over the expenditure of their contributions (see FEC v. NRWC, 103 S. Ct. 552 (1982)) and are permitted to participate in the direction, operation and policies of the NRA.

MUR 1765 1st GC Report at p. 15-16 (footnotes omitted).

The General Counsel also noted that other "indicia of membership recognized by the Court in FEC v. NRWC, 103 S. Ct. 552, also appear to be present within the NRA organization" such as providing for members in its bylaws, the provision for an annual meeting, the use of membership cards, insignias, and official journals, and other membership services. Importantly, the General Counsel closed with:

> As discussed above, the Court did not dictate the requirements for membership in a corporation without capital stock, but rather commented upon the various indicia that were lacking in the factual situation under its consideration. The right to vote is only one type of right vis-a-vis the corporation, in this office's view.

MUR 1765 at 17. 7/

This application and analysis of the NRWC decision was, in my opinion, exactly right. The Commission properly noted a person could have either a "financial" or an "organizational" attachment to qualify as a member.

7/ See also FEC v. Democratic Senatorial Campaign Committee, 454 U.S. 27, 38-39 n.19 (1981) ("it is sufficiently clear that the staff report provides the basis for the Commission's action").

The Commission acknowledged the extreme factual differences between NRA and NRWC, and the extensive membership rights NRA's non-voting members enjoy. Also, the Commission correctly noted the NRWC decision did not "dictate the requirements for membership." MUR 1765 at 17.

Astonishingly, NRA's very same membership structure was given the opposite analysis and treatment in today's Advisory Opinion. To understand this flip-flop, a brief review of the Commission's odyssey of Advisory Opinions on this subject after NRWC is necessary.

4. The Commission's Membership Advisory Opinions.

Since the NRWC decision, the Commission has issued at least 18 Advisory Opinions on the subject of membership, culminating with today's opinion to the NRA. 8/ Reading these opinions reveals several slippery standards and plenty of result-oriented legal analysis.

In fact, the Commission made the classic legal mistake of confusing the facts of previous cases as the law for the future. This resulted in a metamorphosis of our legal standard into a two-part test that made voting rights the sine qua non of "membership" in our new regulations. This happened when the Commission misread its prior Advisory Opinions and effectively substituted the word "and" where the Supreme Court used the word "or" - creating a standard for membership that two-thirds of the NRA now can't meet.

Advisory Opinion 1984-22 was the first post-NRWC opinion on the subject of membership. In it, the Commission was asked whether "regular," "options principal," "associate," and "allied" members of the American Stock Exchange, Inc., a New York non-profit corporation, could be solicited for contributions under §441b(b)(4)(C). After noting that "all four classes share equal rights and opportunities to participate in the governance of the Exchange" and that differences existed in voting rights, dues obligations and trading privileges, the Commission rendered the following decision:

8/ Those Advisory Opinions are: 1993-24, 1992-41, 1992-9, 1991-24, 1990-18, 1989-18, 1988-39, 1988-38, 1988-3, 1987-31, 1987-13, 1987-5, 1986-13, 1985-12, 1985-11, 1984-63, 1984-33, and 1984-22.

Member name	Governance rights	Right to vote	Pays dues	Other privileges	Can be solicited
regular	yes	yes	yes	yes	yes
opt. pncl.	yes	no	yes	yes	yes
associate	yes	no	yes	no	split 9/
allied	yes	no	no	no	no

With the inclusion of "options principal" members within the solicitable class, and the failure to say "associate" members were not solicitable, the Commission was initially saying voting rights were not the sine qua non of membership. If voting rights had been mandatory, then only "regular" members would have cleared the hurdle for membership under the FECA.

In reaching its decision in 1984-22, the Commission quoted the NRWC opinion and reviewed our prior decisions:

> In determining if a class of membership has the requisite "enduring" and "independently significant" financial or organizational attachment," the Commission has considered whether such persons have any interests and rights in the organization through some right to participate in the governance of organization and an obligation to help sustain the organization through a regular financial contribution of a predetermined amount. See Advisory Opinions 1982-2, 1979-69, 1977-67 and 1977-17.

Advisory Opinion 1984-22 at 4 (emphasis added, cited Advisory Opinions in footnote below). 10/

9/ The Commission split 3-3 on this particular group, and was therefore unable to determine whether associates are or are not "members" under the FECA.

10/ Advisory Opinion 1982-2 ("active" and "associate" members of a broadcaster's association are "members" even though only "active" members had a right to vote, since both classes pay dues and have governance rights); Advisory Opinion 1979-69 (associate members of logging association are not "members" since they do "not have the right to vote at any meeting or have any voice in the Association or any control over its officers"); Advisory Opinion 1977-67 (association who's bylaws stated "no members shall have any voting or property rights" still has "members" under the FECA if they affirmatively express a desire to join, participate in membership surveys and pay a predetermined amount of dues, or have them waived pursuant to an established

The above use of the word "and" was correct since Advisory Opinion 1984-22 was merely listing various facts the Commission was presented with in those prior Advisory Opinions. See Footnote 10. "And" was not indicating a two-part test for membership, since none of those prior opinions required people meet such a test, nor could have they, since we qualified some people as "members" in those Advisory Opinions that couldn't have met both halves of the test. 11/

The problem came when the Commission erratically re-characterized these past Advisory Opinions and created a "legal lump sum" out of all their facts. Instead of finding the common denominator of the prior opinions, the Commission combined every essential fact of every prior opinion into one master test. This created a "standard" for membership few could meet.

For example, the above quoted phrasing of Advisory Opinion 1984-22 was replaced in Advisory Opinion 1984-63 by:

(Footnote 10 continued from previous page)
policy);

Advisory Opinion 1977-17 ("commodity representatives" were not "members" of a Mercantile Exchange since Exchange's bylaws did not definitively provide for them as members, they had no trading privileges, no right to vote on Exchange rules or elections, nor could they serve as officers or directors of the Exchange).

11/ In fact, Advisory Opinion 1984-22 specifically acknowledged that in Advisory Opinion 1982-2 the:

> Commission concluded that where a membership class of a trade association lacked a right to vote for the officers and directors of the organization, but were eligible to be elected as at-large directors and to serve on the organization's committees and were limited to a defined business group, the class were 'members.'

See also Advisory Opinion 1985-11, p.3 n.3 (In Advisory Opinions 1982-2 and 1977-67, "the Commission held that voting rights were not in all cases a mandatory requirement for membership status under the Act.").

> "the Commission has required that members have specific obligations to and rights in the governance of the organization"

(emphasis added). No we had not. There was no such requirement in those opinions.

Even worse, Advisory Opinion 1985-11 re-wrote the past as:

> the Commission has held that for individuals to have the kind of enduring and significant attachment that would qualify them as members, they must have (1) some right to participate in the governance of the organization and (2) an obligation to help sustain the organization through regular financial contributions of a predetermined amount.

That also is not true. Astonishingly, Advisory Opinion 1985-11 went on to say:

> where an incorporated organization had membership classes who had full or partial voting rights and a class that had no such rights, the Commission stated that such individuals without voting rights were not "members" who could be solicited. See Advisory Opinion 1984-22 and opinions cited therein.

Advisory Opinion 1985-11 at 2.

Advisory Opinion 1984-22, of course, held nothing of the sort, nor did two of the Advisory Opinions it cited (1982-2, and 1977-67). In fact, all three of those opinions held just the opposite: persons were qualified to be members even though they lacked the right to vote.

This revisionism came to a head in Advisory Opinion 1987-31 when a requester challenged the Commission on our standard which essentially replaced the Supreme Court's one part test for a "relatively enduring and independently significant financial or organization attachment" with our emerging two-part requirement that a member must "maintain some right to participate in the governance of the organization and some obligation to help sustain the organization through regular financial contributions." Request for Reconsideration, Advisory Opinion 1987-31 (March 4, 1988).

In defense of its "and" standard, the General Counsel's office made the following jaw-dropping argument:

> The Supreme Court has also recognized the "trouble with" differentiating between the use of the word "and" and the word "or." De Sylva v. Ballantine, 351 U.S. 570, 573 (1956). In Ballantine, the Court noted that the "word 'or' is often used as a careless substitute for the word 'and'; that is, it is often used in phrases where 'and' would express the thought with greater clarity." Id.
>
> The Court's application of the membership requirement in NRWC indicates that it intended to use a conjunctive rather than disjunctive standard. ... Instead of offering a specific standard, the Court "suggested" that membership required independently significant financial or organizational attachment. 459 U.S. at 204. To apply this suggested standard, the Court followed the district court, the Commission and the Supreme Court in Hunt [v. Washington Apple Adv. Comm., 432 U.S. 333 (1977)] using the word "or" to convey a conjunctive standard which would have been better expressed with the word "and."

Agenda Document #88-122 Request for Reconsideration of Advisory Opinion 1987-31; Supplement to Agenda Document #88-87 (Nov. 10, 1988).

Unbelievable! The problems with this so-called analysis are almost too numerous to count. First, the Commission never used an "and" test before NRWC. Second, the Court never cited let alone "followed" the district court decision, or any previous Commission decision, or the Hunt case in its entire unanimous opinion in NRWC. Third, Ballantine concerned the use of the word "or" in an intricate statutory construction of the Copyright Act, and was not a command on how to read the prose of all Supreme Court opinions. Fourth, and most importantly, the Supreme Court had just repeated its "or" test verbatim a year earlier in FEC v. Massachusetts Citizens for Life, Inc., 479 U.S. 238, 264 n. 13 (1986)("National Right to Work Committee requires that 'members' have either a 'financial or organizational' attachment."), indicating that it meant what it said.

Unfortunately, this is not the first time the Commission has unsuccessfully attempted to rewrite a Supreme Court decision it doesn't like. Faucher v. FEC 928 F.2d 468, 470-471 (1st Cir. 1991)("The Court's basis for deciding should not later be treated as dictum simply because a critic would have decided on another basis. ... It is not the role of the FEC to second-guess the wisdom of the Supreme Court."); FEC v. CLITRIM, 616 F.2d 45, 53 (2d Cir. 1980)(en banc)("Thus, the FEC would apparently

have us read 'expressly advocating the election or defeat' to mean for the purpose, express or implied, of encouraging election or defeat. This would, by statutory interpretation, nullify the change in the statute ordered in Buckley v. Valeo and adopted by the Congress in the 1976 amendments. The position is totally meritless").

I have no reason to believe the Supreme Court meant "and" when it said "or." Nor do I think the Commission is well-served by revising its past or rewriting judicial opinions. The Commission could have prevented this by taking a fresh, honest look at this issue. Instead, we decided to codify our errors into our new rules on membership.

5. New Rules On Membership

On October 8, 1992, the Commission published a Notice of Proposed Rulemaking in the Federal Register to replace our membership rules with new ones allegedly designed to reflect the Supreme Court's 10 year old decision in NRWC and close the gap between the current rules and the Commission's Advisory Opinions on the subject. 57 FR 46348.

Numerous commenters urged the Commission to reconsider its two-part "and" test and return to the Supreme Court's disjunctive language. Nevertheless, the General Counsel recommended, and the Commission adopted, new membership rules that "require both a financial and an organizational attachment in most instances, to qualify for membership status." 11 C.F.R. §114.1(e)(2)(ii). Agenda Document #93-49 Proposed Revisions to Definition of Member, at p. 4 (June 1, 1993). 12/

12/ As noted in footnote three, the new rules give members four ways to qualify as members: either by a significant financial tie, a combination of dues and voting rights, by having significant voting rights, or on a case-by-case basis. 11 C.F.R. §114.1(e)(2)(i), (ii), (iii) and (e)(3). But the E&J went on to state "the Commission's experience has been that most organizations do not meet the 'significant' test for either [the first or third] tie" and the Commission anticipates that most members will have to qualify under the "and" test of subsection (ii). Agenda Document #93-67 Explanation and Justification of the Revised Rules Defining "Member" p. 9-10 (Aug. 12, 1993). 58 FR 45771.

The Explanation and Justification contains some interesting revisions to Commission history. For example, the E&J states:

> The Commission considers the NRWC decision to have overruled prior Advisory Opinions that were inconsistent with its holding.

Explanation and Justification, 58 FR 45772.

I am not aware of any of the 18 opinions issued after NRWC saying that a pre-NRWC opinion has been overruled. In fact, the Commission has cited and relied on pre-NRWC Advisory Opinions in post NRWC Advisory Opinions: most notably Advisory Opinion 1984-22 which approvingly cited numerous pre-NRWC Advisory Opinions.

In yet another plot twist, the E&J tries to show how liberal the new rules are by stating:

> However, several Advisory Opinions issued following [the NRWC] decision, including Advisory Opinion ... 1984-22, have explicitly or implicitly required more substantial voting rights than those required by these revised rules. Any such Advisory Opinion is overruled to the extent it requires more extensive voting rights than those contained in ... 114.1(e)(2).

Id.

Now wait a minute: it is impossible to overrule Advisory Opinion 1984-22 on the basis that it "required more substantial voting rights than those required by the revised rules." That is because the Commission found certain people in that opinion to be members who had no voting rights at all. 13/

In other words, voting rights are now the sine qua non of membership as defined by the FEC. As stated in the E&J:

13/ Some may respond to this argument that Advisory Opinion 1984-22 is over-ruled because it involved a stock exchange whose members would now be solicitable under subsection (e)(2)(i). This counter-argument heaps revisionism on revisionism. Nowhere in that opinion was any "significant investment" attachment discussed, nor does the E&J state that is why it is being overruled.

> the Commission believes that some voting rights are mandated by the Supreme Court's NRWC decision, as interpreted in a number of Advisory Opinions ...

58 FR 45774

Also, voting rights will still be required in any "case by case" review of members who do not meet any of the three precise definitions of "member." As the Commission explained, §114.1(e)(3) gives some flexibility in this rulemaking, but any "case by case" members will still have to "hold some voting rights in the association." 58 FR 45773.

Many commenters suggested the Commission's insistence on voting rights was inconsistent with the Supreme Court's and the legislative history's analogy to shareholders; especially since "not all owners of one share of a corporation's stock are allowed to vote on corporate matters." 58 FR 45772. The Commission's reason for dismissing this argument was:

> the FECA expressly authorizes corporations to solicit contributions of their PAC's from their shareholders. 2 U.S.C. §441b(b)(4)(B).

Id.

So what! The FECA also expressly authorizes membership organizations to solicit contributions from their members. 2 U.S.C. §441b(b)(4)(C). That's no distinction, that is a direct similarity!

Also, despite the Supreme Court's suggestion to analogize stockholders to members, the E&J states:

> In addition, stock ownership differs significantly from the interests involved in this rulemaking. The ownership of even one share of stock provides a direct financial stake and continuous equity interest in the company.

Id.

I am sure the IRS would be interested in any non-profit association who's members had an "equity interest" or "financial stake" in the organization! The Commission has taken a good analogy and ruined it by

exaggerating the differences. I find this particularly interesting since our regulations allow stockholders to be solicited even if they do not own voting stock. 11 C.F.R. §§100.8(b)(4)(ii); 114.1(h).

It is now humorous to note that these new, tougher membership rules actually were characterized "as a substantial liberalization of the former rules," and that "the standard announced in the new rules is substantially more liberal than that which has been approved by the Commission since NRWC," and that "voting rights have been made as non-burdensome as possible in the final rule." Agenda Document 93-93 Announcement of Effective Date, page 2 (Nov. 1, 1993); Agenda Document 93-90 Letter Requesting Withdrawal of the "Member" Rules, page 1 (Oct. 22, 1993). It only took us a couple of months to find out this wasn't true when the Commission answered NRA's request for an Advisory Opinion.

6. The NRA Advisory Opinion

On February 3, 1994, a majority of the Commission approved sending Advisory Opinion 1993-24 to the National Rifle Association. This opinion reversed the Commission's decision in MUR 1765 and held that non-voting members of the NRA 14/ are not "members" under the FECA because they cannot meet any of the tests in our new membership regulations.

The significant organizational and financial attachments of NRA's non-voting members, especially the annual members, do not need to be repeated here. They are thoroughly discussed in the Advisory Opinion and are similar to my description of the non-voting members at issue in MUR 1765. What does need to be recounted, however, is the rationale employed by the Commission during its meeting to deny membership to these people.

The overriding theme of the NRA Advisory Opinion discussion was: the rules have changed, the Commission has changed, so the NRA should change as well. Even though the statute hasn't changed, the NRA could solve this "problem" by reforming itself, adjusting its bylaws, expanding its class of honorary members, or creating a house of delegates that annual members could vote for.

14/ These are all "associate" "junior" members, and "annual" members who have been affiliated with the NRA for less than five years.

I object to these attempts to remake the NRA in our own image. The Commission cannot, in my opinion, democratize private membership associations, segregate their membership, or prevent some from hearing the views of an organization they voluntarily join, just to allow solicitation under §441b(b)(4)(C).

Lastly, I find it terribly disappointing that we have abandoned the Supreme Court's analogy of members to stockholders. This has been accomplished by overemphasizing the equity interest stockholders can have, which members of non-profit associations obviously lack. Overemphasizing equity interests, however, creates this unfortunate dichotomy: a person who was given one share of non-voting stock that is worth one dollar can be solicited for PAC contributions by that corporation, but an adult who has chosen to join NRA and has actively been an annual member for four years and contributed $80.00 cannot.

7. The NRA Has Been Consistent

During the Commission's consideration of this opinion, it was alleged that the NRA's request had a few ironies in it. The supposed irony was that the NRA was now seeking an Advisory Opinion that its non-voting members should be considered "members" under the FECA, but that during the rulemaking NRA urged us to require voting rights of all members.

The NRA said nothing of the kind. What the NRA did say was that "NRA agrees with the general direction of the proposed regulations and their emphasis on voting rights as defining a 'membership organization'." (emphasis added). NRA Comments at 1 (Nov. 19, 1992). As my colleagues know, our new regulations not only re-define "member" but also define "membership association" for the first time. Compare 11 C.F.R. §114.1(e)(1992) with 11 C.F.R. §114.1(e)(1) and (e)(2)(Aug. 30, 1993). NRA's emphasis on defining "membership association" should not be a surprise to anyone, since that was the basis for complaints they filed at the Commission and NRA v. FEC, 854 F.2d 1330, 1332-34 (D.C. Cir. 1988)(NRA contends an opposing association was not a "membership organization").

Clearly, what the NRA was saying in its comments was that you can't be a "membership organization" unless you have some voting members - they were not saying only

people with voting rights can be "members." 15/ In fact, NRA went to great lengths in their November 19, 1992 comments to advocate "membership" for non-voting members:

> A structural element which is absent from the proposed regulation is the allowance for more than one class of membership. Including such an element would adhere to the analogy in NRWC to stockholders since stock can either be common (with voting rights) or preferred (without voting rights) .... if [our] suggestion concerning more than one class of member is adopted, the regulation needs to establish the elements defining "organizational attachment."

NRA Comments at 2.

To further illustrate their points, the NRA provided the Commission with what they considered the legally appropriate definition of "member." In it, they specifically deleted our proposed combination of dues and voting rights, and replaced it with a definition of significant organization attachment to the association which:

> means the right to serve on association committees which recommend policies, the right to attend and speak at all organization meetings, and the right to circulate and submit petitions for nominating candidates for the governing body.

Id.

The NRA repeated their plea for according membership status to non-voting members in their December 9, 1992, testimony before the Commission. After opening comments

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15/ Additionally, in their November 19, 1992, written comments, the NRA submitted a draft regulation which defined "membership organization" as an entity that

> expressly provides in its articles or bylaws that all, or a class of, members are entitled to nominate candidates, and to vote directly for [those on the highest governing body] ... provided that, if a class of members is not entitled to nominate candidates and to vote directly, the articles or bylaws must provide such class of members with some other significant organizational attachment to the association.

which stated that non-voting members should be accorded "membership" by the Commission, the following colloquies took place:

> **CHAIRMAN AIKENS:** I want to ask just one quick question on your last point, the nonvoting class membership. They would be solicitable, those members?
> **MR. GARDINER (of the NRA):** They would be, yes. They would still be members within the meaning of the law.
> **CHAIRMAN AIKENS:** As long as all the other rights and privileges accrued to them --
> **MR. GARDINER:** Correct
> **CHAIRMAN AIKENS:** -- as well
> **MR. GARDINER:** Correct.
> **CHAIRMAN AIKENS:** Even if it was a lesser amount of dues or a --
> **MR. GARDINER:** That would really be the only distinction, is a lesser amount of dues.
>
> . . .
>
> **COMMISSIONER MCGARRY:** ... you would not, in all cases, require voting rights; is that correct?
> **MR. GARDINER:** Correct.
>
> . . . .
>
> **COMMISSIONER POTTER:** I am interested in your suggestion that individuals could be members in some circumstances although they don't vote. As a preliminary matter, I take it there is such a group of the NRA now.
> **MR. GARDINER:** Correct.
> **COMMISSIONER POTTER:** ... If I hear your response, though, it is that it would be possible to have a situation where you don't have voting rights and you have also a smaller financial commitment.
> **MR. GARDINER:** (Hesitating; but) I think you need a third leg there, which is other structural organizational attachment, this is structurally defined organization attachment.

Transcript Commission Hearing on Proposed Membership Regulations (Dec. 9, 1992) p. 11-12, 13-14, 16-17.

Since the NRA never advocated the Commission require voting rights of all members 16/ there is no irony in today's Advisory Opinion, only tragedy. The NRA has just lost two-thirds of its membership for FECA purposes, and it is very disappointing that some think it is ironic.

8. Conclusion

In my opinion, the Commission has rendered an Advisory Opinion based on an invalid regulation. Our new membership regulations are contrary to the statute and its interpretation by the Supreme Court in NRWC, and the Commission's enforcement decision on this very group.

> Any organization's partisan communications, solicitations and expenditures represent activity at the core of the First Amendment. Further, the voluntary nature of joining (and leaving) a membership association certainly reduces any coercive element in its PAC solicitations. FEC v. National Conservative PAC, 470 U.S. 480, 499 (1985). And unlike for-profit corporations, the treasury of a membership association is a rough measure of its popular support. But by assuming the corporate form, large non-profit associations **must** be regulated by §441b.

The regulations we adopt to enforce this provision, however, must have some foundation in the law, its legislative history and judicial precedent. Our new membership regulations do not. In fact, these regulations are designed to take people out of the political process. As Judge Kaufman prophesied about the Federal Election Commission 14 years ago:

> Officials can misuse even the most benign regulation of political expression to harass those who oppose them. ... This danger is especially acute when an official agency of government has

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16/ The NRA did submit an additional comment on June 21, 1993 which enclosed Senate floor discussion purporting to relate to membership organizations. It does not. The floor discussion related to the controversy of limiting for-profit corporations' PAC solicitations to "salaried employees who have policy making or supervisory responsibilities." 122 Cong. Rec. 7228 (1976). Contrary to the NRA, "the entire legislative history of [§441b(b)(4)(C)] appears to be the floor statement of Senator Allen who introduced the provision in the Senate. NRWC at 204 quoting 122 Cong. Rec. 7198 (1976).

> been created to scrutinize the content of political expression, for such bureaucracies feed upon speech and almost ineluctably come to view unrestrained expression as potential "evil" to be tamed, muzzled or sterilized. ... The possible inevitability of this institutional tendency, however, renders this abuse of power no less disturbing to those who cherish the First Amendment and the unfettered political process it guarantees.

CLITRIM at 54-55 (Kaufman, J., concurring).

For these reasons, I declined to approve Advisory Opinion 1993-24, and I await a declaratory review. Faucher v. FEC, 928 F.2d 468 (1st Cir. 1991).

March 11, 1994

Lee Ann Elliott
Commissioner