FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

Statement of Vice Chair Ann M. Ravel and Commissioner Ellen L. Weintraub on Judicial Review of Deadlocked Commission Votes

June 17, 2014

On December 3, 2013, the Commission deadlocked 3-3 on whether to find reason to believe that Crossroads Grassroots Policy Strategies ("Crossroads GPS"), a 501(c)(4) "social welfare organization,"[1] should have registered and reported as a political committee under the Federal Election Campaign Act (the "Act") and Commission regulations.[2] As we explained at the time,[3] we believe that, as a result of our colleagues' votes in that case, the Commission "failed to adhere to its own policy on political committee status or to recent judicial decisions finding that policy to be valid and constitutional."[4] The complainants then brought suit against the Commission for its failure to take action against Crossroads GPS.[5]

We are writing now to address an issue that arises in the context of this litigation, but that has much broader significance—the issue of how courts review a 3-3 deadlock at the FEC. In particular, we are concerned about the potential that courts will continue to grant deference to the perspectives of only half of the members of the Commission when the Commission has a split vote. This "deadlock deference" appears to be unique to the enforcement process at the FEC, for reasons that the D.C. Circuit has never fully explained. Such deference undermines the bipartisan structure of the agency and puts complainants at a unique disadvantage in precisely the process where Congress sought to empower them. Moreover, the longstanding justifications for granting deference to an administrative agency—the presence of subject-matter expertise and the ability to craft policy compromises—are entirely absent in the case of a deadlock.

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[1] *See* 26 U.S.C. § 501(c)(4).

[2] We, along with Commissioner Walther, voted to approve the recommendations in the First General Counsel's Report. *See* Certification in MUR 6396, dated Dec. 5, 2013, *available at* http://eqs.fec.gov/eqsdocsMUR/14044350869.pdf. Then-Vice Chairman Goodman and Commissioners Hunter and Petersen dissented, and the vote failed 3-3. *Id.* The Commission then unanimously approved a ministerial motion to close the file.

[3] *See* Statement of Reasons of Vice Chair Ravel, Commissioner Walther, and Commissioner Weintraub in MUR 6396 (Crossroads GPS), dated Jan. 10, 2014, *available at* http://eqs.fec.gov/eqsdocsMUR/14044350964.pdf.

[4] *Id* at 1.

[5] Complaint, *Public Citizen v. FEC*, No. 1:14-cv-00148 (D.D.C. Jan. 31, 2014).

Our concern here is not specific to the *Public Citizen* litigation.[6] In fact, it is our view that the level of deference granted to the reasoning of the three dissenting Commissioners should not change the outcome of the litigation. The Commission is not permitted to render decisions for reasons that are "contrary to law."[7] As we have said previously,[8] the reasons provided by the dissenting Commissioners for failing to enforce the law drastically depart from and contradict the Commission's own policy on political committee status, which recent judicial decisions have found to be valid and constitutional.[9] No amount of deference can overcome a finding that the failure to act disregarded the existing law. Nonetheless, whatever the court may say about deferring to a deadlocked vote could have broad consequences for future cases.

The D.C. Circuit first explicitly discussed the issue of FEC deadlocks in 1992, when it reviewed the Commission's 3-3 vote on whether the National Republican Senatorial Committee ("NRSC") had run afoul of the Commission's regulations governing "earmarking" of contributions.[10] For the Commission to find probable cause that a violation has occurred, there must be affirmative votes from at least four Commissioners.[11] In *NRSC*, since only three Commissioners had voted to find probable cause, the Commission could not pursue the matter further. However, 2 U.S.C. § 437g(a)(8) provides that when the Commission dismisses or fails to act on a complaint, the complainant may file a petition with the District Court for the District of Columbia seeking a ruling that the Commission's dismissal or failure to act was contrary to law.[12] In *NRSC*, the complainant, Common Cause, filed suit under § 437g(a)(8) seeking to compel the Commission to act. The District Court found in favor of Common Cause, and the case was appealed to the D.C. Circuit.

The court of appeals raised a number of questions about how to determine the "Commission's" view of the earmarking regulation:

> "But what, in this case, is the Commission's construction? Do we look to the Commission's litigating position...? Do we rely on the presumably identical reading of the regulation by the three Commissioners who voted in favor of finding probable cause? Or do we defer to the contrary interpretation of the three Commissioners who voted against pursuing the complaint?"

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[6] *See* Complaint, *Public Citizen v. FEC*, No. 1:14-cv-00148 (D.D.C. Jan. 31, 2014).

[7] 2 U.S.C. § 437g(a)(8).

[8] *See* note 3, above.

[9] *Real Truth About Abortion, Inc. v. FEC*, 681 F.3d. 544, 556 (4th Cir. 2012) ("*RTAA*"), *cert. denied*, 133 S. Ct. 841 (2013); *Free Speech v. FEC*, 720 F.3d 788, 798 (10th Cir. 2013); *Shays v. FEC*, 511 F. Supp. 2d 19, 29-31 (D.D.C. 2007).

[10] *FEC v. Nat'l Republican Senatorial Comm.*, 966 F.2d 1471 (D.C. Cir. 1992) ("*NRSC*").

[11] 2 U.S.C. § 437c(c).

[12] 2 U.S.C. § 437g(a)(8)(C).

The D.C. Circuit had already provided a partial answer to these questions: for the purposes of litigation, the position of the three Commissioners who voted for no action to be taken, referred to as the "controlling group,"[13] "controlled" the outcome; had any of them voted differently, the Commission would have taken action. Since the *failure* to take action is the subject of the challenge, these three Commissioners had to provide the reasoning for their votes,[14] in order "to make judicial review a meaningful exercise."[15] Unless the courts can review the reasoning of the three Commissioners who prevented the Commission from acting, not only could three Commissioners block any enforcement action, but complainants would be powerless to challenge the Commission's failure to act in court.

The court in *NRSC*, however, appears to have gone one step further. Prior to its discussion of the controlling group's rationale, the court noted that an agency's construction of its own regulations is normally granted significant deference.[16] Having determined to review the controlling group's view, the court then chose to *defer* to that view[17]—presumably in the same way that it would defer to a decision made by a four-vote majority of the Commission.

Congress intended the Commission to operate almost exclusively by four-vote majority.[18] Indeed, this is part of the reason that Courts have given deference to a *majority* of the Commission (four Commissioners)—because decisions of the Commission are "inherently bipartisan in that no more than three of its six voting members may be of the same political party."[19] In passing the Federal Election Campaign Act, the legislation creating the Commission, Congress emphasized the dangers of "partisan misuse" and hoped that the FEC's four-vote majority requirement would help to ensure a "mature and considered judgment."[20] It is this bipartisan nature that enables the Commission to "decide issues charged with the dynamics of party politics."[21] When the Commission makes the bipartisan judgments that Congress designed it to make, it is perfectly reasonable that the courts would grant deference to those decisions.

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[13] *NRSC*, 966 F.2d at 1476.

[14] *See generally Democratic Cong. Campaign Comm. v. FEC*, 831 F.2d 1131 (D.C. Cir. 1987) ("*DCCC*") (remanding a case to the Commission so that the three Commissioners voting against the General Counsel's recommendation could provide their reasons for doing so).

[15] *NRSC*, 966 F.2d at 1476.

[16] *Id.* at 1475-6 (citing *Bowles v. Seminole Rock Co.*, 325 U.S. 410, 414 (1945)).

[17] *Id.* at 1476.

[18] Congress required "the affirmative vote of 4 members of the Commission" for substantive Commission action. 2 U.S.C. § 437c(c). Thus, even at times when the Commission lacks a full complement of Commissioners, a simple majority is not sufficient—there must be four or more affirmative votes.

[19] *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37 (1981).

[20] H.R. REP. NO. 94-917, at 3 (1976).

[21] *Id.*

However, when a court defers to the judgment of three Commissioners, particularly three Commissioners of the *same* political party, it undermines the balance that Congress sought to strike. A 3-3 split vote is a disagreement, not a decision. In the absence of four votes, the Commission can neither proceed with enforcement nor determine that the law has not been violated. Granting deference to a non-majority group of a deadlocked Commission frustrates the four-vote majority rule Congress enacted to foster bipartisanship. By contrast, preserving deference for a vote of four or more Commissioners is more likely to foster the cooperation and consensus across party lines that Congress intended. Where the Commission fails to act by virtue of a 3-3 split, courts should review the matter *de novo*.

Tellingly, no court has ever granted deference to a controlling group of three Commissioners outside of the enforcement context. For example, the Commission sometimes deadlocks on requests to issue advisory opinions, denying the requestors the protection of agency guidance.[22] Just like enforcement matters—indeed, like most Commission decisions—advisory opinions must be approved by at least four affirmative votes.[23] In a recent case, the District Court of the Eastern District of Virginia held that the position of the controlling group of Commissioners resulting in the failure to issue an advisory opinion "warrants neither *Chevron* nor *Skidmore* deference."[24] The court reasoned that "there is simply no basis for giving deference to the views of commissioners who voted against" a draft advisory opinion, "as opposed to those who voted for it."[25] The failure to issue an advisory opinion results in "no ruling, interpretation, nor opinion of the agency"—rather, "there is only a deadlocked FEC and there is no reason to defer to the reasoning or conclusion of one side of the deadlock as opposed to the other."[26]

[22] *See generally* 2 U.S.C. § 437f (setting out the process for requesting an advisory opinion and the effect of such an opinion).

[23] 2 U.S.C. §§ 437c(c), 437d(a)(7).

[24] *Hispanic Leadership Fund v. FEC*, 897 F.Supp.2d 407, 428 (E.D. Va. 2012) (*citing Chevron, U.S.A., Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837 (1984); *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)).

[25] *Hispanic Leadership Fund v. FEC*, 897 F.Supp.2d at 428.

[26] *Id.* at 429. The court in *Hispanic Leadership Fund* attempts to distinguish the D.C. Circuit's § 437g(a)(8) cases by stating that, unlike a deadlocked vote on an enforcement case, a deadlocked vote on an advisory opinion does not result in "final agency action." *Id.* at 428. This, however, misunderstands how the FEC functions. A 3-3 deadlocked vote on an enforcement matter results in no action whatsoever. In fact, § 437g(a)(8) specifically provides that complainants may file suit when there is a "failure of the Commission to act on [a] complaint" within 120 days. 2 U.S.C. § 437g(a)(8)(A). Furthermore, procedural Commission rules provide that any matter that the FEC has failed to resolve by at least four votes will "automatically be placed on the next Executive Session agenda." *See* Commission Directive 17: Circulation Authority; Agenda Deadline Procedures III(C), *available at* http://www.fec.gov/directives/directive_17.pdf. When it is apparent that a majority compromise will not be reached at subsequent meetings, the Commission will usually take a ministerial vote to "close the file," removing the matter from future agendas. This vote is important because it has the effect of putting the case file, including the Commission's previous votes, on the public record. If the Commission failed to close the file, the complainant would have no way of knowing whether the matter was under investigation, and therefore would have no way to determine when to file suit—a further frustration of the complainant's right to challenge the Commission's inaction. Thus, while the vote to close the file serves an important administrative purpose, it should not be confused with a

The only distinction between enforcement actions and other Commission actions requiring at least four votes is that, with regard to enforcement, Congress went out of its way to ensure that complainants could contest the Commission's failure to act.[27] It is therefore an unfortunate irony that *only in this context* are the litigants at a unique *disadvantage* when the Commission's inaction is the result of a deadlock.

Neither *NRSC* nor any other decision of the D.C. Circuit has explained the reasoning behind this "deadlock deference," other than a brief and conclusory note in *NRSC* that agencies are "[o]rdinarily" granted deference.[28] The D.C. Circuit's "cursory treatment"[29] of the legal basis for deference calls for reexamination. Generally, agency decisions are granted deference because agencies possess certain institutional advantages in carrying out the mission entrusted to them by Congress. As *NRSC* acknowledged, "expertise [and] policymaking judgment" are "the twin fonts from which ... deference to the Commission flows."[30] However, when the Commission votes 3-3, there are conflicting sources of expertise and policymaking judgment. There are two groups of Commissioners—one in favor of taking action, another opposed. And there is the expert recommendation of the Commission's professional staff.[31] As a whole, a deadlocked vote is capable of sending only two collective messages: (1) that the "experts" disagree; and (2) that the agency vested with the authority to "reconcile competing political interests"[32] in this area of the law has failed to do so.

Regrettably, deadlocks at the Commission have become increasingly common.[33] Though we value consensus—and are always striving to find new ways to achieve it—there are likely to be more 3-3 votes in the future, including on matters with broad legal and policy implications. Thus, the issue of what weight to give to the opinions of a controlling group of Commissioners will continue to arise, and it could have a significant impact on the enforcement of campaign finance law. Courts should rethink "deadlock deference," in order to ensure that complainants

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final agency action worthy of judicial deference. In both the enforcement process and the advisory opinion process, a 3-3 deadlock has the same result—an agency incapacitated from acting.

[27] 2 U.S.C. § 437g(a)(8).

[28] *NRSC*, 966 F.2d at 1476; *see also In re Sealed Case*, 223 F.3d 775 (D.C. Cir. 2000) (deferring to a statement of reasons written by a controlling group of Commissioners in a deadlocked enforcement case).

[29] *See McCutcheon v. FEC*, 134 S. Ct. 1434, 1447 (2014).

[30] *NRSC*, 966 F.2d at 1476.

[31] One scholar has recently argued that when there is a deadlock in "election-related administrative agencies," *Skidmore* deference should be given to documents prepared by the "politically insulated" professional staff. Jennifer Nou, *Sub-Regulating Elections*, SUP. CT. REV. (forthcoming 2014), *available at* http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1452&context=public_law_and_legal_theory. Whatever the merits of this argument, it highlights the impropriety of looking at a minority opinion within an agency as a source of expert judgment.

[32] *Chevron v. Nat'l Resources Defense Council*, 467 U.S. 837, 865 (1984).

[33] *See, e.g.*, Press Release, Public Citizen, Roiled in Partisan Deadlock, Federal Election Commission is Failing (Jan. 2013) (listing the number of split votes on enforcement actions since 2003); *see also* R. SAM GARRETT, CONG. RESEARCH SERV., R40779, DEADLOCKED VOTES AMONG MEMBERS OF THE FEDERAL ELECTION COMMISSION (FEC): OVERVIEW AND POTENTIAL CONSIDERATIONS FOR CONGRESS 1 (2009).

get a fair, independent review and that partisan positions or rigid ideologies are not substituted for reasoned judgment.

6/17/2014
Date

Ann M. Ravel
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Vice Chair

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Date

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Commissioner