

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)
)
The Leadership Forum, et al.) MUR 5338
)

**STATEMENT OF REASONS
OF
VICE CHAIRMAN BRADLEY A. SMITH**

Introduction

I concur with the Statement of Reasons issued by Commissioner Mason, including his discussion of the analysis provided in the First General Counsel's Report. I write this added statement to address certain jurisdictional issues, which I believe the Commission has dealt with incorrectly, and to address certain arguments of the dissenting commissioners.

The Complaint filed in this case was, in my opinion, fundamentally deficient as a matter of law, and should not have been accepted by the Commission. The Commission, however, followed longstanding policy in deciding to accept and activate the case. That being so, I supported the recommendations of the Office of General Counsel, and agree with that office's legal conclusions subject only to the caveats regarding the National Republican Congressional Committee that are raised in Commissioner Mason's Statement of Reasons. Nevertheless, I hope that this case will spur reconsideration of the Commission's longstanding interpretation of its authority to accept complaints.

Jurisdictional Issues

The complaint did not allege that the Leadership Forum, the Democratic State Parties Organization ("DSPO") or any of the other groups designated as respondents by either the complainants or the Commission had actually violated the law. Rather, the Complaint alleged that the primary respondents Leadership Forum and DSPO were affiliated with the National Republican Congressional Committee ("NRCC") and the Democratic National Committee ("DNC"), respectively, and speculated that in the future

they would raise and spend non-federal funds in violation of the Federal Election Campaign Act ("FECA" or "the Act"), as amended by the Bipartisan Campaign Reform Act ("BCRA").

The Commission has long maintained a regulation at 11 C.F.R. § 111.4(a), providing in pertinent part that, "any person who believes that a violation of any statute or regulation over which the Commission has jurisdiction has occurred or is about to occur may file a complaint...." It is my opinion that this regulation exceeds our statutory authority. Pursuant to 2 U.S.C. §437g(a)(1), a complaint may only be filed with the Commission by "any person who believes a violation of this Act [FECA]... *has occurred*...." (Emphasis added). No provision is made for filing complaints in the belief that a violation is about to occur. There are many reasons why Congress may have chosen to limit the ability of the FEC to launch investigations based on speculative complaints. Those of us who serve on this Commission know very well that a substantial number of complaints are filed as much to harass and embarrass political opponents prior to an election as to seek redress for any serious violation of law. Members of Congress are no doubt aware of this as well. Thus, our statute requires that complaints be in writing, that they be signed and sworn to, that they be notarized, and that they be made under the penalty of perjury. Each of these provisions can be seen as an effort to prevent frivolous complaints from being filed for political purposes. The restriction on speculative complaints - i.e. on complaints alleging that, in essence, "my opponent is about to violate the law" - seems equally designed to accomplish this purpose.

That complaints must allege an actual violation in order to be legally sufficient to trigger an investigation is reinforced by 2 U.S.C. § 437g(a)(2). That section allows the Commission to open an investigation if, "upon receiving a complaint under paragraph (1) or on the basis of information ascertained in the normal course of carrying out its supervisory responsibilities, [it] determines ... that it has reason to believe that a person has committed, or is about to commit, a violation of this Act...." So Congress knew how to write language for an investigation to go forward on the basis that a violation is likely to occur in the near future and in 437g(a)(1), dealing specifically with complaints, it did not give the Commission this authority. Reading paragraphs (1) and (2) together, I conclude that internally generated investigations may be launched on the basis of likely future activity, but complaints must allege a past violation. To read paragraph (a)(2) to allow the Commission to investigate speculative complaints would make the specific language of paragraph (a)(1) a nullity. The requirement that complaints allege that violations have actually occurred makes perfect sense as part of the statutory framework aimed at limiting frivolous or politically motivated complaints.

Nor can we collapse § 437g(a)(1) with 437g(a)(2) by arguing that, once the Commission receives a complaint alleging violations are about to occur, it can open the investigation under its authority granted in 437g(a)(2) to investigate future violations.¹

¹ The Commission does open investigations based on information "ascertained in the normal course of carrying out its supervisory responsibilities," but the phrase "normal course of carrying out its supervisory responsibilities" is not usually interpreted to mean "reading newspapers." In any case, this case was not activated pursuant to those procedures, but in response to the complaint.

To do so would have the practical effect of abolishing the jurisdictional limit of 437g(a)(1). Any party could file a speculative violation knowing that the complaint, though itself legally deficient, would nonetheless trigger an investigation under paragraph (a)(2).

The Commission routinely rejects complaints that are not notarized. We routinely inform persons that their complaints must be in writing, and may not be anonymous. We are equally required to reject any complaint that does not comply with the statutory requirement that it allege that a violation "has occurred." Because the complaint did not meet the statutory requirements of a complaint under § 437g(a)(1), I would have rejected it outright.

Counsel's Analysis of DSPO

However, having followed what is, admittedly, a long standing interpretation of 2 U.S.C. § 437g(a)(1) to accept and activate this case, the Counsel's office then concluded that the DSPO was affiliated with the Democratic National Committee. Nevertheless, it recommended that the Commission find "No Reason to Believe" against the DSPO on the basis that the DSPO has not, in fact, raised or spent any non-federal funds.

Commissioners Weintraub, Thomas, and McDonald argue that, "there is not reason to believe that DSPO has committed any act in violation of BCRA. This conclusion logically flows from the simple fact that there is no reason to believe that DSPO has done anything at all since BCRA's effective date of November 6, 2002." Therefore, they argue that the analysis of the relationship between DSPO and the DNC was "extraneous" to the decision, and should not have been made. MUR 5338, Statement of Reasons, Chair Weintraub and Commissioner Thomas (hereinafter "Weintraub/Thomas Statement"). *See also* Concurring Statement of Reasons of Commissioner McDonald. Given long-standing Commission practices, this argument is without merit.

Once the Commission accepted the complaint, two criteria had to be met to determine whether to launch a full investigation. The Office of General Counsel had to determine if there was indeed reason to believe that the DSPO and Leadership Forum were affiliated with national party committees, and if so, it had to determine if there was reason to believe that their behavior had violated the Act. It is true that a negative result on either prong would result in a "no reason to believe" finding by the Commission. The dissenters seem to suggest that OGC should have first analyzed the latter prong, and having concluded that no activity had taken place, stopped there.

However, if it was apparent that the DSPO had done nothing since the effective date of the Act at the time the General Counsel's Report came before the Commission, that fact was equally apparent from the face of the complaint, filed four months before. The complaint could have been rejected at that time with no additional analysis. Yet none of the Commissioners who now express alarm over OGC analyzing the question of affiliation joined my objections, at that time or at any time prior to receiving the General

Counsel's First Report,² to accepting the complaint and analyzing the relationships between the DSPO and the DNC or between the Leadership Forum and the NRCC.

Once the complaint was accepted and activated on the grounds that a violation was "about to occur," OGC had no *a priori* way of knowing which of the two prongs - affiliation or action - was more likely to be dispositive. In fact, it turned out to be affiliation where the Leadership Council was concerned, and action where the DSPO was concerned. In any case, the Counsel's office analyzed the complaint against both groups in a logical two step fashion. First it examined affiliation (for without affiliation none of the speculative activities of the respondents would be illegal); and only after finding affiliation between the DNC and DSPO, did it move on to the actual activities of the DSPO. It makes perfect sense to begin the analysis with the question of affiliation - a concrete issue - and only secondly to take up the more speculative task of discerning the future intent of the respondents. The dissenters offer no reason for suggesting that the Counsel's Office should have taken up the issues in reverse order.

That leaves only the question of whether or not the First General Counsel's Report should have contained, as it did, the full legal analysis, or been restricted only to those issues which turned out to be dispositive. In part because the Counsel cannot always know in advance what issues will be dispositive to which commissioners,³ it has been longstanding policy for the Counsel's office to present its full legal analysis to the Commission, and to place its full report on the public record when the case is closed. It may be wise to change this policy - in fact, I might well support such changes if implemented across the board. But I see no reason why this case merits a one-time exception.

Counsel's Analysis of Association of State Democratic Chairs

Dissenters also express concern over the Office of General Counsel's analysis of the relationships between DSPO and the Association of State Democratic Chairs ("ASDC"), and between the ASDC and the DNC. Their concern is that ASDC was not designated as a respondent, and so was not afforded notice "that its own status or its relationship with a respondent might be affected by the Commission's actions in this matter." Weintraub/Thomas Statement at 2-3. I am sympathetic to these arguments, which raise due process concerns similar to those that I have vigorously pressed since joining the Commission.

In this case, however, it should be noted that ASDC's status is not "affected" by this MUR. No action is being taken against it. It is in no different position now than it

² Chair Weintraub did not join the Commission until December 2002, approximately two weeks after the complaint was filed.

³ For example, in this case it is possible that a commissioner might have concluded, as the complainants apparently did, that there was enough evidence of intent to act to meet the very low legal and evidentiary threshold the Commission has established to find "reason to believe." In such a case, it would have been vital for that hypothetical commissioner to have then considered the DSPO's affiliation status. Prior to presenting the report, the Office of General Counsel could not know which parts of the analysis would matter to individual commissioners.

would have been had this case never been activated - except to the extent that it has received something of a free "advisory opinion" as to how its legal status might be viewed if a complaint were to be filed against it in the future. In this it is arguably better off. Secondly, it should be noted that the ASDC's counsel is the DSPO's counsel, so the element of surprise and lack of notice is somewhat muted. *See* First General Counsel's Report ("FGCR") at 25, 27, n. 34. Finally, the ASDC has repeatedly identified itself to the FEC as an affiliated committee of the DNC, so I doubt that it will be surprised by this part of OGC's analysis. *See* FGCR at 26, 31 n. 36.

The dissenters are especially critical of footnote 37 in the First General Counsel's Report. That footnote states that, "there is presently enough information to conclude that DSPO is directly established, financed, maintained, or controlled by ASDC and is therefore indirectly established, financed, maintained, or controlled by the DNC. Accordingly, before the DSPO accepts any non-Federal funds, it would be well advised to obtain an advisory opinion . . . and to present, in a request for such an opinion, evidence that either its relationship with ASDC or ASDC's relationship with the DNC has changed from that described in this report." FGCR at 33, n. 37. The dissenting Commissioners argue that "adopting this finding would mean that DSPO... would be barred from raising or spending non-Federal funds." Weintraub/Thomas Statement at 3.

While determinations of administrative agencies can have the effect of *collateral estoppel*, *see* Restatement (Second), Judgments § 83, the most basic principles of *collateral estoppel* are not met here. Most notably, any issue not actually litigated or not essential to the final determination is not binding in a future case, *see id.* § 27, so if the dissenters are correct in their analysis of the case, their concern about the legal effect of the ruling on DSPO is incorrect. The Office of General Counsel has merely warned DSPO that based on what is now known, it would recommend to the Commission a finding of Reason to Believe in a future case. Of course, DSPO does not have to seek an advisory opinion - it can go ahead and raise non-Federal funds, then make its defense in a future enforcement action, if one were brought. It seems odd, however, to criticize the Counsel's office for trying to notify the group of potential legal liability, and suggesting one method to assure compliance with the Act.⁴

Conclusion

Though I find the arguments relatively unconvincing in this case, I agree in principle with the types of the due process concerns raised by the dissenters. Given the particular facts of this MUR, and considering that the Commission is not taking action

⁴ The alternative supported by the Chair and Commissioner Thomas would be not to reveal this information to DSPO. The possible result could be DSPO taking in millions of dollars and then being named in a complaint and subject to thousands of dollars in penalties. Additionally, donors to both the DSPO and DNC might suddenly find that they had inadvertently contributed more than the legal limit to the affiliated organizations. This can hardly be a favorable result for DSPO or DNC. I think it rather obvious that such a complaint would be forthcoming, probably from the same groups that filed this complaint.

against the ASDC or any of the respondents, I supported the Counsel's recommendations.⁵

I also agree that the Commission should not pursue legal issues needlessly, when a case can be disposed of on narrow grounds. But while I will consider systematic changes in the manner in which we handle complaints, or in the extent to which we ask the Counsel to include in its reports its an analysis of all potential issues, I am reluctant to make an exception in a single case without more compelling facts than exist here.

Bradley A. Smith, Vice Chairman

Date

⁵ In fact, the basis for Chair Weintraub's and Commissioner Thomas's objection to the Counsel's recommendations is obscure, as they seem to agree with the Counsel's recommendations and offered no alternative disposition of the matter. It is well established that Commissioners vote on the recommendations of the Counsel, and that approval of those recommendations does not necessarily constitute agreement with the legal analysis preceding them. I am open to reevaluating whether that is a correct legal interpretation of the relationship between OGC and the Commission, but not to making an exception in a single case. I note that both the Chair and Commissioner Thomas joined a unanimous Commission vote recently to seek public comment on many of the Agency's enforcement procedures, and I hope that this process may lead to constructive changes that would address some of our concerns.