



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

STATEMENT FOR THE RECORD
VICE CHAIRMAN DANNY LEE MCDONALD
COMMISSIONER SCOTT E. THOMAS
COMMISSIONER JOHN WARREN MCGARRY
ADVISORY OPINION REQUEST 1994-4

In Advisory Opinion Request 1994-4, the Commission split 3-3 on the issue of whether certain individuals may be considered "members" of the National Chamber of Commerce. Applying the Commission's new membership regulations, the Explanation and Justification for those regulations, and recent Commission precedent, we concluded that the individuals claimed as members by the Chamber did not qualify as members under the definition contained in the Commission's membership regulations. Accordingly, we voted for the legal analysis and legal conclusion set forth in the General Counsel's Advisory Opinion draft.

Determining whether certain individuals meet the Commission's definition of member is an important legal matter. The provision which allows membership organizations to use otherwise prohibited funds to make partisan communications advocating the election or defeat of a candidate to its members and to solicit its members for contributions to a separate segregated fund is an exception to the general prohibitions of 2 U.S.C. §441b. See 2 U.S.C. §441b(b)(4)(C). See also 11 C.F.R. §§ 114.3(a)(2) and 114.7(h). Thus, how broadly or how narrowly "member" is defined has a direct correlation to the amount of "soft money" that is allowed into the federal election process. In FEC v. NRWC, 459 U.S. 197 (1982), the Supreme Court recognized that limits on what constitutes a member are necessary if the general prohibitions of 2 U.S.C. §441b are to survive. The Court specifically found that to adopt a broad definition of member would "open the door to all but unlimited corporate solicitations and thereby render meaningless the statutory limitation to members." 459 U.S. at 204 (emphasis added).

I.

Our three colleagues adopt a broad definition of member and disagree with the legal conclusion reached in the General Counsel's advisory opinion draft. They do so, however, for differing reasons. Commissioner Elliott, for example, agrees that the General Counsel's draft correctly applies the new membership rules to the facts presented in the advisory opinion request and apparently agrees that the Chamber's alleged members do not meet any of the membership criteria laid out in the membership regulations. She declines to apply these regulations in this advisory opinion

request, however, arguing that the new membership regulations are incorrect because they fail to reflect certain principles of "association law" which she deems important. Commissioner Elliott then goes on to conclude that all of the Chamber's asserted members are indeed members for purposes of the Federal Election Campaign Act (FECA).

We believe that this approach runs counter to one of the most basic tenets of administrative law:

It is elementary that an agency must adhere to its own rules and regulations. Ad hoc departures from those rules, even to achieve laudable aims, cannot be sanctioned, *Teleprompter Cable Systems v. FCC*, 543 F.2d 1379, 1387 (D.C.Cir. 1976), for therein lies the seeds of destruction of the orderliness and predictability which are the hallmarks of lawful administrative action. Simply stated, rules are rules, and fidelity to the rules which have been properly promulgated, consistent with applicable statutory requirements, is required of those to whom Congress has entrusted the regulatory missions of modern life.

Reuters LTD. v. F.C.C., 781 F.2d 946, 950 (D.C.Cir.1986)(opinion of J. Starr)(emphasis added). Indeed, the courts sternly have lectured that:

We do not believe [an agency] should have the authority to play fast and loose with its own regulations. It has become axiomatic that an agency is bound by its own regulations. The fact that a regulation as written does not provide [an agency] a quick way to reach a desired result does not authorize it to ignore the regulation or label it 'inappropriate.'

Panhandle Eastern Pipe Line Co., v. F.E.R.C., 613 F.2d 1120, 1135 (D.C.Cir. 1979)(emphasis added). See *U.S. Lines v. Federal Maritime Commission*, 584 F.2d 519, 526 n.20 (D.C. Cir. 1978)(it is well-settled that "an agency is not free to ignore or violate its regulations while they remain in effect")(emphasis added), citing *United States v. Nixon*, 418 U.S. 683, 693-696 (1974), *Service v. Dulles*, 354 U.S. 363 (1957), and *Accardi v. Shaughnessy*, 347 U.S. 260 (1954); see also *Memorial, Inc. v. Harris*, 655 F.2d 905 (9th Cir. 1980)("[I]t is by now axiomatic that agencies must comply with their own regulations while they remain in effect.").

Pursuant to its statutory authority, see 2 U.S.C. § 437d(a)(8), the Commission put into place only last year new regulations defining who is a "member" of a membership association. These regulations did not steal upon an unsuspecting Commission. The Commission unanimously approved these carefully crafted regulations only after considering all the comments and testimony submitted in the rule-making process as well as the pertinent case law, including *FEC v. NRWC*, 459 U.S.

196 (1982), and Commission precedents.¹ These validly adopted regulations have the "force and effect of law." Accardi v. Shaughnessy, *supra*; see also United States v. Nixon, *supra*, 418 U.S. at 695 ("So long as this regulation is extant it has the force of law.").

It is possible for the Commission to amend or revoke the regulations defining who is a member of a membership organization. But it has not done so. So long as these regulations remain in effect and have the force of law, the Federal Election Commission is bound by them, and indeed, the six members of the Commission are bound to respect and enforce them.

II.

There is another school of thought which disagrees with the legal conclusion reached in the General Counsel's draft but does so on the basis of a broad interpretation of the regulations, as applied. Commissioner Potter argues that the Chamber's asserted members qualify as members for FECA purposes and tries to fit them under the so-called "case-by-case" provision of the membership regulations. See 11 C.F.R. §114.1(e)(3).² Commissioner Potter places great weight upon the first sentence of the case-by-case provision which states:

Notwithstanding the requirements of paragraph (e)(2)(ii)³ of this section, the Commission may determine, on a case by case basis, that persons seeking to be considered members of a membership association for purposes of this section have a significant organizational and financial attachment to the association under circumstances that do not precisely meet the requirements of the general rule.

¹ Moreover, the record shows that Commissioner Elliott joined a unanimous Commission and voted to approve the text of the final rules defining who is a "member" of a membership association. See FEC Minutes of an Open Meeting at 3 (June 24, 1993). The record further shows that Commissioner Elliott joined a unanimous Commission and voted not only to approve the membership regulations Explanation and Justification for publication in the Federal Register, but also to transmit the text of the regulations and the Explanation and Justification to Congress pursuant to 2 U.S.C. §438(d). See FEC Minutes of an Open Meeting at 5 (August 24, 1993).

² The "case-by-case" rule is restated at 11 C.F.R. §100.8(b)(4)(v)(C).

³ Under 11 C.F.R. §114.1(e)(2)(ii), "member" means all persons who are currently satisfying the requirements for membership in a membership association, who affirmatively accept the membership association's invitation to become a member, and who:

11 C.F.R. §114.1(e)(3). Commissioner Potter argues that since voting rights are one of "the requirements of paragraph (e)(2)(ii)," and since the case-by-case provision states "notwithstanding the requirements of paragraph (e)(2)(ii)," voting rights are not required under the case-by-case provision. See Advisory Opinion 1994-12, Statement of Commissioner Potter at 3.

We cannot accept this construction of the case-by-case provision of the regulations. The text of the regulation, the Explanation and Justification of the regulation, and Commission precedent interpreting the regulation all plainly show that minimum voting rights are required in order for an individual to be considered a member under the case-by-case analysis. Since the individuals claimed as members by the Chamber do not have even these minimum voting rights, we must reach the legal conclusion that these individuals do not meet the definition of member under the case-by-case approach.

The use of the phrase "notwithstanding the requirements of paragraph (e)(2)(ii)" was only meant to indicate that if the precise requirements of that subsection were not met, an individual might still meet the definition of member under the case-by-case analysis. The phrase was not intended to waive the requirement that minimal voting rights be present. Indeed, the remaining language of the regulation, not relied upon by Commissioner Potter, goes on to give an example of a factual situation which would meet the definition of member under the case-by-case provision but specifically requires that voting rights be present:

For example, student members who pay a lower amount of dues while in school or long term dues paying members who qualify for lifetime membership status with little or no dues obligation may be considered members if they retain voting rights in the association.

Id. (emphasis added). It is significant that satisfaction of the membership definition under the language of the case-by-case provision is specifically conditioned upon holding "voting rights in the association." Id. Absent these voting rights, the individuals described in the text of the regulations would not be considered members. If Commissioner Potter's expansive interpretation of the case-by-case provision were correct, the example given in the text of the regulation never would have conditioned membership on the retention of voting rights. The fact that it did clearly shows that

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 of the membership association, or for those who select at least one member of those on the highest governing body of the membership association.

the presence of voting rights is necessary to meet the definition of member under the case-by-case provision.

This straightforward reading of the text of the regulation is confirmed by the Commission's Explanation and Justification which explicitly states that certain minimum voting rights are required under the case-by-case provision of the regulations:

[P]aragraphs 100.8(b)(4)(v)(C) and 114.1(e)(3) require only that those considered for membership under this provision "retain voting rights in the association." The Commission intends, however, that this provision incorporate the requirements set forth in paragraphs 100.8(b)(4)(v)(B)(2) and 114.1(e)(2)(i) that members be required to vote for "at least one member who has full participatory and voting rights" on the association's highest governing body, or for those who select one such member.

Explanation and Justification, 11 C.F.R. Parts 100 and 114, 58 Fed. Reg. 45773 (August 30, 1993) (emphasis added). The Explanation and Justification demonstrates conclusively that the Commission understood that certain minimum voting rights are required under the case-by-case provision. The record shows that Commissioners Potter and Alkens joined a unanimous Commission and voted not only to approve this language in the Explanation and Justification, but also to transmit the text of the regulations and the Explanation and Justification to Congress pursuant to 2 U.S.C. §438(d). See FEC Minutes of an Open Meeting at 5 (August 24, 1993).

In considering the requirements of the case-by-case approach, we believe the Commission has no choice but to follow the clear and unambiguous language from its Explanation and Justification. Before prescribing any regulations, the Commission is required by law to transfer the proposed regulation and a "detailed explanation and justification" of that regulation to Congress. See 2 U.S.C. § 438(d). The Explanation and Justification thus plays a vital and statutorily mandated role in providing information to Congress upon which Congress relies in examining proposed Commission regulations. Given the important informative function of the Explanation and Justification as well as the conclusive nature of the representations made by the Commission to the United States Congress regarding the legal issue before us, we do not believe that the Commission can now disregard the Explanation and Justification's explicit language requiring voting rights under a case-by-case analysis.⁴ We believe the Explanation and Justification is dispositive and should be followed by the Commission.

⁴ It is argued that the Explanation and Justification is nothing more than the administrative law version of legislative history and, as such, can be easily discarded when ascertaining the intent of an agency's regulation. Unlike legislative history, however, where it can be argued that the statements of a few members of Congress may not reflect the intentions of the whole Congress, see, e.g., Green v. Brock Laundry Mach. Co., 490 U.S. 504, 528 (1989) (Scalia, J., concurring), the Explanation and Justification is an official agency statement

Recent Commission precedent also recognizes that voting rights are required for membership under a case-by-case analysis. Earlier this year, in Advisory Opinion 1993-24, 2 Fed. Elec. Camp. Fin. Guide(CCH) ¶6105, the Commission addressed the application of the definition of "members" under the case-by-case approach of sections 114.1(e)(3) and 100.8(b)(4)(iv)(C) to individuals considered members by the National Rifle Association (NRA). Specifically relying upon the Explanation and Justification, the Commission flatly declared that "[t]he importance of voting rights is reaffirmed under section 114.1(e)(3) when considering what constitutes a 'significant organizational attachment.'" *Id.* Advisory Opinion 1993-24 then states that "[s]ince, again, [NRA's] associate members, junior members, senior members, and annual members of less than five years membership have no voting rights at all, the Commission concludes that they do not meet the definitional requirement for 'members' under section 114.1(e)(1)." *Id.* (emphasis added). The record shows that both Commissioners Potter and Aikens voted for Advisory Opinion 1993-24.⁵ See FEC Minutes of an Open Meeting at 5 (February 3, 1994); see also Concurring Opinion of Commissioner Aikens, Advisory Opinion 1993-24 at 1 ("I reluctantly voted to approve Advisory Opinion 1993-24, not because I agreed totally with its result, but because it tracked the language of the recently promulgated regulations at 11 CFR §§100.8(b)(4)(iv), 114.1(e) and 114.7.") (emphasis added).

III.

The Commission's new membership regulations reflected a compromise of competing concerns. The new regulations sought to produce a definition of member

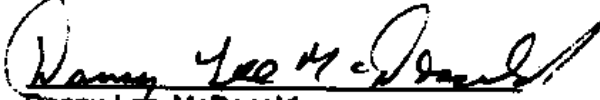
which has been voted on and approved by at least four members of the Commission. All six members of the Commission voted to approve the Explanation and Justification for the membership regulations. There can be little doubt that the Explanation and Justification reflects the intention of the whole Commission and should be followed.

⁵ Indeed, we imagine that the NRA today is very puzzled as to why Commissioners Potter and Aikens found that the NRA's asserted members in Advisory Opinion 1993-24 did not qualify as members under the case-by-case provision, but that the alleged members of the Chamber in Advisory Opinion Request 1994-4 did qualify as members.

which considered the section 441b prohibitions but, at the same time, was not unduly restrictive.⁶ We note that if the non-voting members of the Chamber in this Advisory Opinion Request could vote for just one member of the Chamber's highest governing body, they would satisfy the minimal requirements for voting set out in section 114.1(e)(2)(i) and be considered "members."⁷ Our colleagues, however, seek to broaden the definition of member and reduce these minimal requirements even further. Their approach threatens to "open the door to all but unlimited corporate solicitations and thereby render meaningless the statutory limitation to members." FEC v. NRWC, 459 U.S. at 204 (emphasis added).

We think it is important for the Commission to base its decisionmaking in this crucial area on the concrete legal standards and objective criteria established in its recently passed membership regulations. These decisions should not be made by either completely ignoring our membership regulations or construing the regulations without regard to Commission precedent and the Explanation and Justification submitted to Congress. Unless and until our new membership rules are repealed, the Commission has no choice but to faithfully apply them. For these reasons, we voted for the legal analysis and legal conclusion contained in the General Counsel's draft response to Advisory Opinion Request 1994-4.

10/6/94
Date



Danny Lee McDonald
Vice Chairman

10/6/94
Date



Scott E. Thomas
Commissioner

10/6/94
Date



John Warren McGarry
Commissioner

⁶ The Commission's new membership rules broadened and liberalized the Commission's policy on who qualifies as a member in a number of important ways. For a detailed discussion of these changes, see Concurring Opinion of Commissioners Thomas, McDonald and McGarry in Advisory Opinion 1993-24 at 1-3.

⁷ This, by the way, is the same approach the Commission had been taking before the regulation revision. See, e.g., MUR 3178; MUR 2804; and Jordan v. FEC, No. 91-2428 (D.D.C. May 27, 1994) (notice of appeal filed, July 25, 1994).

