



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

SENSITIVE

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)	
)	
Joseph Gallagher)	MUR 5651
Blount County Democratic Party and)	
Arnold G. Pesterfield, Treasurer.)	

STATEMENT OF REASONS OF VICE CHAIRMAN ROBERT D. LENHARD AND COMMISSIONERS STEVEN T. WALTHER AND ELLEN L. WEINTRAUB

On May 2, 2006, the Commission unanimously approved the Office of General Counsel’s recommendation to exercise prosecutorial discretion and dismiss this matter under *Heckler v. Chaney*, 470 U.S. 821 (1985). In reaching this determination, our fellow Commissioners have indicated that they saw “no rationale other than the raw dollar total for dismissal of this matter.” Our colleagues have further concluded that, in their opinion, from this day forward, the Commission should *always* exercise prosecutorial discretion for certain types of violations involving less than \$13,000, regardless of any other factors that might be present. We respectfully disagree.

Exercise of our prosecutorial discretion based solely on the amount at issue, and establishment of a monetary threshold for all cases, would be a significant departure from how the Commission has historically interpreted its authority to exercise prosecutorial discretion under *Heckler*. In fact, the Commission has consistently interpreted *Heckler* as prescribing that we consider a range of factors in deciding whether to proceed. It is that practice the Office of General Counsel followed here, and that practice the undersigned followed in approving the Office of General Counsel’s recommendation.¹

Analysis

This matter began as a complaint filed on March 21, 2005, by a member of a county political party in Tennessee. The complaint alleged that “a man from New York” (Mr. Gallagher) had come to Blount County and “opened a Kerry-Edwards headquarters,” sold campaign paraphernalia, and raised over \$12,000 in the process.

¹ A more complete recitation of the facts and legal analysis is set forth in the First General Counsel’s Report, which is incorporated herein by reference.

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A dispute arose between Mr. Gallagher and members of the Blount County Democratic Party over five checks worth a total of \$245 that Mr. Gallagher deposited in his campaign account. County party officials believed that these checks should have been deposited in the party's account.² The complainant asks if the FEC can require that Mr. Gallagher provide them with an accounting of his activities.

The Supreme Court has provided Federal agencies with clear guidance regarding prosecutorial discretion. Specifically, the Court noted in the *Heckler* decision that:

[A]n agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise. Thus, the agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all. An agency generally cannot act against each technical violation of the statute it is charged with enforcing. The agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities.

Heckler, 470 U.S. at 831-32.

After completing its review of this case, the General Counsel's Office recommended we dismiss the matter under *Heckler*. In doing so, the General Counsel's Office noted that "there is virtually no factual basis for what appears to be the principal concerns set forth in the complaint – i.e., that Gallagher deposited into [Blount County] Kerry for President five checks that were intended for the [Blount County] Democratic Party.... Even if Gallagher's misdeposit of the \$100 check constituted a violation of the Act, this amount of money was so small and the activity so limited that it would not justify any use of resources of the Commission."

The General Counsel's Office also evaluated the merits of pursuing other possible violations of the Act not clearly raised by the complainant and specifically considered whether the facts presented provided a "reason to believe" that Mr. Gallagher was required to register as a "political committee" and report his activity.³ The General Counsel's Office also considered the inexperience of the individuals involved, the type of grassroots activity involved and the limited sums at stake in making its recommendation that the Commission dismiss under *Heckler*.

² The General Counsel's Office concluded that Mr. Gallagher may have misdeposited a single check worth \$100. The parties report that Mr. Gallagher subsequently transferred all remaining sums in the account (\$865) to the county party. While this resolved the dispute between Mr. Gallagher and the county party, it does not resolve our inquiry into Mr. Gallagher's activities.

³ As discussed in the First General Counsel's Report, this activity could have totaled at most \$12,978.98.

In the alternative, Mr. Gallagher could have been operating on behalf of the county party, the state party, the Kerry-Edwards campaign or some combination of those entities. The staff concluded that if an investigation revealed this to be true, the consequent reporting violations of approximately \$3,700 would result in a *de minimis* penalty.

In order to determine what, if any, violations occurred in this case, the General Counsel's Office noted that Commission staff would have had to pursue out of state discovery in Tennessee to establish the roles and relationships of Mr. Gallagher and the various individuals who made up the Blount County Democratic Party, the Tennessee Democratic Party and the Kerry-Edwards campaign to various activities, including a phone bank, a picnic/rally, the purchase of a newspaper advertisement and some billboards, and an inaptly named "victory party." The General Counsel's Office cautioned that this sorting out of responsibility among various individuals and entities could be difficult and commented that the individuals involved did not think of their roles and responsibilities within the FECA and BCRA constructs, and as a consequence, it could be hard to get clear testimony about which entity was responsible for the various activities that occurred in Blount County.

The General Counsel's Office concluded that regardless of which theory the Commission pursued, "investigating this matter would not appear to be a prudent use of Commission resources" and also noted that other enforcement matters on the Commission's docket compete for staff resources.

Given the staff resources necessary to investigate this matter, the complexity of determining which individual or entity was legally responsible for the activities in Blount County in 2004, the sums at stake, the local grassroots nature of the political activity at issue, and the General Counsel's assessment that the individuals involved were inexperienced, we voted to approve the recommendation of the General Counsel's Office here. The Commission's decision to dismiss this matter was based on numerous factors, in line with the Commission's longstanding interpretation of its authority under *Heckler*.

The Commission's exercise of prosecutorial discretion here was also consistent with our colleagues' past statements on *Heckler*. At least some of our colleagues have identified the following as relevant considerations – in addition to the amount at issue – in their past decisions to exercise prosecutorial discretion: the case law of the relevant jurisdiction⁴; complexity of legal issues⁵; how new the allegedly violated legal

⁴ Statement of Reasons of Vice-Chairman Michael E. Toner, Commissioners David M. Mason and Bradley A. Smith, MUR 5491 (Jerry Falwell Ministries, Inc.), p. 3 ("The fact that [Liberty Alliance ("LA")] is an *MCFL* corporation in the Fourth Circuit is a valid reason, given that LA's principal place of business is in the Fourth Circuit, to exercise prosecutorial discretion and dismiss the express-advocacy claims against LA.")

⁵ Statement of Reasons of Commissioners David M. Mason and Bradley A. Smith, MUR 4922 (Illinois Suburban O'Hare Commission), p. 11 ("Because of the difficult legal issues... [even if the Act were violated] we believe that a prosecution in this case would involve substantial resources with at best a modest prospect of success, for a matter of relatively little importance").

obligations were⁶; the credibility and scope of the allegations in the complaint⁷; the severity of the asserted violation⁸; the impact of the asserted violation⁹; the financial status of respondent¹⁰; respondent's prompt correction of asserted violation¹¹; mootness¹²; other enforcement actions proceeding against respondent¹³; and the political context of the asserted violation.¹⁴

⁶ Statement of Reasons of Chairman Scott E. Thomas, Vice Chairman Michael E. Toner and Commissioners David M. Mason, Danny L. McDonald and Ellen L. Weintraub, ADR 271/MUR 5649 (Taff for Congress), p. 2 ("The 2004 election cycle was the first in which the disclaimer requirement applied to telephone banks, and some committees were unaware of this.").

⁷ Statement of Reasons of Vice Chairman Michael E. Toner and Commissioners David M. Mason, Bradley A. Smith and Ellen L. Weintraub, MUR 5513 (Norway Hill), p. 2 ("The Commission does not see the value of spending investigatory resources to determine whether this small amount was reimbursed in a commercially reasonable period. More importantly, the Commission notes that there was nothing in the factual record or Commission practice that would warrant a knowing and willful finding in this matter should it have chosen to go forward. There was presented in the complaint no credible information from which the Commission could draw the inference that the respondents in this matter were attempting to evade the contribution limits.").

⁸ Statement of Reasons of Chairman Michael E. Toner, Vice Chairman Robert D. Lenhard and Commissioners David M. Mason, Hans A. von Spakovsky, Steven T. Walther and Ellen L. Weintraub, MUR 5595 (World Class Gun Shows, Inc.), p. 1 ("Under the circumstances, even if a technical violation of 2 U.S.C. §§ 434(f), 441b or 441d could be proven, the matter does not represent a sufficiently serious matter to devote the resources to pursue.").

⁹ Statement of Reasons of Chairman Scott E. Thomas, Vice-Chairman Michael E. Toner and Commissioners David M. Mason, Danny L. McDonald and Ellen L. Weintraub, MUR 5523 (Local 12, United Assoc. Plumbers & Gasfitters Bldg. Corp.), p. 2 ("The website's relatively small amount of traffic and the respondent's prompt removal of the material in question suggest that the impact of the apparent violation was minimal and that the expenditures associated with these express advocacy and solicitation website communications were negligible. Therefore, the Commission as a matter of prosecutorial discretion in the proper ordering of its priorities and resources voted 6-0 to dismiss the matter as to Plumbers Local 12, and close the file.").

¹⁰ Statement of Reasons of Chairman Scott E. Thomas, Vice Chairman Michael E. Toner and Commissioners David M. Mason, Danny L. McDonald and Ellen L. Weintraub, ADR 271/MUR 5649 (Taff for Congress), p. 2 ("Moreover, the Taff for Congress telephone calls in question appear not to have been numerous, the campaign is in debt, and the candidate has said he is not running again.").

¹¹ See *supra* note 9.

¹² Statement of Reasons of Commissioners David M. Mason and Bradley A. Smith, MUR 4922 (Illinois Suburban O'Hare Commission), p. 11 ("Finally, the complaint was filed nearly one year after the election in question, and there is no evidence that SOC continues to engage in such activities.").

¹³ Statement of Reasons of Chairman Scott E. Thomas, Vice Chairman Michael E. Toner and Commissioners David M. Mason, Danny L. McDonald and Ellen L. Weintraub, ADR 271/MUR 5649 (Taff for Congress), p. 2 ("Under these circumstances, pursuing the less serious alleged disclaimer violation is not worthy of the Commission's limited resources while the more serious indictment is pending.").

¹⁴ Statement of Reasons of Chairman Michael E. Toner, Vice Chairman Robert D. Lenhard and Commissioners David M. Mason, Hans A. von Spakovsky, Steven T. Walther and Ellen L. Weintraub, MUR 5595 (World Class Gun Shows, Inc.), p. 1 ("The commercial purpose of the ad is further reflected by

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We write this Statement to make clear that our votes in this case do not represent adoption of a bright line rule that the Commission will neither investigate nor prosecute any case that involves a sum of \$13,000 or less. Instead, our votes constitute an exercise of our discretion based on a multitude of factors, consistent with existing authority.

Robert D. Lenhard
Robert D. Lenhard, Vice Chairman

9/21/06
Date

Steven T. Walther
Steven T. Walther, Commissioner

9/21/06
Date

Ellen L. Weintraub
Ellen L. Weintraub, Commissioner

9/21/06
Date

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the fact that, at the time of the broadcast, Senator Kerry and President Bush were not seriously competing for votes in Indiana."); Statement of Reasons of Commissioners David M. Mason and Bradley A. Smith, MUR 4922 (Illinois Suburban O'Hare Commission), p. 11 ("We note that the race for Representative Hyde's seat was not competitive - Mr Hyde ultimately won with 67 percent of the vote, compared to 64 percent in 1996 and 73 percent in 1994. It is highly doubtful that the SOC News had any serious effect on that race.").