



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

**STATEMENT OF CHAIRMAN LEE E. GOODMAN AND COMMISSIONERS
CAROLINE C. HUNTER AND MATTHEW S. PETERSEN REGARDING THE
COMMISSION'S VOTE TO AUTHORIZE DEFENSE OF SUIT IN *PUBLIC CITIZEN,
ET AL. V. FEC*, CASE NO. 14-CV-00148 (RJL)**

For nearly forty years, votes to defend the Commission in cases challenging dismissals of administrative complaints have been routine, *pro forma* acts. Even when the Commission has split on whether to proceed in an enforcement matter, the decision to defend has been uncontroversial. In recent days, however, our colleague Commissioner Ann Ravel has announced her desire to upend this consensus. Not only does this effort derail longstanding Commission practice, but more troublingly, it contravenes well-established legal precedents and evinces a flippant disregard for judicial review.

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On January 31, 2014, Public Citizen sued the Commission pursuant to 2 U.S.C. § 437g(a)(8), alleging that the dismissal of its complaint against Crossroads Grassroots Policy Strategies (“Crossroads GPS”) was contrary to law.¹ Consistent with nearly four decades of Commission practice, the Office of the General Counsel (“OGC”) recommended that the Commission authorize OGC to defend the Commission in the lawsuit.² Although the Commission ultimately approved the recommendation, two Commissioners, including Commissioner Ravel, sought to thwart the defense of the suit by abstaining from the vote.³ Recently, Commissioner Ravel explained the basis for her obstructionism, saying that our decision against finding reason to believe Crossroads GPS — a prominent conservative 501(c)(4) organization — was a political committee was “not the position of the Commission. [It] was a

¹ *Public Citizen, et al. v. Federal Election Commission*, Case No. 14-cv-00148 (RJL) (D.D.C. filed Jan. 31, 2014). See 2 U.S.C. § 437g(a)(8) (“Any party aggrieved by an order of the Commission dismissing a complaint filed by such party under paragraph (1), or by a failure of the Commission to act on such complaint during the 120-day period beginning on the date the complaint is filed, may file a petition with the United States District Court for the District of Columbia.”).

² The Federal Election Campaign Act (“the Act”) requires a vote of at least four Commissioners to authorize defense of lawsuits brought under § 437g(a)(8). 2 U.S.C. § 437d(a)(6).

³ *Public Citizen, et al. v. Federal Election Commission*, Certification, Mar. 18, 2014.

non-decision.”⁴ In the process, Commissioner Ravel derided the federal courts in astonishing fashion, accusing them of acting as a “rubber-stamp approval of inaction.”⁵

Commissioner Ravel’s strident contentions, however, run into a brick wall when confronted by the controlling law of the D.C. Circuit, which could not be more clear.⁶ As the court explained in *FEC v. National Republican Senatorial Committee*,

[W]hen the Commission deadlocks 3–3 and so dismisses a complaint, that dismissal, like any other, is judicially reviewable under § 437g(a)(8). . . . [T]o make judicial review a meaningful exercise, the three Commissioners who voted to dismiss must provide a statement of their reasons for so voting. Since those Commissioners constitute a controlling group for purposes of the decision, their rationale necessarily states the agency’s reasons for acting as it did.⁷

Far from being a “non-decision,” a dismissal, along with the articulated reasons underlying that decision, represent the agency’s position for purposes of judicial review.⁸ Moreover, governing precedent “requires that the same deference be accorded the reasoning of the ‘dissenting’ Commissioners who prevent Commission action by voting to deadlock as is given the reasoning of the Commission when it acts affirmatively as a body to dismiss a complaint.”⁹

Accordingly, the Act’s language regarding votes to authorize defense in section 437g(a)(8) lawsuits must be read through the lens of controlling court decisions requiring that Commissioners who vote against proceeding in an enforcement action spell out their reasons for doing so. Thus, any effort to undermine the defense of a section 437g(a)(8) lawsuit subverts an essential agency obligation to provide the rationale of the controlling group to the court so that judicial review is “a meaningful exercise.”¹⁰ As the D.C. Circuit has stated, “Absent an

⁴ Dan Morain, *Having the Temerity to Challenge Washington Gridlock*, Sacramento Bee (April 6, 2014), available at <http://www.sacbee.com/2014/04/06/6297058/dan-morain-having-the-temerity.html>.

⁵ Ann M. Ravel, *How Not to Enforce Campaign Laws*, N.Y. Times (Apr. 2, 2014), available at http://www.nytimes.com/2014/04/03/opinion/how-not-to-enforce-campaign-laws.html?_r=0.

⁶ Section 437g(a)(8) requires suits brought under that section be filed in the U.S. District Court for the District of Columbia.

⁷ 966 F.2d 1471, 1476 (D.C. Cir. 1992) (citation omitted).

⁸ On January 8, 2014, we issued a Statement of Reasons explaining the basis for our votes not to adopt OGC’s recommendations in this matter. MUR 6396 (Crossroads GPS), Statement of Reasons of Chairman Lee E. Goodman and Commissioners Caroline C. Hunter and Matthew S. Petersen (“Statement”), available at <http://eqs.fec.gov/eqsdocsMUR/14044350970.pdf>. A Supplemental Statement of Reasons was issued on March 25, 2014. MUR 6396 (Crossroads GPS), Supplemental Statement of Reasons of Chairman Lee E. Goodman and Commissioners Caroline C. Hunter and Matthew Petersen, available at <http://eqs.fec.gov/eqsdocsMUR/14044352011.pdf>.

⁹ *Stark v. FEC*, 683 F. Supp. 836, 841 (D.D.C. 1988) (citing *Democratic Congressional Campaign Comm. v. FEC*, 831 F.2d 1131, 1135 (D.C. Cir. 1987)) (“DCCC”).

¹⁰ See 966 F.2d 1471 at 1476.

explanation by the Commissioners for the FEC's stance, [the court] cannot intelligently determine whether the Commission is acting 'contrary to law.'"¹¹

For judicial review to be meaningful, a reviewing court must be fully informed of all perspectives.¹² The American adversary system presupposes advocacy of all sides of a question in order to fully apprise the court and produce an intelligent resolution.¹³ Congress subjected virtually all substantive Commission decisions to judicial review, the expectation of which imposes a duty of responsible conduct upon each Commissioner. Eschewing these principles, two Commissioners sought to prevent the Commission from even appearing before the court to present the controlling position and answering the court's questions. Had they succeeded, this unprecedented action would have hampered the court's inquiry and been profoundly irresponsible.

Courts have not looked kindly upon the Commission in instances where it has not adequately presented its views. For example, in *Center for Individual Freedom v. Van Hollen*, after the Commission deadlocked on whether to appeal the lower court's decision,¹⁴ the D.C. Circuit chastised the Commission for its "failure to participate in [the] appeal," noting that it "ma[de] it impossible for the court to fully understand the agency's position on numerous issues that have been raised by the parties ... and the import of the Supreme Court's decisions addressing campaign finance law."¹⁵ A failure to defend the controlling position in this instance may similarly have invited the court's ire.

It is important to remember that a vote to authorize defense of a section 437g(a)(8) lawsuit is not an endorsement of the controlling group's legal rationale regarding the merits of the case. Rather, the Commission is simply following the judicial instruction to provide the

¹¹ *DCCC*, 831 F.2d at 1132 (citation omitted).

¹² *See, e.g., United States v. Esquivel-Rios*, 725 F.3d 1231, 1239 (10th Cir. 2013) (A court's "responsibility is to ensure an important and novel legal question bound to affect many cases and parties ... gets the full vetting it deserves so this court ultimately might be in a position to offer a judgment with the degree of confidence the question merits.").

¹³ *See, e.g., Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 542 (1986) (emphasizing that where constitutional questions are presented, a court should "have the benefit of adversary presentation and a full development of the relevant facts"); *Butz v. Economou*, 438 U.S. 478, 512 (1978) (discussing how "the adversary nature of the process" is an important procedural safeguard built into the American system of judicial review); *United States v. Lynch*, 598 F.2d 132, 136 (D.C. Cir. 1978) (explaining that the "nature of the adversary process requires that ... counsel be accorded a meaningful participation and hearing").

¹⁴ *Center for Individual Freedom v. Van Hollen*, Certification, Apr. 24, 2012 (Chair Caroline Hunter and Commissioners Donald McGahn and Matthew Petersen voted against OGC's recommendation to decline to appeal the district court decision, and Vice Chair Ellen Weintraub and Commissioners Cynthia Bauerly and Steven Walther supported the recommendation).

¹⁵ *Center for Individual Freedom v. Van Hollen*, 694 F.3d 108, 111 (D.C. Cir. 2012). *See also* *Camp v. Pitts*, 411 U.S. 138 142-43 (1973) (per curiam) (discussing steps that might be necessary when the existing record fails "to explain administrative action [so] as to frustrate judicial review").

rationale of the controlling group to the court for review when there are not four affirmative votes to proceed in an enforcement matter.¹⁶

In the Act, Congress has conditioned enforcement on bipartisan support, meaning that the votes of at least four Commissioners are needed before enforcement can proceed.¹⁷ Because bipartisan support is necessary for an enforcement action to move forward, the Act permits judicial review to assess the controlling group's reasoning and question Commission attorneys in instances where such support is lacking. Commentators have observed that "[t]his process of judicial oversight is designed to provide a check against possible strategic or partisan behavior on the part of the commissioners."¹⁸ Therefore, far from being "a rubber-stamp approval of inaction,"¹⁹ courts play an integral role in ensuring the reasonableness of Commission decision-making.

Rather than exhibiting confidence in her substantive convictions, Commissioner Ravel has gone to extraordinary and unprecedented lengths to try to censor presentation of the agency's rationale for its prosecutorial decision in the Crossroads GPS matter. The process by which courts review agency actions, including dismissals, is well established. It is in the best interest of the American public for Commissioners to respect that judicial-review process rather than frustrate it.

¹⁶ Some might attempt to argue that denying legal representation to a controlling Commission position with which one disagrees is a principled use of the vote to authorize defense granted by 2 U.S.C. § 437c(c) (requiring four votes to authorize defense of suit). But this "ends-justifies-the-means" approach ignores the public importance of deferential judicial review. There is nothing principled about censoring viewpoints to be presented before the courts.

¹⁷ 2 U.S.C. § 437g(a). No more than three members of Commission may be affiliated with the same political party. *Id.* § 437c(a)(1)

¹⁸ Todd Lochner and Bruce E. Cain, *Equity and Efficacy in the Enforcement of Campaign Finance Laws*, 77 *Tex. L.R.* 1891, 1907 n.59 (June 1999).

¹⁹ *See Ravel*, supra n. 5.