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NEWSLETTER

The FEC's Litigation Dilemma

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According to a recent article in *Mother Jones* ("Elections Commission Chief Uses the 'Nuclear Option' to Rescue the Agency from Gridlock," Feb. 20, 2019), FEC Chair Ellen Weintraub has decided to use her vote to block the agency from (1) defending itself in lawsuits challenging dismissals of enforcement matters (at least those dismissals that the Commissioner disagrees with) and (2) conforming its enforcement actions to federal court orders remanding matters to the Commission for further action. So long as the six-member Commission is operating with only four Commissioners, the Chair's vote amounts to a veto power in these litigation and enforcement decisions which, by law, require four affirmative votes. The Chair exercised this veto power in a recent case. The strategy has important short-term and long-term implications for the agency as well as for complainants and respondents.

Background

The Federal Election Campaign Act of 1971, as amended (the FECA), provides a statutory process by which citizens can file complaints against other citizens. Responsibility for enforcement of bona fide violations of the FECA then falls to the agency. The agency, which by statute consists of six Commissioners, votes on whether to proceed with enforcement or to dismiss matters. In all cases, the Commissioners must explain their decisions in writing and those decisions can be subjected to judicial review.

The law generally allows the private complainant (assuming she has constitutional standing) to sue the Commission when it dismisses the complaint in order for a court to determine if the agency's dismissal was "contrary to law." The law also authorizes the Commission to send its General Counsel to court to defend such lawsuits, but the law requires four (4) Commissioners to vote affirmatively for the agency to

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defend itself in such a case.

If a federal court rules the Commission's dismissal was "contrary to law," it remands the matter to the agency to bring its action into conformity with the court's ruling. Sometimes this results in the agency changing its decision and proceeding with enforcement, and sometimes the agency dismisses again following the court's legal guidance. However, if the agency fails to comply with the court's order, the law affords the private complainant authority to sue the private respondent in a direct action to enforce the FECA violation.

The upshot of this statutory scheme is that, on a Commission temporarily constituted of only four Commissioners, one Commissioner can block the agency's defense of itself when sued by a complainant, and one Commissioner can block the Commission's efforts to conform its enforcement actions to court orders on remand. In the agency's default, the private complainant can gain standing to step into the agency's shoes and sue the private respondent directly to enforce the FECA. That is a result Chair Weintraub apparently desires to facilitate in cases where she disagrees with the Commission's original decision to dismiss.

Implications for the FEC

The Chair's voting strategy has both short-term and long-term consequences for the agency. The first question is whether the absence of agency counsel will skew judicial outcomes. The agency cannot "default" in the same way that a private litigant can default by not appearing and defending itself. Courts are bound to review each agency action, explained in the Commission's written statements of reasons, to determine whether the action is contrary to law.

In addition to silencing a legal defense or explication of the Commission's controlling rationale, the more profound impact of the Chair's "empty seat" litigation strategy will be to deny the courts a full briefing of all sides of the issues, an important predicate of the adversarial legal system. Thus, withholding a defense would shortchange the court as much as it would the controlling Commissioners with whom the Chair disagrees.

Significantly, the Commission has a good track record of being upheld by the courts over the last 10 years. During the past decade, the Commission has been upheld in the vast majority of lawsuits challenging its enforcement dismissals. One could count on one hand the number of Commission dismissals that have been found by courts to be contrary to law and remanded to the Commission. Whether the agency's success rate can be altered through an "empty seat" litigation strategy remains to be seen.

But even if the Commission does not authorize its General Counsel to appear in court to defend the agency's reasoning, it is unlikely courts will go without helpful adversarial briefs. There are several potential alternatives for affording Commission decisions a defense. One alternative is for respondents to intervene in lawsuits and defend the Commission's reasons for dismissing their cases. Another alternative is for friends of the court to file *amicus* briefs basically defending the Commission's actions.

The third and most consequential alternative, which has never been explored, is the possibility for the U.S. Department of Justice to appear on behalf of the agency. Several statutes grant exclusive authority for agency litigation to the Department of Justice (*see* 28 USC §§ 516, 517, 518, 519) and, moreover, prohibit agencies

from representing themselves in court (5 USC § 3106). The exclusivity of the authority, however, is limited by the phrase "except as otherwise authorized by law," and the FECA affirmatively authorizes the Commission to deploy its own agency lawyers to court. The question is whether the FECA provision displaces the Justice Department entirely or merely permits the Commission to represent itself if it so chooses. Neither statute may provide the *exclusive* mechanism for the Commission to be represented in court.

A strong argument can be made that the FECA provision is merely permissive and does not entirely displace the Justice Department's general authority to represent the agency. The FECA does not state that *only* the Commission can represent itself. And the Justice Department's statutory authority to represent agencies in appeals before the Supreme Court has trumped the FECA provision in a number of cases.

If the Barr Justice Department were to take up litigation defense of the Commission, it would open the door to politicized representations that reflect the priorities and philosophical preferences of future Justice Departments. In the long term, the door once opened would be difficult to close. It would be difficult for the agency to reclaim its own independence. Likewise, the agency's regulatory positions could become less predictable, a liability for an already complicated agency that should strive to regulate consistently given the First Amendment rights it regulates.

In sum, institutionalists warn about the harm done to the judicial process generally, the potential politization of Commission litigation under the control of future Justice Departments, and more specifically about the abrogation of responsibility and the unseemly tactic of placing the agency in effective contempt of court remand orders.

Implications for Complainants, Respondents, and Friends of the Court

Reformer-complainants cheer the "empty chair" strategy because it empowers them to take up enforcement and rectify what they perceive as unreasonable inaction by the agency. This happened in a recent case where the Chair announced she had blocked the Commission from conforming its decision to a remand order of the federal district court. That action allowed Citizens for Ethics and Responsibility in Washington (CREW) to sue American Action Network (AAN) directly to enforce the FECA. The case is pending in the U.S. District Court for the District of Columbia. Wiley Rein is counsel to AAN.

Respondents, on the other hand, decry the strategy as intentional weaponization of enforcement, turning their enforcement fate over to politically motivated ideological opponents who can misuse the enforcement process to hobble them with litigation expense, intrusive discovery, and the vicissitudes of selection bias and uneven judicial results.

So long as there are only four Commissioners on the Commission, respondents in matters involving deep-pocketed institutional complainants and legal issues at the heart of the philosophical divide must plan early for the possibility of being required to defend Commission decisions in their favor in a federal court. This will require additional planning at the early stages of the enforcement process and can add to the length of time and cost of defending complaints. Respondents facing complaints would be wise to plan early for such an extended process.

Likewise, the role of *amici* briefs may become more critical and influential when lawsuits challenging Commission decisions are lodged. Therefore, groups interested in upholding agency dismissals and vindicating the regulatory policy reflected in statements of reasons should track lawsuits carefully, submit briefs early, and recast their briefs as defense arguments explaining the reasonableness of agency decisions.

For more information about the implications of the Commission's litigation positions, contact Lee E. Goodman at (202) 719-7378 or lgoodman@wiley.law.