



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

SENSITIVE

BEFORE THE FEDERAL ELECTION COMMISSION

In re)
)
Save American Jobs Association, Inc.)
Jack Davis for Congress and Robert R. Davis,)
in his official capacity as treasurer)
I Squared R Element Co., Inc.)
Save Jobs Party and Jack Davis,)
in his official capacity as treasurer)
John "Jack" Davis Jr., in his personal capacity)
)
John "Jack" Davis Jr., in his personal capacity)
Jack Davis for Congress and Robert R. Davis,)
in his official capacity as treasurer)
I Squared R Element Co., Inc.)
Save American Jobs PAC)
Jack Davis Exploratory Committee, Inc.)
Davis for Congress and Alan J. Davis,)
in his official capacity as treasurer)

MUR 5672

MUR 5733

**STATEMENT OF REASONS OF CHAIRMAN ROBERT D. LENHARD,
VICE CHAIRMAN DAVID M. MASON AND COMMISSIONERS
MICHAEL E. TONER, HANS A. von SPAKOVSKY AND ELLEN L. WEINTRAUB**

These matters arise from complaints filed by the law office of Stamm, Reynolds & Stamm of Williamsville, New York,¹ and by the Niagara County, New York, Republican committee.² We write to explain the Commission's reasons for dismissing³ two allegations on which the Office of General Counsel ("OGC") urged the Commission to proceed, and to make one observation regarding an issue on which OGC urged the Commission to exercise prosecutorial discretion.

I. BACKGROUND

Respondent Jack Davis, who owns Respondent I Squared R Element Co., Inc.,⁴ lost a general election for the United States House of Representatives in 2004. His principal campaign

¹ Compl (July 22, 2005)

² First Gen. Counsel's Rep. at 2 (Nov. 20, 2006).

³ Voting affirmatively were Commissioners Lenhard, Mason, von Spakovsky, Toner, Walther, and Weintraub

⁴ *Id* at 9

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committee was Respondent Jack Davis for Congress. Thereafter, Davis formed Respondent Save American Jobs Association, Inc. ("SAJA") and Respondent Save American Jobs PAC ("SAJPAC"). He also formed Respondent Save Jobs Party ("SJP"). He registered SJP, but not SAJA, with the Commission as a political committee.⁵ With an eye toward running in 2006, Davis formed Respondent Jack Davis Exploratory Committee, which appears to have become his 2006 principal committee, Respondent Davis for Congress.⁶ The name of the 2006 committee was slightly different from the 2004 committee, *Jack Davis for Congress*.

II. DISCUSSION

A. SAJPAC

First, the Complaint alleged that SAJPAC made various unreported in-kind contributions to Jack Davis for Congress. These alleged contributions included travel expenses incurred by Davis himself for travel to Washington. However, given the size of the alleged contributions and the Commission's limited resources, this issue is not worth pursuing. *See Heckler v. Chaney*, 470 U.S. 821 (1985).

B. Jack Davis

Second, the Complaint raises the question of whether certain statements made by Davis to a reporter were sufficient to require him to register and report as a candidate.

OGC contends he may have become a candidate in November 2005, four months before registering a political committee in March 2006. To support this contention, OGC notes that Davis paid \$7,280 to a firm for "political market research" and that this "appears to be a campaign expenditure, which would have made Mr. Davis a candidate" *See* 2 U.S.C. § 431(2)(A). Accordingly, OGC recommends that the Commission find reason to believe ("RTB") that Davis violated FECA. *See* 2 U.S.C. § 437g(a)(2) (2002).⁷ However, a payment of this amount for "political market research" may have been a "testing the waters" expense, such as for pre-campaign polling, *see* 11 C.F.R. § 100.131(a) (2002), so this by itself does not suffice to find RTB that Davis violated FECA.

To support the proposition that Davis was a candidate as early as March 2005, OGC cites a newspaper story attached to the complaint. The story reports that Davis "appeared to slip up at least two times, saying, 'the fact that I'm running again' and 'when I run again' – though he quickly corrected himself."⁸ However, Davis's quickly corrected "slip ups" do not establish him as a candidate here. *See id.* § (b)(3). Any other conclusion could run the risk of creating the

⁵ *Id.* at 4-5. The SJP was not a party under the Federal Election Campaign Act ("FECA"), 2 U.S.C. § 431 *et seq* GCR at 4 n.3 (citing 2 U.S.C. § 431(16) (2002)).

⁶ *Id.* at 4 n.2.

⁷ *Id.* at 15, 18.

⁸ *Id.* at 17 (quoting Bree Hocking, *Millionaire Eyes Reynolds Rematch*, ROLL CALL, March 2, 2005, at 11)

impression that the Commission is waiting for prospective candidates to “slip up,” at which point, it will exclaim, “Gotcha!” and proclaim their “testing the waters” periods over.

While the Commission’s “testing the waters” regulation includes an intent element, *see id.* § (a) (“Payments made for the purpose of ...”), it does not turn on subjective intent. Rather, the test measures objectively deliberate actions, including advertising the intent to campaign, *id.* § (b)(1), fundraising beyond exploratory needs, *id.* § (b)(2), activities close to an election, *id.* § (b)(4), and qualifying for the ballot. *Id.* § (b)(5). In this context, the further factor, “making or authorizing written or oral statements that refer” to themselves as candidates, *id.* § (b)(3), requires some objective deliberateness, not a mere “slip up.”

The rest of the same newspaper story also supports Davis’s position that he was not yet a candidate:

- “I said, ‘If I run will you help?’ and [the Democratic Congressional Campaign Committee chairman] said, ‘yes,’” Davis said.”
- “Davis is unlikely to make a formal announcement about the race until the end of the year”
- “‘As soon as I announce, then I’m shut off from so many people,’ the 72-year-old Davis said”
- “‘He is the overwhelming favorite to run again if that’s what he wants to do,’ said Erie County Democratic Chairman Leonard Lenihan.”
- “Should he decide to run, Davis will have his work cut out for him.”⁹

C. Davis for Congress

The remaining issue involves electronic mail sent by Davis for Congress. OGC observes that the disclaimer – “Paid for by Davis for Congress” – in the electronic mail is not in a printed box, which OGC maintains is required by 2 U.S.C. § 441d(c)(2) (2002).¹⁰

However, since OGC issued its recommendation, the Commission has considered FECA disclaimer requirements with respect to Internet pages and held that the additional disclaimer requirements of Section 441d(c), as opposed to the basic disclaimer requirements of Section 441d(a), do not apply to Internet pages. *In re Graf for Congress*, Matter Under Review 5526, Statement of Reasons of Chairman Toner, Vice Chairman Lenhard, and Commissioners Mason, von Spakovsky, Walther, and Weintraub at 2-4.¹¹ Just as the ordinary meaning of “print” does not include Internet pages, *id.* at 3 (citation omitted), it also does not include electronic mail. Just as the ordinary meaning of “print” does not include Internet pages, *id.* at 3 (citation omitted), it also does not include electronic mail. “[W]hen FECA uses the words ‘Internet,’ ‘web,’ ‘website,’ or ‘electronic,’ or forms of these words, it does not mean something ordinarily understood as being in print or in printed form.” *Id.*

⁹ Hocking, *supra* n. 8, at 11, 16.

¹⁰ GCR at 19.

¹¹ Available at <http://eqs.sdrdc.com/eqsdocs/0000588D.pdf> (visited Dec. 28, 2006)

The reasons supporting the holding in MUR 5526 also support holding that the additional disclaimer requirements of Section 441d(c) do not apply to e-mail.

Therefore, rather than exercise prosecutorial discretion as OGC recommends,¹² the Commission dismissed this disclaimer allegation as a matter of law.¹³

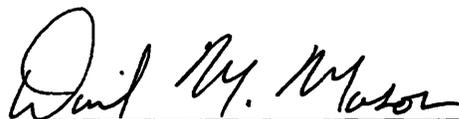
III. CONCLUSION

With these observations, we agreed to dismiss this matter.

March 13, 2007



Robert D. Lenhard
Chairman



David M. Mason
Vice Chairman



Michael E. Toner
Commissioner



Hans A. von Spakovsky
Commissioner



Ellen L. Weintraub
Commissioner

¹² GCR at 19

¹³ Under proposed Commission Action in Matters at the Initial Stage of Enforcement, the Commission in such an instance would find no RTB. See Commission Action in Matters at the Initial Stage of Enforcement (F.E.C. Feb. 27, 2007) available at <http://www.fec.gov/agenda/2007/mtgdoc07-14.pdf> (visited March 13, 2007)

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