



FEC Deadlock: Is a tie really a win for the speaker?

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Most people who ask the Federal Election Commission (“FEC”) for an advisory opinion regarding a campaign finance issue want a favorable outcome. But perhaps a favorable outcome is not necessary.

As covered in a recent article by *The New York Times* and the anonymous blog *Ashur Court*, a new understanding of FEC rulings has come to pass. Now, a deadlock on the FEC could benefit the speaker just as much as a favorable ruling.

The FEC is made up of six commissioners: three Republican-appointees and three Democrat-appointees. One of the roles of these commissioners is to issue advisory opinions to individuals, campaign committees, political action committees (“PAC”), etc., that have requested formal interpretations of federal campaign finance laws. At times, the FEC will issue a unanimous ruling, 5-1 ruling, or 4-2 ruling. But as can be expected with a direct party-line split in the makeup of the commissioners, sometimes the rulings deadlock in 3-3 votes and there is, essentially, no decision.

In recent years, the FEC has garnered a lot of attention, and criticism, for its deadlocks. According to *The New York Times* article mentioned previously, the FEC has been deadlocked at 3-3 over 200 times in the past six years. Obviously, these deadlocks have created a lot of uncertainty for those seeking advisory opinions on how to proceed with their campaign finance questions. But regarding the recent split decision over whether the Conservative Action Fund could accept contributions from Bitcoin, which is an untraceable online currency, Republican Commissioner Lee E. Goodman indicated that a tie among the FEC goes in favor of the speaker.

This reasoning seems most appropriate. Campaign finance is a form of speech. A staple of our Constitution is that when government wants to limit speech, it must do so in the least restrictive manner possible. So when we limit speech through campaign finance laws and those in charge of enforcing those limitations cannot agree as to whether a course of conduct is covered by the laws, the speaker should be allowed to speak. “Giving the tie to the speaker” avoids limiting more speech than is constitutionally permissible.

This seems to be just another piece of the recent trend to favor the speaker in campaign finance disputes. One only has to look at recent United States Supreme Court decisions, such as *Citizens United v. Federal Election Commission* and *McCutcheon v. Federal Election Commission*, to realize that the campaign finance industry – thanks largely to the justice system – is moving toward deregulation over regulation.



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