UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REPRESENTATIVE CHRISTOPHER SHAYS, et al., Plaintiffs, v. FEDERAL ELECTION COMMISSION, Defendant.	Civil Action No. 04-1597 (EGS)

BUSH-CHENEY '04, INC., Plaintiff, v. FEDERAL ELECTION COMMISSION, Defendant.	Civil Action No. 04-1612 (EGS)

FEDERAL ELECTION COMMISSION'S MEMORANDUM IN REPLY TO PLAINITFFS' MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO STRIKE PLAINTIFFS' EXHIBITS

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Introduction

In their opposition brief, plaintiffs argue that this Court should abandon the well-established rule of this Circuit – that the administrative record before the agency at the time it made its decision is the exclusive basis of judicial review[1] – and elevate the Esch exceptions into a general rule broadly permitting extra-record evidence.[2] Plaintiffs concede that their disputed extra-record exhibits (Plaintiffs' Exhibits ("EX") 3, 4, 5, 7, 14, 17, 18, and 21-25) are not, in fact, necessary for the Court's resolution of their challenge of the Commission's decision in its rulemaking regarding section 527 organizations. Plaintiffs' Mem. in Opp. to Def.'s Mot. to Strike Pls' Exhs. ("Pl. Strike Opp.") at 2; Plaintiffs' Mem. in Support of Pls' Mot. for Summary Judgment ("Pl. SJ Opp.") at 7 n.4. This concession alone provides this Court with sufficient grounds to grant the Commission's motion to strike, and for the additional reasons we describe below, the Court should reject all the other reasons plaintiffs have advanced to circumvent the requirement that review of an agency decision be limited to the administrative record that was actually before the agency when it made its decision.

ARGUMENT

I. THE COURT SHOULD STRIKE PLAINTIFFS' EXHIBITS BECAUSE PLAINTIFFS HAVE FAILED TO DEMONSTRATE THAT EXTRA-RECORD EVIDENCE IS WARRANTED OR NECESSARY

In their opposition to strike, plaintiffs claim for the first time that all of the disputed extra-record exhibits were submitted to support this Court's jurisdiction over their claim. Pl. Strike Opp. at 3. The affidavits they submitted to establish their standing, however, refer to only three of plaintiffs' twenty-five extra-record documents. Between their two merits briefs,

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[1] See FEC's Mem. of P&A in Support of Its Mot. to Strike Pls' Exhs. ("FEC Strike Mem. (Pl.)") at 2-3, and 3 n.2.

[2] Esch v. Yeutter, 876 F. 2d 976, 991 (D.C. Cir. 1989) (listing eight exceptions in dicta).

plaintiffs refer only once in their standing and ripeness arguments to any disputed exhibit other than the Bush-Cheney '04 primary committee's administrative complaints (EX 17 and 18), and then only to one exhibit (EX 21).[3] In that single instance, the referenced exhibit appears in a footnote where plaintiffs assert informational standing, a claim they did not pursue in their summary judgment opposition brief. See Pl. SJ Mem. at 24 n.13. See also Defendant FEC's Reply Mem. in Support of the Commn's Mot. for Summ. J. at 2. Although we have already explained that the Commission has no objection to plaintiffs' use of extra-record exhibits solely to address jurisdictional issues, plaintiffs' claim that all the exhibits support their standing is belied by the use they make of them.

Actually, plaintiffs actually rely upon their extra-record exhibits primarily to support their substantive claims on the merits. For example, plaintiffs claim that the administrative complaints "contain[] extensive factual information relating to the 2004 federal campaign activities of the 527 groups named in the complaints." Pl. SJ Mem. at 34. Citing the administrative complaints, along with a newspaper article (EX 7) and congressional testimony (EX 3, 4), plaintiffs concoct a "history" of their claim that the Commission "to date has done nothing" to apply the Federal Election Campaign Act of 1971 (as amended) ("FECA" or "Act") to 527 organizations, concluding that therefore, the Court should direct the FEC to issue regulations "in order to prevent further massive circumvention of the law." Plaintiffs' Mem. in Jt. Reply & Opp. to FEC's Mot. for Summary Judgment ("Pl. SJ Opp.") at 4-5 (emphasis in original). They use two administrative complaints (EX 22 and 23) as the basis for Appendix A,

[3] The Declaration of Thomas J. Josefiak in support of BC '04, Inc.'s standing does refer to the two administrative complaints filed with the Commission by the Bush-Cheney primary committee (EX 17 and 18). The Commission did not move to strike those two exhibits, insofar as they were used to support jurisdiction, but for the reasons we have described, we do object to treating them as if they were part of the administrative record.

which purportedly details the activities of two 527 organizations, and conclude that "[t]hese groups plainly meet the 'major purpose' standard that the Supreme Court has applied to political committees, and as such the FEC's decision not to regulate them plainly violated FECA." Pl. SJ Mem. at 43, 44-45. Therefore, since plaintiffs actually rely upon these exhibits primarily to support their arguments on the merits, and not to support their standing or ripeness arguments, the Court should reject plaintiffs' arguments that the disputed exhibits are admissible to address jurisdiction, and should disregard plaintiffs' merits arguments that rely upon them.

A. Plaintiffs Ignore the Basic Rules of Record Review

As we have already demonstrated, in attempting to place twelve extra-record exhibits before the Court, plaintiffs seek to circumvent some of the most central principles of judicial review of agency action. Throughout their briefs, they have failed even to acknowledge the most basic rule concerning judicial review of agency action – that it "'be based on the full administrative record that was before the [agency] at the time [it] made its decision.'" American Bioscience, Inc. v. Thompson, 243 F.3d 579, 582 (D.C. Cir. 2001) (quoting Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 420 (1971)). The reasons for this rule are well established: (1) to avoid having the judiciary second-guess the agency, FEC Strike Mem. (Pl.) at 3 n.2, and 13, and (2) to avoid opening up a second notice-and-comment period before the reviewing court. Id. at 4 and n.4, 5 and n.5. Plaintiffs' attempt to supplement the record with evidence not submitted to the Commission is designed to turn this Court's deferential review of the agency's action into a de novo proceeding, in which the Court would address the policy questions at issue anew based on new "background" materials, post-promulgation developments, and supposed "legislative facts" that were not presented to the Commission. Since we have shown that none of plaintiffs' extra-record exhibits was ever submitted to the Commission, the

agency whose quasi-legislative authority is at issue in this suit, the Court should reject plaintiffs' attempt to supplement the record.

Although there is a limited exception to the basic rule prohibiting supplementation of the administrative record when "the record is so bare as to frustrate effective judicial review," Cmty for Creative Non-Violence v. Lujan ("CCNV"), 908 F.2d 992, 998 (D.C. Cir. 1990), plaintiffs have made no showing that the record the Commission compiled is deficient in any respect.[4] Plaintiffs concede that their extra-record documents are not necessary for the Court to render a decision in this case, Pl. Strike Opp. at 2-3, and acknowledge in their reply on the merits that the Commission's rulemaking process was "extensive," producing "a developed record [that] gives the court a substantive basis on which to review the administrative decision." Pl. SJ Opp. at 7 n.4. These concessions should end the matter altogether, since under the law, if the record is sufficient for the Court to rule on the merits, there is no basis for supplementation. See CCNV, 908 F.2d at 998.[5]

[4] Plaintiffs ignore the "proper" remedy courts use when they need additional information to resolve a matter – "to remand to the agency for additional investigation or explanation." PBGC v. LTV Corp., 496 U.S. 633, 654 (1990). See also e.g., Beach Communications, Inc. v. FCC, 959 F.2d 975, 987 (D.C. Cir. 1992) (citing National Wildlife Fed'n v. ICC, 850 F.2d 694, 702-08 (D.C. Cir. 1988) (remanding to agency for reconsideration of takings issue).

[5] However, if the Court concludes that further analysis is warranted, it should not relieve plaintiffs of their burden of demonstrating that the record is so sparse as to frustrate review, by following the backward procedure that plaintiffs urge: to "decide the exhibit issues in the context of a full review of the cross-motions for summary judgment" and to review the exhibits themselves first to see whether they provide "useful and helpful background for the Court in its understanding of the issues." Pl. Strike Opp. at 2.

B. Plaintiffs' Assertion that the Commission Had Notice or Should Have Been on Notice of Their Exhibits Would Circumvent Well-Established Rules of Administrative Record Review

Plaintiffs argue that the Commission was on notice or should have been on notice of the existence of a number of their exhibits, that the administrative complaints did not post-date the close of the administrative record, and that it is not clear when the administrative record closed. Pl. Strike Opp. at 10-13, n.8, n.9, n.10. All of these arguments are beside the point, since the basic rule is that any exhibit not submitted to the Commission during the rulemaking is outside of the administrative record, regardless of why the exhibit was not submitted. This rule applies the same to exclude both pre-decisional and post-decisional documents that were not actually entered in the record before the agency.

The only distinction between pre- and post-decision documents that were not submitted to the Commission is that if a pre-decisional document could have been submitted to the agency during the rulemaking and was not, plaintiffs have waived their opportunity to do so. FEC Strike Mem. (Pl.) at 7. As for post-decisional documents, we demonstrated in our opening brief that supplementing the administrative record with documents created after the Commission made its decision is fundamentally unfair. Id. at 4-5.[6] "To review more than the information before the [agency] at the time [it] made [its] decision risks our requiring administrators to be prescient."

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[6] As plaintiffs note (Pl. Strike Opp. at 5 n.4 and 7 n.5), the Commission refers in its merits briefs to congressional consideration of 527 and IRS legislation that was not included in the administrative record and which pre- or post-dates the Commission's rulemaking, but these references are all to citable government documents. See Military Toxic Project v. EPA, 146 F.3d 948, 954 (D.C. Cir. 1998)("the challenged materials . . . are judicially cognizable apart from the record as authorities marshaled in support of a legal argument"). As the Commission made clear in its opening brief, it does not object to plaintiffs' use of such documents, and thus there is no basis for plaintiffs' suggestion (Pl. Strike Opp. at 5 n.4) that the Commission is employing some sort of double standard.

Walter O. Boswell Mem'l Hosp. v. Heckler, 749 F.2d 788, 792 (D.C. Cir. 1984).[7] Since it is undisputed that none of plaintiffs' twelve exhibits was actually submitted to the Commission in connection with the rulemaking, all are outside the administrative record, regardless of their dates.[8]

Plaintiffs try to divert attention from their failure to submit any of the exhibits to the Commission by raising general questions about the scope of the administrative record, in particular the date on which it closed. (Pl. Strike Opp. at 10-11 and n.10). The Administrative Procedure Act makes clear, however, that "interested persons [shall be given] an opportunity to participate in the rulemaking through submission of written data, views, or arguments with or without opportunity for oral presentation," 5 U.S.C. 553(c), and the Notice of Proposed Rulemaking in this case plainly states the deadline for submitting comments and requests to testify, as well as the hearing dates on which testimony would be taken. See Administrative Record 11 at 246. Thus, there is no basis for plaintiffs' claim (Pl. Strike Opp. at 10 n.8) that they

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[7] See infra at 10 distinguishing Public Citizen v. Heckler, 653 F. Supp. 1229, 1237 (D.D.C. 1987) from the case at bar. Amfac Resorts, L.L.C. v. United States Dep't. of the Interior, 143 F. Supp. 2d 7, 11-12 (D.D.C. 2001), outlines "certain narrow exceptions" to the basic rule of not looking beyond the administrative record. In Amfac, plaintiffs were seeking discovery of the agency's extra-record documents, not trying to supplement the administrative record with their own extra-record exhibits, and the court held that plaintiffs had not made the requisite showing.

[8] Plaintiffs claim that EX 22 (one of the administrative complaints) is already part of the administrative record, even though it was not presented to the Commission as part of the rulemaking proceeding, by virtue of a reference that someone else made in a comment submitted to the Commission. Pl. Strike Opp. at 9-10. The only case that plaintiffs marshal for that proposition is a vacated district court decision, McDonnell Douglas Corp. v. NASA, 895 F. Supp. 319, 323-24 (D.D.C. 1995), vacated as moot, 88 F.3d 1278 (D.C. Cir. 1996). A vacated decision, of course, is not a valid precedent, see, e.g., O'Connor v. Donaldson, 422 U.S. 563, 577 n.12 (1975) (decision vacated by higher court "deprives that court's opinion of precedential value"), but even if it were good law, McDonnell Douglas would require excluding all of the other administrative complaints submitted by plaintiffs; "[T]hree of the eight letters representing previous NASA decisions were not referenced or submitted by either party. These [] documents are therefore appropriately not part of the record." Id. at 324.

are at a "distinct disadvantage" and must "guess" when their opportunity to present materials to the Commission lapsed – they need only consult public documents to find that answer.

Plaintiffs also complain that the Commission included some ex parte comments that were submitted after the close of the comment period on the administrative record disks that the Commission submitted to the Court. Pl. Strike Opp. at 11 n.10. The Commission's regulation at 11 C.F.R. 201.4, however, requires that ex parte comments submitted to the Commission from "the date on which a proposed rulemaking document is first circulated to the Commission or placed on an agenda of a Commission public meeting, through final Commission action on that rulemaking" be added to the public record, and the Commission routinely includes such materials on its website. See EX A-D, attached to Pl. Strike Opp. Ex parte comments, however, do not become part of the official administrative record on which the decision is based unless the Commission has formally voted to include them. See EX D, attached to Pl. Strike Opp.

But even if these ex parte communications that were actually submitted to the Commission were properly treated as part of the official administrative record, that would provide no support for plaintiffs' position here, for plaintiffs' exhibits were never submitted to the Commission in connection with the rulemaking proceeding at all. Accordingly, even if plaintiffs could have gotten some of their exhibit into the administrative record by submitting them to the Commission after the close of the comment period, the fact remains that plaintiffs did not do so. Accordingly, this entire argument is simply irrelevant to the issue before the Court.

C. Plaintiffs' Version of Esch Will Violate the Requirement that Review Be Limited to the Administrative Record

Another way plaintiffs seek to circumvent the rule limiting judicial review to the administrative record is by advocating a dramatic expansion of the narrow Esch exceptions to that rule. Pl. Strike Opp. at 7-8, 13-14.

Leaving aside questions of whether Esch is dicta, or whether the exceptions even apply in a case challenging agency action on purely substantive, not procedural, grounds, see FEC Strike Mem. (Pl.) at 8-9 (both points we raised that plaintiffs do not answer in their brief), plaintiffs have still failed to meet their burden of offering "cogent support for the application" of any of Esch's narrow exceptions to the rule against supplementing the administrative record. See Sociedad Anonima Vina Santa Rita v. Dept. of Treasury, 193 F. Supp. 2d 6, 18 n.11 (D.D.C. 2001). Plaintiffs have made no showing that the administrative record lacks the type of information contained in their exhibits, especially the administrative complaints upon which they heavily rely, or what factors the Commission should have considered but did not. They point to no factual findings concerning section 527 organizations that they claim are incorrect, or suggest what other information the Commission should have sought out for the record. In instituting the rulemaking, the Commission recognized that section 527 organizations were active during the 2004 election cycle, and the rulemaking record contains ample information concerning section 527 organization activity. See Defendant FEC's Mem. in Support of the Commission's Mot. for Summary Judgment and in Opp. to Pls' Mot. for Summary Judgment ("FEC SJ Mem.") at 9-13. In fact, plaintiffs have conceded that none of their exhibits is necessary for this Court to decide

this case. Thus, plaintiffs have not justified applying any of the exceptions identified in Esch upon which they rely.[9]

Plaintiffs' assertion that the administrative complaints are actually part of the administrative record just because they are "public" and plaintiffs think they are "adverse" to the Commission's decision would entirely subvert the rule limiting judicial review to the materials actually presented for the agency during the rulemaking. Pl. Strike Opp. at 12, 14. Contrary to plaintiffs (Pl. Opp. to Strike at 14), in Carlton v. Babbit, 26 F. Supp. 2d 102, 107 (D.D.C. 1998), the "public" extra-record factual materials that the court included in the record related to findings the agency had made based on specific factors the agency was required by statute to consider in the rulemaking proceeding under review. The administrative complaints at issue here include no Commission findings at all, and the Act does not set out any particular factor the Commission must consider when considering a proposed rule.[10] Moreover, as we have discussed, the materials contained in the administrative complaints at issue here are not facts, but simply allegations that the Commission was requested to investigate.

Plaintiffs' claim that the administrative complaints are "adverse" to the Commission's decision and, therefore, must be part of the administrative record under Public Citizen v. Heckler, 653 F. Supp. 1229, 1237 (D.D.C. 1987), Pl. Strike Opp. at 12, is similarly meritless. There is nothing in their complaints that is "adverse" to the Commission's decision to apply the

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[9] As we noted in our opening brief, if post-decisional events concerning section 527 organizations required the Commission to revisit the subject of the rulemaking, a showing plaintiffs have failed to make here, plaintiffs' remedy would be to petition the Commission for another rulemaking, not to supplement the record with documents that were never submitted to the agency for use in the rulemaking. FEC Strike Mem. (Pl.) at 10-11.

[10] The only exception is the Bipartisan Campaign Reform Act of 2002, Pub.L.No. 107-155, 116 Stat. 81 (2002) ("BCRA") coordination regulations at BCRA 214(b) and (c) which are not at issue here. See FEC SJ Mem. at 28 n.18.

Act on a case-by-case basis rather than through general regulation, and the mere filing of these complaints does not establish that the Commission has rejected their allegations. If the Commission had decided that the section 527 organizations named in those complaints did not violate the FECA, there would be evidence of that since the Commission is required under FECA to make public its dismissal of an administrative complaint. 2 U.S.C. 437g(a)(4)(b)(ii).

In sum, plaintiffs have not made the threshold showing that permits the Court even to consider supplementing the closed administrative record, and courts do not permit wholesale supplementation of the record with so-called "background" evidence and other extra-record documents as plaintiffs urge the Court to do here. Under plaintiffs' expansive view, the exceptions would swallow the rule, for any supplementary evidence submitted by a party challenging agency action could be characterized as supplying "background," or evidence related to the party's claim that the agency's action under review is "incorrect," and under plaintiffs' view, any document that is "public" could be added to the record at any time. That is plainly not the law.

III. HEARSAY

In our opening brief, we showed that, in addition to being outside the administrative record, a number of plaintiffs' exhibits are simply hearsay, and thus are not admissible in this Court under the Federal Rules of Evidence. FEC Strike Mem. at 12. This is an independent reason to reject all of the inadmissible exhibits, regardless of whether they are used only for jurisdictional purposes or also on the merits. In their opposition brief, plaintiffs try to circumvent the hearsay rules by arguing that the contents of the exhibits can be considered "legislative fact" and thus outside the rules, and that the Court can take judicial notice of three of

the exhibits.[11] Pl. Strike Opp. at 3-4, 16. As we explain below, neither of these arguments has any merit.

Labeling the contents of some of the disputed exhibits "legislative fact" does not resolve their hearsay problem, as plaintiffs claim. Pl. Strike Opp. at 4. As we have already demonstrated, this is not a de novo proceeding where evidence can be introduced to prove facts. This Court is acting in an adjudication rather than a legislative role, reviewing the policy decision of the Commission, not formulating policy itself. Of course, the Commission is permitted to rely on credible hearsay and legislative facts in formulating policy and promulgating regulations that, plaintiffs point out (Pl. Strike Opp at 4 n.2) do not have to comply with the rules of evidence. But plaintiffs did not present their exhibits to the Commission. Thus, plaintiffs' exhibits are not "rulemaking record materials" exempt from the Federal Rules of Evidence, as they claim, (Pl. Strike Opp. at 4), but ordinary evidence they seek to introduce into the adjudicatory record of this Court, which must comply with the rules of evidence that are applicable to such proceedings.

In addition, plaintiffs' claim that the hearsay issues we have identified with regard to three of their exhibits can be resolved by this Court's taking "judicial notice" of them. Plaintiffs ask that the Court take judicial notice of EX 24 (statement of Sen. Feingold dated Mar. 22, 2001)

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[11] Plaintiffs seem to consider the administrative complaints to be the equivalent of affidavits because they are "verified." Pl. Strike Opp. at 13. Rule 56(e) of the Federal Rules of Civil Procedure, however, requires affidavits submitted for summary judgment purposes to "be made on personal knowledge," to "set forth such facts as would be admissible in evidence" and to "show affirmatively that the affiant is competent to testify to the matters stated therein." All five of the administrative complaints recite that they are based on "information and belief," and none includes any information based on the personal knowledge of the complainant. Accordingly, they cannot be treated as admissions affidavits under Rule 56. Moreover, EX 18 the version of the second of the Bush-Cheney '04 primary committee complaints submitted to this Court is incomplete, missing hundreds of pages of exhibits that were included in the version that the committee filed in Bush-Cheney '04 v. FEC, Civil Action No. 04-1501 (JR) (filed Sept. 9, 2004) (D.D.C.).

and EX 25 (statement of Sen. McCain, dated Mar. 20, 2002), part of the legislative history of BCRA. Pl. Strike Opp. at 5. Although the Commission does not object to plaintiffs' citing to these statements as part of the legislative history of BCRA, the Commission objects to treating them as if they were part of the administrative record on which the Commission's rulemaking decision was made. In addition to all of the reasons we have already outlined for rejecting plaintiffs' extra-record exhibits, the legislative history of BCRA is irrelevant to the issues in this case because plaintiffs have conceded that BCRA is not the statutory basis for their claims. Pl. SJ Opp. at 17. Even if BCRA were at issue here, each of the two exhibits presents only the personal views of a single member of Congress and "remarks of a single legislator regarding a bill are not controlling as to its interpretation." United States v. McGoff, 831 F.2d 1071, 1090 (D.C. Cir. 1987).

Finally, the third exhibit, EX 7, a newspaper article purporting to quote Commissioner Weintraub, is especially unsuitable for judicial notice. For a fact to be judicially noticed, it "must be one not subject to reasonable dispute." Fed. R. Evid. 201(b). See also United States v. Wolny, 133 F.3d 758, 764 (10th Cir. 1998) (quoting Fed. R. Evid. 201(b)) ("A judge takes judicial notice when he recognizes the truth of a matter that is either 'generally known' or 'capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned'").[12] Far from being indisputable, EX 7 constitutes pure hearsay

[12] The cases plaintiffs cite in support of taking judicial notice of newspaper articles (Pl. Strike Opp. at 16-17) are inapposite because they concern instances where the newspaper articles were admitted for the readily determinable facts they contain or because they reflect the opinion of the author. Plaintiffs' Exhibit 7 fits in neither category. What EX 7 relays is not a readily determined fact or the author's opinion, but the author's version of what someone else supposedly said to him or her. Although courts can take judicial notice of published materials as representative of the opinion of the author, they may not accept the contents as true. See United States v. Microsoft Corp., 56 F.3d 1448, 1463 (D.C. Cir. 1995) (per curiam) ("[t]he book's

because there is no way for this Court to readily determine exactly what Commissioner Weintraub said, and whether it was accurately reported. [13]

V. CONCLUSION

For the reasons stated above and in the Commission's opening brief, the Commission reiterates its request that the Court strike plaintiffs' exhibits (EX 3, 4, 5, 7, 14, 17, 18, and 21-25), except insofar as they permissibly support plaintiffs' jurisdictional claims, and strike those portions of plaintiffs' briefs that impermissibly rely upon them.

Respectfully submitted,

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allegations are, of course, not evidence on which a judge is entitled to rely"); Mayor of the City of Philadelphia v. Educ. Equal. League, 415 U.S. 605, 619, n.19 (1974).

[13] Even if the newspaper account were an accurate quotation of what Commissioner Weintraub said, her view is that of only one Commissioner, not the whole Commission. The Commission consists of six Commissioners, four of whose members must vote affirmatively in order for the Commission to take most actions, including adopting a regulation. See 2 U.S.C. 437(c). Indeed, the Commission's regulations explicitly provide that the opinion of any one Commissioner does not constitute the opinion of the Commission. See 11 C.F.R. 2.3(c). The newspaper account (EX 7) does not suggest that the opinion Commissioner Weintraub allegedly expressed was one on which the Commission had voted affirmatively, or even that any other Commissioners agreed with it.

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