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## STATEMENT OF VICE CHAIR ELLEN L. WEINTRAUB ON THE D.C. CIRCUIT'S DECISION IN *CREW v. FEC*

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With a bolt out of the blue last Friday, a panel of the D.C. Circuit Court of Appeals bestowed a superpower upon the Federal Election Commission. Unfortunately, it is the power to kill any FEC enforcement matter, wholly immune from judicial review. Thanks, but no thanks.

Left in place, this decision destroys not just the right that Congress gave the American people to challenge the FEC's enforcement decisions, but the FEC's entire enforcement mechanism. The panel's decision<sup>1</sup> flies in the face of what Congress intended and urgently needs to be reconsidered by the *en banc* D.C. Circuit.

It is no secret that my obstructionist colleagues on the Federal Election Commission spike most major enforcement cases. One of the only ways that big cases can be forced forward is when a judge reviewing the case shreds my colleagues' legal reasoning and leaves them with little choice on remand. But this startling split opinion from the D.C. Circuit removes that judicial review entirely whenever my colleagues add a few newly conjured magic words about prosecutorial discretion to their statement regarding any dismissal. While the decision was technically a win for my agency, it will have far-reaching negative consequences for the law that the D.C. Circuit panel cannot have intended.

When Congress created the FEC with our unusual 3-3 partisan split of commissioners, it provided for a kind of review most agencies do not have. "Congress wanted to prevent the agency's frequent deadlock from sweeping under the rug serious campaign finance violations – turning a blind eye to illegal uses of money in politics, and burying information the public has a right to know," explained Judge Cornelia T.L. Pillard in her dissent in this case. "To that end, Congress provided for judicial review of Commission decisions not to enforce [the Federal Election Campaign Act]."<sup>2</sup>

The public's only meaningful check on the unelected administrators (like me) who run the Federal Election Commission is that when a complainant is "aggrieved by an order of the Commission dismissing a complaint,"<sup>3</sup> it may sue the Commission in D.C. federal district court

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<sup>1</sup> Decision, *CREW v. FEC*, (No. 1:15-cv-02038), June 15, 2018, *found at* [https://www.cadc.uscourts.gov/internet/opinions.nsf/A0A7C6C35F1863B3852582AD0054B275/\\$file/17-5049-1736010.pdf](https://www.cadc.uscourts.gov/internet/opinions.nsf/A0A7C6C35F1863B3852582AD0054B275/$file/17-5049-1736010.pdf).

<sup>2</sup> *Id.* at Dissent p. 1.

<sup>3</sup> 52 U.S.C. §30109(c)(8)(A).

for a review of whether the dismissal was contrary to law. “Thus,” wrote Judge Pillard, “the Act retains its bite.”<sup>4</sup>

But this D.C. Circuit decision knocks the teeth right out of the statute, because any dismissal featuring a commissioners’ statement of reasons containing the eleven magic words will no longer be reviewable by any court under any circumstances.

Though they played almost no part in the circuit court’s decision, the facts of the matter are: The Commission for Hope, Growth & Opportunity, a dark-money group, operated for years as a political committee without registering as one. Citizens for Responsibility and Ethics in Washington (CREW) filed a complaint, the FEC’s Office of General Counsel recommended that the Commission investigate, two colleagues and I agreed, three commissioners disagreed, the matter deadlocked and was thus dismissed, and we were sued by CREW over the dismissal.

Whenever our lawyers recommend that the Commission investigate, and the agency does not do so because the vote deadlocks, the commissioners who voted against moving forward are required to write a statement explaining their reasoning, because their votes determined the outcome even though they did not constitute a majority. The arguments in the “controlling commissioners” statement are treated as the agency’s rationale when a court determines whether the agency acted contrary to law.

In this matter, three commissioners wrote a five-page statement<sup>5</sup> explaining why they declined to move forward with an investigation. The FEC’s litigators defended that statement in court, telling the trial court that the statement’s reasoning should be given substantial deference and only overturned if the commissioners had abused their discretion. The district court examined the reasoning and held that the commissioners had acted within their discretion.

But when the case was appealed by CREW to the D.C. Circuit, two out of three judges on a panel decided that all that mattered were eleven magic words in the statement’s second paragraph, where the commissioners wrote that they concluded that “*this case did not warrant the further use of Commission resources.*”

This three-commissioner declaration that they would have exercised the agency’s prosecutorial discretion to decline to pursue a matter was not due substantial deference, said the appeals court. It was due *absolute, unreviewable deference*. Even the question of whether the three commissioners abused their discretion, the court held, was beyond *any* court’s jurisdiction.

This cannot be right. Under this ruling, if three commissioners write a statement in any matter that says, “Because the Respondent was a white male, this case did not warrant the further use of Commission resources,” the dismissal would be bulletproof and final, and no court could overturn it.

What is more likely to happen in practice is that *every* future statement from my colleagues may or may not include substantial legal reasoning, but will *certainly* include verbiage stating that because of *budgetary constraints*, or *the extended time since the complaint was filed*, or *lack of*

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<sup>4</sup> Decision, *CREW v. FEC*, at Dissent p. 1.

<sup>5</sup> “Statement of Reasons of Vice Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Lee E. Goodman,” Nov. 6, 2015, found at <http://eqs.fec.gov/eqsdocsMUR/15044381253.pdf>.

*staff expertise in the subject matter*, and so forth, “this case did not warrant the further use of Commission resources.” This tactic could be used on every single matter that comes before the Commission. And it magically makes the matter beyond any court’s power to review, no matter what the stated reason is, and no matter any other legal rationales, stated or unstated.

If I have learned anything in my last ten years on the FEC, it is that those who ideologically oppose campaign-finance law enforcement will use every single legal and procedural advantage they possess to the fullest. Make no mistake: If my obstructionist colleagues are allowed to keep this case-killing power they have been handed, they will wield it.

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If this case does proceed to *en banc* review, the full D.C. Circuit may also want to take the opportunity to re-examine another issue that lurks within: the aforementioned “substantial deference” courts grant to FEC deadlocks. By statute, the FEC can act only by a bipartisan affirmative vote of at least four commissioners. When the Commission has a full complement of six commissioners, a 3-3 vote to investigate a matter fails. The Court looks to the reasoning of the No votes to assess whether the agency acted contrary to law. Pretending that the views of the three naysayers represent a decision of the Commission is a practice even the D.C. Circuit majority described as “a rather apparent fiction raising problems of its own.”<sup>6</sup>

But then current D.C. Circuit precedent requires courts to go well beyond this “rather apparent fiction” and *substantially defer* to the reasoning of the “controlling commissioners,” as if the FEC had had a bipartisan majority advancing that reasoning. This mistakes a disagreement for a decision. An agency’s construction of its own regulations is normally granted significant deference because it is presumed to have subject-matter expertise and the ability to craft policy compromise. But in the case of an FEC deadlock, the Commission has not made any decision on how best to interpret its regulations; it has not applied subject-matter expertise; it certainly has not crafted a policy compromise. The commissioners have, instead, simply disagreed.<sup>7</sup>

This “deadlock deference” is unique to the enforcement process at the FEC and exists for reasons the D.C. Circuit has never fully explained.<sup>8</sup> The full D.C. Circuit should re-examine its precedents here. When conducting reviews of deadlock-driven FEC dismissals, it would be far better for courts to afford no special weight to the legal arguments made by the “controlling commissioners.” They are nothing more than the opinions of several commissioners, counterbalanced by the competing opinions of other commissioners. The Federal Election Commission has not spoken.

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<sup>6</sup> Decision, *CREW v. FEC*, at 4.

<sup>7</sup> If anything, in matters where the Office of General Counsel has recommended moving forward with an investigation, the vote splits, and the “controlling commissioners” write a statement, the weight of the agency’s expertise leans *against* the “controlling commissioners.” On one side of the ledger, half the commission *plus* the agency’s nonpartisan legal staff wants to move forward. On the other side of the ledger, the other half of the commission alone opposes agency action.

<sup>8</sup> For further detail on this topic, see “Statement of Vice Chair Ann M. Ravel and Commissioner Ellen L. Weintraub on Judicial Review of Deadlocked Commission Votes,” June 17, 2014, *found at* <http://eqs.fec.gov/eqsdocsMUR/14044354045.pdf>.