

FEC's Prosecutorial Discretion Deemed Unreviewable by D.C. Circuit, Again

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The U.S. Court of Appeals for the District of Columbia Circuit recently issued its long-awaited decision in *Citizens for Responsibility and Ethics in Washington (CREW) v. Federal Election Commission (FEC)* (hereinafter "*New Models*" based on the name of the organization involved in that case). The case involved CREW's challenge to the FEC's dismissal of CREW's complaint against a now-defunct conservative 501(c)(4) organization, New Models, alleging that the issue advocacy organization became a "political committee," or PAC, by contributing to independent super PACs. The D.C. Circuit held that because the FEC dismissed CREW's complaint both for legal reasons "and in exercise of our prosecutorial discretion," the FEC's dismissal decision cannot be subject to judicial review. CREW has indicated that it will seek en banc rehearing, potentially providing the full court with an opportunity to weigh in later this year on an issue that has been percolating within the Circuit since 2018.

The Facts

New Models was a tax-exempt social welfare organization established in 2000 as a policy think tank. In its 15 years of operation, New Models never made any independent expenditures. In 2012, New Models made \$3.1 million in contributions to independent super PACs. Although these contributions constituted a small percentage of New Models' spending over its lifetime, CREW alleged that the contributions, in one calendar year, transformed New Models into a PAC, and that New Models had therefore failed to comply with certain registration and ongoing reporting obligations that the Federal Election Campaign Act (FECA) imposes on PACs. New Models argued it was a bona fide social welfare organization whose "major purpose" was the study of public policy, notwithstanding the

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isolated contributions it made in 2012.

The FEC Commissioners voted 2-2 on the issue of whether three isolated super PAC contributions could transform an otherwise bona fide policy think tank into a PAC, resulting in the dismissal of CREW's complaint (four affirmative votes are necessary to find "reason to believe" a violation has occurred and open an investigation). The two controlling commissioners issued a statement of reasons explaining why they found no "reason to believe" New Models had violated FECA. First, New Models did not become a political committee by making occasional (albeit large) contributions to a super PAC in a single calendar year of a fifteen-year existence. Second, and in any event, New Models was a defunct organization and the statute of limitations for civil penalties had long passed. "For these reasons, and in exercise of our prosecutorial discretion," the controlling commissioners voted to dismiss.

CREW sought judicial review of the FEC's dismissal. The district court dismissed based on a 2018 D.C. Circuit decision, also captioned *CREW v. FEC* (hereinafter "*CHGO*" based on the name of the organization involved in that case), by Senior Judge Randolph and joined by then-Judge Kavanaugh, holding that the FEC's exercise of prosecutorial discretion is unreviewable.

The Law

The D.C. Circuit's 2018 *CHGO* decision applied to the FEC a principle established by the Supreme Court in the seminal case *Heckler v. Chaney*. There, the Supreme Court dismissed as "unreviewable" a challenge to a decision by the U.S. Food and Drug Administration that rested on the agency's legal conclusion and its exercise of enforcement discretion. Two years later, the Supreme Court reaffirmed that decision, describing as "misguided" the argument "that if the agency gives a 'reviewable' reason for otherwise unreviewable action, the action becomes reviewable."

CHGO applied the *Chaney* presumption to the FEC because it found that "nothing in the [FECA] overcomes the presumption against judicial review" of enforcement decisions. The court concluded that because the controlling commissioners had "placed their judgment squarely on the ground of prosecutorial discretion," the court could not review their decision. The court acknowledged that if the FEC declined to bring the action "based entirely on its interpretation of the statute," that decision would be reviewable, but opined that it would "be mistaken" to "carv[e] reviewable legal rulings out from the middle of non-reviewable actions."

Judge Pillard dissented from the panel decision, and later, from the D.C. Circuit's order denying rehearing en banc. She argued that *CHGO* was a departure from the D.C. Circuit's prior practice of reviewing FEC dismissal decisions and not required by *Chaney*.

The Divide

In March 2020, a different panel of the D.C. Circuit – comprised of Judge Tatel, Judge Garland, and Senior Judge Edwards – decided *Campaign Legal Center v. FEC*, yet another case involving an FEC discretionary dismissal decision. The FEC had dismissed a group of cases concerning LLC contributions to super PACs on the basis that the legal issue was a matter of first impression with no clear guidance. In this case, the panel

passed on deciding the reviewability question implicated by *CHGO*. Finding that question “complicated” and the merits straightforward, the panel affirmed the Commission’s dismissal on the merits in a per curiam decision. Senior Judge Edwards concurred, but wrote separately to express his view that *Chaney*’s presumption “do[es] not apply to matters in which a complainant seeks review of Commission actions under the Federal Election Campaign Act.” In his view, *CHGO* was mistaken.

Not surprisingly, *CHGO* was front and center in *New Models*. Judge Rao, joined by Judge Katsas, relied on *CHGO* to hold that “a Commission decision based even in part on prosecutorial discretion is not reviewable.” It thus made no difference that the controlling commissioners had “featured only a brief mention of prosecutorial discretion alongside a robust statutory analysis.” “The law of this circuit and of the Supreme Court demonstrates” that a court is “unable to review the Commission’s exercise of its enforcement discretion, irrespective of the length of [any] legal analysis” that may have accompanied that exercise of discretion.

In addition to grounding its decision in precedent, the *New Models* majority explained why it would reach the same conclusion “even if we were able to decide this case on a clean slate.” Among those reasons, the panel explained that the Administrative Procedure Act codifies “the general principle that an agency’s exercise of enforcement discretion is unreviewable,” and that this principle “follows from ‘tradition, case law, and sound reasoning,’ as well as protection for a core executive power.” And because FECA’s judicial review “procedures are entirely compatible with the APA, which both allows for judicial review to determine whether agency action is contrary to law and bars judicial review of matters committed to agency discretion, such as enforcement decisions,” there was no reason to read FECA to “displace the traditional unreviewability of the Commission’s discretionary decisions not to enforce.”

Judge Millet dissented. She argued the FEC should not be permitted to “immunize its conclusive legal determinations and evidentiary analyses from judicial review simply by tacking a cursory reference to prosecutorial discretion onto the end of a lengthy and substantive merits decision.” In her view, the majority opinion granted the FEC an unmerited “get out of judicial review free” card.

The Future

The decision in *New Models* makes clear that *CHGO* applies to FEC dismissals even where a dismissal is based on an exercise of prosecutorial discretion in addition to substantive legal grounds. It also sharpened the philosophical division on the D.C. Circuit. So far, the more conservative judges have tended toward the traditional rule that agency enforcement decisions are unreviewable even when they rest in part on an assessment of the legal merits. The more liberal judges, on the other hand, appear to prefer a rule that would permit courts to review nearly all enforcement dismissals – at least campaign finance enforcement decisions by the FEC where dismissals by nature tend to be deregulatory and are often decided by evenly divided votes of the six-member commission.

CREW has indicated it will seek en banc rehearing. If CREW’s petition is granted, the full 11-member court will have an opportunity to reconsider the issues in *New Models* and *CHGO*. The en banc court is already scheduled to convene in October for another case so *New Models*, if granted, could conceivably be heard at

the same time.

The positions of four judges are fairly ascertainable. Because Judge Katsas and Judge Rao formed the majority in *New Models*, they presumably would vote to uphold their decision. And because Judge Pillard and Judge Millett dissented in *CHGO* and *New Models*, respectively, they presumably would vote to overturn.

The positions of the other judges are less clear. Judge Wilkins voted to rehear *CHGO* but did not join Judge Pillard's dissent, so has not indicated his position on the merits. Judge Tatel – who remains active status pending confirmation of his replacement – joined the per curiam labeling the question “complicated.” That leaves Judge Srinivasan, Judge Henderson, Judge Rogers, and Judge Walker as not having indicated any view in these cases. Meanwhile, five other judges that previously did indicate their view would not participate in rehearing either because they have taken senior status (Edwards and Randolph), or because they have left the D.C. Circuit entirely (Kavanaugh, Garland, and Griffith).

For now, the best way for a group of controlling commissioners to ensure that a particular dismissal decision based on prosecutorial discretion is not reviewable is to make explicit in their statement of reasons that the exercise of discretion is independent of the substantive legal merits. Respondents before the FEC, in turn, should be prepared to equip the agency with the reasons why discretion is appropriate apart from the merits of the case, and then be prepared to pursue those reasons in district court and, if necessary, to the D.C. Circuit.

The case number in *New Models* is No. 19-5161.

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