

# Court of Appeals Upholds FEC's Action in LLC Contribution Cases, But...

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On March 13, the U.S. Court of Appeals for the District of Columbia Circuit ruled that the FEC acted reasonably when it dismissed five cases involving contributions by corporate LLCs. The cases were dismissed by a vote of 3 to 3, with the Republican commissioners voting to dismiss on the grounds that contributions by corporate LLCs to Super PACs presented an issue of first impression and it would be unfair to punish citizens where the law is unclear and failed to provide citizens fair notice. Unable to entreat their Democratic colleagues to address the novel issue via rulemaking, the Republican commissioners articulated their legal approach to LLC contributions going forward – that the focus would be on “whether funds were intentionally funneled through a closely held corporation or corporate LLC for the purpose of making a contribution that evades the Act’s reporting requirements.” If so, the Republican commissioners reasoned, a citizen’s funding of a corporate LLC for the purpose of making a contribution in the name of the LLC would violate the FECA’s prohibition against making contributions in the name of another person.

Two reform organizations that had filed complaints initiating the administrative matters, Campaign Legal Center and Democracy 21, sued the FEC asserting that the dismissals were arbitrary and capricious or otherwise contrary to law. As previously explained in Election Law News, the U.S. District Court dismissed the lawsuit on the basis that the controlling commissioners exercised “prosecutorial discretion” which is non-reviewable under the Appeals Court’s recent precedent of *Citizens for Responsibility and Ethics in Washington (CREW) v. FEC*, 892 F.3d 434 (D.C. Cir. 2018), a decision authored by then-Circuit Judge Kavanaugh. The reform organizations appealed.

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The Appeals Court ruled that the dismissal was reasonable in light of the novelty of contributions by corporate LLCs and conflicting or confusing precedents. The Appeals Court afforded the agency's controlling statement of reasons a high level of deference in interpreting its own regulations and precedents. The Court further seemed impressed by the absence of clear notice to citizens. Accordingly, the Court upheld the agency's dismissal.

While upholding an agency dismissal under a deferential standard, the Appeals Court's decision does send signals about active judicial review of FEC actions in the future. Significantly, the Appeals Court disregarded Judge Kavanaugh's opinion on the non-reviewability of agency prosecutorial discretion in *CREW v. FEC*. Senior Circuit Judge Edwards issued a concurring opinion expressly disagreeing with *CREW v. FEC*. The panel cited Judge Edwards' concurring opinion and proceeded to review the reasonableness of the agency's exercise of discretion. This creates a split within the Circuit and signals to the district judges they can actively review all exercises of enforcement discretion – at least by the FEC. The Appeals Court also articulated a broad concept of informational standing specifically tailored for campaign finance reform advocacy organizations which might invite a broader range of court challenges.

Meanwhile, the Appeals Court conscientiously avoided any endorsement of the FEC's substantive rule on LLC contributions, saying that would be left an open issue for perhaps a future court challenge. Thus, the decision avoided making any substantive law and appears to have been focused on setting procedures for a more robust role for the courts in reviewing FEC enforcement actions.