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NEWSLETTER

En Banc D.C. Circuit Lets Stand Ruling Holding that the FEC's Exercise of Prosecutorial Discretion Is Unreviewable

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The en banc U.S. Court of Appeals for the District of Columbia Circuit recently issued its long-anticipated 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). In 2021, a D.C. Circuit panel held that when the FEC dismisses an administrative complaint for legal reasons and also invokes its prosecutorial discretion, the FEC's dismissal decision cannot be subject to judicial review. Last month, the full Court declined to rehear the panel decision over just two noted dissents, confirming that *New Models* is indeed the law of the Circuit.

Despite this clear result, there are signs that some frequent litigants may be unwilling to accept it. Issues relating to the reviewability of FEC dismissals based on prosecutorial discretion have been percolating within the Circuit since 2018, and some parties appear to prefer a rule that would permit courts to review nearly all enforcement dismissals, at least at the FEC where dismissals by nature tend to be deregulatory and are often decided by evenly divided votes of the six-member commission. These parties may be counting on more recent judicial appointments to change the en banc result. Issues relating to the reviewability of FEC dismissals based on prosecutorial discretion thus merit continued attention.

The Facts

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The underlying case involved CREW's challenge to the FEC's dismissal of CREW's administrative complaint against a now defunct conservative 501(c)(4) social welfare organization, New Models. New Models was established in 2000 as a policy think-tank. In 2012, New Models made $3.1 million in contributions to several independent super PACs. CREW alleged that these contributions transformed New Models into a PAC, and that New Models had therefore failed to comply with certain registration and on-going 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 isolated contributions it made in 2012.

The FEC commissioners voted 2 to 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. 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 Food & 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 dismissal decision. 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." 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 Denial

The panel decision in *New Models* made clear that *CHGO* applies to FEC dismissals that pair an exercise of prosecutorial discretion with legal reasoning. CREW sought rehearing from the full court, arguing hyperbolically that reversal was required to preserve "the 'free functioning of our national institutions.'"

The en banc Circuit did not agree. With two newly appointed judges not participating and one judicial vacancy, CREW's petition failed to garner the five-majority necessary for rehearing.

Judge Millett and Judge Pillard dissented from the court's denial of rehearing en banc. Echoing their prior dissents (from the *New Models* panel decision and *CHGO*, respectively), these judges again argued that *New Models* hands "a Commission minority" "a Get Out of Judicial Review Free card even though Congress expressly mandated judicial review of dismissal orders." That result is, in their view, "the rule of lawlessness, not law."

In an opinion concurring with the Circuit's denial of rehearing, Judge Rao, joined by Judges Henderson, Katsas, and Walker, pointed out that the dissent's concern about "minority" Commission control "arises not from the panel opinion, but from Congress's requirement that four of six commissioners agree to enforcement actions." Congress adopted that structural requirement to ensure "at least some bi-partisan agreement" in FECA enforcement decisions.

Furthermore, Judge Rao explained that although the dissent expressed "consternation about the inability of this court to oversee the Commission's non-enforcement decisions," the dissent did not "contest that the Commission retains prosecutorial discretion or that a decision based entirely, or even in some substantial part, on such discretion would be unreviewable" under Supreme Court precedent.

Finally, Judge Rao took issue with "the actions of some commissioners, in the wake of *New Models*, concealing the basis for Commission action or inaction." Here, Judge Rao was referring to matters where, when the FEC lacked four votes to enforce and the controlling commissioners relied on prosecutorial discretion to dismiss, some commissioners blocked public disclosure of the FEC's action so that "citizen suits [would] proceed." Judge Rao observed that "[l]egal questions around these actions are being litigated in our circuit, but they are not before us today."

The Future

By declining rehearing, the en banc D.C. Circuit confirmed that *New Models* is the law of the Circuit. However, the petitioner in *New Models* appear to be teeing up, together with its allies (at the FEC and elsewhere) additional cases that would continue to test the application of the *Heckler* rule to the Commission. These parties appear to prefer a rule that would permit courts to review nearly all enforcement dismissals, at least at the FEC where dismissals by nature tend to be deregulatory and are often decided by evenly divided votes of the six-member commission.

For now, the best way for a group of controlling FEC commissioners to ensure that a particular dismissal decision based on prosecutorial discretion is not reviewed is to make explicit in their statement of reasons that the exercise of discretion is independent of the substantive legal merits. In turn, respondents in appropriate cases before the FEC 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.