

# FEC's Prosecutorial Discretion Considered by Federal Court, Again

May 2020

The U.S. Court of Appeals for the District of Columbia Circuit heard arguments in *Citizens for Responsibility and Ethics in Washington (CREW) v. Federal Election Commission (FEC)* on April 24, 2020. The case involves CREW's challenge to the FEC's dismissal of CREW's complaint against a now-defunct conservative 501(c)(4) organization, New Models, alleging the organization became a "political committee," or PAC, by contributing to several independent super PACs. Because the FEC dismissed for legal reasons "and in exercise of our prosecutorial discretion" the case implicates an important and ongoing dispute in the D.C. Circuit involving the reviewability of the FEC's exercise of prosecutorial discretion when the agency pairs that discretion with substantive legal reasoning.

## 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 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 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 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 to a PAC, resulting in dismissal of CREW's

## Authors

Jeremy J. Broggi  
Partner  
202.719.3747  
jbroggi@wiley.law

## Practice Areas

Election Law & Government Ethics  
Federal Election Commission  
Representation  
Issues and Appeals  
Litigation

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, 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 U.S. 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 & 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

Earlier this year, a different panel of the D.C. Circuit – comprised of Judge Tatel, Judge Garland, and Senior Judge Edwards – did not decide 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.

*CHGO* was front and center at oral argument last month in the New Models case. Judge Katsas and Judge Rao pressed CREW's counsel on its theories that *CHGO* had left open the possibility that a decision citing both legal reasons and prosecutorial discretion remained reviewable, and that the agency could not exercise discretion through an evenly divided decision. Judge Millett, by contrast, directed most of her questions to the FEC's attorney, probing potential defects in the substantive legal reasons given by the controlling commissioners and the ambiguity around the influence of those legal grounds on the exercise of enforcement discretion.

The decision in the New Models case, expected this summer, may provide additional clarity on the application of *CHGO* to FEC dismissals that pair an exercise of prosecutorial discretion with legal reasoning. It may also sharpen the philosophical division on the D.C. Circuit. So far, the more conservative judges have tended toward the traditional rule that 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 at the FEC where dismissals by nature tend to be deregulatory and are often decided by evenly divided votes of the six-member Commission.

It remains to be seen whether the en banc D.C. Circuit will take up these issues and, if it does, how they will be decided. While no other judge joined Judge Pillard's dissent from denial of rehearing en banc in *CHGO*, Judge Wilkins indicated that he would have reheard the case, and Judge Griffith wrote to express his view that it would be worth considering these issues more fully "in the right case." The developments this year, likewise, suggest that the issue may not be fully settled.

In the absence of additional clarity, it seems that the best way for a group of controlling commissioners to ensure that a 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. 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 *CREW v. FEC (New Models)* is No. 19-5161.