An FEC loophole killed the Stormy Daniels case

BY ELLEN L. WEINTRAUB

Pretty much all the Stormy Daniels story needed was a murder. Last week it got one, when news broke that Republican members had killed the Federal Election Commission's hush-money case against former president Donald Trump with barely any explanation.

This action reaches beyond the FEC. Under current law, no court can overturn this decision.

We all know the larger story. Trump's then-lawyer Michael Cohen paid $130,000 to Stephanie Clifford (a.k.a. Stormy Daniels) to keep her quiet in the days before the 2016 election. Cohen admitted that he routed the payment to Daniels "for the principal purpose of influencing the election," and that Trump not only knew about but orchestrated the payment.

This led to criminal charges and a complaint to the FEC, which is charged with enforcing campaign finance law. In the criminal case, Cohen was sentenced to prison and ordered to pay almost $2 million in restitution, forfeiture and fines.

But when the FEC's professional legal staff recommended the commission investigate, two Republican commissioners instead tanked the case without a word about its merits. Since Cohen had already been prosecuted, they said, "pursuing these matters further was not the best use of agency resources."

Now, we're pretty busy at the FEC, digging out from all the matters that piled up for more than a year while we were short on commissioners — and therefore unable to decide cases.

But are we too busy to enforce the law against the former president of the United States for his brazen violation of federal campaign finance laws on the eve of a presidential election? No.

Would pursuing this matter have been an unwise use of resources? Of course not. Taxpayers entrust us with resources *exactly* so that we can pursue enforcement in important cases and ensure that no one is above the law. This dismissal of the allegations against Trump is arbitrary, capricious, outrageous and contrary to the law that Congress created the FEC to enforce.

It gets worse. The Republican commissioners' grossly inadequate justification for dismissal is effectively insulated from review because of the last 13 words of their statement: "We voted to dismiss these matters as an exercise of our prosecutorial discretion." The courts have turned "prosecutorial discretion" into magic words that render any administrative decision invulnerable to appeal.

So the man who directed and benefited from the hush-money scheme escapes accountability, as do the officials who let him off the hook.

Federal campaign finance law allows those who file FEC complaints to sue when they believe the commission has dismissed their complaint for a reason contrary to law, or if the agency fails to act on their complaint altogether. This serves as a check on the agency, and one that can cut through obstruction to get the law enforced.

But a 2018 decision in *CREW v. FEC (CHGO)* virtually destroyed the ability of the public — and the federal judiciary — to hold the FEC accountable.

The decision held that if FEC commissioners decline to pursue a complaint citing "prosecutorial discretion," that cannot be challenged by any court.

This wouldn't make much sense even if a majority of the commission discarded a complaint with a few throwaway words about discretion. But the rule holds even in this case, where just *two* of the six commissioners cited prosecutorial discretion.

Fortunately, at least some of this problem can be fixed. Another case, *CREW v. FEC (New Models)*, could help repair the damage.

In *New Models*, a different group of Republican FEC commissioners opined that a dark-money group that gave most of its money in a calendar year to a super PAC could not, under *any* circumstances, be considered a political committee, and therefore be required to disclose its donors. Never mind that the exact theory, from the same commissioners, had been found "arbitrary" and "contrary to law" just a year before in another case against the FEC.

Toward the end of the commissioners' 32-page statement, in their *139th* footnote, they dropped a few words of prosecutorial discretion, and that was that. When the case went to federal court, the decision amounted to a 23-page judicial cry for help, repeating more than a dozen times how thoroughly the court's hands were tied when commissioners invoked their magic words.

It was never Congress's intent that a majority of the commission, or especially *less* than half, could extinguish the public's right to challenge dismissals and the courts' ability to review FEC decisions.

Last month, a split panel of the federal appeals court upheld the district court's ruling that the *New Models* case had to be dismissed. The full D.C. Circuit should take up the case — and close this gaping loophole.

Here's the reality otherwise: Republican commissioners continue to deem a breathtaking variety of campaign finance law violations as not worth our time — modest violations, medium-size violations or, in this case, a serious and well-documented violation committed by the former president who appointed them to their positions.

That's not prosecutorial discretion deserving of judicial deference. It's an abandonment of responsibility that shouldn't be tolerated.

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