FEDERAL ELECTION COMMISSION
1050 FIRST STREET, N.E.
WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	
American Action Network	)	MUR 6589R
	)	

STATEMENT OF REASONS OF CHAIRMAN ALLEN J. DICKERSON AND COMMISSIONERS SEAN J. COOKSEY AND JAMES E. "TREY" TRAINOR, III

This Matter arose from a Complaint alleging that American Action Network (AAN) violated the Federal Election Campaign Act of 1971 (FECA or Act) by failing to organize, register, and report as a political committee in 2009.[1] As of this writing, that Complaint has spawned a decade of proceedings before the Commission and in federal court.[2] Under FECA's carefully crafted enforcement framework, the Commission has voted on whether to pursue enforcement in this Matter, and has declined to do so. This determination predates our service on the Commission. As such, it is irrelevant whether we agree with the outcome—the decision is made, and all that remains is to close the file on this Matter. We voted to do so, and we issue this statement of reasons to address the Commission's inexcusable failure to perform this ministerial act—a refusal which continues as of this writing.

I. LEGAL FRAMEWORK FOR COMMISSION ENFORCEMENT AND JUDICIAL REVIEW

For good or for ill, this Matter illustrates the Commission's particular enforcement and review paradigm in action. Under this framework, any person may allege a FECA violation by filing a complaint with the Commission, which then must give the accused notice and an opportunity to respond.[3] After considering the complaint and any response, the Commission may—by affirmative vote of four commissioners—find "reason to believe" (RTB) that there is a FECA violation and open an investigation.[4]

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[1] Stmt. of Reasons of Chairman Goodman & Comm'rs Hunter & Petersen at 2, MUR 6589 (July 30, 2014).
[2] *See CREW v. Fed. Election Comm'n* ("*CREW I*"), 209 F. Supp. 3d 77 (D.D.C. 2016); *CREW v. Fed. Election Comm'n* ("*CREW II*"), 299 F. Supp. 3d 83 (D.D.C. 2018); *CREW v. AAN* ("*CREW III*"), 410 F. Supp. 3d 1 (D.D.C. 2019), *on reconsideration*, No. 18-CV-945 (CRC), 2022 WL 612655 (D.D.C. Mar. 2, 2022) (Mem. Op.) (appeal filed Mar. 31, 2022).
[3] 52 U.S.C. § 30109(a)(1).
[4] *Id.* § 30109(a)(2).

Congress included this four-vote requirement to ensure that Commission enforcement action could not proceed without bipartisan support.[5]

If the Commission dismisses a complaint, or does not act on a complaint within 120 days, any aggrieved person may sue in the United States District Court for the District of Columbia.[6] The relief available in these "(a)(8) suits"—named for the FECA provision that creates the cause of action—is a declaration that the Commission's dismissal or failure to act was contrary to law.[7] If the court finds as much, it "may direct the Commission to conform with such declaration within 30 days, failing which the complainant may bring, in the name of such complainant, a civil action to remedy the violation involved in the original complaint."[8]

II. FACTUAL AND PROCEDURAL HISTORY: CREW'S COMPLAINT AGAINST AAN

In 2012, CREW filed a complaint alleging that AAN was operating as an unregistered political committee in violation of the Act.[9] The Commission did not find RTB (by a vote of 3-3), and closed the file (by a vote of 6-0).[10] CREW filed an (a)(8) suit, and the court found that the controlling commissioners'[11] application of the major-purpose test for political-committee status was contrary to law and remanded the Matter to the Commission.[12]

When the Commission considered the Matter on remand, it again did not find RTB (by a vote of 3-3) and closed the file (by a vote of 5-1).[13] The controlling commissioners issued a statement of reasons incorporating the district court's opinion.[14] CREW filed a second (a)(8) suit and—though the district court acknowledged that "nothing in the Commissioners' dismissal violated the letter of its prior decision"[15]—it nevertheless concluded that the Commission had acted "contrary to law," and again remanded the Matter to the Commission.[16]

On this second remand, the Commission did not act within 30 days, thereby triggering CREW's statutory right to sue AAN, which CREW did.[17] The Commission

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[5] *See generally id.* § 30106(a)(1) (providing that no more than three of the six voting commissioners "may be affiliated with the same political party.").
[6] *Id.* § 30109(a)(8)(A).
[7] *Id.* § 30109(a)(8)(C).
[8] *Id.*
[9] *See, e.g.*, *CREW I*, 209 F. Supp. 3d at 80.
[10] Certification, MUR 6589 (June 24, 2014).
[11] Stmt. of Reasons of Chairman Goodman & Comm'rs Hunter & Petersen, MUR 6589 (July 30, 2014).
[12] *CREW I*, 209 F. Supp. 3d at 95.
[13] Certification, MUR 6589R (Oct. 18, 2016).
[14] Stmt. of Reasons of Chairman Petersen & Comm'rs Hunter & Goodman, MUR 6589R (Oct. 19, 2016).
[15] *CREW II*, 299 F. Supp. 3d at 92 (citation omitted).
[16] *Id.* at 101.
[17] 52 U.S.C. § 30109(a)(8)(C); *CREW III*, 410 F. Supp. 3d at 11.

voted on the Matter soon after and again declined to find RTB by the requisite four votes.[18] Three commissioners voted to close the file, but a Democratic commissioner dissented.[19] As a result, the Commission Secretary's Office stated that the Commission "failed, by a vote of 3-1, to close the file."[20] According to the Commission Secretary's Office, after the May 10, 2018 vote, this Matter was placed on the executive session agenda six more times in 2018, but was "held over"[21] each time.

This past January, with an eye toward resolving stale matters and ensuring responsible use of agency resources, the Chairman again placed this Matter on the executive session agenda. Because the Commission had already voted not to pursue enforcement, the only action before us was to close the file. We voted to do so, but three of our colleagues dissented.[22] Since then, this Matter has been on the executive session agenda eight times. But each time, a Democratic commissioner has asked that the Matter be "held over." Consequently, the file in this Matter remains open today—nearly four years after the Commission last declined to find RTB.[24]

III. PROCEDURAL DYSFUNCTION AND THE RECENTLY MISUNDERSTOOD ACT OF "CLOSING THE FILE"

In its early days, this Matter was among numerous examples of the historical practice of voting to close the file on a matter after the Commission, acting with a lawful quorum, has declined to find RTB by the required four votes. Until recently, this has, by all accounts, been regarded as an uncontroversial, ministerial act.[25] Indeed, as set forth above, when this Matter was first before the Commission, after

[18] Certification, MUR 6589R (May 10, 2018).
[19] *Id.* at ¶ 4.
[20] *Id.* (punctuation altered).
[21] As a matter of professional courtesy, it has been institutional practice for the Chairman to grant a commissioner's informal request to "hold over" a matter on the executive session agenda until the next executive session (for instance, if the press of other work or the complexity of a particular matter necessitates more time for deliberation). If the Chairman is not amenable to such informal request, however, the Commission may vote on postponing consideration of a matter. *See* Federal Election Commission, Directive 10 at 4, ¶ 7(f) (amended Dec. 20, 2007), https://www.fec.gov/resources/cms-content/documents/directive_10.pdf (contemplating "[a] motion to postpone consideration of a matter to a date certain," which requires "a majority vote of at least three members of the Commission.").
[22] Certification, MUR 6589R (Jan. 11, 2022).

[24] *See* Certification, MUR 6589R (May 10, 2018). Because the decision not to find RTB predates our service on the Commission, we need not decide whether—as of this writing—the Commission has jurisdiction to pursue enforcement in connection with CREW's complaint in this Matter. But we note that the five-year statute of limitations on Commission enforcement, 28 U.S.C § 2462, would appear to preclude action at this stage, even if we were to vote (again) on RTB.
[25] *See, e.g.*, Certification ¶ 2, MUR 6589 (June 24, 2014) (reflecting that, despite splitting 3-3 on whether to find RTB, the Commission unanimously voted to close the file). *See generally* Stmt. of Chairman Trainor on the Dangers of Procedural Disfunction at 2, 7 (Aug. 28, 2020).

the RTB vote, the Commission voted to close the file that same day.[26] The same thing happened on the Matter's initial remand to the Commission.[27] But by the second remand to the Commission, something had changed. Though the Commission voted on (and declined to find) RTB, a Democratic commissioner voted against closing the file.[28] This refusal thus had the effect of shielding that file from public view.[29] Due to our colleagues' continued refusal to close the file, this effect lingers to this day.

This illustrates a disturbing trend that has emerged among some members of this Commission in recent years. After the Commission has voted on (and declined to find) RTB in a matter, the Commission has failed to close the file on that matter. This practice troubles us deeply, for several reasons.

First, and most fundamentally, it depends upon the legal fiction that, rather than being resolved when the Commission declines to find RTB, an enforcement decision has not really been made until the Commission has concluded (by four votes, no less) to perform a ministerial act of "closing the file." This cannot be reconciled with our enabling statute. To be sure, FECA requires four affirmative votes to proceed with enforcement.[30] But there is no similar requirement to dismiss a matter, as the D.C. Circuit explicitly acknowledged just last year,[31] nor to take a ministerial action like closing a file (a practice mentioned nowhere in FECA). In fact, the D.C. Circuit has explicitly acknowledged the existence of "'deadlock dismissals.'"[32] That is precisely what occurred here. The theory that a no-RTB vote has no effect is simply wrong as a matter of statutory construction.

Second, the recent contrivance of a "four-votes-to-close-the-file" requirement undermines Congress' carefully crafted framework for enforcement by our agency and judicial review of the same. Where the Commission's handling of a matter is challenged in an (a)(8) suit, courts have explicitly recognized that the statement of reasons of the controlling commissioners (*i.e.*, those who declined to find RTB) is

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[26] Certification, MUR 6589 (June 24, 2014).
[27] Certification, MUR 6589R (Oct. 18, 2016).
[28] Certification, MUR 6589R (May 10, 2018).
[29] *See* Federal Election Commission, Stmt. of Policy: Disclosure of Certain Documents in Enforcement & Other Matters, 81 Fed. Reg. 50702, 50703 (Aug. 2, 2016) (listing documents that the Commission will place on the public record). This is particularly striking given that the three other sitting commissioners all voted to find RTB, but the Democratic commissioner who refused to close the file abstained, effectively blocking enforcement action. Certification ⁋⁋ 2, 3, MUR 6589R (May 10, 2018).
[30] 52 U.S.C. § 30109(a)(2).
[31] *CREW v. Fed. Election Comm'n*, 993 F.3d 880, 891 (D.C. Cir. 2021) ("The statute specifically enumerates matters for which the affirmative vote of four members is needed and dismissals are not on this list, which suggests that they are not included under the standard construction that *expressio unius est exclusio alterius*. A decision to initiate enforcement, but not to decline enforcement, requires the votes of four commissioners.") (citations omitted).
[32] *Id.* at 891 (quoting *Common Cause v. Fed. Election Comm'n*, 842 F.2d 436, 449 (D.C. Cir. 1988); citing *Democratic Cong. Campaign Comm. v. FEC*, 831 F.2d 1131, 1133 (D.C. Cir. 1987)).

necessary "to make judicial review a meaningful exercise."[33] If a vote of four commissioners were really required to "close the file" on a matter, commissioners who disagreed with a particular result could block meaningful judicial review of Commission enforcement decisions where there are not four votes to find RTB (for instance, in the event of a "deadlock dismissal," as discussed above). This would stymie the judicial review for which Congress deliberately provided.

Third, as a matter of policy, holding a matter open despite a vote declining to find RTB is a disingenuous effort to "Commission shop."[34] It undermines fundamental fairness (not to mention foundational notions of due process) to hold a matter open in the hope that a future slate of commissioners will re-vote and reach a different result. This amounts to unvarnished gamesmanship and is an embarrassment to the Commission. It also prejudices respondents, who are entitled to learn when the Commission has voted not to pursue enforcement action in connection with a complaint about their (often constitutionally protected) activity. This is not just a matter of right, it is also memorialized in Commission Directive 68, which requires us to provide a status report to respondents "if the Commission has not voted to find reason to believe, no reason to believe, or to dismiss the matter within twelve (12) months from receipt of the complaint . . . and at every twelve (12) month interval thereafter."[35] The report must include "[a] reasonable estimate as to the date by which the Commission is expected to vote on the matter."[36] Where the Commission has declined to find RTB but the file is taken hostage by commissioners who prefer a different result, this required report will at best mislead respondents, and at worst blatantly lie about the status of the enforcement matter against them. This state of affairs is no fairer to complainants, who are entitled to learn the outcome of their complaint so that they may timely plan and pursue any legal action in response.

Finally, this recent trend exercises a corrosive influence on the work and collegiality of the Commission. Once the Commission has voted and declined to find RTB, responsible stewardship of the public resources with which we are entrusted compels us to move forward with the other business of the agency. No matter should be allowed to languish with the Commission, subject to being re-called and re-voted indefinitely, wasting taxpayer resources and rendering meaningless our efforts as commissioners. After all, why work diligently on a matter, why prepare thorough statements of reasons, why earnestly engage with colleagues, if the eventual votes have no meaning and will simply be a dress rehearsal for some future "real" event?

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[33] *Nat'l Republican Senatorial Comm. v. Fed. Election Comm'n*, 966 F.2d 1471, 1476 (D.C. Cir. 1992).
[34] This is not the first time that this has been observed. *See, e.g.*, Stmt. of Reasons of Vice Chair Dickerson, MUR 7486 (45Committee, Inc.) (Dec. 9, 2021); Stmt. of Chairman Trainor on the Dangers of Procedural Disfunction (Aug. 28, 2020).
[35] Federal Election Commission, Directive 68 at 1, Part I(A)(1) (Dec. 14, 2017), https://www.fec.gov/resources/cms-content/documents/directive_68.pdf.
[36] *Id.* at 1, Part I(B)(3).

This cannot be what Congress, the public, or the regulated community expects (or deserves) from this agency.

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To be sure, the Commission took multiple RTB votes in this Matter. But that was by design—Congress provided for the Commission to consider afresh its disposition of enforcement matters upon remand from a federal court.[37] Absent such circumstance, an enforcement matter before the Commission is resolved once there is a vote declining to find RTB.

The substantive vote where the Commission declined[38] (for the third time)[39] to find RTB here predates our service on the Commission, and as such, we take no position on the merits of that decision. But even if we disagreed with it, the vote is taken, and the Commission has decided not to pursue enforcement action. Because that was the end of the Matter, we voted to close the file.

It is our earnest hope that the Commission will turn away from its errors and return to the soberer approach of moving beyond enforcement matters where there are not four votes for RTB. In our view, this is not just the only natural reading of the statute, it is also essential to the Commission's continued effectiveness and legitimacy.

May 13, 2022
Date

Allen Dickerson
Chairman

May 13, 2022
Date

Sean J. Cooksey
Commissioner

May 13, 2022
Date

James E. "Trey" Trainor, III
Commissioner

[37] 52 U.S.C. § 30109(a)(8)(C).
[38] Certification, MUR 6589R (May 10, 2018).
[39] *Id.*; *see also* Certification, MUR 6589 (June 24, 2014); Certification, MUR 6589R (Oct. 18, 2016).