FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

STATEMENT OF CHAIR JAMES E. "TREY" TRAINOR III ON THE DANGERS OF PROCEDURAL DISFUNCTION

I. INTRODUCTION

A dangerous paradigm shift is happening in federal campaign finance law that is threatening Americans' free speech rights. The careful balance stuck by Congress when it created the Federal Election Commission ("FEC") is being tilted by outside groups taking advantage of the FEC's unique administrative enforcement and judicial review procedures by seeking private enforcement of the federal campaign finance laws and using the courts to get their preferred policy positions enacted. The Commission's expertise is ignored, its prosecutorial role is subverted, and the clear separation of powers set forth in the Constitution are being tested. Free speech is being chilled. As I explain below, the system designed to protect free speech is being weaponized.

A. The Federal Election Commission & FECA

The FEC has exclusive jurisdiction over civil enforcement of the Federal Election Campaign Act of 1971, as amended ("FECA" or "the Act."). The FEC's structure is unique among federal executive branch agencies: Commissioners are nominated by the President and confirmed by the U.S. Senate, yet no more than three "may be affiliated with the same political party."[1] Congress purposely designed the FEC this way so that it could not become a partisan or ideological weapon. As former FEC Commissioner Bradley Smith explained:

> Imagine you are a Republican. Would you agree to let the rules of political campaigns be written by a partisan committee selected by Barack Obama? Or if you're a Democrat, do you think Donald Trump should be able to appoint a partisan majority to determine the rules? Of course not. That's why for more than 40 years, Republicans and Democrats have agreed that campaign regulations should be enforced by an independent, bipartisan agency. The Watergate scandal that forced Richard Nixon to resign the presidency showed the dangers of allowing one party to use the power of government against the other. In the aftermath, the Federal

[1] 52 U.S.C. §30106(a)(1).

> Election Commission was created to make sure future administrations could not abuse campaign regulations to bludgeon their opponents.[2]

Moreover, it takes the approval of four Commissioners for the agency to take most enforcement, policymaking, and litigation actions.[3] This 4-vote requirement strengthens the credibility of the agency by foreclosing allegations that any pursuit of potential violations of the law is driven by partisan considerations (*i.e.* a political witch hunt by one party against the other). It also means that when the Commission lacks a quorum (that is, when there are fewer than four Commissioners), it is statutorily prohibited from taking many actions, such as opening investigations, settling matters, and defending itself in court in certain types of actions.[4]

The FEC currently lacks a quorum. Although this should go without saying, I nonetheless feel obligated to say it: the current sitting Commissioners have no ability to nominate or confirm additional Commissioners to reestablish a quorum. So when the professional complainants equate the lack of a quorum with the FEC's purported "failure to enforce the law", the public's confidence in the FEC is undermined.[5] Rather than suing the FEC, these groups should lobby the White House and U.S. Senate to nominate and confirm additional Commissioners.[6] After all, as Commissioner Weintraub has pointed out, pursuant to the Act it is up to the President and Congress to nominate and confirm FEC Commissioners.[7]

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[2] Brad Smith, "Prevent the Reckless Restructuring of the FEC," *The Columbus Dispatch* (May 1, 2017).

[3] 52 U.S.C. §§30106(c), §30107(a)(6), 30107(a)(9), §30109(a). Specifically with respect to litigation, although the Commission is authorized by the Act to defend itself against any action brought under the Act's provisions; the Act also requires the approval of at least four Commissioners to defend an a8 suit, to initiate offensive enforcement litigation, or to file an appeal in any litigation. 52 U.S.C. §§30106(c), 30107(a)(6).

[4] When Commissioner Petersen resigned on August 31, 2019, the Commission lost a quorum. It was restored when I joined the Commission on June 5, 2020. But when Commissioner Hunter resigned on July 3, 2020, the Commission again lost a quorum. *But see* Commission Directive 10, Section L (setting forth the rules of procedure to be followed when the Commission has fewer than four sitting members, and the matters on which the Commission may still act upon: notices of filing dates, non-filer notices, approving debt settlement plans and administrative terminations, and considering appeals under the Freedom of Information and Privacy Acts).

[5] *See* MUR 7643 (American Progress Now), Statement of Reasons of Chair James E. "Trey" Trainor III, at 1, n. 1.

[6] On June 26, 2020, the White House announced its intent to nominate a new FEC Commissioner. President Donald J. Trump Announces Intent to Nominate and Appoint Individuals to Key Administration Posts (Jun. 26, 2020), available at: https://www.whitehouse.gov/presidential-actions/president-donald-j-trump-announces-intent-nominate-appoint-individuals-key-administration-posts-43/.

[7] "Well, I think people should be outraged about this - that the president and the Senate have left the agency in this precarious position for so long and that we now find ourselves without a quorum at all." Interview by NPR (Aug. 31, 2019) available at: https://www.npr.org/2019/08/31/756323244/fec-chair-lack-of-quorum-is-completely-unacceptable. Commissioners are appointed for staggered six-year terms, but a Commissioner whose term has expired may continue to serve until he or she is replaced (known as a "holdover"). My two colleagues on the Commission are both holdovers (Commissioner Weintraub having joined in 2002, Vice Chair Walther in 2006). This is not uncommon. Recently departed Commissioner Hunter served from 2008-2020, and Commissioner Petersen served from 2008-2019.

B. Administrative Enforcement and Judicial Review

Pursuant to FECA, any person may file a complaint with the FEC alleging a violation of the Act.[8] Although the complaint must conform to certain formalities,[9] there is no requirement for the complainant to have the same standing that is required to bring an action in court (that is, unlike in an Article III court, a "case or controversy" is not required for the FEC to consider a complaint).

At the initial stage of the enforcement process, the Commission considers the allegations in the complaint and any responses thereto, and determines whether there is "reason to believe" ("RTB") that there was a violation of the Act.[10] The affirmative vote of at least four Commissioners to find RTB is required to move forward with an investigation.[11] If the Commission affirmatively finds no RTB, then the Commission will "close the file" and notify the complainant.[12]

One unusual feature of FECA is the provision found at 52 U.S.C. § 30109(a)(8), which provides that "any party aggrieved by an order of the Commission dismissing a complaint… or by a failure of the Commission to act on such complaint during the 120-day period beginning on the date the complaint is filed, may file a petition with the United States District Court for the District of Columbia" (known as the "a8 suit" provision). In an a8 suit, the Court may declare that the dismissal was "contrary to law," and "may direct the Commission to conform with the Court's declaration within 30 days, failing which the complainant may bring, in their own name, a civil action to remedy the violation alleged in the original complaint (the so-called "private right of action" provision).

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[8] 52 U.S.C. §30109(a)(1).

[9] The complaint shall be in writing, signed and sworn to by the person filing such complaint, shall be notarized, and shall be made under penalty of perjury and subject to the provisions of section 1001 of title 18. 52 U.S.C. §30109(a)(1).

[10] 52 U.S.C. §30109(a)(2); 11 CFR §111.9. *See* Statement of Policy Regarding Commission Action in Matters at the Initial Stage of the Enforcement Process, 72 Fed. Reg. 12545 (Mar. 16, 2006) (At the initial stage of the enforcement process, the Commission may find "reason to believe" ("RTB"), dismiss the matter, dismiss the matter with an admonishment, or find "no reason to believe" ("no RTB").). The Act, however, provides no legal guidance as to what standard the Commission should apply in making an RTB determination; and Commissioners have frequently disagreed about what the standard should be. *See, e.g.* MUR 6269 (Kenneth R. Buck, *et. al.*), Statement of Reasons of Vice Chair Caroline Hunter and Commissioners Matthew Petersen and Donald McGahn at 4-7.

[11] The affirmative votes of four Commissioners are also required to authorize pre-probable conciliation, to find probable cause, to approve a conciliation agreement, and to institute *de novo* civil enforcement in federal district court. 52 U.S.C. §§30109(a)(2), (4)(A), and (6)(A).

[12] 72 Fed. Reg. at 12546.

Where a complainant files an a8 suit in a matter where the Commission lacked four affirmative votes to find RTB,[13] the so-called "controlling Commissioners" (those Commissioners who did not support a finding of RTB) issue a Statement of Reasons ("SOR") which becomes the agency's reasoning for the purpose of judicial review of the decision not to move forward[14] (assuming that the Commission has a quorum, and votes to "close the file", the latter of which, as discussed below, is no longer a pro forma ministerial action). Furthermore, the same deference is to be accorded to the reasoning of the "dissenting" Commissioners who vote not to move forward as is given the reasoning of the Commission when it acts affirmatively as a body to dismiss a complaint.[15] Upon review, if the Court finds the controlling Commissioners' decision to be contrary to law, the Act requires the Court to direct the Commission to conform with its ruling within 30 days."[16] If the Commission fails to do so, it may be held in contempt, and the complainant may seek to invoke the Act's private right of action provision. And therein lies the danger.

II. THE ORIGINS AND CONSQUENCES OF PROCEDURAL DISFUNCTION

A. Background

There are several organizations dedicated to limiting the free speech rights of Americans by changing the nation's campaign finance laws. The group is led by Citizens for Responsibility in Washington ("CREW"), Campaign Legal Center ("CLC"), Democracy 21, and Public Citizen. CREW promotes its efforts to "highlight the negative impact of money in politics" and its use of "aggressive legal action" to "reduce the influence of money in politics."[17] CLC "advocates for passing and enforcing strong campaign finance reforms."[18] Democracy 21 supports "an alternative way to finance presidential and congressional campaigns, based on matching small contributions with public funds,"[19] and has described the "legacy of Citizens United" as "destructive."[20] Public Citizen "champions a constitutional amendment to overturn Citizens United and works to enact crucial reforms to end the massive influx of corporate and special

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[13] *See FEC v. Nat'l Republican Senatorial Comm*., 966 F.2d 1471, 1476 (D.C. Cir. 1992) ("NRSC") (holding that the a8 provision may be invoked in the case of a so-called "split vote.").

[14] 966 F.2d 1471 at 1476 (citing *Common Cause v. FEC*, 842 F.2d 436, 449 (D.C. Cir. 1988)).

[15] *Stark v. FEC*, 683 F. Supp. 836, 841 (D.D.C. 1988) (citing *Democratic Congressional Campaign Comm. V. FEC*, 831 F.2d 1131, 1135 (D.C. Cir. 1987)).

[16] 52 U.S.C. §30109(a)(8)(C).

[17] https://www.citizensforethics.org/who-we-are/

[18] https://campaignlegal.org/issues/campaign-finance

[19] https://democracy21.org/small-donor-public-financing

[20] Fred Wertheimer, "The legacy of 'Citizens United' has been destructive. We need campaign finance reform," *The Washington Post* (Jan. 20, 2020).

interest money corrupting our democracy."[21] Make no mistake, these are all code phrases for seeking to limit free speech rights.[22]

Ironically, not all of these groups who champion themselves as being pro-disclosure publicly disclose the sources of their funding. But at least they are transparent about their agenda – to change campaign finance law to align with their preferred policy position, that is, to limit the ability of Americans to exercise their right to speak freely and participate fully in the civic discourse. They seek to change policy not by making the most persuasive case, but by seeking to silence those with whom they disagree by whatever means necessary. Their tactics are akin to accusing someone of driving 60 miles per hour in a 55 MPH zone in an effort to get the speed limit lowered to 40.[23]

B. Taking Advantage of FEC Administrative Enforcement and Judicial Review Procedures

With the help of ideologically aligned Commissioners, these professional complainants are taking advantage of the Commission's unique structure and recent loses of a quorum to pursue their strategy to limit speech, subvert the Commission's prosecutorial role, and allow private actors to make law via the courts. If permitted to succeed, this will limit the FEC's ability to meaningfully enforce FECA, set campaign finance policy, or provide lasting guidance. The result would be circumvention of the Act's provisions requiring bipartisan consideration of enforcement and regulations that govern federal election campaign finance and an upending of the separation of powers that reserves for the executive branch the role of prosecutor. Finally, while the FEC is designed to keep from giving one political party or candidate an advantage over the other, these professional complainants have no such checks or balances on picking partisan winners and losers through biased policy preferences.

The trend began with CREW aggressively pursuing a8 lawsuits. First, it would file a complaint alleging a violation of the Act, generally packed full of speculative and salacious accusations. In cases where the Commission lacked four affirmative votes to find RTB (commonly called "deadlocks", but in reality a reflection of the bipartisan structure of the Commission), the Commission would then vote to close the file, and the Commissioners who did not support moving forward would issue an SOR which the court would use as the basis of its judicial review in the complainant's a8 suit. Many of these lawsuits were focused on areas of the law where the complainants believed the law was not being "aggressively" enough enforced, but

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[21] https://www.citizen.org/topic/protecting-democracy/money-in-politics/

[22] *See McCutcheon v. FEC*, 572 U.S. 185, 191 (2014) ("Congress may not regulate contributions simply to reduce the amount of money in politics, or to restrict the political participation of some in order to enhance the relative influence of others." (citing *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 564 U. S. 721, 745-46 (2011)).

[23] Since 2000, these four groups have collectively filed hundreds of complaints against various respondents and over 40 actions against the Commission.

many were unsuccessful.[24] CLC recently adopted this tactic and is currently litigating against the Commission in seven separate actions.[25]

For nearly forty years, votes to defend the Commission in cases challenging dismissals of administrative complaints had been routine, pro forma acts, even when the Commission split on whether to proceed in an enforcement matter.[26] However, in 2014, this model shifted when Vice Chair Ann M. Ravel and Commissioner Ellen L. Weintraub issued a statement calling on the courts to "rethink" the longstanding principle of "deadlock deference".[27] The courts apply the principle of deference to the controlling Commissioners to provide for meaningful judicial review of Commission actions under the standard set forth in the Act (*i.e.* "contrary to law"), but Vice Chair Ravel and Commissioner Weintraub recast it as "put[ting] complainants at a unique disadvantage."[28] This view is at odds with the well-established principle that an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion.[29] In furtherance of their position, in an unprecedented move, Vice Chair Ravel and Commissioner Weintraub abstained on the vote to authorize defense of the (a)(8) lawsuit in *Public Citizen. et. al. v. FEC*.[30] By the time I joined the Commission, Commissioner Weintraub felt empowered to vote against defending a8 lawsuits in cases where she disagreed with the controlling Commissioners' position. I, however, wholeheartedly agree with Chairman Lee E. Goodman and Commissioners Caroline C. Hunter and Matthew S. Petersen when they explained:

> Some might attempt to argue that denying legal representation to a controlling Commission position with which one disagrees is a principled use of the vote to

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[24] *See, e.g., See, e.g., CREW v. FEC* ("CREW/CHGO"), 892 F.3d 434 (D.C. Cir. 2018) (affirming the District Court's dismissal of CREW's complaint alleging the FEC's dismissal of its complaint was contrary to law); *CREW v. FEC*, 475 F.3d 337 (D.C. Cir. 2007) (holding CREW lacked standing to pursue its a8 lawsuit); *CREW v FEC*, 363 F.Supp.3d 33 (D.D.C. 2018) (holding that there was no basis for judicial review of the FEC's handling of a complaint brought by CREW); *CREW v. FEC*, 267 F.Supp.3d 50 (D.D.C. 2017) (holding CREW lacked standing to pursue its a8 lawsuit).*CREW v FEC,* 799 F.Supp.2d 78 (D.D.C. 2011) (holding CREW lacked standing to pursue its a8 lawsuit).

[25] For a complete list of lawsuits brought by CLC against the FEC, visit https://transition fec.gov/law/litigation_CCA_Alpha.shtml#C.

[26] Statement of Chairman Lee E. Goodman and Commissioners Caroline C. Hunter and Matthew S. Petersen Regarding the Commission's Vote to Authorize Defense of Suit in *Public Citizen. et. al. v. FEC*, Case No. 14-CV-00148 (RJL) (Apr. 10, 2014), available at: https://www.fec.gov/resources/about-fec/commissioners/goodman/statements/PublicCitizenStatement_LEG_CCH_MSP.pdf.

[27] Statement of Vice Chair Ann M. Ravel and Commissioner Ellen L. Weintraub on Judicial Review of Deadlocked Votes (Jun. 17, 2014), available at: https://eqs.fec.gov/eqsdocsMUR/14044354045.pdf.

[28] *Id.* at 5.

[29] [redacted]

[30] The Commission ultimately voted to defend the agency in the a8 lawsuit. *Public Citizen, et al. v. Federal Election Commission*, Certification dated Mar. 18, 2014. However, the vote is not a matter of public record because under the Commission's policy, votes on litigation decisions are not made public.

> authorize defense granted by [the provision of the Act requiring four votes to authorize defense of suit]. But this "ends-justifies-the-means" approach ignores the public importance of deferential judicial review. There is nothing principled about censoring viewpoints to be presented before the courts.[31]

Commissioners who are ideologically aligned with the professional complainants have adopted another tactic to deny meaningful judicial review of the Commission's decision not to move forward in matters where Commissioners did not agree: refusing to vote to close the file. Under Commission procedures, if there are not four votes to move forward with a matter, the Commission then votes to close the file, and if there are four votes to close the file, the Commission takes the ministerial step of closing the file and then makes the case file public. Without four votes to close the file, the matter remains in limbo. As a result, complainants can then file an a8 lawsuit, and in the absence of four votes to defend the lawsuit (including in the event of a lack of quorum), seek a default judgment against the Commission.[32] Without four votes to authorize the defense of an a8 lawsuit, courts cannot review the agency's decision not to move forward with a matter, denying the agency's full participation in adversarial system.

A failure [redacted] to defend a case happened recently, [redacted]. When I joined the Commission, [redacted] there was already a pending a8 suit, and a court entered a default judgment against the Commission for having failed to put in an appearance in the delay suit (notwithstanding that the Commission lacked a quorum and was statutorily prevented from doing so). [redacted] The Commission considered the question of

[31] Statement of Chairman Lee E. Goodman and Commissioners Caroline C. Hunter and Matthew S. Petersen Regarding the Commission's Vote to Authorize Defense of Suit in *Public Citizen. et. al. v. FEC*, Case No. 14-CV-00148 (RJL) (Apr. 10, 2014), at 4, n. 16, available at: https://www.fec.gov/resources/about-fec/commissioners/goodman/statements/PublicCitizenStatement_LEG_CCH_MSP.pdf.

[32] Under Rule 55 of the Federal Rules of Civil Procedure, a plaintiff may seek a default judgment in a lawsuit where the defendant fails to "plead or otherwise defend." Fed. R. Civ. P. 55(d). Although disfavored, "default judgment may be entered against the United States, its officers, or its agencies only if the claimant establishes a claim or right to relief by evidence that satisfies the court." *Id.*

[33] [redacted]

[34] [redacted]

[35] [redacted]

whether to file a response to provide information to the Court (which I supported), but there were not four affirmative votes in favor of doing so.

Via their votes in [redacted] matters, my colleagues have intentionally prevented meaningful judicial review of the Commission's actions , and effectively empowered the complainant to usurp the role of the agency as prosecutor. And because of the FEC's confidentiality rules, without the agreement of at least four Commissioners, the agency cannot notify the courts or the public of its actions. As a result, respondents are denied resolution of the complaints filed against them, meaningful judicial review of the agency's actions is denied, and the FEC's reputation is undermined.

This procedural morass is exacerbated when, as now, the Commission lacks a quorum. First, the professional complainants file a complaint (knowing the Commission lacks a quorum and therefore cannot act on the complaint). Then, after the expiration of the statutory 120 period, they file suit against the Commission for its failure to act on the complaint (knowing that the Commission lacks a quorum and therefore cannot defend itself in the lawsuit[38]), and when the Commission does not defend itself, they file a default action against the Commission (knowing the Commission cannot explain itself to the court[39]). And when the Commission is still unable to

[36] [redacted]

[37] [redacted]

[38] As a last resort, some Respondents have sought to intervene in a8 suits arising from allegations against them. But even if the courts consistently allowed respondents to intervene in a8 suits as a matter of right under Federal Rule of Civil Procedure 24(a)(2) -- which CLC has on at least two occasions opposed -- that does not solve the problem because it necessitates the respondent redefending itself against the same complaint that it already defended itself against before the Commission, and shifts the burden to a private party to defend the Commission's exercise of its prosecutorial discretion (without the benefit of being privy to the Commission's consideration of the matter), which undermines the efficacy of the adversarial process.

[39] Recently the U.S. District Court for the District of Columbia stayed its default judgment against the Commission only after an amicus filed a brief explaining to the court that the FEC lacked a quorum at the time the complainant,

act, they seek to bring a private right of action, which, as explained below, is wielded as weapon against the speech rights of their political opponents.

C. The Threat of The Private Right of Action

The Act's private right of action provision lay dormant for decades. Then came *CREW v. FEC & American Action Network* ("AAN"), a matter that arose from a complaint alleging that a non-profit group failed to register and report as a political committee in violation of the Act and Commission regulations.[40] OGC recommended that the Commission find RTB, but there were not four affirmative votes for that recommendation, and the Commission ultimately voted to dismiss the matter.[41] CREW filed an a8 lawsuit, and the U.S. District Court for the District of Columbia found that the controlling Commissioners' reasoning was contrary to law and remanded the matter back to the FEC. On remand, the Commission reconsidered the matter. A motion to approve OGC's recommendations (including to find RTB) failed by a vote of 3-3 (with Commissioners Ravel, Weintraub, and Walther voting in the affirmative), and by a vote of 5-1 (with Commissioner Ravel dissenting) the Commission voted to close the file. The controlling Commissioners issued a new SOR. CREW sued again. The Court held that the agency had again misapplied FECA and remanded the matter back to the Commission again. The Commission having lacked four affirmative votes to appeal the Court's decision (the vote certification is not public), CREW then moved forward with its plan to bring a private right of action against AAN.[42]

On April 19, 2018, Commissioner Weintraub announced her support for CREW's private right of action in the AAN case, describing her position as "breaking the glass," and accusing her colleagues who did not support moving forward in the matter of working to "find a way to block meaningful enforcement of the law in this and any other dark-money matter that comes before us."[43] Putting her cards on the table, Vice Chair Weintraub concluded that "[t]his matter holds real promise of shining a bright light on a significant source of dark money" and "[p]lacing this

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CLC, filed its complaint and motion for default judgment. *Campaign Legal Center v. FEC, No. 20-cv-0588-BAH* (20-0588), Brief of Amicus Institute for Free Speech. Again, it is highly problematic that it has come to this.

[40] MUR 6589 (American Action Network, Inc.).

[41] *Id.*, Certification dated June 24, 2014.

[42] The Court expressed its belief that this was the first suit to be filed under FECA's so-called "citizen-suit provision." *CREW v. Am. Action Network*, 410 F. Supp. 3d 1, 7 (D.D.C. 2019), motion to certify appeal denied, 415 F. Supp. 3d 143 (D.D.C. 2019). *But see* https://www.fec.gov/resources/record/1997/oct97.pdf (discussing *DSCC v. NRSC*, No. 97-1493, which the FEC characterized as "the first contested case in which a private party has sued another private party for violations of [the Act]." In the same case the FEC in its amicus brief noted that "[i]n the 1970's there was one other private right of action filed." *DSCC v. NRSC*, No. 97-1493, Amicus Brief of Federal Election Commission (Aug. 15, 1997).

[43] Statement of Vice Chair Ellen L. Weintraub Regarding *CREW v. FEC & American Action Network* (Apr. 19, 2018), available at: https://www fec.gov/resources/cms-content/documents/2018-04-19-ELW-statement.pdf.

matter in CREW's hands is the best way to achieve that goal."[44] That should not have come as a surprise to anyone paying attention, because she often agrees with CREW's policy positions, especially when it comes to "dark money"[45] (or more accurately, CREW's efforts to limit the free speech rights of the groups with whom it disagrees).

However, placing an enforcement matter in the hands of a private complainant conflicts with Article II of the Constitution, which provides that the President alone is charged with the duty "to take care that the laws are faithfully executed."[46] Upon this basis, it is well established that executive branch agencies are afforded broad prosecutorial discretion, in particular, when it comes to decisions not to prosecute or enforce. In *Heckler v. Chaney*, the U.S. Supreme Court explained that "an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion," a conclusion "attributable in no small part to the general unsuitability for judicial review of agency decisions to refuse enforcement."[47] Moreover, an agency's refusal to institute proceedings shares the characteristics of the decision of a prosecutor in the Executive Branch not to indict[48] – a decision which has long been regarded as the special province of the Executive Branch."[49] This principle was recently reiterated and applied by the United States Court of Appeals for the District of Columbia in matter of *In re: Michael T. Flynn.*[50]

Allowing complainants to bring private rights of action creates the threat of chilling speech in an area of the law where the First Amendment has its "fullest and most urgent

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[44] *Id.* This matter remains in litigation. *See CREW v. American Action Network*, United States District Court for the District of Columbia, Civil Action No. 18-cv-945 (CRC).

[45] *See, e.g.* Nihal Krishan, "The New Chief Campaign Finance Regulator Has a Plan to Make Her Agency Matter for the First Time in Years," Mother Jones, Feb. 26, 2019, available at: https://www.motherjones.com/politics/2019/02/fec-ellen-weintraub-campaign-finance-interview-citizens-united-dark-money/ (accessed Aug. 19, 2020).

[46] U.S. Constitution, Article II. The D.C. District Court, in its decision allowing CREW's private right of action against AAN to proceed, contends that the private right of action provision "does not violate Article II because in every case in which it is available, the citizen with standing to invoke the provision does so 'in its own name to remedy a violation of federal law that has caused it injury,'" and "enforcement by private attorneys general has become a feature of many modern legislative programs" such as fair housing, antitrust and qui tam. 410 F. Supp. 3d at 27-28. This analysis fails to appreciate the heightened First Amendment protections afforded to political speech generally; and specifically, the reality that laws governing issues such as fair housing and antitrust are significantly less likely to be wielded as weapons against the free speech rights of one's ideological opponents than campaign finance laws.

[47] 470 U.S. 821, 831 (1985) (emphasis added). Moreover, agency enforcement decisions, to the extent they are committed to agency discretion, are not subject to judicial review for abuse of discretion. *CREW/CHGO*, 892 F.3d *at* 439-440.

[48] As the D.C. Circuit recently recognized, "[u]nder the APA, agency attorneys who bring civil enforcement actions are engaged in 'prosecuting functions.'" CREW/CHGO, 892 F.3d at 438 (citing *3M Co. v. Browner*, 17 F.3d 1453, 1456–57 (D.C. Cir. 1994)).

[49] 470 U.S. at 832.

[50] No. 20-5143 (June 24, 2020).

application."[51] Discussions of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by the U.S. Constitution,[52] but individuals and groups already feel their speech rights being chilled by the prospect of having to respond to a complaint filed at the FEC by an ideologically-opposed group, and then being hauled into court by the same complainant, where the FEC's confidentiality provisions do not apply, [53] and where a sympathetic judge may grant a plaintiff's discovery requests for documents that they never would have had access to within the FEC's enforcement process (such as membership lists and donor data). Moreover, "private enforcement" of FECA would circumvent the constitutional prohibition on attempts to disfavor certain viewpoints; that is, groups that support changing the state of the law can cherry-pick cases to bring to court without regard to viewpoint neutrality.

Like the litigation in *CREW v. American Action Network*,[54] [redacted] exemplify the dangers of the erosion of the FEC's prosecutorial role: [redacted][55] I wish there was more transparency about what happened in these matters so the public can fully understand the dangers ahead. This statement is a first step in that direction.[56]

J.E. Trainor, III

8/28/2020

James E. "Trey" Trainor III
Chairman

Date

[51] *Citizens United v. FEC*, 588 U.S. 310, 333 (2010).

[52] *Id.*

[53] *See* Disclosure of Certain Documents in Enforcement and Other Matters, 81 Fed. Reg. 50703 (Aug. 2, 2016); 52 U.S.C. § 30109(a)(4)(B)(i).

[54] *CREW v. Am. Action Network*, United States District Court for the District of Columbia, Civil Action No. 18-cv-945 (CRC).

[55] On August 11, 2020, the complainant in the MUR underlying *Campaign Legal Center v. FEC*, No. 20-cv-00809-ABJ (D.D.C. filed March 24, 2020),filed a notice with the U.S. District Court for the District of Columbia informing the court that, "[t]o date, Plaintiff has received no indication that the Commission has taken an action with respect to the underlying complaint." [redacted]

[56] It is my understanding that a single Commissioner cannot make an appearance in a pending action to vindicate his or her position or the actions taken by the Commission.

EXHIBIT A

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)
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[redacted]) MUR [redacted]

STATEMENT OF REASONS OF CHAIR JAMES E. "TREY" TRAINOR III

I. INTRODUCTION

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II. BACKGROUND

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III. LEGAL STANDARD

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10 [redacted]

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12 [redacted]

[redacted]

IV. ANALYSIS

[redacted]

[redacted]

[redacted] [redacted]

[redacted] [redacted]

[redacted] [redacted]

13 [redacted]

14 [redacted]

15 [redacted]

16 [redacted]

[redacted]

[redacted]

V. CONCLUSION

[redacted]

[17] [redacted]

[18] [redacted]

[19] [redacted]

[20] [redacted]

[21] [redacted]

[redacted]

8/28/2020

James E. "Trey" Trainor III
Chairman

Date

[22] [redacted]