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

STATEMENT OF CHAIRMAN ALLEN J. DICKERSON AND COMMISSIONERS SEAN J. COOKSEY AND JAMES E. "TREY" TRAINOR, III REGARDING CONCLUDED ENFORCEMENT MATTERS

For decades, members of the Federal Election Commission ("Commission") agreed to certain collegial norms. Most fundamentally, whatever their disagreements on the law, commissioners of all parties acknowledged that because the Federal Election Campaign Act ("FECA" or "Act") requires four affirmative votes to find reason to believe the law was violated, an enforcement matter that deadlocked 3-3 was concluded. Commissioners acted accordingly. Formal, invariably unanimous votes were taken to close the file in a matter and to authorize the Office of General Counsel ("OGC") to defend the agency in any subsequent legal challenges by complainants.

As has been widely understood, if seldom discussed, this convention has eroded in the last four years. First, the public was treated to the scandalous spectacle of the Commission—an independent agency of the United States government—defaulting in litigation before federal courts.[1]

Things went downhill from there.

In eight enforcement matters presently before the Commission,[2] our colleagues have made the unprecedented decision to refuse to close the file—even though the Commission took final votes on the merits of these complaints more than a year ago. The result has been chaos and an escalating collapse of institutional norms. Lawsuits have been filed against the Commission for "failing to act" even though we have, in fact, acted. We have affirmatively misled respondents by claiming these matters remain pending when they are concluded. And our actions have been intentionally shielded from both judicial and public review.

This cascade threatens to continue. But it need not. It is premised on the thin fiction that a deadlocked vote to close the file in a particular Matter Under Review

---

[1] *E.g.*, Statement of Vice Chair Weintraub Re: *CREW v. FEC & Am. Action Network* (Apr. 19, 2018).

[2] MUR 7516, Heritage Action for Am.; MUR 6589R, Am. Action Network; MURs 6915 & 6927, John Ellis Bush, *et al.*; MUR 7422, Greitens for Missouri, *et al.*; MURs 7427, 7497, 7524 & 7553, Nat'l Rifle Ass'n of Am. Political Victory Fund, *et al.*; MUR 7486, 45Committee, Inc.; MURs 7672, 7674 & 7732, Iowa Values, *et al.*; MUR 7726, David Brock, *et al.*.

("MUR") keeps the matter open perpetually—even where the Commission has voted on all the underlying merits. This assertion is unsupportable.

In our view, the eight matters our colleagues refuse to close have, nevertheless, long concluded. Where, as in these cases, votes have been taken as to all parties and statements of reasons have been included in the file by the commissioners declining to move forward, there is no basis for claiming that the Commission is continuing to deliberate. In these cases, our work is done and a vote to close the file, while welcome and administratively convenient, is legally immaterial.

* * *

For the past several decades, Congress's carefully crafted framework for Commission enforcement and judicial review has generally operated as designed. But recently, "for reasons they have yet to explain,"[3] several of our colleagues have held eight MURs hostage by refusing to provide their assent to closing the file. In public, one commissioner has argued that, rather than being resolved upon the Commission's declination to adopt an OGC enforcement recommendation, matters remain perpetually open until a vote to close the file succeeds.[4] That commissioner has also suggested that these files are left open for future reconsideration.[5]

This position misstates the law and sharply departs from the facts.

There is no legal support for the argument that a majority of the Commission must vote to close a file in order to conclude a matter. To the contrary, the Act precludes proceeding with enforcement without four affirmative votes to do so.[6] Accordingly, the United States Court of Appeals for the D.C. Circuit has long recognized the existence of "deadlock dismissals"—including in matters where the Commission has

---

[3] Statement of Reasons of Chairman Dickerson and Comm'rs Cooksey and Trainor at 1, PMUR 611/MUR 7425, Donald J. Trump Found., *et al.* (Feb. 22, 2022).

[4] Fed. Election Comm'n, Audio Recording of April 22, 2021 Open Meeting at 34:35, https://www.fec.gov/resources/cms-content/documents/OM2021042202.mp3 (Comm'r Weintraub: "I just want to say that I strongly disagree with Commissioner Cooksey that the close the file vote is ministerial…Sometimes we have a formal dismissal motion, and then a vote to close the file, but the close the file is not ministerial, and we know this because there are consequences for dismissing a case. It allows someone to sue…and that 60-day clock has never started to run until we actually closed the file. That is the trigger for dismissal.").

[5] *Id.* at 13:03 (Comm'r Weintraub: "[T]he one small power that is left to those of us who want to see the law enforced is that decision whether or not to dismiss the case, or whether there is some path forward – whether we could continue to work on it – and this policy [proposal to automatically close the file] would take that decision away from us.").

[6] 52 U.S.C. § 30109(a)(2).

deadlocked on the merits of enforcement before voting unanimously to close the file.[7] And in such matters—where "three Commissioners reject[] or fail[] to follow the General Counsel's recommendation"—"[t]he Commission or individual Commissioners" must put a statement of reasons into the file so that any reviewing court may determine "whether reason or caprice determined" the agency's action.[8] Courts have explicitly recognized that the statement of reasons of the controlling commissioners (*i.e.*, those who declined to proceed with enforcement) is necessary "to make judicial review a meaningful exercise."[9] After all, "[s]ince those Commissioners constitute a controlling group for purposes of the decision, their rationale necessarily states the agency's reasons for acting as it did."[10]

Thus, it is wrong to conflate the declination to proceed with enforcement and the attendant issuance of a statement of reasons with the nominal act of file closure. Instead, a dismissal, as a substantive enforcement decision, exists in an entirely different category from customary, non-statutory administrative acts such as closing the file.[11]

The theoretical possibility that commissioners might change their votes at some hypothetical future date, after having already adjudicated the merits of a complaint, does not alter this reasoning, for at least two reasons. First—and most obviously—the Commission *has already passed judgment* on the entirety of the merits in these

---

[7] *See, e.g.*, *CREW v. Fed. Election Comm'n*, 209 F. Supp. 3d 77, 83 (D.D.C. 2016) (noting that, in that case, "the Commissioners deadlocked 3-to-3 with respect to both [respondents] on whether to commence an investigation, dismissing CREW's complaints accordingly."); Certification ¶ 2, MUR 6589, Am. Action Network (June 24, 2014), https://www.fec.gov/files/legal/murs/6589/14044361924.pdf (reflecting that, despite "deadlocking" 3-3 on whether to proceed with enforcement, the Commission voted 6-0 to close the file).

[8] *Democratic Cong. Campaign Comm. v. Fed. Election Comm'n*, 831 F.2d 1131, 1135 (D.C. Cir. 1987) ("*DCCC*"). This 35-year-old precedent remains good law. *See, e.g.*, *Common Cause v. Fed. Election Comm'n*, 842 F.2d 436, 449 (D.C. Cir. 1988) ("A statement of reasons…is necessary to allow meaningful judicial review of the Commission's decision not to proceed.") (discussing *DCCC*); *see also id.* at 451 (R.B. Ginsburg, J., dissenting in part and concurring in part) ("I concur in part III of the court's opinion holding the *DCCC* rule applicable, prospectively, to all Commission dismissal orders based on tie votes when the dismissal is contrary to the recommendation of the FEC General Counsel."); *Campaign Legal Ctr. & Democracy 21 v. Fed. Election Comm'n*, 952 F.3d 352, 355 (D.C. Cir. 2020); *see also CREW v. Fed. Election Comm'n*, 993 F.3d 880, 894 (D.C. Cir. 2021) ("The Commission must provide a statement of reasons explaining dismissal of a complaint.").

[9] *Fed. Election Comm'n v. Nat'l Republican Senatorial Comm.*, 966 F.2d 1471, 1476 (D.C. Cir. 1992).

[10] *Id.* (citing *DCCC*, 831 F.2d at 1134–35).

[11] *See* Fed. Election Comm'n, "Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process," 72 Fed. Reg. 12545, 12545–12546 (Mar. 16, 2007) (describing dismissal, but not closing the file, as one of several substantive votes that the Commission may take).

matters and has explained its reasoning. This distinguishes such cases from, for example, a matter that the Commission is considering piecemeal over the course of several executive sessions but where it has yet to vote on all the enforcement questions presented.

Second, it is belied by our colleagues' handling of the MURs that they are currently hiding from view. Acting with a lawful quorum, the Commission has considered each of those MURs and has taken votes fully resolving their substance. But despite multiple efforts to close the relevant files, our colleagues have refused. And—crucially—they have not attempted to resolve these matters on the merits in the meantime. Instead, they have essentially ignored them. Under the leadership of a Democratic Chair, these matters were generally left off the Commission's executive session agenda (and, when they were considered, our colleagues declined to close the file). After a Republican became Chairman on January 1, 2022, the Commission again voted on whether to close the file in each of these MURs, and the Democratic and Independent commissioners voted against doing so.[12] Since then, each MUR has been placed on every subsequent agenda—only to be held over at the request of a Democratic commissioner. The truth is simple: our colleagues are weaponizing a nominal housekeeping act, not to allow future action, but to create the public impression[13] that we have not started our work, even though we have actually finished it.[14]

Apart from its dependence upon (and perpetuation of) legal and factual errors, this practice also creates numerous practical problems.

First, it undermines Congress's carefully crafted framework by depriving courts of the statements of reasons that are necessary "to make judicial review a meaningful

[12] *See, e.g.*, Certification, MUR 7516, Heritage Action for Am. (Jan. 11, 2022); Certification, MUR 6589R, Am. Action Network (Jan. 11, 2022); Certification, MURs 6915 & 6927, John Ellis Bush, *et al.* (Jan. 11, 2022); Certification, MUR 7422, Greitens for Missouri, *et al.* (Jan. 13, 2022); Certification, MURs 7427, 7497, 7524 & 7553, Nat'l Rifle Ass'n of Am. Political Victory Fund, *et al.* (Jan. 11, 2022); Certification, MUR 7486, 45Committee, Inc. (Jan. 11, 2022); Certification, MURs 7672, 7674 & 7732, Iowa Values, *et al.* (Jan. 11, 2022); MUR 7726, David Brock, *et al.* (Jan. 11, 2022).

[13] *See, e.g.*, Order (ECF No. 32) at *5, *Campaign Legal Ctr. v. Fed. Election Comm'n*, No. 1:20-cv-809-ABJ (D.D.C. Apr. 21, 2022) ("When the FEC takes a vote on an administrative complaint, the results are publicly announced; it does not take a FOIA request to learn what transpired." Rather, where the FEC has not "made its vote and rationale for the vote public . . . there is no reason for the Court to assume that the redacted portions of an otherwise unrelated document could report a vote that should have been publicly reported but was not.").

[14] FECA prohibits any person, including commissioners and Commission staff, from publicly discussing any MUR unless a respondent waives confidentiality. 52 U.S.C. § 30109(a)(12)(A)–(B). Thus, while the existence of a complaint is known to a complainant, the work the agency has done on that complaint typically remains secret to the outside world until the agency closes the file and places its contents on the public record. 11 C.F.R. § 4.4(a)(3).

exercise."[15] It cannot be true that a vote of four commissioners is really required to conclude a matter, because this would stymie the judicial review for which Congress deliberately provided. This is clear from the statutory text itself; one cannot seriously argue that an *affirmative* effort to hold a file open despite the exhaustion of the Commission's statutory role is in fact a *failure* to act as that phrase is used in FECA. Our colleagues' pretention otherwise frustrates Congress's explicit statutory grant of federal court jurisdiction to review certain Commission actions.

Second, as a matter of policy, holding a matter open despite a vote rejecting OGC's enforcement recommendation is a disingenuous effort to "Commission shop."[16] 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. It also prejudices respondents, who are entitled to learn when the Commission has voted not to pursue enforcement in connection with a complaint about their (often constitutionally protected) activity. And it 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.

Third, this recent trend exercises a corrosive influence on the work and collegiality of the Commission. Once the Commission has voted and declined to pursue enforcement by the required margin, responsible stewardship of the public resources with which we are entrusted compels us to move forward with the other business of the agency. No MUR 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 to review and evaluate a complaint, 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? This cannot be what Congress, the public, or the regulated community expects (or deserves) from this agency.

* * *

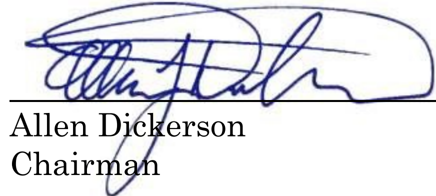
It is our earnest hope that the Commission will turn from the spiral in which it finds itself and restore the processes that allowed for efficient consideration of our docket and thorough judicial review of our decisions. But for now, with decades of collegial practice weaponized against the interests of complainants, respondents, and the law itself, let us be clear.

---

[15] *Nat'l Republican Senatorial Comm.*, 966 F.2d at 1476.

[16] This is not the first time that this has been observed. *See, e.g.*, Statement of Reasons of Vice Chair Dickerson, MUR 7486, 45Committee, Inc. (Dec. 9, 2021); Statement of Chairman Trainor on the Dangers of Procedural Disfunction (Aug. 28, 2020).

"Closing the file" has no legal significance where the Commission has fully decided the merits of a MUR. Rather, in the matters our colleagues continue to hold open—where the Commission has voted and chosen not to proceed with enforcement, and commissioners rejecting OGC's enforcement recommendation have provided statements of reasons explaining their votes—the Commission has concluded its deliberations.

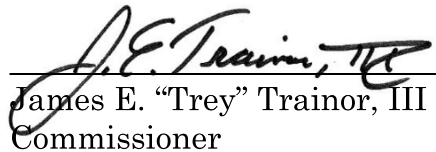


May 13, 2022
Date

Allen Dickerson
Chairman

May 13, 2022
Date

Sean J. Cooksey
Commissioner



May 13, 2022
Date

James E. "Trey" Trainor, III
Commissioner