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12 Stetson J. Advoc. & L. 144 (2025)

The Positive Power of Three at the FEC:

Project Ripcord

Tom Moore

Senior Fellow for Democracy Policy
Center for American Progress
Washington, D.C.

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I. Introduction

144. Between 2018 and 2022, a remarkable plan unfolded at the U.S. Federal Election Commission (FEC), one that allowed significant enforcement complaints that would have otherwise been dismissed to move forward on an unusually solid procedural posture.

145. Personnel changes on the Commission have caused the plan — known informally as "Project Ripcord"[2]— to be mothballed for the moment, but the underlying theory remains solidly grounded in the text and spirit of the Federal Election Campaign Act (FECA).[3]

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1 Tom Moore is a Senior Fellow for Democracy Policy, Center for American Progress. Moore previously served as counsel and chief of staff to Commissioner Ellen L. Weintraub of the Federal Election Commission. He was honored to have participated in the development and implementation of the voting and litigation strategy described in this Article and to have assisted in the drafting and editing of the Commissioner's statements on these topics.

2 The term refers to the device parachutists pull to activate their emergency reserve parachute when their primary parachute has failed. As partisan obstruction had caused the Commission's primary enforcement mechanism (four-Commissioner votes to pursue complaints) to fail, other methods were sought within the Federal Election Campaign Act.

3 52 U.S.C. § 30101 et. seq.

146. This Article aims to describe how Project Ripcord works and detail its legal basis, so that when the day arrives when the FEC again enjoys the service of three commissioners who are interested in vigorous enforcement of federal campaign-finance law, those commissioners will have a playbook from which to operate should they choose to do so.

II. The Federal Election Commission

147. The FEC is the independent federal agency with the mission to "protect the integrity of the federal campaign finance process by providing transparency and fairly enforcing and administering federal campaign finance laws."[4] It has exclusive jurisdiction over the civil enforcement of the law.[5]

148. The Commission comprises six commissioners, no more than three from any one political party. Commissioners are appointed by the President and confirmed by the Senate.[6] They step into a running six-year term, during which they can only be replaced for cause, and after which they can be replaced at any time by the President. Once their term ends, Commissioners may serve until the Senate confirms their replacement.[7]

149. The Act requires all decisions exercising Commission duties or powers to be supported by at least a majority of commissioners, and specifically calls out dismissals of administrative complaints as requiring Commission action.[8]

150. The most significant Commission powers require the affirmative vote of at least four Commissioners: filing and appealing lawsuits; defending litigation challenges to its enforcement dismissals or inaction; issuing advisory opinions; promulgating regulations; conducting investigations; and referring matters to other law enforcement agencies.[9] The four-vote requirement has the effect of requiring bipartisan support for these actions.

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4 See "Mission and History," FEDERAL ELECTION COMMISSION ("The Federal Election Commission (FEC) is the independent regulatory agency charged with administering and enforcing the federal campaign finance law. The FEC has jurisdiction over the financing of campaigns for the U.S. House, Senate, Presidency and the Vice Presidency").

5 52 U.S.C. § 30106(b)(2)(granting the Commission "exclusive jurisdiction with respect to" the Act).

6 52 U.S.C. § 30106(a)(1).

7 52 U.S.C. § 30106(a)(2)(B) ("A member of the Commission may serve on the Commission after the expiration of his or her term until his or her successor has taken office as a member of the Commission").

8 52 U.S.C. §30106(c).

9 52 U.S.C. § 30106(c) ("The affirmative vote of 4 members of the Commission shall be required in order for the Commission to take any action in accordance with paragraph (6), (7), (8), or (9) of section 30107(a) of this title"). See also 52 U.S.C. § 30107(a)(6)-(9) ("(6) to initiate (through civil actions

III. The Complaint Process

151. The FEC's enforcement of the Act is driven by administrative complaints; anyone who believes the Act has been violated can file a complaint with the Commission.[10]

152. Complaints generally follow this path: The Commission's Office of General Counsel (OGC) reaches out to the alleged violator (the "respondent") and analyzes both the complaint and the response. It then writes a General Counsel's Report (GCR) for the Commission's consideration. The Commission then ordinarily votes on whether to find there is "reason to believe" the respondent has violated the Act (an "RTB vote," in Commission parlance). This threshold determination requires four affirmative votes.[11]

153. A 3–3 vote on such a motion means the motion fails, but, as FEC Commissioner Ellen L. Weintraub notes, "Standard parliamentary procedure, the Act, and common sense all agree that when a vote on a motion — *any* motion — fails, no action has taken place."[12] When an RTB motion fails, it can be followed up by a similar motion, no motion at all, or a motion to dismiss.[13] Only when a majority of the Commission votes in favor of a motion to dismiss is the matter dismissed.[14]

154. If the Commission does vote to find RTB, it can either launch an investigation or it can begin settlement talks with the respondent if the violation is already so well-established that there would be little more for an investigation to uncover. After an

for injunctive, declaratory, or other appropriate relief), defend (in the case of any civil action brought under section 30109(a)(8) of this title) or appeal any civil action in the name of the Commission to enforce the provisions of this Act and chapter 95 and chapter 96 of title 26, through its general counsel; (7) to render advisory opinions under section 30108 of this title; (8) to develop such prescribed forms and to make, amend, and repeal such rules, pursuant to the provisions of chapter 5 of title 5, United States Code, as are necessary to carry out the provisions of this Act and chapter 95 and chapter 96 of title 26; and (9) to conduct investigations and hearings expeditiously, to encourage voluntary compliance, and to report apparent violations to the appropriate law enforcement authorities").

10 52 U.S.C. § 30109(a)(1) ("Any person who believes a violation of this Act . . . has occurred may file a complaint with the Commission. Such 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"). The Commission may also internally generate enforcement matters, see § 30109(a)(2), but this tends to be employed more against routine violations.

11 52 U.S.C. § 30109(a)(2) (requiring "an affirmative vote of 4 of its members" to find "reason to believe" "that a person has committed, or is about to commit, a violation of this Act").

12 Ellen L. Weintraub, Statement of Commissioner Ellen L. Weintraub on the Voting Decisions of FEC Commissioners, FED. ELECTION COMM'N, at 9 (Oct. 4, 2022).

13 Commission Directive 10(k) incorporates Robert's Rules to govern matters it does not address directly. Directive 10, FED. ELECTION COMM'N, at 5. (Robert's Rules 38:1 allows for the "renewal" of a failed motion immediately if there is a "significant change in the wording." At the next meeting, the identical motion can be offered).

14 See 52 U.S.C. §§30109(a)(1) (referring to "a vote to dismiss"); 30109(a)(8)(A) (referring to "an order of the Commission dismissing a complaint").

investigation, the Commission votes on whether there is probable cause that a violation has occurred, and if such a vote is successful, proceeds to negotiate a conciliation agreement with the respondent.[15]

155. While the complaint is active, the Act requires that enforcement matters be kept confidential.[16]

IV. Lawsuits Against the Commission

156. The Act contains an unusual provision, 52 U.S.C. §30109(a)(8), that allows complainants to challenge in federal court both the Commission's dismissals of — and inaction on — administrative complaints. Project Ripcord puts just about every word of §30109(a)(8) to use, so it is worth examining in detail:

> *(A) Any party aggrieved by an order of the Commission dismissing a complaint filed by such party under paragraph (1), 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.*

157. This establishes the two types of enforcement lawsuits complainants may file: actions challenging the Commission's (1) dismissal of the complaints they have filed or (2) failure to act upon them.[17] It also requires that all such lawsuits be filed in the U.S. District Court for the District of Columbia. Within the Commission, these are known as "(a)(8) suits."

> *(B) Any petition under subparagraph (A) shall be filed, in the case of a dismissal of a complaint by the Commission, within 60 days after the date of the dismissal.*

158. This sets a timeline for dismissal suits. It is an unremarkable provision except that it can be used to determine the moment when the Commission dismisses an enforcement complaint.

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15 52 U.S.C. § 30109(a)(4)(A).

16 52 U.S.C. §30109(a)(12): "(A) Any notification or investigation made under this section shall not be made public by the Commission or by any person without the written consent of the person receiving such notification or the person with respect to whom such investigation is made. (B) Any member or employee of the Commission, or any other person, who violates the provisions of subparagraph (A) shall be fined not more than $2,000. Any such member, employee, or other person who knowingly and willfully violates the provisions of subparagraph (A) shall be fined not more than $5,000."

17 While this section appears to authorize any aggrieved party to file suit, it is only those aggrieved parties who have filed "such complaint" as the Act authorizes — that is, aggrieved complainants.

> *(C) In any proceeding under this paragraph the court may declare that the dismissal of the complaint or the failure to act is contrary to law, and 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.*

159. There's a lot going on in this paragraph. First, it establishes that the job of a court evaluating dismissal and failure-to-act suits is to determine whether the Commission's action or inaction is "contrary to law."

160. Second, If the court does so determine, it "may" — but is not required to — remand the matter to the Commission on a 30-day deadline. In a failure-to-act suit, the court's direction to the Commission is that it act on the administrative complaint, but not that it act in any particular way. In a dismissal suit, the direction is also that the Commission act, generally speaking, on the complaint, but that if dismisses the complaint again, it not cite the grounds cited before.

161. Third, if the Commission fails to meet the deadline the court sets, the complainant may sue the respondent directly in federal court "to remedy the violation involved in the original complaint." This is known as a "third-party lawsuit." Note well that even when the initial lawsuit had concerned the Commission's failure to act, the third-party lawsuit challenges the substance of the original complaint, not the delay in action. This is key.

162. When a complainant sues over the Commission's dismissal or failure to act on its complaint, the Commission votes on whether to defend against the lawsuit. This vote requires four affirmative votes to succeed.[18]

V. Recent Commission History

A. Late 1980s–Early 90's: D.C. Circuit Creates the 'Controlling Commissioners' Doctrine

163. Much of the trouble the Commission has had in enforcing the law stems from the "controlling commissioner" doctrine, which holds that when a non-majority of the Commission votes to block an enforcement matter from proceeding on a matter the agency's lawyers recommended pursuing, they are required to write a "Statement of Reasons" explaining their RTB vote, and a court examining the subsequent dismissal will look to — and defer to — that non-majority's reasoning when determining whether the dismissal was contrary to law.

18 52 U.S.C. § 30107(a)(6), 52 U.S.C. § 30106(c).

164. In some ways, this makes sense — when the Commission's general counsel recommends a dismissal, the Commission votes to dismiss, and the dismissal is challenged, that's easy: a court can look to the General Counsel's Report ("GCR") for the Commission's reasoning (or any factual and legal analysis the Commission provides with its majority vote to dismiss, which are frequently the same thing).

165. But when the agency's lawyers recommend pursuing the complaint and the Commission instead votes to dismiss, a court examining a challenge cannot look to the GCR since the Commission did not follow its legal reasoning and recommendations.

166. The court's charge under the statute is to determine whether the dismissal is contrary to law, not necessarily whether the Commission's reasoning was faulty. But the D.C. Circuit, over time, took harmful shortcuts that empowered less than a majority of commissioners to completely control the Commission's enforcement efforts.

167. The doctrine was established through three key D.C. Circuit cases:[19] 1987's *Democratic Cong. Campaign Comm. v. Fed. Election Com'n* ("*DCCC*"),[20] 1988's *Common Cause v. Federal Election Com'n* ("*Common Cause*"),[21] and 1992's *Federal Election Com'n v. NRSC* ("*NRSC*").[22]

168. In *DCCC*, the court granted the Commission the opportunity to go back and cast (and explain) a four-or-more-commissioner precedential vote on the matter, to which a district court should defer. The court stated, "Because we have no explanation why three Commissioners rejected or failed to follow the General Counsel's recommendation, we are unable to say whether reason or caprice determined the dismissal of DCCC's complaint." Notably, it did not require the Commission to provide such an explanation.

169. *Common Cause* required a Statement of Reasons in situations where an RTB vote had deadlocked and the Commission had subsequently voted to dismiss the matter. That Statement of Reasons, from those commissioners who had voted No on the RTB motion, would illuminate the Court's understanding of the dismissal before it. Notably, the court would not defer to this three-commissioner, non-precedential statement.[23]

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19 These cases are discussed in much greater detail in Ellen L. Weintraub, Statement On the Opportunities Before the D.C. Circuit in the New Models Case To Re-Examine *En Banc* Its Precedents Regarding 'Deadlock Deference,' FED. ELECTION COMM'N, at 3–8 (Mar. 2, 2022).

20 *Democratic Cong. Campaign Comm. v. Fed. Election Com'n* ("*DCCC*"), 831 F.2d 1131 (D.C. Cir. 1987).

21 *Common Cause v. Federal Election Com'n* ("*Common Cause*"), 842 F.2d 436 (D.C. Cir. 1988).

22 *Federal Election Com'n v. NRSC* ("*NRSC*"), 966 F.2d 1471 (D.C. Cir. 1992).

23 *Common Cause*, 842 F.2d at 449.

170. In *NRSC*, the court combined *DCCC* and *Common Cause* together into something unrecognizable. The court took *DCCC*'s deference and *Common Cause*'s required Statement of Reasons and held that courts must defer to the Statement of Reasons the three blocking commissioners write. "Since those Commissioners constitute a controlling group for purposes of the decision, their rationale necessarily states the agency's reasons for acting as it did," wrote the court.[24]

171. This marked the beginning of the judicial conflation between failed RTB votes and successful dismissal votes. The D.C. Circuit failed to recognize — and continues to fail to recognize — that the outcome of a failed RTB vote does not automatically determine the outcome of a dismissal vote. The two motions are separate, the votes on them are taken at different times, and they have different lineups of commissioners voting for them.

B. 2008: Personnel Changes Bring Obstructed Votes

172. In 2008, the entire Republican side of the Commission turned over. These three new commissioners employed a different voting strategy, voting as a bloc to, well, block enforcement of major enforcement complaints.[25]

173. Voting as a bloc had the effect of requiring unanimous support for pursuing enforcement complaints; assuming all Democratic commissioners wished to pursue a matter, the votes of all three Republican commissioners would have to be secured in order to meet the four-vote threshold for an RTB motion to succeed. It was all or nothing.

174. The Republicans' change in voting strategy had an immediate impact. A study conducted by former FEC Chair Ann M. Ravel found that the share of substantive votes resulting in partisan deadlock rose from 2.9 percent in 2006 to 30 percent in 2016.[26] (That number understates the problem, as that 30 percent included the most important matters before the Commission.)[27]

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24 *NRSC*, 966 F.2d at 1476.

25 Statement of Commissioner Ellen L. Weintraub on the Voting Decisions of FEC Commissioners, FED. ELECTION COMM'N, at 6 (Oct. 4, 2022) (describing 2008 as the year when a "fresh crop of anti-enforcement commissioners discovered and set about abusing their ability to block action on even the most meritorious and important complaints"). An NBC News study found that the new Republican commissioners voted as a bloc 98 percent of the time during the study period. See Ann M. Ravel, Dysfunction and Deadlock: The Enforcement Crisis at the Federal Election Commission Reveals the Unlikelihood of Draining the Swamp, FED. ELECTION COMM'N, at 8 (Feb. 2017) ("Ravel Dysfunction Report").

26 RAVEL DYSFUNCTION REPORT at 1.

27 Statement of Commissioner Ellen L. Weintraub on the Voting Decisions of FEC Commissioners, FED. ELECTION COMM'N (Oct. 4, 2022), (noting that since 2008, "blocking pursuit of complaints along par-

175. And make no mistake: This was purely a Republican voting strategy. "In every matter where the Commission's Office of General Counsel has recommended RTB and the Commission has split on the recommendation," Weintraub wrote in 2022, "the voting line-up has been the same: the Republican commissioners have voted against enforcement and the Democratic and Independent commissioners have voted to approve our counsel's recommendations to proceed."[28]

176. According to *The New York Times*, this "created a rapidly expanding universe of unofficial law, where Republican commissioners have loosened restrictions on candidates and outside groups simply by signaling what standards they are willing to enforce."[29]

C. 2018: It Gets Worse: CREW v. FEC *("CHGO")*

177. Starting in the late 1980s, *DCCC*, *Common Cause*, and *NRSC* had made challenges to Commission dismissals more difficult, but not impossible. The 2008 crop of obstructionist commissioners forced dismissals of many more matters. And then in 2018, in *CREW v. FEC* ("*CHGO*"),[30] the D.C. Circuit shattered the Commission's ability to enforce the law.[31]

178. The panel decision held that in matters where the naysaying commissioners cite "prosecutorial discretion" in their Statements of Reasons explaining their No votes, the dismissal is unreviewable by courts. "Prosecutorial discretion is," writes Weintraub,

> a principle of administrative law that allows an agency to decline to pursue a matter even if the law may have been violated. The bases for prosecutorial discretion are issues that do not go to the merits of a matter, but instead go to the prudence of pursuing a particular allegation. Some things in this world may, indeed, not be worth making a federal case over. An excess contribution of $5. A complaint describing activity that occurred in the previous

tisan ideological lines has become the rule, *especially* regarding the Commission's most consequential matters," at 6, and noting further that "In every matter where the Commission's Office of General Counsel has recommended RTB and the Commission has split on the recommendation, the voting line-up has been the same: the Republican commissioners have voted against enforcement and the Democratic and Independent commissioners have voted to approve our counsel's recommendations to proceed," at n. 27).

28 Statement of Commissioner Ellen L. Weintraub on the Voting Decisions of FEC Commissioners, FED. ELECTION COMM'N, at n. 27 (Oct. 4, 2022).

29 Nicholas Confessore, *Election Panel Enacts Policies by Not Acting*, N.Y. TIMES (Aug. 26, 2014).

30 *Citizens for Responsibility & Ethics in Wash. v. FEC*, 892 F.3d 434 (D.C. Cir. 2018) ("*CHGO*"). See also *Crew v. FEC,* (15-2038 / 17-5049).

31 Statement of Commissioner Ellen L. Weintraub on the Voting Decisions of FEC Commissioners, FED. ELECTION COMM'N, at 6 (Oct. 4, 2022) (calling the decision "a stunning blow to the Commission's ability to enforce the law").

> century. A complaint against an individual who is deceased. It is appropriate to exercise the Commission's prosecutorial discretion in dismissing such complaints, and I have voted many times to so exercise it.[32]

179. In the *CHGO* matter, those commissioners had written in their Statement of Reasons that "this case did not warrant the further use of Commission resources."[33] The overall statement satisfied the trial court, which held that the naysaying commissioners had acted within their discretion. But on appeal, a D.C. Circuit panel held that their invocation of those eleven words alone was due absolute and unreviewable deference, that is, that those words put the dismissal beyond the reach of any court to overturn or even question it.

180. The D.C. Circuit followed up the following year in a case also called *CREW v. FEC* (regarding a dark-money group called "New Models" and thus dubbed the *New Models* case), which made matters still worse.[34]

181. In *New Models*, the cited prosecutorial discretion was even flimsier. Republican commissioners spent 32 pages and 138 footnotes providing their factual and legal analysis of the matter — every bit of which was subject to legal challenge. *But in the very last sentence* of their Statement of Reasons, they wrote, "For these reasons, and in exercise of our prosecutorial discretion, we voted against finding reason to believe that New Models violated the Act by failing to register and report as a political committee and to dismiss the matter."[35] And that was that. In upholding the dismissal, the district court wrote, "[H]ow closely may a court scrutinize the FEC's exercise of prosecutorial discretion in dismissing an administrative complaint? The Circuit's answer: not at all."[36]

182. "All the Republican commissioners need to do is include the magic words 'prosecutorial discretion' and a court will then decline to review the action," Paul S. Ryan, then Common Cause's vice president for litigation, told *The New York Times*.[37]

183. The absurd peak — so far — of judicial deference to Republican FEC commissioners' invocation of prosecutorial discretion is in the MAGA PAC matter (MUR 7784).[38]

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32 Ellen L. Weintraub, Supplemental Statement of Reasons of Commissioner Ellen L. Weintraub, MUR 7784 (Make America Great Again PAC, *et al.*), FED. ELECTION COMM'N, at 2 (July 14, 2022).

33 Statement of Reasons of Vice Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Lee E. Goodman, FED. ELECTION COMM'N, AT 1 (Nov. 6, 2015).

34 *Citizens for Responsibility & Ethics in Wash. v. FEC*, 923 F.3d 1141 (2019) ("*New Models*").

35 Statement of Vice Chair Caroline C. Hunter and Commissioner Lee E. Goodman, MUR 6872 (*New Models*), FED. ELECTION COMM'N (Dec. 20, 2017).

36 Opinion, *Citizens for Resp. and Ethics in Wash. v. FEC,* 1:18–00076–RC, at 14 (Mar. 29, 2019).

37 Shane Goldmacher, *Democrats' Improbable New F.E.C. Strategy: More Deadlock Than Ever*, N.Y. TIMES (June 8, 2021).

38 See MUR 7784 (Make America Great Again PAC, *et al.*), FED. ELECTION COMM'N (June 15, 2018).

They dismissed a complaint alleging a *$781 million violation* — "the largest potential amount in violation in the Commission's history," as Weintraub noted[39] — on, yes, prosecutorial discretion grounds. The district court and D.C. Circuit panel reviewing the MAGA PAC dismissal cited *New Models* to uphold the dismissal.[40]

184. There is a late-breaking bright spot here — a very bright spot. The Campaign Legal Center petitioned the full D.C. Circuit for *en banc* rehearing of MAGA PAC[41] and a companion case that raises many of the same challenges to *New Models, End Citizens United PAC v. FEC*.[42] Circuit courts rarely grant such petitions,[43] but in October 2024, the D.C. Circuit granted the petition as to *End Citizens United*.[44] The full D.C. Circuit has heard oral arguments in that case on February 25, 2025,[45] and ordered the *MAGA PAC* case to be held in abeyance,[46] presumably until it decides *End Citizens United*.

185. Only the full circuit can overturn the decision of a circuit panel; it is difficult to see why the D.C. Circuit agreed to rehear *End Citizens United* if a majority of judges voting did not intend to overturn the *New Models* precedent it relies upon.

VI. Response: Project Ripcord

A. Ingredients are Assembled

186. The first outlines of Project Ripcord began to emerge in Spring 2018. Only four commissioners were serving on the Commission at that time: Weintraub, a Democrat; a Democratic-leaning independent commissioner; and two Republican commissioners.[47]

39 Supplemental Statement of Reasons of Commissioner Ellen L. Weintraub, MUR 7784 (Make America Great Again PAC, *et al*.) FED. ELECTION COMM'N, at 2 (July 14, 2022).

40 *Campaign Legal Center. v. Fed. Election Comm'n*, No. 22-1976 (D.D.C. Dec. 8, 2022) and *Campaign Legal Ctr. v. FEC*, 89 F.4th 936 (D.C. Cir. 2024), respectively.

41 *Campaign Legal Center v. FEC* ("*MAGA PAC*"), FED. ELECTION COMM'N, 22–1976 / 22-5339.

42 *End Citizens United PAC v. FEC*, FED. ELECTION COMM'N, 21–2128 / 22–5277.

43 See *Reviewed:* En Banc *Review*, D.C. Circuit Review, Notice & Comment, YALE JOURNAL ON REGULATION (September 30, 2017), (reporting that the D.C. Circuit granted just 8 discretionary en banc petitions from 2010–2017 – one a year).

44 Order, *End Citizens United PAC v. FEC*, FED. ELECTION COMM'N, 21–2128 / 22–5277 (Oct. 15, 2024).

45 Order, *End Citizens United PAC v. FEC*, FED. ELECTION COMM'N, 21–2128 / 22–5277 (Oct. 15, 2024).

46 Order, *Campaign Legal Center v. FEC*, ("MAGA PAC"), FED. ELECTION COMM'N, 22–1976 / 22–5339 (Oct. 15, 2024).

47 Two commissioners who had resigned had not yet been replaced by the President: Democrat Ann M. Ravel had resigned in March 2017 and Republican Lee E. Goodman resigned in February 2018. The Commission had difficulty maintaining a full complement of commissioners from 2017 to 2022. During two periods, from August 2019 to May 2020, and then July 2020 to December 2020, its

187. This created an unusual voting environment. When the Commission has its full complement of six commissioners, the four-vote majority it needs to exercise its most significant powers can be assembled without the votes of two of them. But with only four commissioners on board, every one of them must vote in favor of any motion that requires four votes.

188. This meant that Weintraub could unilaterally control the outcome of any motion that required four affirmative votes to succeed. This was most motions — the Commission had long before passed a directive that went well beyond the requirements of the Act and required at least four votes for almost every motion, including motions to dismiss.[48]

189. Ordinarily, strategic use of the four-vote requirement thwarted the enforcement of the law; since 2008, Republican commissioners had done so by voting as a bloc to withhold the necessary fourth vote from many RTB motions, thus blocking the Commission's pursuit of those complaints.

190. By the spring of 2018, Weintraub had realized that a fourth vote could also be withheld to *promote* the enforcement of the law in two critical situations: Motions to dismiss matters and motions to defend the Commission against lawsuits challenging dismissals and failures to act. Both of these were powerful, but used together, they were extraordinarily powerful: They could control the outcome of every matter upon which the Commission had split along partisan lines.

191. The American Action Network matter,[49] opened in 2014, spurred Weintraub to take action. Even by Commission standards, the course this matter had taken was unusually tortuous:

- In Round One, the RTB vote had split along partisan lines, the Commission had voted unanimously to dismiss the complaint,[50] the Republicans had written a

membership dropped to three, leaving the Commission without enough commissioners to cast the four affirmative votes required under the Act to exercise the Commission's most significant powers. See 52 U.S.C. § 30106(c).

48 Directive 10(E)(3), FED. ELECTION COMM'N ("Any principal or secondary motion that exercises a duty or power of the Commission under the Act shall require four votes for approval"); *see also* Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process, 72 FED. REG. 12545, 12546 (Mar. 16, 2007) ("As with other actions taken by the Commission, dismissal of a matter requires the vote of at least four Commissioners").

49 See MUR 6589, FED. ELECTION COMM'N, and MUR 6589R, FED. ELECTION COMM'N, respectively. (The "R" is for "Remand.") This timeline is explained in great detail in Statement of Commissioner Ellen L. Weintraub, *American Action Network*, MUR 6589R, FED. ELECTION COMM'N (Sept. 30, 2022).

50 For both votes, see Certification, *American Action Network,* MUR 6589, FED. ELECTION COMM'N (June 26, 2014).

Statement of Reasons explaining their votes,[51] and the dismissal had been successfully challenged in court (with the district court writing in September 2016 that the Republicans' theory of the case "blinks reality").[52]

- In Round Two, on remand, the Commission again split along partisan lines on RTB and again voted to dismiss the matter,[53] the Republicans had again written a Statement of Reasons explaining their votes,[54] and the dismissal had again been successfully challenged in court (this time with the same district court asking of the Republicans' new theory of the case, "Seriously?"[55])

192. The court wearily remanded the matter to the Commission once again in March 2018, directing the Commission to conform with its declaration by April 19, 2018, and noting: "If the FEC does not timely conform with the Court's declaration, CREW [the complainant in the matter] may bring 'a civil action to remedy the violation involved in the original complaint.'"[56]

193. Weintraub had had enough. "[D]espite two clear defeats before the District Court," she wrote on April 19, her anti-enforcement colleagues "will eventually find a way to block meaningful enforcement of the law in this and any other dark-money matter that comes before us."[57] So she decided to "break the glass" on the Act's never-fully-used third-party suit provision. Her goal, she wrote, was to "enforce America's campaign-finance laws fairly and effectively. Placing this matter in CREW's hands is the best way to achieve that goal."[58] The Commission did not conform by the court's deadline, the Act thus authorized a third-party suit against AAN, and CREW promptly filed one.[59]

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51 Statement of Reasons of Chairman Lee E. Goodman and Commissioners Caroline C. Hunter and Matthew S. Petersen, *American Action Network,* MUR 6589, FED. ELECTION COMM'N (July 30, 2014).

52 Opinion, *CREW v. FEC,* 209 F. SUPP. 3D 77, 93 (D.D.C. 2016) ("*CREW I*") (initial dismissal of CREW's complaint against AAN held to be contrary to law, remanding matter to the Commission).

53 For both votes, see Certification, *American Action Network*, MUR 6589R, FED. ELECTION COMM'N (Oct. 19, 2016). The dismissal vote was not unanimous, with Commissioner Ann M. Ravel dissenting.

54 Statement of Reasons of Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Lee E. Goodman, American Action Network, MUR 6589R, FED. ELECTION COMM'N (Oct. 19, 2016).

55 Opinion, *CREW v. FEC,* 299 F. Supp. 3d 83, 98 (D.D.C. 2018) ("*CREW II*") (second dismissal of CREW's complaint held to be contrary to law, again remanding to the Commission).

56 Opinion, *CREW v. FEC*, 209 F. Supp. 3d 77, 93 (D.D.C. 2016) ("*CREW I*") (initial dismissal of CREW's complaint against AAN held to be contrary to law, remanding matter to the Commission), at 101, citing 52 U.S.C. § 30109(a)(8)(C).

57 Statement of Vice Chair Ellen L. Weintraub Regarding *CREW v. FEC & American Action Network*, FED. ELECTION COMM'N (Apr. 19, 2018).

58 Statement of Vice Chair Ellen L. Weintraub Regarding *CREW v. FEC & American Action Network*, FED. ELECTION COMM'N (Apr. 19, 2018).

59 *CREW v. AAN*, No. 18–945 (D.D.C. Sept. 30, 2019) ("*CREW III*").

194. Weintraub unveiled what became the second ingredient of Project Ripcord in February 2019, telling *Mother Jones* magazine that she would no longer vote to authorize defense of dismissed matters she did not believe should be defended. *Mother Jones* quoted a former FEC lawyer as calling this the "nuclear option."[60]

195. "If [the commissioners] are not going to vote to enforce the law," Weintraub told the magazine, "I'm not going to pull any punches and I'm not going to be shy about calling them out. And if we get sued, that requires four votes to defend those kinds of lawsuits... I'm not going to authorize the use of agency resources to defend that litigation."[61] Because the Commission had only four commissioners at the time, Weintraub could unilaterally control the outcome of defense votes.

B. A New Path

196. For years, many of the FEC's major enforcement matters had taken discouragingly similar paths:

- Complaints were filed
- General Counsel's Reports were written
- Votes on RTB motions failed on party-line votes
- Statements of Reasons were written and published by the commissioners who had voted against finding RTB
- Lawsuits challenging the dismissal were filed
- Votes to authorize defense passed
- Commission lawyers presented courts with Republican Statements of Reasons justifying dismissal
- Courts deferred to the Statements of Reasons and upheld the dismissals

197. Judicial deference to commissioners' factual and legal analyses was already substantial; once *CHGO* and *New Models* were handed down, courts began deferring to *any* Statement of Reasons that invoked prosecutorial discretion without even considering those analyses anymore.

60 Nihal Krishan, *Elections Commission Chief Uses the 'Nuclear Option' to Rescue the Agency From Gridlock,* MOTHER JONES (Feb. 20, 2019).

61 Nihal Krishan, *Elections Commission Chief Uses the 'Nuclear Option' to Rescue the Agency From Gridlock,* MOTHER JONES (Feb. 20, 2019).

198. Challenges to the Commission's failures to act on complaints were similarly largely unsuccessful. Those matters proceeded this way:

- Complaints were filed
- General Counsel's Reports were written
- [For a wide variety of reasons, no definitive actions were taken; the Commission neither voted to find RTB, nor did it vote to dismiss.]
- Lawsuits challenging the failure to act were filed sometime after 120 days had passed[62]
- Votes to authorize defense passed
- Commission lawyers argued that minimal Commission action constituted "action" on the complaint
- Courts deferred to Commission attorneys and held there was no failure to act

199. Project Ripcord works by withholding the fourth vote the Act requires at certain moments. This (1) redirects split-RTB-vote matters toward failure-to-act lawsuits instead of dismissal lawsuits, and (2) vastly enhances the odds of success in failure-to-act lawsuits.

200. This is the flow of a complaint under Project Ripcord:

- Complaint is filed
- General Counsel's Report is written
- Votes on RTB motions fail
- Vote on dismissal motion **fails — Withheld Yes Vote**
- *No* Statement of Reasons is published by the commissioners who had voted against finding RTB. If they do *write* one, (1) the matter is still open and confidential and (2) such statements only carry any legal weight when there has been a dismissal
- Lawsuit challenging the failure to act is filed sometime after 120 days has passed
- Vote to authorize defense **fails — Withheld Yes Vote**
- Commission lawyers do **not** appear in court, as they have not been authorized to do so

62 52 U.S.C. § 30109(a)(8): Any party aggrieved by an order of the Commission dismissing a complaint filed by such party under paragraph (1), 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.

- Commission **defaults**; Commission *loses* lawsuit; courts remand matter back to the Commission to take action within 30 days[63]
- Matter comes back to Commission. Efforts can be made to find compromise. The matter could well find enough votes to proceed. Commissioners who had not favored going forward have a choice: Will they vote to have the Commission move forward on the matter, or will they take their chances on a neutral federal court's handling of the case without the FEC's involvement?
- If those efforts **fail,** then votes to dismiss matter fail, or **the 30-day clock runs out — Withheld Yes Vote**
- The Act authorizes a third-party suit. The Commission's role in this matter is over.

201. The issue of whether there has been a failure to act has been litigated, the Commission has lost, and once the 30-day period expires without Commission action, the complainant is now free to sue the respondent in federal court on the merits of the matter.

202. When that lawsuit arrives in federal court, it is in an exceptionally good procedural posture. A third-party suit following a successful failure-to-act suit basically arrives in court with a blank slate:

- There has been no Commission action on the matter, so there is no agency action for the court to defer to.
- There is no Statement of Reasons to defer to, as the matter is still open and must remain confidential. Even if a Statement of Reasons were to emerge, it carries no weight, as there has not been a dismissal in the matter.
- And surprisingly, no matter how long the Commission had failed to act, the five-year statute of limitations starts over, as the end of the 30-day period marks the first moment the complainant's cause of action has become ripe.

203. There are strategic advantages as well: Commission lawyers must follow the direction of the Commission, which may tie their hands, but lawyers for the complainants are not limited by political considerations in how zealously they can press their case against the respondent.

63 When the federal government is the defendant in a default situation, the plaintiff must satisfy the court that it has a claim. See FEDERAL RULES OF CIVIL PROCEDURE, 55(d): "Judgment Against the United States. A 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."

C. Ripcord in Action

204. The strategy drew quick notice. "Instead of waiting for years for the commission to deadlock, and then filing long-shot lawsuits to appeal the F.E.C.'s split decision," reported *The New York Times*, "the law allows advocates to sue the commission far sooner for defaulting in its basic duties. Then, because the agency isn't defending itself in those lawsuits, groups have a mostly clear path to sue candidates and campaigns directly."[64]

205. The good-government groups that form the bulk of the litigation docket against the FEC (notably the Campaign Legal Center ("CLC") and Citizens for Responsibility and Ethics in Washington ("CREW")) quickly picked up on the opportunity they were being presented with.

206. Stuart McPhail, who serves as CREW's Director of Campaign Finance Litigation, told the *Daily Beast*: "One day, the Democrats just said, 'We're not going to vote to close these cases.' That move allows plaintiffs to take the FEC to court for failing to act, and then the court can authorize you to bypass the FEC and file your own lawsuit directly against the defendant."[65]

207. "If successful," *The New York Times* wrote, "the gambit could have far-reaching implications for future campaigns and for pending F.E.C. complaints from the 2020 election, like one that accused former President Donald J. Trump's campaign of laundering hundreds of millions of dollars through limited liability companies to conceal whom his campaign was ultimately paying."[66]

208. The strategy was successful. Weintraub's votes caused the Commission to not authorize defense 10 times.[67] As of August 2024, six of the third-party lawsuits were actively being litigated:

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64 Shane Goldmacher, *Democrats' Improbable New F.E.C. Strategy: More Deadlock Than Ever*, N.Y. TIMES (June 8, 2021).

65 Roger Sollenberger, *The Republicans Who Want Election Laws to 'Stay Broken*,' DAILY BEAST (Aug. 2, 2022).

66 Shane Goldmacher, *Democrats' Improbable New F.E.C. Strategy: More Deadlock Than Ever*, N.Y. TIMES (June 8, 2021). The matter Goldmacher referred to is MUR 7784 (MAGA PAC) supra n. 38; the litigation regarding this matter is currently being considered for *en banc* rehearing by the D.C. Circuit, supra n. 46.

67 Ellen L. Weintraub, Answers to questions from the Majority members of the Committee on House Administration, FED. ELECTION COMM'N, at 3–4 (Sept. 20, 2023). The Commission authorized defense over Weintraub's vote in *Lieu v. FEC*, No. 16–2201 (D.D.C. filed Nov. 4, 2016); *Free Speech for People, et al. v. FEC*, No. 21–3206 (D.D.C. filed Dec. 8, 2021); *AB PAC v. FEC*, No. 22–02139 (D.D.C. filed July 20, 2022); *Campaign Legal Center v. FEC*, No. 22–1976 (D.D.C. filed July 8, 2022); *Common Cause Georgia, et al. v. FEC*, No. 22–3067 (D.D.C. filed Oct. 10, 2022). The Commission did not authorize defense in *Campaign Legal Center v. FEC*, No. 20–730 (D.D.C. filed Mar. 13, 2020); *Campaign Legal Center v. FEC*, No. 20–809 (D.D.C. filed Mar. 24, 2020); *Campaign Legal Center v. FEC*, No. 20–1778 (D.D.C. filed June 30, 2020); *Patriots Foundation v. FEC*, No. 20–2229 (D.D.C. filed Aug. 13, 2020);

- *CLC v. Correct the Record*, 23–0075 (D.D.C.), was stayed by the district court pending the resolution of *FEC v. CLC* (No. 22–5336 (D.C. Cir.), which was decided in CLC's favor July 9, 2024.
- *CREW v. AAN* is before the DC Circuit (No. 22–7038; underlying case was No. 18–945 (D.D.C.).
- *CLC v. 45Committee* is before the D.C. Circuit (No. 23–7040; underlying case was No. 22–1115 (D.D.C.)). The oral argument held February 20, 2024.
- *Giffords v. NRA Political Victory Fund*, 21–2887 (D.D.C.), was stayed by the district court pending the resolution of *CLC v. 45Committee, Inc.* (above).
- *CLC v. Heritage Action*, 22–1248 (D.D.C), is in abeyance pending the resolution of *CLC v. 45Committee, Inc*. (above).
- *CLC v. Iowa Values*, 21–389 (D.D.C.) is actively being litigated in district court.

209. Naturally, Ripcord did not meet universal acclaim. The FEC's Republican commissioners published a statement decrying the strategy. "The result has been chaos and an escalating collapse of institutional norms," they wrote, and they called the failed authorization of defense votes a "scandalous spectacle."[68]

210. "It's a handful of cases — eight this year. It's certainly not 'chaos,'" Weintraub told the *Daily Beast*. "And the norms broke down years ago. For most of the agency's history, commissioners worked hard to find four votes for different outcomes. It is only since 2008 that we've had an increasing number of split votes, and we are seeing them again and again, not on petty issues, but on big, important issues. That was the breakdown in the norms."[69]

211. The district court in *Iowa Values* defended the validity of third-party lawsuits: "Defendant fails to reckon with the fact that the § 30109(a)(8)(C) citizen suit is *a part*

Campaign Legal Center v. FEC, No. 21–406 (D.D.C. filed Feb. 16, 2021); *End Citizens United PAC v. FEC*, No. 21–1665 (D.D.C. filed June 21, 2021); *End Citizens United PAC v. FEC*, No. 21–2128 (D.D.C. filed Aug. 9, 2021); *CREW v. FEC*, No. 22–00035 (D.D.C. filed Jan. 6, 2022); *National Legal and Policy Center v. FEC*, No. 22–822 (D.D.C. filed Mar. 25, 2022); *Campaign Legal Center v. FEC*, No. 22–838 (D.D.C. filed Mar. 29, 2022).

68 Statement of Chairman Allen J. Dickerson and Commissioners Sean J. Cooksey and James E. 'Trey' Trainor, III Regarding Concluded Enforcement Matters, FED. ELECTION COMM'N, at 1 (May 13, 2022).

69 Roger Sollenberger, *The Republicans Who Want Election Laws to 'Stay Broken*,' DAILY BEAST (Aug. 2, 2022). See also Weintraub Voting Statement, FED. ELECTION COMM'N, at 7–8 ("These statements have no basis in the version of the Act that exists in this universe and they are utterly alien to uninterrupted decades of the practice of the Commission in this universe. As discussed, under FECA, the Commission only acts when more commissioners vote for a motion than vote against it. The Act distinguishes between RTB motions and motions to dismiss. And the Act clearly contemplates the dismissal of a complaint as an affirmative decision of the Commission that commissioners must vote upon.") (citations removed)

of the long and cumbersome process Congress created. A citizen suit is not a bypass of the process."[70]

212. District courts have had a mixed reaction to Ripcord's approach, especially the part that results in the Commission failing to appear when sued. "Some judges appear confused, and less than amused, by the unusual absences," wrote *The New York Times*.[71] Several district courts have held that matters are dismissed at the moment of a failed RTB vote;[72] more recently, the judge overseeing the AAN litigation pushed back hard on that conclusion:

> Although oftentimes a deadlocked reason-to-believe vote will lead to a successful vote to close the file and dismissal of the complaint, that need not be the case. As the FEC's recent track record demonstrates, the Commission is free to keep the file open in the hopes of reaching some resolution on the matter. Thus, until the Commission affirmatively votes to close the file, the door remains open for further enforcement action because the complaint is not closed — *viz.*, the Commission has not dismissed the complaint.[73]

213. But no matter whether judges are amused or confused, and no matter what dueling district courts might say, binding precedent is set only by the D.C. Circuit, and the Circuit has not yet invalidated any of Project Ripcord's approach.[74]

D. Ripcord in Hibernation

214. Describing Project Ripcord, *The New York Times* wrote, "The tactic will work only as long as all three commissioners in the Democratic bloc agree not to close an investigation and not to defend the F.E.C. in court on a particular case."

215. In August 2022, the FEC's Democratic commissioners abruptly stopped voting as a bloc, and Ripcord's first run came to an abrupt end. Dara Lindenbaum, a Democratic commissioner appointed by President Joe Biden, joined the Commission in that month and immediately set about shutting Project Ripcord down.[75]

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70 Opinion, *CLC v. Iowa Values*, 573 F.Supp.3d 243, 257 (D.D.C. Nov. 19, 2021) (internal references omitted).

71 Shane Goldmacher, *Democrats' Improbable New F.E.C. Strategy: More Deadlock Than Ever*, N.Y. TIMES (June 8, 2021).

72 See Opinion, *Campaign Legal Center v. 45Committee, Inc.*, 666 F.Supp.3d 1 (D.D.C. Mar. 31, 2023), and Opinion, *Heritage Action for Am. v. FEC*, 682 F.Supp.3d 62 (D.D.C. July 17, 2023).

73 Memorandum Opinion and Order, *CREW v. FEC*, No. 22–3281, at 25 (D.D.C. Sept. 20, 2023).

74 See, e.g., *Camreta v. Greene*, 563 U.S. 692, 709 (2011) (quoting Moore's Federal Practice: "A decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case").

75 Dara Lindenbaum Sworn In As Commissioner, FED. ELECTION COMM'N (Aug. 2, 2022).

216. Lindenbaum was making good on the promises she extended to Republican senators on the Senate Rules Committee during her confirmation hearing in April 2022. Lindenbaum testified that she believed enforcement matters that had been held open "should be closed." GOP Sen. Roy Blunt of Missouri asked her, "And you'll commit advocating for that as a member of the Commission?" Lindenbaum replied, "Yes." When Blunt asked whether there were circumstances where she thought it would be appropriate for the Commission not to defend litigation, Lindenbaum replied, "Nothing comes to mind."[76]

217. Lindenbaum "unraveled" Project Ripcord "almost immediately, providing the fourth vote to close all of those cases," wrote *The New York Times*.[77] Her votes "signal[ed] the end of a years-long Democratic Hail Mary legal scheme to open a new path forward for deadlocked cases," the *Daily Beast* reported.[78]

218. Since joining the Commission, Lindenbaum has aligned herself with the Republican commissioners on a variety of anti-enforcement measures, alarming those who advocate for strong enforcement of federal campaign finance laws. *The New York Times* reported this unexpected alignment in a front-page story entitled, "A Democrat, Siding With the G.O.P., Is Removing Limits on Political Cash at 'Breathtaking' Speed."[79]

219. "In a series of recent decisions that are remaking the landscape of money in American politics," the *Times* wrote, "an ascendant new bloc of three Republicans and one Democrat is voting together to roll back limits on how politicians, political parties and super PACs raise and spend money. Reform groups are aghast at what they see as the swift unraveling of longstanding restraints."

220. "We are in a new era," CLC executive director Adav Noti told the *Times*. "It is breathtaking the speed with which the rules are being torn down. There has been more

76 Hearing on the nomination of Dara Lindenbaum to be a member of the Federal Election Commission, *Senate Committee on Rules & Administration*, S.Hrg. 117–237 (2022).

77 Shane Goldmacher, *A Democrat, Siding With the G.O.P., Is Removing Limits on Political Cash at 'Breathtaking' Speed*, N.Y. TIMES (June 10, 2024). See Weintraub Voting Statement, FED. ELECTION COMM'N, at 16 (citing her tweet from Sept. 30, 2022 and listing matters shut down as: MUR 6589R (*American Action Network*); MURs 6915 and 6927 (*John Ellis Bush*); MURs 7427, 7497, 7524, and 7553 (*National Rifle Association of America Political Victory Fund*); MURs 7558, 7560, and 7621 (*Donald J. Trump, MAGA PAC, et al.*); MUR 7486 (*45Committee*); MURs 7654 and 7660 (*America First Action*), MURs 7672, 7674, and 7732 (*Iowa Values*), and MUR 7726 (*Correct the Record*)). See also Federal Election Commission's Notice of Subsequent Developments, *Heritage Action Inc. vs. Federal Election Commission*, No. 22–1422 (D.D.C. Sept. 1, 2022).

78 Roger Sollenberger, *She's Trying to Fix the FEC. She May Be Breaking It More*, DAILY BEAST (Oct. 6, 2022).

79 Shane Goldmacher, *A Democrat, Siding With the G.O.P., Is Removing Limits on Political Cash at 'Breathtaking' Speed*, N.Y. TIMES (June 10, 2024).

activity in the last two years to allow money into the system than in the 20 years before that combined."

221. "It's inexplicable and it's stunning," Democratic Sen. Sheldon Whitehouse of Rhode Island told the *Times*.[80]

VII. Ripcord in Waiting

222. Three commissioners cannot write regulations, nor issue advisory opinions, nor force the Commission to pursue enforcement complaints. But the Act clearly empowers three commissioners to keep worthy complaints from being wrongly dismissed and to clear the way for complainants to sue respondents directly.

223. At the moment, the Federal Election Commission does not have three commissioners aboard who can be said to be pro-enforcement. And until this moment ends, Project Ripcord doesn't work. Until this moment ends, the short-term prospects for any positive action from the Federal Election Commission are bleak.

224. But the moment the Commission regains a third commissioner who favors enforcement and is willing to press hard for it, Project Ripcord will be available to the three of them. They will still be able to turn to the Federal Election Campaign Act's provisions requiring bipartisan agreement to dismiss matters and defend lawsuits. As long as they stick together, enforcement complaints cannot be disposed of without their assent.

80 Shane Goldmacher, *A Democrat, Siding With the G.O.P, Is Removing Limits on Political Cash at 'Breathtaking' Speed*, N.Y. TIMES (June 10, 2024).