FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

STATEMENT OF CHAIR CAROLINE C. HUNTER
ON CREW'S MOTION FOR ENTRY OF DEFAULT JUDGEMENT IN *CREW V. FEC*

I regret to have to issue this statement when our most pressing concern is, and rightfully should be, the health and safety of all Americans. The appalling conduct of a group calling itself Citizens for Responsibility and Ethics in Washington ("CREW"), however, leaves me little choice. Earlier this week, while the government wrestled with vital issues presented by the coronavirus crisis and in the absence of a quorum at the Federal Election Commission, CREW filed a motion in federal court asking for default judgement to be entered against the Commission in *CREW v. FEC*, Civil Action No. 19-2753. CREW's lawsuit claims the Commission failed to act in a timely manner on an administrative complaint alleging violations of the Federal Election Campaign Act.

CREW's recent motion is outrageous. First, CREW held off on filing suit against the Commission until after the Commission lost its quorum and could no longer defend itself in court. Second, CREW admits that the law prevents the Commission from acting without a quorum, but nonetheless asks the court to rule that the Commission's lack of action — compelled by law — is, in fact, contrary to law. Finally, CREW wants the court to order the Commission to act within 30 days, even though the Commission would be unable to comply with such an order until after its quorum has been restored.

CREW's claim that there has been "a pattern of inaction and enforcement deadlock" at the Commission is misleading. It relies on stale, discredited statistics dredged up from a paper written in secret several years ago and dropped by a former Commissioner on her unsuspecting colleagues as she walked out the door. After a member of that Commissioner's staff went to work for the U.S. House Committee on House Administration, the Committee sent the Commission questions that reflected the same faulty analysis. In our response to the Committee's questions, we demonstrated the serious flaws in the data and provided a more accurate picture of the Commission's administrative enforcement record. Given that CREW's motion to the court also relies on the flawed data, we have attached the relevant portion of our response to the Committee's questions. It is available at www.fec.gov/resources/cms-content/documents/FEC_Response_to_House_Admin_Attachment_B_Petersen_Hunter.pdf.

In addition, CREW's claim relies on statements by a current Commissioner that are noteworthy more for their vitriol than their validity. This Commissioner regularly complains about the Commission's operations, particularly when she fails to get her way in enforcement matters. In one fairly recent matter, MUR 7314 (National Rifle Association, *et al.*), this Commissioner blamed her Republican colleagues for allegedly "blocking" the Commission from investigating sensationalized allegations against an American advocacy organization — even though the law, precedent, and legal counsel's recommendation were all on our side. My

statement in that matter is also attached. It is available at www.fec.gov/about/leadership-and-structure/caroline-c-hunter.

While my current and former colleagues are, of course, free to express their views, their statements should not be misconstrued as reflecting anything other than their own personal opinions. They certainly should not be offered as authority in a court of law.

What CREW chose to leave out of its motion is more informative than what it included. For example, CREW's motion does not materially address the Commission conduct that is the focus of CREW's lawsuit. This is not surprising, given that CREW did not bother at any point during the course of this litigation to obtain a Commission chronology. CREW's motion also fails to note the obvious fact that if, as CREW asserts, CREW filed two amended complaints after filing a first complaint with the Commission, then CREW itself would have drawn out the administrative timeline: Each time new facts are alleged against a respondent, the Commission must notify respondents and await their responses. Nor does CREW grapple with the likely effects of the federal government shutdown that prevented the Commission from operating for more than a month in late 2018-early 2019.

Particularly during this time of crisis, I would hope that everyone would conduct themselves with honor and integrity, rather than playing games in an attempt to gain unfair advantage in federal court.

March 19, 2020

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27. For purposes of this question, assume a "deadlocked vote" is an equally divided vote of the Commission or any other vote that lacks four affirmative votes. Of Matters Under Review considered in Executive Session since January 1, 2012 and that are now closed, how many and what percentage of the MURs included at least one deadlocked vote of the Commission during Executive Session? Please provide, categorized by year since 2012, the count and percentages. Please also provide the MUR number for each MUR that included at least one deadlocked vote.

Response of
Vice Chairman Matthew S. Petersen and Commissioner Caroline C. Hunter

Using a Commission vote database maintained by the Commission's Secretary, an Enforcement Division case management database, and the Enforcement Query System on the FEC's website, all MURs (as defined in response to question 25 above) that were considered by the Commission in Executive Session after January 1, 2012 and that were closed as of April 1, 2019 were examined. 531 such MURs were identified. 269 of these MURs, or 50.6%, had at least one vote after January 1, 2012, with no position receiving the support of four or more Commissioners, which the Commission has typically called a "split vote." Split votes are most often 3-3 or 2-2, and can also be any other combination that lacks four or more votes in the affirmative or negative.

The Commission does not consider some of the votes that the question considers to be "deadlocked" to be split votes. FECA requires four Commissioners' votes for certain decisions, without regard to how many Commissioners are currently serving. Consequently, the Commission views any position supported by four or more Commissioners as a Commission decision, and not as a "deadlocked" vote.[1] The question seeks information about cases where there were not four *affirmative* votes. In one such case, for example, an initial motion to dismiss the case as a matter of prosecutorial discretion was defeated by a vote 1-5, and the case then proceeded through multiple unanimous votes through reason-to-believe and probable-cause-to-believe findings, and was resolved by a conciliation agreement with admissions and a substantial civil penalty.[2] The initial vote of 1-5 lacks four affirmative votes and is therefore responsive to this question. The Commission, however, would not consider this case an example of a "deadlocked" case. As a result of conferring with House Administration Committee staff, the Commission compiled the data related to cases with votes like this and present it separately in footnotes in response to questions 27 and 28.[3]

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[1] Congressional Research Service did not consider four or more negative votes to be a deadlocked vote in its work in 2009 or 2015. *See* CRS, "The Federal Election Commission: Enforcement Process and Selected Issues for Congress," R44319, at 10 n.44 (Dec. 22, 2015) and CRS, "Deadlocked Votes Among Members of the Federal Election Commission (FEC): Overview and Potential Considerations for Congress," R40779, at 5 & 10-11 (Oct. 6, 2009).

[2] *See* MUR 6394 (Pingree for Congress).

[3] If additional cases with votes that lack four affirmative votes after January 1, 2012, are also considered responsive to question 27, an additional 12 MURs would be responsive, for a total of 281 or 52.9%.

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The following chart breaks down this data by calendar year. Some MURs are subject to one vote in one Executive Session, while others can be considered in multiple Executive Sessions that might fall in different years. The data below include each MUR considered by the Commission in Executive Session in each of the calendar years, so some MURs appear more than once.

Calendar Year	Closed MURs with At Least One Split Vote Considered in Executive Session	Closed MURs Considered in Executive Session	Percentage (At Least One Split/ Closed MURs in Exec.)	Total Closed MURs (Exec. Sess. & Tally)	Percentage (At Least One Split/ Total Closed MURs)
2012	27	61	44.3 %	103	26.2 %
2013[4]	41	93	44.1 %	172	23.8 %
2014[5]	23	61	44.3 %	94	24.5 %
2015[6]	53	91	58.2 %	133	39.8 %
2016[7]	49	75	65.3 %	137	35.8 %
2017[8]	39	72	54.2 %	169	23.1 %
2018	51	86	59.3 %	194	26.3 %
1/1-3/31/ 2019	16	20	80.0 %	35	45.7 %
Total for Entire Period	269	531	50.6 %	839	32.1 %

In addition to the 531 cases resolved in Executive Session, the Commission resolved a significant tranche of cases unanimously without the need for an Executive Session. As noted in response to Question 26, an additional 308 MURs were resolved on tally, for a total of 839 closed MURs.[9] Thus, MURs resolved on tally are nearly 37% of the closed MURs for this eight year period, which is far too large a portion to ignore. In order to provide more complete information, the chart above also presents the closed MURs with at least one split vote as a

[4] If votes lacking four affirmative votes were included, 2013's Closed MURs with At Least One Deadlock Vote Considered in Executive Session would increase by one to 42, and the percentage would increase to 45.2 %.

[5] If votes lacking four affirmative votes were included, 2014's Closed MURs with At Least One Deadlock Vote Considered in Executive Session would increase by two to 25, and the percentage would increase to 41.0%.

[6] If votes lacking four affirmative votes were included, 2015's Closed MURs with At Least One Deadlock Vote Considered in Executive Session would increase by seven to 60, and the percentage would increase to 65.9 %.

[7] If votes lacking four affirmative votes were included, 2016's Closed MURs with At Least One Deadlock Vote Considered in Executive Session would increase by three to 52, and the percentage would increase to 69.3 %.

[8] If votes lacking four affirmative votes were included, 2017's Closed MURs with At Least One Deadlock Vote Considered in Executive Session would increase by four to 43, and the percentage would increase to 59.7%.

[9] By definition, all 308 MURs resolved on a tally vote were cases where the Office of General Counsel's recommendations received at least four Commissioners' votes—and in fact unanimous Commissioner support in very nearly all such cases.

percentage of total closed MURs each year, including all the MURs closed exclusively on tally vote and those considered in Executive Session.[10]

[10] Results from other analyses of Commissioner voting data vary widely based on methodology, time period, and the types of votes studied. For example, in 2009 the Congressional Research Service (CRS) defined "substantive deadlocks" as votes garnering less than four Commissioners' support and which "essentially halted substantive Commission action." *See* R. Sam Garrett, Cong. Research Serv., R40779, Deadlocked Votes Among Members of the Federal Election Commission (FEC): Overview and Potential Considerations for Congress at 4-5 (Aug. 26, 2009) (finding "substantive deadlocks" occurred in approximately 13% of publicly available MURs closed between July 2008 and June 2009).

In 2013, Public Citizen defined deadlock as *any* split vote on *any* Commission enforcement vote, regardless of whether it ended substantive Commission action. *See* Public Citizen, Roiled in Partisan Deadlock, Federal Election Commission Failing (Apr. 2015) (finding an average of 18.8% of all substantive and non-substantive *votes* were split between 2012-2014, but an average of 4.8% from 2003-2014). In 2015, the CRS noted the debate over how to count deadlocks, noting that "[f]ocusing on deadlocks might or might not provide meaningful information" since they "reveal little about why the Commission made its decision (or declined to make a decision)." One method counts MURs as the "'unit of analysis' (the thing being counted)" where votes precluding resolution of the matter would count as a single deadlock (*i.e.*, CRS's definition of "substantive deadlock" in 2009). By contrast, a higher number results when each individual split vote is defined as a Commission deadlock. *See* R. Sam Garrett, Cong. Research Serv., R44318, The Federal Election Commission: Enforcement Process and Selected Issues for Congress at 13 (Dec. 22, 2015).

Before her departure in 2017, former Commissioner Ravel utilized the same metric as Public Citizen (*any* split vote on *any* Commission enforcement vote) to proclaim the Commission was suffering from an "enforcement crisis," but even under this analysis, the percent of MURs "closed due to a deadlock" never exceeded 15% and averaged less than 10% for all MURs between 2006 and 2016. *See* Dysfunction and Deadlock: The Enforcement Crisis at the Federal Election Commission Reveals the Unlikelihood of Draining the Swamp at 10 (Feb. 2017). As shown in our response to the Committee's question number 28, an average of **just 10.0%** of MURs closed because of Commission deadlocks from January 1, 2012 through March 31, 2019.

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28. For purposes of this question, assume a "deadlocked vote" is an equally divided vote of the Commission or any other vote that lacks four affirmative votes. Of Matters Under Review considered in Executive Session since January 1, 2012 and that are now closed, how many and what percentage of the MURs deadlocked on all votes taken during Executive Session, other than a vote to close the file and send the appropriate letter(s)? Please provide, categorized by year since 2012, the count and percentages. Please also provide the MUR numbers and MUR subject of the cases that deadlocked on all votes taken in Executive Session (other than a vote to close the file and send the appropriate letter(s)).

Of the 531 MURs that were considered by the Commission in Executive Session after January 1, 2012 and that were closed as of April 1, 2019, 84 of these MURs or 15.8% had split votes (as defined in response to question 27) on all votes taken during the Executive Session other than a vote to close the file.[11]

Calendar Year	Closed MURs with All Split Votes Considered in Executive Session	Total Closed MURs Considered in Executive Session	Percentage (All Split/ Closed MURs in Exec.)	Total Closed MURs (Exec. & Tally)	Percentage (All Split/ Total Closed MURs)
2012	2	61	3.3 %	103	1.9 %
2013	12	93	12.9 %	172	7.0 %
2014	6	61	9.8 %	94	6.4 %
2015[12]	19	91	20.9 %	133	14.3 %
2016[13]	12	75	16.1 %	137	8.8 %
2017	12	72	16.7 %	169	7.1 %
2018	24	86	27.9 %	194	12.4 %
1/1-3/31/ 2019	11	20	55.0 %	35	31.4 %
Total for Entire Period	84	531	15.8 %	839	10.0 %

The MURs responsive to question 28 consist of matters where the votes on all substantive issues were split votes, other than votes to close the files. These 84 "all split" MURs were also responsive to question 27, as MURs with at least one split vote. However, an additional 185

[11] If all of the 839 MURs that have been closed from January 1, 2012, to April 1, 2019, are considered, and if additional cases with votes without four affirmative votes after January 1, 2012 are also considered, an additional 5 MURs would be responsive to question 28, for a total of 90 or 17.0%.

[12] If votes lacking four affirmative votes were included, 2015's Closed MURs with All Deadlock Votes Considered in Executive Session would increase by three to 21, and the percentage would increase to 23.1%.

[13] If votes lacking four affirmative votes were included, 2016's Closed MURs with All Deadlock Votes Considered in Executive Session would increase by two to 14, and the percentage would increase to 18.7%.

MURs were also responsive to question 27. Unlike the 84 "all split" MURs, the other 185 MURs that were also responsive to question 27 had some degree of Commission consensus about the issues in those cases.

For example, some of the split votes that rendered a MUR responsive to question 27 concerned the terms of a conciliation agreement to resolve a MUR nearing its conclusion. The stage of the case alone means there was: (1) a four-vote consensus (at a minimum) about a reason-to-believe finding; (2) a similar consensus about a legal theory for that violation with a common understanding of the facts of a case; and (3) a similar consensus about whether an investigation was required, and if it was, about the state of the evidence of that case. Further, the Commission agreed that resolving the case by a conciliation agreement was the best next step, but then disagreed initially over the terms of a conciliation agreement that the Commission should seek from respondents to resolve the case. Of the 183 MURs that had at least one split vote but were not "all split" MURs, the Commission has identified more than fifty closed MURs where the split vote concerned the amount of a civil penalty in cases that went on to be resolved with at least four Commissioners' votes with conciliation agreements with lower civil penalties.[14]

Similarly, some of the split votes that rendered a MUR responsive to question 27 concerned a particular aspect in a case that was otherwise handled by an at least four vote consensus of Commissioners. For example, in dismissing cases pursuant to the recommendation of the General Counsel and with the votes of at least four Commissioners, the Commission has had split votes over whether a respondent should be issued a letter of caution against repeating the conduct at issue in the MUR.[15] In other MURs, the Commission has had split votes over approving a proposed Factual and Legal Analysis that were followed by majority votes to approve a revised Factual and Legal Analysis.[16] The Commission has also had split votes concerning the amount in violation where, for example, the Commission pursued a case of a personal use violation of FECA, but disagrees over some of the transactions that were alleged personal use violations.[17] Like the disagreements over civil penalty amounts, these split votes show Commissioner disagreement on a particular aspect, but still within the context of four or more Commissioners in agreement over strategy for a case.

Still other split votes occur on more significant issues, and represent more consequential disagreement among Commissioners, but still should be viewed in their context of Commissioner agreement on other aspects of a case. For example, the Commission has had split votes over whether there is sufficient proof to pursue a FECA violation as a "knowing and willful" violation, which has potential parallel criminal consequences, and then agreed to pursue the same violation on a non-knowing and willful basis.[18] The Commission has also had split votes on particular legal theories of liability for respondents, while ultimately agreeing to pursue

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14 *See, e.g.*, MUR 7470 (For Our Future), Certifications (Aug. 8, 2018 & Feb. 7, 2019).

15 *See, e.g.*, MUR 7023 (Kinzler) and MUR 6961 (Trump).

16 *See, e.g.*, MUR 6566 (Foley).

17 *See, e.g.*, MUR 6498 (Lynch).

18 *See, e.g.*, MUR 6498 (Lynch).

other legal theories of liability related to the same facts of a MUR.[19] The Commission has also had split votes on whether to begin an investigation of a case, followed by at least four vote consensus to resolve a case via conciliation.[20] These are significant and consequential disagreements among Commissioners; nonetheless, they should be viewed in context of Commissioner agreement about other aspects of the cases.

[19] *See, e.g.*, MUR 7126 (Michigan Democratic Party).

[20] *See, e.g.*, MUR 6535 (Restore Our Future).

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	
National Rifle Association, *et al.*	)	MUR 7314
	)	

STATEMENT OF CHAIR CAROLINE C. HUNTER

Boiled down to its essence, the complaint in this matter claimed that Russian sleeper agents used the National Rifle Association ("NRA") to help Donald Trump win the 2016 presidential election. Such an explosive claim should only have been made — let alone filed with the federal government — if there were credible evidence to back it up. That is not what happened here. Instead, the complaint capitalized on fears of foreign influence in U.S. elections to conjure inferences of illegal conduct, and relied on statements from anonymous sources in a single article written by reporters whose dependability in this area is in doubt.

I agreed with the recommendation of the Commission's Office of General Counsel ("OGC") to dismiss the complaint. But my colleague, Commissioner Weintraub, strongly disagreed; she has argued that the only acceptable Commission response would have been to launch an immediate investigation. Given the law's protections against partisan prosecutions, her approach is not just wrong, it is dangerous. This statement explains why.

* * *

Concerns about foreign interference in U.S. elections have been with us since our nation's founding. As John Adams famously wrote to Thomas Jefferson, "You are apprehensive of foreign Interference, Intrigue, Influence. So am I.—But, as often as Elections happen, the danger of foreign Influence recurs."[1]

The Federal Election Campaign Act (the "Act") prohibits foreign nationals from making contributions and donations in connection with U.S. elections.[2] I take seriously my responsibility to enforce this prohibition, and I have voted to investigate and punish violations of the foreign national ban when such action was justified by the facts.[3] But — and this is an

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[1] Letter from John Adams to Thomas Jefferson (Dec. 6, 1787), https://founders.archives.gov/documents/Jefferson/01-12-02-0405.

[2] 52 U.S.C. § 30121; *see also* 11 C.F.R. § 110.20.

[3] *See, e.g.*, MUR 7122 (American Pacific International Capital) (conciliating violations of foreign national ban), MUR 6184 (Skyway Concession Company, LLC) (same), MUR 6093 (Transurban) (same).

important "but" — I do *not* believe that Commissioners' concerns about foreign influence should shut down our ability to think critically, or that mere claims of foreign interference, by themselves, should trigger knee-jerk Commission investigations of Americans' political activities.

The complaint in this matter did not offer a shred of credible evidence in support of its claim that Russian nationals Alexander Torshin and Maria Butina illegally "funneled" money to the NRA to help Donald Trump win in 2016 and participated in the NRA's decision-making process.[4] As OGC stated, "the only piece of information directly alleging that there was a conspiracy to funnel foreign money to the NRA" in the record — a single McClatchy news service article — is "vague," "does not provide specific information," and "describes the [alleged funneling] scheme in the broadest possible terms."[5] Indeed, the article itself conceded that it "could not be learned" whether the FBI had any evidence of wrongdoing.[6] The other information in the complaint "does little to corroborate or provide a sufficient factual basis to infer the alleged prohibited [funneling] occurred."[7] "[A]t best," OGC found, "[it] suggests that Torshin and Butina had 'opportunities' to violate the foreign national prohibition."[8] In sum, OGC concluded that "the Complaint and current record do not provide a sufficient factual basis to infer that the alleged violations occurred."[9]

In contrast to the unsubstantiated allegation, the NRA's denials were specific, detailed, and based on facts.[10] They included the results of the NRA's internal reviews of its financial activities, and sworn affidavits from the NRA's executive director and treasurer, among others. Given the absence of information supporting the allegation and the detailed information against it, OGC correctly concluded that "there is not an adequate basis to conclude that Respondents

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4 MUR 7314 (NRA, *et al.*), Complaint; *see also id.*, Supplemental Complaint.

5 *Id.*, First Gen. Counsel's Rpt. at 3, 17 ("FGCR").

6 *Id*. at 11 (citing Peter Stone & Greg Gordon, *FBI Investigating Whether Russian Money Went to NRA to Help Trump*, MCCLATCHY, Jan. 18, 2018). The McClatchy article was written by the same reporters who recently doubled down on the now-discredited story that Donald Trump's then-attorney, Michael Cohen, met secretly with Russian officials in Prague to help Trump win in 2016. *See* Peter Stone & Greg Gordon, *Sources: Mueller has evidence Cohen was in Prague in 2016, confirming part of dossier*, MCCLATCHY, Apr. 13, 2018; Peter Stone & Greg Gordon, *Cell signal puts Cohen outside Prague around time of purported Russian meeting*, MCCLATCHY, Dec. 27, 2018.

7 FGCR at 17.

8 *Id*. at 18 (citation omitted).

9 *Id.* Although OGC found that "the activities at issue may have resulted in potential violations of statutes outside the Commission's jurisdiction, the available information does *not* support a finding of reason to believe with respect to the alleged violations of federal campaign finance law." *Id.* at 3 (emphasis added).

10 *See* MUR 7314 (NRA, *et al*.) NRA Resp. (March 19, 2018), NRA Resp. (April 13, 2018), NRA Resp. (July 27, 2018).

violated the foreign national prohibition, as alleged,"[11] and recommended that the Commission dismiss the complaint.

I agreed with OGC's recommendation because it was based on the facts, law, and Commission precedent.[12] My colleague, on the other hand, did not. She voted to find reason to believe the Act was violated. When her view did not prevail, she issued a statement blaming Republican Commissioners for "blocking" the Commission from investigating the NRA.[13]

The reasons that my colleague has given for her vote have little, if anything, to do with the evidence or the law. First, she focuses on the nature of the allegation, by itself, as justifying a Commission investigation. She argues that the allegation is "too serious to ignore," "too serious to take the Respondents' denials at face value," "one of the most blockbuster campaign finance allegations in recent memory," concerns "a matter of . . . national importance," and potentially implicates "an extraordinarily significant violation of the Act."[14] Separately, she has reiterated the "blockbuster" nature of the allegation and said that "we should have looked into it *merely because* it was so important and we need to put it to rest one way or the other."[15]

But the Act does not permit this Commission to investigate the political activities of Americans (or American advocacy groups) "merely because" an allegation is important, serious, blockbuster, sensational, going viral, or trending on Twitter. To the contrary, the Commission may open investigations only when there is *reason* to believe a violation occurred — that is, when credible evidence supports the allegation.[16] "'[T]he FEC is entitled, and indeed required, to make subjective evaluation of claims.' . . . [and] is expected to weigh the evidence before it and make credibility determinations in reaching its ultimate decision" on whether to find reason to believe.[17]

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[11] FGCR at 20.

[12] *See id.* at 19 (citing prior MURs).

[13] *Id.*, Statement of Reasons of Chair Ellen L. Weintraub ("Weintraub SOR").

[14] *Id.* at 1, 4, 5.

[15] Chicago Tonight, Interview with FEC Chair Ellen Weintraub at 7:31 (Aug. 27, 2019), https://www.pbs.org/video/full-interview-fec-chair-ellen-weintraub-amh1yx/ (emphasis added).

[16] *See* MUR 4960 (Hillary Rodham Clinton for U.S. Senate Exploratory Committee, *et al.*), Statement of Reasons of Commissioner David M. Mason, Commissioner Karl J. Sanldstrom, Commissioner Bradley A. Smith, and Commissioner Scott E. Thomas at 3 ("[P]urely speculative charges, especially when accompanied by a direct refutation, do not form an adequate basis to find reason to believe that a violation of the FECA has occurred.").

[17] *Buchanan v. FEC*, 112 F. Supp. 2d 58, 72 (D.D.C. 2000) (quoting *Orloski v. FEC*, 795 F.2d 156, 168 (D.C. Cir. 1986)); *see also FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 388 (D.C. Cir. 1981) ("mere 'official curiosity' will not suffice as the basis for [Commission] investigations").

Further, launching an investigation "merely because" a particular allegation is a "blockbuster" would encourage increasingly spectacular but unfounded allegations: The more spectacular the claim, the smaller the factual basis would need to be. At the same time, it would negate the Act's requirement that respondents be given an opportunity to respond to allegations before the Commission finds reason to believe. Under my colleague's rationale, if a complaint alleges something sufficiently sensational, there's *nothing* a respondent could say to avoid a reason-to-believe finding and investigation.

Undeterred by the lack of credible record evidence supporting the complaint, my colleague next argues, "[i]f the FBI is investigating a matter that is the subject of an FEC complaint, then that should be considered *prima facie* evidence" of a violation.[18] Because the McClatchy article claimed — based on anonymous sources — that the FBI was investigating whether Torshin had illegally funneled money through the NRA, she asserts that "[t]he complaint's use of this article alone justified" finding reason to believe.[19] "But had we known for sure whether the FBI was investigating this matter," she claims, "the Commission's RTB decision could have been a slam dunk."[20]

My colleague's statements reflect nothing more than wishful thinking on her part. At the risk of stating the obvious, the Commission and the FBI are different agencies, operating under different statutes, policies, precedents, and standards. For example, the Act prohibits the Commission from launching investigations in complaint-generated matters unless: (1) The complaint is in writing, signed, notarized, and sworn by the person filing it under penalty of perjury;[21] (2) The accused has been notified in writing about the complaint and afforded an opportunity to respond;[22] and (3) A bipartisan vote of at least four Commissioners finds reason to believe.[23] I am not aware of any such constraints on the FBI.

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[18] Weintraub SOR at 2-3.

[19] *Id.* at 3; *see also id.* at 4 ("I considered McClatchy's credible and unrefuted reporting that such an [FBI] investigation existed to be enough to find RTB and authorize our own investigation.").

[20] *Id.* at 4.

[21] 52 U.S.C. § 30109(a)(1); *see also id.* ("[t]he Commission may not conduct any investigation or take any other action under this section solely on the basis of a[n] [anonymous] complaint").

[22] *Id.*

[23] 52 U.S.C. § 30106(c); *FEC v. DSCC*, 454 U.S. 27, 37 (1981) (noting that Commission is "inherently bipartisan" as one reason why "Congress wisely provided that the Commission's dismissal of a complaint should be reversed only if 'contrary to law'"); *see also FEC v. NRA Political Victory Fund*, 6 F.3d 821, 825 (D.C. Cir. 1993) (identifying "the sensitive political nature of [the Commission's] work" as reason why "an equal number of members from each party was contemplated," and quoting H.R.Rep. No. 917, 94th Cong., 2d Sess. 3 (1976) ("It is therefore essential in this sensitive area [of campaign regulation] that the system of administrative and enforcement enacted into law does not provide room for partisan misuse . . . .")).

The Act's procedural safeguards for respondents in enforcement matters are solidly rooted in the Commission's unique mandate. The Commission is "[u]nique among federal administrative agencies, having as its sole purpose the regulation of core constitutionally protected activity — the behavior of individuals and groups only insofar as they act, speak and associate for political purposes."[24] Thus, the Commission cannot predicate an expansive investigative authority on standards that apply to agencies whose sole purpose is not "regulat[ing] activities involving political expression" and whose actions could be guided by ideological or partisan considerations.[25] For the Commission to investigate based only on what the FBI is or might be doing — as my colleague has advocated — we would have to abrogate our responsibilities under the Act to make decisions based on the evidence before us. I would encourage my colleague, instead, to follow her own advice in another matter: "'(1) Read the statute; (2) read the statute; (3) read the statute!'"[26]

My colleague's remaining arguments here are even less persuasive. By plugging the words "alexander," "torshin," "nra," "fbi," and "investigation" into a Google search, she claims to have found that "[t]housands of articles have been written on the FBI's interest in Torshin's and Russia's dealings with the NRA."[27] Assuming for the sake of argument that her claim is correct, she nonetheless fails to identify any articles with evidence of the statutory violations alleged here.[28]

My colleague also argues that Maria Butina's 2018 guilty plea to one count of conspiracy to access the NRA and other conservative groups as an unregistered foreign agent "bolsters the credibility" of the complaint's allegations.[29] In this, she is just flat-out wrong. As OGC correctly noted, "[n]either the plea documents nor the criminal complaint mention any potential

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[24] *Van Hollen v. FEC*, 811 F.3d 486, 499 (D.C. Cir. 2016); *see also McCutcheon v. FEC*, 572 U.S. 185, 191 (2014) (Commission investigations implicate activities that are "basic in our democracy," involving materials "of a delicate nature represent[ing] the very heart of the organism which the [F]irst [A]mendment was intended to nurture and protect").

[25] *FEC v. Florida for Kennedy Comm.*, 681 F.2d 1281, 1284 (11th Cir. 1982); *see also FEC v. Machinists Non-Partisan Political League*, 655 F.2d at 387 (distinguishing Commission from administrative agencies "vested with broad duties to gather and compile information and to conduct periodic investigations concerning business practices" because "the FEC has no such roving statutory functions").

[26] MUR 7432 (John James for Senate, Inc., *et al.*), Statement of Reasons of Chair Ellen L. Weintraub at 2 (quoting Justice Felix Frankfurter).

[27] Weintraub SOR at 3.

[28] *Id.* at 3, n.15. This is hardly a scientific exercise. Plugging in the words "Clinton," "foundation," "Saudi" "campaign," and "money," for example, results in 2.78 million hits. To the extent that my colleague's Google search found articles touching on the conduct alleged here, a cursory review indicates that they simply relied on the same McClatchy article as the complaint. A single piece of reporting does not become more credible or persuasive merely because it has been picked up and recycled by other media outlets or has gone viral.

[29] *Id.* at 3; *see also* Statement of Offense, *U.S. v. Maria Butina*, 18-cr-218 (D.D.C. Dec. 8, 2018).

violations of federal campaign finance law or otherwise refer to a scheme to funnel donations."[30] Nor does the FBI's affidavit describing its investigation of Butina.[31] And, although the Special Counsel investigating interference in the 2016 election interviewed Butina, he did not indict her, or Torshin, or anyone at the NRA.[32]

Finally, the questionable genesis of the Russian funneling claim is reminiscent of a child's game of telephone, which only confirms the wisdom of OGC's dismissal recommendation. In testimony before the House Judiciary Committee, former Associate Deputy Attorney General Bruce Ohr said that he had heard about the claim from Fusion GPS's co-founder Glenn Simpson, who had heard about it from former NRA attorney Cleta Mitchell, and that Ohr had then passed the information on to the FBI.[33] But Simpson, for his part, did not say *anything* about Russian money being funneled through the NRA in more than 16 hours of congressional testimony, even though Simpson did address the NRA, Butina, and Torshin by

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[30] FGCR at 11. OGC also concluded that the public criminal filings did not indicate that Butina had participated in the NRA's decision-making process with respect to its election-related activities. *Id.* at 21.

[31] Affidavit in Support of an Application for a Criminal Complaint, In the Matter of an Application for Criminal Complaint for Mariia Butina, Also Known as Maria Butina (July 2018), https://www.justice.gov/usao-dc/pr/russian-national-charged-conspiracy-act-agent-russian-federal-within-united-states.

[32] This is potentially significant because if, as McClatchy has also reported, the Special Counsel's "main focus" was on the NRA's funding sources, the fact that his office brought no indictments against these respondents further undermines the complaint's funneling claim. *See* Peter Stone and Greg Gordon, *Russia investigators likely got access to NRA's tax filings, secret donors*, MCCLATCHY (July 2, 2018).

[33] Ohr testified, in part, as follows:

> MR. OHR: I think it was Glenn Simpson mentioned to me was that Cleta Mitchell became aware of money moving through the NRA or something like that from Russia. And I don't remember the exact circumstances. And that she was upset about it, but the election was over. I seem to remember that from my notes.
> MR. MEADOWS: So in your conversations with Mr. Simpson did you verify the veracity of that allegation?
> MR. OHR: I was just taking the information. I wasn't — you know, so I don't remember asking followup questions on that.
> MR. MEADOWS: And he said he knew that how?
> MR. OHR: I don't —
> MR. MEADOWS: How did he find out about Cleta Mitchell?
> MR. OHR: I don't think he said.

Bruce Ohr, Transcript of Testimony to U.S. House of Representatives Committee on the Judiciary at 128 (Aug. 28, 2018); *see also id.* at 22 ("when I provided [the Fusion GPS information] to the FBI, I tried to be clear that this is source information. I don't know how reliable it is. You're going to have to check it out and be aware. These guys were hired by somebody relating to – who's related to the Clinton campaign, and be aware. . . . I wanted them to be aware of any possible bias").

name.[34] Further, former NRA attorney Cleta Mitchell — whom Ohr had named as the source of Simpson's funneling claim — has repeatedly and vehemently denied it, including in an affidavit executed under oath and provided to the Commission, and in a letter to the Senate Select Committee on Intelligence.[35]

* * *

Investigating the political activities of American advocacy groups threatens to chill the free exercise of their First Amendment rights of political speech and association. Thus, the Commission should take such action only when there is a demonstrable factual basis for it. Even my colleague has acknowledged that "facts matter," and serious allegations of wrongdoing demand evidence.[36] Here, OGC determined the facts did not indicate or even suggest activity that is illegal under the Act. I agree.

[34] Simpson said "it appears the Russians" had "infiltrated" the NRA, admitted spending "a lot of time investigating" Torshin, and thought Butina was "suspicious." Glenn Simpson, Transcript of Testimony to U.S. House of Representatives Permanent Select Committee on Intelligence at 142-43 (Nov. 14, 2017).

[35] *See, e.g.*, MUR 7314 (NRA, *et al.*), NRA Resp., Ex. A (Affidavit of Cleta Mitchell) (July 27, 2018) ("I told [McClatchy] reporter Peter Stone that this entire reference to Russia and the NRA is a lie . . . . I told him it was preposterous. Then [McClatchy] run[s] a story saying the OPPOSITE?"); Letter From Cleta Mitchell to Senate Select Committee on Intelligence (May 8, 2018) ("Whatever stories Glenn Simpson, Dan Jones, and other operatives associated with Fusion GPS, have told your staff about me, they are lying" and describing McClatchy's reporting as "false").

[36] Letter from Ellen L. Weintraub to President Donald J. Trump (Aug. 16, 2019) (demanding Trump "provide evidence [he] may have . . . to substantiate [his] claims."); *see also* Letter from Ellen L. Weintraub to President Donald J. Trump (Mar. 22, 2017) (stressing importance of "facts, not unsupported statements").