



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

## BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	MUR 6915
John Ellis Bush, <i>et al.</i>	)	MUR 6927
	)	

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

The complaints in these Matters were filed in early 2015, and yet, at the time of this writing, like ghosts with unfinished business, they still haunt the Commission’s internal files. During that time, former Governor Bush announced his bid for the White House, failed in that effort, and saw his principal opponent Donald Trump sworn in as President and defeated, in turn, for re-election. Meanwhile, the statute of limitations lapsed and four commissioners of this agency left and were replaced.

#### I. PROCEDURAL HISTORY

To repeat a story from a prior decade, John Ellis “Jeb” Bush, the former governor of Florida, sought the Republican nomination for President of the United States during the 2016 election cycle. Prior to formally announcing his candidacy and filing the appropriate paperwork with the Commission, Bush served as the honorary chairman of Right to Rise PAC, a multicandidate committee, and he also interacted with Right to Rise USA, an independent-expenditure-only committee<sup>1</sup> that would go on to spend over \$100,000,000 in a failed bid to secure the Republican nomination for Bush.

The complaints in these Matters argued that Bush had actually become a candidate for President well before he formally announced, and that, consequently, Bush’s interactions with the above-mentioned PACs violated the Federal Election Campaign Act of 1971 (“FECA” or “Act”), as amended.<sup>2</sup> In February of 2017, our Office

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<sup>1</sup> Commonly known as a “super PAC.”

<sup>2</sup> First Gen’l Counsel’s Report (“FGCR”) at 3-4, MURs 6915/6927 (Bush, *et al.*), Feb. 8, 2017.

of General Counsel (“OGC”) concluded that “[t]he available information indicates that there is reason to believe that Bush became a candidate at least as early as January 2015, that he and the Super PAC violated the Act’s soft money ban, and that [Right to Rise] PAC may have made excessive and unreported in-kind contributions to Bush and his” 2016 campaign committee.<sup>3</sup>

At two executive sessions in December 2018, the Commission rejected OGC’s recommendations.<sup>4</sup> This ought to have been the end of these Matters. As the D.C. Circuit recently observed, “[u]nder FECA, an affirmative vote of four commissioners is required for the agency to initiate enforcement proceedings” and where there are not four “votes in favor of moving forward with an enforcement action against [a respondent], the Commission dismis[s]...[the] complaint.”<sup>5</sup>

Under the Act, then, these Matters were concluded in December 2018. Pursuant to our statutory scheme, the complainant should then have been notified that the Commission had declined to proceed with enforcement, statements of reasons released by our predecessors explaining their votes,<sup>6</sup> and the complainants would have been faced with the decision whether or not to challenge the Commission’s dismissal as “contrary to law.”<sup>7</sup> Had they elected to do so, the reviewing court would have, after considering the statements of reasons issued by the “controlling commissioners”<sup>8</sup> (those that declined to adopt OGC’s enforcement recommendation), made a determination on the merits as to whether our predecessors acted with “reason or caprice.”<sup>9</sup>

That is not what happened.

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<sup>3</sup> FGCR at 4; *see also id.* at 33-34 (listing OGC recommendations).

<sup>4</sup> Certification at 1-2, MURs 6915/6927 (Bush, *et al.*), Dec. 6, 2018; Certification at 1-2, MURs 6915/6927 (Bush, *et al.*), Dec. 13, 2018.

<sup>5</sup> *Citizens for Resp. & Ethics in Washington v. Fed. Election Comm’n*, 993 F.3d 880, 883 (D.C. Cir. 2021)

<sup>6</sup> *Democratic Congressional Campaign Comm. v. Fed. Election Comm’n*, 831 F.2d 1131, 1135 (D.C. Cir. 1987) (“DCCC”).

<sup>7</sup> 52 U.S.C. § 30109(a)(8)(C).

<sup>8</sup> *Fed. Election Comm’n v. Nat’l Republican Senatorial Comm.*, 966 F.2d 1471, 1476 (D.C. Cir. 1992) (“We further held that, to make judicial review a meaningful exercise, the three Commissioners who voted to dismiss must provide a statement of their reasons for so voting. 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”) (citation omitted).

<sup>9</sup> *DCCC*, 831 F.2d at 1135.

Instead, at the Commission's executive session of December 13, 2018, two commissioners declined to assent to the ministerial act of closing the file.<sup>10</sup> On April 9, 2019, there was another effort to close the file, which Commissioners Hunter and Petersen opposed.<sup>11</sup> This vote was followed by an unsuccessful effort to close the file and preemptively authorize defense of the agency "in the event the complainant files a suit under 52 U.S.C. § 30109(a)(8)."<sup>12</sup>

On April 23, 2019, there was yet another effort to close the file, where the two commissioners that initially declined to close the file voted to do so, but Commissioners Hunter and Petersen both abstained.<sup>13</sup> On May 7, 2019, that same vote occurred again.<sup>14</sup>

On May 23, 2019, a motion was made to dismiss these Matters pursuant to the agency's prosecutorial discretion.<sup>15</sup> No commissioner voted for that motion.<sup>16</sup> A motion was then made, once again, to close the file and to preemptively authorize defense of the agency if a lawsuit was brought by pursuant to 52 U.S.C. § 30109(a)(8).<sup>17</sup> This vote was also deemed to have failed.<sup>18</sup> On a subsequent motion, the Democratic and Independent commissioners then voted to simply close the file, and this vote also was deemed to have failed, with the Republican commissioners

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<sup>10</sup> Certification at 2, MURs 6915/6927 (Bush, *et al.*), Dec. 13, 2018.

<sup>11</sup> Certification at 1, MURs 6915/6927 (Bush, *et al.*), April 9, 2019. At that time, only four commissioners sat on the Commission. We are not privy as to why our Republican predecessors declined to acquiesce in this ministerial vote. Nevertheless, they were wrong to do so.

<sup>12</sup> *Id.* at 1-2.

<sup>13</sup> Certification at 1, MURs 6915/6927 (Bush, *et al.*), Apr. 23, 2019.

<sup>14</sup> Certification at 1, MURs 6915/6927 (Bush, *et al.*), May 7, 2019.

<sup>15</sup> See *Heckler v. Chaney*, 470 U.S. 821 (1985).

<sup>16</sup> Certification at 1, MURs 6915/6927 (Bush, *et al.*), May 23, 2019. ("Commissioners Walther and Weintraub dissented. Commissioners Hunter and Petersen abstained").

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* ("Commissioners Hunter, Petersen, and Walther voted affirmatively for the motion. Commissioner Weintraub dissented").

again abstaining.<sup>19</sup> Thereafter, Commissioner Petersen resigned and the agency lost its quorum.<sup>20</sup>

FECA provides that “[a]ny party aggrieved...by a failure of the Commission to act on [a] 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.”<sup>21</sup> Because the file has remained open in these Matters, the public had not been apprised that the Commission had, in fact, acted on these complaints.<sup>22</sup>

On March 13, 2020, two complainants filed a lawsuit claiming that “[u]pon information and belief, the Commission has failed to act on” their “complaint...since it was filed more than four and a half years ago. The Commission’s inaction has thus persisted well beyond the statutorily allotted 120-day response period, as indeed, it has failed to take action over a period more than ten times that length.”<sup>23</sup>

At the time that this so-called “delay suit” was filed, the Commission was still inquorate, but the quorum was restored on May 19, 2020 with the confirmation of Commissioner Trainor.<sup>24</sup> On June 23, 2020, the Commission again failed to close the file, declined to dismiss the allegations pursuant to the agency’s prosecutorial discretion, and declined to authorize defense of the agency in the delay suit.<sup>25</sup> As a result, Commission attorneys were unable to apprise the plaintiffs or the federal court that the premise of the complainants’ suit was wrong, and that the Commission’s work in these Matters had long concluded.

President Biden prevailed in the 2020 election and on January 20, 2021, these Matters entered their third presidential administration. Nearly a year later, on

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<sup>19</sup> *Id.* at 2.

<sup>20</sup> Resignation Ltr. of Comm’r Petersen, Fed. Election Comm’n, Aug. 26, 2019; available at: [https://www.fec.gov/resources/cms-content/documents/Vice\\_Chairman\\_Petersen\\_LOR\\_8.26.19.pdf](https://www.fec.gov/resources/cms-content/documents/Vice_Chairman_Petersen_LOR_8.26.19.pdf)

<sup>21</sup> 52 U.S.C. § 30109(a)(8)(A).

<sup>22</sup> See 11 C.F.R. § 4.4(a)(3) (“Opinions of Commissioners...shall be placed on the public record of the Agency no later than 30 days from the date on which all respondents are notified that the Commission has voted to close...an enforcement file”).

<sup>23</sup> Cmplt. at 10, ¶ 35, *Campaign Legal Ctr. v. Fed. Election Comm’n*, No. 20-730 (D.D.C. Mar. 13, 2020)

<sup>24</sup> “James E. ‘Trey’ Trainor III,” Fed. Election Comm’n, available at: <https://www.fec.gov/about/leadership-and-structure/james-e-trainor-iii/>

<sup>25</sup> Certification at 1, MURs 6915/6927 (Bush, *et al.*), June 23, 2020.

January 11, 2022, at the first executive session under Chairman Dickerson, these Matters were once more called and the Commission once more failed to close the file.<sup>26</sup>

## II. WHERE WE'RE GOING

As of the writing of this Statement of Reasons, the delay suit remains ongoing.<sup>27</sup> Meanwhile, our five-year statute of limitations has long passed.<sup>28</sup>

Two of us have never been presented with an opportunity to vote on the substance of these Matters, and we take no position on the merits of the decisions reached by our predecessors in declining to find reason to believe by the four affirmative votes that the Act requires. Even if we disagreed with the Commission's 2018 decision, that vote was taken, and the Commission has declined to enforce. Because that was the end of these Matters, especially where we lack jurisdiction to do otherwise given the elapsed statute of limitations, we have voted to close the file.

It is our earnest hope that the Commission will turn from its errors, close this file, and return to the Commission's multi-decade practice of routinely closing files after the agency has declined to proceed with enforcement. In our view, that is not just the natural reading of the statute, it is also essential to the Commission's continued effectiveness and legitimacy.

## CONCLUSION

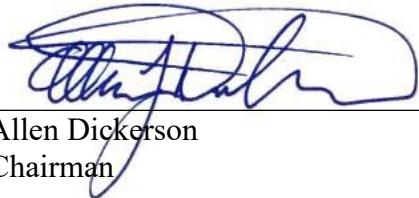
For the foregoing reasons, we voted to close the file.

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<sup>26</sup> Certification at 1, MURs 6915/6927 (Bush, *et al.*), Jan. 11, 2022.

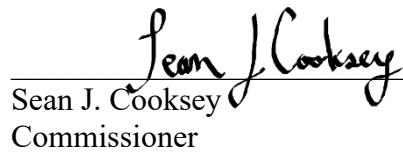
<sup>27</sup> *E.g.* Plaintiff's Reply in Further Supp. of Mot. for Reconsideration, *Campaign Legal Ctr. v. Fed. Election Comm'n*, No. 20-730 (D.D.C. Feb. 23, 2022).

<sup>28</sup> 52 U.S.C. § 30145(a) ("No person shall be...punished for any violation of" the Act "unless...the information is instituted within 5 years after the date of the violation"); 28 U.S.C. § 2462 ("Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon").



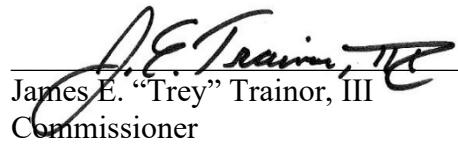
Allen Dickerson  
Chairman

May 13, 2022  
Date



Sean J. Cooksey  
Commissioner

May 13, 2022  
Date



James E. "Trey" Trainor, III  
Commissioner

May 13, 2022  
Date