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FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)
)
Donald J. Trump, *et al.*) MUR 6992
)

**STATEMENT OF REASONS OF VICE CHAIR ALLEN DICKERSON AND
COMMISSIONER JAMES E. “TREY” TRAINOR, III**

INTRODUCTION

The Complaint in this Matter alleged that the Trump Organization, “a privately held conglomerate that owns, develops[,] and manages a variety of real estate holdings,”¹ made “prohibited in-kind contributions to support” the 2016 campaign of former President Donald Trump “when Trump Organization General Counsel Alan Garten provided legal services to the campaign, and Executive Vice President and Special Counsel Michael Cohen communicated with the press on behalf of the Trump Committee.”²

Our Office of General Counsel (“OGC”) recommended that we dismiss these allegations pursuant to our prosecutorial discretion under *Heckler v. Chaney*.³ The trouble, though, is that the statute of limitations had long expired by the time this Matter came to a vote, and so we lacked discretion, prosecutorial or otherwise, as to whether to proceed. Accordingly, we could not follow OGC’s recommendation that the

¹ First Gen’l Counsel’s Report (“FGCR”) at 3, MUR 6992 (Trump, *et al.*).

² *Id.* at 2.

³ 470 U.S. 821 (1985); FGCR at 16; *cf. Citizens for Responsibility and Ethics in Wash. v. Fed. Election Comm’n*, 993 F.3d 880, 884-887 (D.C. Cir. 2021) (describing the Commission’s authority to dismiss pursuant to prosecutorial discretion under the *Heckler* doctrine). OGC had concluded that “the value of the services provided by Garten and Cohen were likely *de minimis*, and in the case of Cohen, may have been covered by the volunteer exception” and did not “warrant[] the use of additional Commission resources.” FGCR at 2.

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Commission invoke discretion it did not have, and instead voted to “[d]ismiss the allegations based upon the expiration of the statute of limitations.”⁴

Our colleagues disagreed, and we accordingly provide this Statement to explain our reasoning.⁵

I. Background

To be clear, our vote did not depend on any of the alleged facts concerning Mr. Cohen, Mr. Garten, the Trump Organization, or the Trump campaign.

The only relevant facts are these: The Complaint in this Matter alleged violations of the Federal Election Campaign Act (“FECA” or “the Act”) that, even if true, were subject to a statute of limitations that expired on December 4, 2020.⁶ And the Matter came before the Commission at the executive session held on July 13, 2021,⁷ 221 days after the statute of limitations had run.⁸

⁴ Amended Certification at 1, MUR 6992 (Trump, *et al.*) (noting 3-3 vote).

⁵ *See Dem. Cong. Campaign Comm. v. Fed. Election Comm’n*, 831 F.2d 1131, 1135 (D.C. Cir. 1987) (“DCCC”) (establishing requirement that “[t]he Commission or the individual Commissioners” must provide a statement of reasons why the agency “rejected or failed to follow the General Counsel’s recommendation”); *Common Cause v. Fed. Election Comm’n*, 842 F.2d 436, 453 (D.C. Cir. 1988) (“A statement of reasons...is necessary to allow meaningful judicial review of the Commission’s decision not to proceed”); *see also id.* at 451 (R.B. Ginsburg, J., dissenting in part and concurring in part) (“I concur in part III of the court’s opinion holding the DCCC rule applicable, prospectively, to all Commission dismissal orders based on tie votes when the dismissal is contrary to the recommendation of the FEC General Counsel”); *Nat’l Republican Senatorial Comm. v. Fed. Election Comm’n*, 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); *Campaign Legal Ctr. & Democracy 21 v. Fed. Election Comm’n*, 952 F.3d 352, 355 (D.C. Cir. 2020).

⁶ FGCR at 1 (“LATEST SOL: Dec. 4, 2020”).

⁷ Amended Certification at 1.

⁸ This was not due to dilatory behavior by OGC. The FGCR in this Matter is dated October 20, 2017. Unfortunately, between March 1, 2017 and December 9, 2020, the Commission never “had a full complement of commissioners” and often during that period lacked “enough commissioners to vote on enforcement matters.” Statement of Comm’r Weintraub on the Senate’s Votes to Restore the Federal Election Commission to Full Strength, Dec. 9, 2020.

II. Legal Analysis

FECA provides this Commission with “exclusive” jurisdiction over civil “enforcement of [its] provisions.”⁹ As with most grants of administrative authority, this one is subject to a statute of limitations. Specifically, we cannot lawfully act on alleged violations that are more than five years old.¹⁰ To have invoked prosecutorial discretion, as OGC recommended, would have implicitly suggested, contrary to our statute, that the Commission could have proceeded but declined to do so.¹¹

This would be improper: administrative agencies are “created by statute” and “can have no jurisdiction but such as the statute confers.”¹² Accordingly, we “may play the sorcerer’s apprentice but not the sorcerer himself,”¹³ and the sorcerer has limited our powers to allegations that are no more than five years stale.

CONCLUSION

Congress limited this Commission’s enforcement authority by giving us a five-year clock. Nevertheless, we did not address this Matter until 221 days after that clock had wound down. Accordingly, we took the only course lawfully available to us and voted to dismiss “based upon the expiration of the statute of limitations.”¹⁴

⁹ 52 U.S.C. § 30107(e).

¹⁰ 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”).

¹¹ We have voted in the past to invoke the *Heckler* doctrine when faced with, *inter alia*, “a lapsed statute of limitations” and an OGC recommendation that the availability of equitable relief entitled us to enforce against a Respondent. Statement of Reasons of Vice Chair Dickerson and Comm’rs Cooksey and Trainor at 4, MUR 7181 (Independent Women’s Voice), Mar. 18, 2021. Here, however, OGC has provided no argument, even one we disagree with, supporting our jurisdiction here.

¹² *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 818 (1988) (quoting *Sheldon v. Sill*, 49 U.S. 441 (1850)).

¹³ *Alexander v. Sandoval*, 532 U.S. 275, 291 (2001) (describing regulatory authority of federal administrative agencies).

¹⁴ Amended Certification at 1.

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Allen Dickerson
Vice Chair

August 31, 2021

Date



James E. "Trey" Trainor, III
Commissioner

August 31, 2021

Date