



FEDERAL ELECTION COMMISSION
 WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)
)
 Debbie Wasserman Schultz for Congress and) MUR 7125
 Lawrence Wasserman in his official capacity)
 as treasurer, *et al.*)
)

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

The Complaint in this Matter alleges that during the 2016 election cycle Representative Debbie Wasserman Schultz, who was then serving as Chair of the Democratic National Committee (“DNC”) and was a candidate for reelection to the House of Representatives from Florida’s 23rd Congressional District, impermissibly used DNC staff and resources to support her congressional campaign. Our Office of General Counsel (“OGC”) recommended that the Commission dismiss the allegations that the DNC made, and Wasserman Schultz’s principal campaign committee (the “Committee”) accepted and failed to report, excessive in-kind contributions in violation of 52 U.S.C. §§ 30104 and 30116, and that Wasserman Schultz violated 52 U.S.C. § 30116(f) by accepting excessive in-kind contributions. OGC also recommended that the Commission find no reason to believe concerning two additional allegations: that Wasserman Schultz violated 52 U.S.C. §§ 30124(a) by fraudulently misrepresenting campaign authority and that the DNC violated 52 U.S.C. § 30116(d) by making contributions in a primary election.

All commissioners agree that these allegations should be dismissed, but views diverge as to why. Ultimately, four commissioners voted to dismiss the allegations as to all Respondents as an exercise of the Commission’s prosecutorial discretion.¹ We, however, dissented. Where, as here, the statute of limitations has unambiguously run, the Commission lacks jurisdiction under our enabling statute. Consequently, we have no discretion to exercise, and this Matter should have been dismissed on that basis alone.

I. Factual Background

The Complaint’s allegations stem from emails released by Wikileaks following an alleged hack of the DNC during the 2016 elections.² The emails purport to contain conversations between

¹ Certification (July 13, 2021), MUR 7125 (Debbie Wasserman Schultz for Congress, *et al.*).

² *See* DNC Resp. at 1; Committee Resp. at 1-2.

DNC staff, members of Wasserman Schultz’s campaign staff, and agents of SKDK, a vendor providing communications consulting services to the DNC.³ The emails primarily appear to reflect conversations regarding how Wasserman Schultz’s campaign committee should respond to various questions pertaining to her congressional campaign.⁴

Based on these documents, the Complaint alleges that the DNC made, and Wasserman Schultz and the Committee accepted and did not report, in-kind contributions in the form of services performed by DNC staffers.⁵ The Complaint also alleges that Wasserman Schultz’s use of DNC staff and resources resulted in her “willfully and knowingly participat[ing] in or conspir[ing] to participate [in a] plan to undermine [Complainant’s] congressional campaign, in violation of the Act’s fraudulent misrepresentation provision.”⁶

After reviewing the record, OGC concluded that the services provided by DNC staff and associated consultants were directed toward Wasserman Schultz’s role as Chair of the DNC, and not provided to her campaign committee or intended to support the Congresswoman in her role as a candidate.⁷ Accordingly, OGC recommended that the Commission dismiss the allegations.

While OGC’s legal analysis may very well be correct, it is beside the point. Because the alleged activity occurred more than five years ago, the statute of limitations has expired and, with it, our authority to consider the Complaint’s merits.⁸

II. Analysis

Our enforcement actions are subject to the default five-year statute of limitations codified at 28 U.S.C. § 2462. This is a settled question of law,⁹ and neither the Complainant nor OGC has suggested that an alternative statute of limitations is applicable here.

³ See Compl. Exs. 1-11; SKDK Resp. at 1.

⁴ See Compl. Exs. 1-11.

⁵ Compl. at 10-11.

⁶ *Id.* at 8-10.

⁷ First General Counsel’s Rpt. at 9.

⁸ The First General Counsel’s Report advised the Commission that the statute of limitations expired on April 1, 2021, although the relevant emails date from May 2016 – as the Report acknowledges. First General Counsel’s Rpt. at 1, 4. But whether the statute of limitations expired on April 1 or May 31 is immaterial: the Commission did not vote on this Matter until July 13, 2021. Certification (July 13, 2021), MUR 7125 (Debbie Wasserman Schultz for Congress, *et al.*).

⁹ See *FEC v. Williams*, 104 F.3d 237, 240 (9th Cir. 1996) (“We hold that § 2462 applies to FEC actions for the assessment or imposition of civil penalties under FECA.”); see also *CREW v. FEC*, 236 F. Supp. 3d 378, 383, 392 (D.D.C. 2017) (“The statute of limitations for FECA actions is five years.”) (citing 28 U.S.C. § 2462).

We exercise only the powers Congress has delegated to us, subject to such limitations as it chooses to impose.¹⁰ The statute of limitations is one such constraint. Put simply, the decision whether to dismiss this Matter is not a question committed to our judgment. And where we are prohibited by statute from taking action in a Matter, the invocation of *Heckler v. Chaney* is a poor fit.¹¹ *Heckler* acknowledges as much, noting that an agency balances a “number of factors” when deciding to exercise its prosecutorial discretion.¹² These factors include assessing “whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency’s overall policies, and, indeed, whether the agency has enough resources to undertake the action at all.”¹³ As these examples suggest, *Heckler* contemplates circumstances where an agency has the option of proceeding with enforcement and must decide whether doing so is the wisest course.

Furthermore, our own guidance weighs against invoking prosecutorial discretion once the statute of limitation has run. According to the FEC Guidebook, it is appropriate for the Commission to exercise its discretion “when the seriousness of the alleged conduct is not sufficient to justify the likely cost and difficulty of an investigation to determine whether there is probable cause to believe a violation in fact occurred, or the evidence is sufficient to support a reason to believe finding but the violation is minor and has already been remedied or is not likely to be repeated.”¹⁴ Again, prosecutorial discretion is appropriate in instances where the Commission *could* pursue enforcement action but has decided not to do so. Such is not the case here.

Finally, there are prudential reasons to acknowledge our lack of jurisdiction, dismiss the matter, and close the file. Where the statute of limitations has run, little legal analysis is required, potentially saving significant resources at our already overburdened agency. Relatedly, a straight jurisdictional dismissal avoids the temptation to opine on elements of the record that have no bearing on our ultimate authority to proceed.¹⁵

¹⁰ See 52 U.S. Code § 30106(b).

¹¹ See *Heckler v. Chaney*, 470 U.S. 821, 832 (1985).

¹² *Id.* at 831.

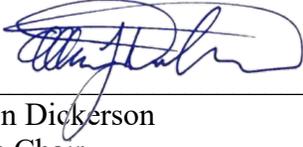
¹³ *Id.*

¹⁴ Guidebook for Complainants and Respondents on the FEC Enforcement Process at 12-13, FED. ELECTION COMM’N (May 2012).

¹⁵ For instance, two of our colleagues have explained their position in this Matter with special reference to the provenance of the emails relied upon by the Complaint. See Statement of Reasons of Chair Shana M. Broussard and Commissioner Steven T. Walther, MUR 7125 (Wasserman Schultz, *et al*). While acknowledging the statute of limitations, they do so only at the end of the last paragraph of their brief statement. And they explain that, in their view, “[t]aken together or separately, the source of the hacked emails and the expiration of the statute of limitations are factors that weigh against further consideration of this matter.” But where there is no jurisdiction, there is no weighing to be done. In our view, the better course is to leave such dicta for a future matter.

III. Conclusion

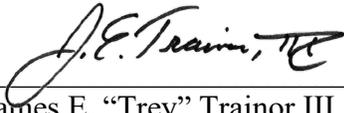
Because 28 U.S.C. § 2462 deprives the Commission of jurisdiction in this Matter, we would have dismissed on that basis alone.



Allen Dickerson
Vice Chair

August 24, 2021

Date



James E. "Trey" Trainor III
Commissioner

August 24, 2021

Date