



FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

**BEFORE THE FEDERAL ELECTION COMMISSION**

In the Matter of	)	
	)	MUR 7220
Make America Great Again PAC f/k/a	)	
Donald J. Trump for President, Inc. and	)	
Bradley T. Crate in his official capacity as treasurer;	)	
Donald J. Trump; Trump Make America Great	)	
Again Committee and Bradley T. Crate in his	)	
official capacity as treasurer	)	

**STATEMENT OF REASONS OF VICE CHAIR ALLEN DICKERSON AND  
COMMISSIONERS SEAN J. COOKSEY AND JAMES E. "TREY" TRAINOR, III**

This matter is yet another example of the Federal Election Commission dropping the ball. Filed shortly after the 2016 election, this Complaint leveled serious allegations of misconduct against a presidential campaign, to which the campaign quickly filed a rebuttal. But rather than prioritizing the matter for the Commission’s timely consideration, the Office of General Counsel (“OGC”) took nearly four years to assess the case and make a recommendation to the Commission. By the time OGC submitted its First General Counsel’s Report (“FGCR”) in July 2021, the statute of limitations had nearly lapsed. And while that report ultimately recommended dismissing the specific charges alleged in the Complaint, it went on to suggest that the Commission enforce against a separate violation not raised in the Complaint, and about which the Respondents were never notified.

Facing a case with no reasonable chance of successful enforcement because of the impending statute of limitations, and declining to give an imprimatur to a circumvention of Respondents’ due process rights, we voted to dismiss this matter as an exercise of prosecutorial discretion.

**I. Factual Background**

On March 2, 2017, the Commission received this Complaint about former President Donald Trump’s campaign committee, which has since become Make America Great Again PAC (the “Trump Committee”), and a joint fundraising committee that it established with the Republican National Committee.<sup>1</sup> The charges were significant: the Complaint claimed that the Trump Committee knowingly and willfully filed false reports with the Commission and

<sup>1</sup> Complaint (Mar. 2, 2017), MUR 7220 (Make America Great Again PAC *et al.*).

misattributed millions of dollars in post-election contributions as servicing non-existent debt.<sup>2</sup> Those moneys should have been refunded or reallocated to the 2020 campaign, the Complaint said, for which Trump and the Trump Committee had failed to file proper organizational paperwork.<sup>3</sup> The Complaint laid out these claims in three specific allegations.<sup>4</sup>

In responses filed in May and August of 2017, the Respondents maintained that the Complaint was wrong. After the 2016 election, they stated, the Trump Committee had approximately \$4 million in anticipated net debts.<sup>5</sup> As a result, in the months immediately after the election, they properly raised funds to retire that debt, pursuant to Commission regulations.<sup>6</sup> Later on, the Trump Committee opted to redesignate contributions for 2016 debt retirement toward the 2020 primary election.<sup>7</sup> They otherwise denied that Trump or the Trump Committee had failed to timely file a Statement of Candidacy or Statement of Organization.<sup>8</sup>

After receiving the Complaint and Responses, OGC did not circulate its report on this matter to Commissioner offices until July 13, 2021—over four years from when the initial Complaint was filed and about four months before the statute of limitations began to lapse.<sup>9</sup> It recommended that the Commission dismiss the charges raised in the Complaint, citing, among other things, the age of the allegations and their diminished relevance in light of subsequent events.<sup>10</sup> The FGCR went on to suggest, however, that the Commission enforce against the Trump Committee on a separate violation—one not raised in the Complaint. According to OGC, the Trump Committee failed to properly report estimates of its anticipated debts on several reports after the 2016 election, which formed the basis for the Complaint’s assumption that the collected contributions were not being properly raised for debt retirement.<sup>11</sup>

The Commission considered these recommendations in its executive session on July 27, 2021. There, we voted to dismiss the allegations as an exercise of our prosecutorial discretion under *Heckler v. Chaney*.<sup>12</sup> The Commission, having failed to agree to any enforcement action by the required four votes, voted to close the file.<sup>13</sup>

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<sup>2</sup> *Id.* at 3–7.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at 10–16 (setting out three allegations with corresponding statutory and regulatory citations).

<sup>5</sup> Response of Donald J. Trump and Donald J. Trump for President, Inc., and Bradley T. Crate, as Treasurer at 2 (May 9, 2017), MUR 7220 (Make America Great Again PAC *et al.*).

<sup>6</sup> *Id.* at 1–3.

<sup>7</sup> *Id.* at 3.

<sup>8</sup> *Id.* at 4–5.

<sup>9</sup> First General Counsel’s Report at 1 (July 13, 2021), MUR 7220 (Make America Great Again PAC *et al.*).

<sup>10</sup> *Id.* at 14, 21.

<sup>11</sup> *Id.* at 15–18.

<sup>12</sup> Certification (July 27, 2021), MUR 7220 (Make America Great Again PAC *et al.*).

<sup>13</sup> *Id.*

## II. Legal Analysis

### a. The Impending Statute of Limitations Demands Dismissal

This matter warranted discretionary dismissal in its entirety because of the impending statute of limitations. When considering whether to pursue any enforcement action, the Commission has an obligation to ensure that it is effectively using agency resources in consideration of competing priorities.<sup>14</sup> Part of that calculus requires that the Commission begin only enforcement actions that it can complete within the applicable five-year statute of limitations.<sup>15</sup> The reason is obvious: resources sunk into a failed investigation cannot be recovered and are better allocated to other cases.<sup>16</sup>

The Complainants filed with the Commission only a few months after the relevant conduct occurred. The Commission therefore had ample time to assess and, if necessary, undertake an investigation and enforcement action within the statute of limitations. But that never happened. Instead, for more than four years, gaps in the review process, staff turnover, and the prioritization of other cases delayed OGC from completing a First General Counsel’s Report—without which the Commission cannot assess whether the Complaint has merit or proceed with any potential investigation, if needed. As a result, much of the limitations period was forfeited without any decision on the Complaint’s merits, and Respondents were left waiting without any substantive updates.<sup>17</sup>

By the time the Commission first had an opportunity to formally consider the allegations in July 2021, the case was severely imperiled by the statute of limitations. Potential violations would begin to fall outside of the limitations period on November 9, 2021—approximately 105 days from when the Commission first considered the matter. To bring an enforcement action within the remaining time—if possible at all—would have required committing significant resources and inevitably have rushed both OGC’s work and the Commission’s deliberation. This would be especially burdensome given the uncertain legal theory, and lack of adequate notice, underpinning OGC’s allegation. In similar circumstances, we have voted to dismiss as an exercise of

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<sup>14</sup> See *Heckler v. Chaney*, 470 U.S. 821, 832 (1985) (“[A]n agency’s decision not to prosecute or enforce ... often involves a complicated balancing of a number of factors which are peculiarly within its expertise. Thus, the agency must not only assess whether a violation has occurred, but 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 ...”).

<sup>15</sup> 28 U.S.C. § 2462.

<sup>16</sup> See Statement of Reasons of Vice Chair Weintraub and Commissioners McDonald, Thomas, and Toner (April 2, 2004), MUR 5089 (Matta Tuchman for Congress, *et al.*) (exercising prosecutorial discretion to dismiss a matter four years and two months after respondents fraudulently misrepresented themselves as writing on behalf of a party committee due, in part, to “the age of the case”); see also Statement of Reasons of Vice Chair Petersen and Commissioners Hunter and Goodman at 1 (Nov. 6, 2015), MURs 6391 and 6471 (Commission on Hope, Growth, and Opportunity) (dismissing matters under *Heckler*, among other reasons, because “the statute of limitations [was] effectively expired” and the matter “did not warrant the further use of Commission resources”).

<sup>17</sup> Statement of Reasons of Vice Chair Dickerson and Commissioners Cooksey and Trainor at 3–4 (Mar. 18, 2021), MUR 7181 (Independent Women’s Voice) (“It undermines fundamental values of due process for a federal agency to hold individuals in jeopardy in this way without end and without explanation.”).

prosecutorial discretion where, “[b]eing only at the initial stage of enforcement ... there was no reasonable chance for the Commission to bring an enforcement action to fruition in the remaining time.”<sup>18</sup> The same is true here. In light of the Commission’s other enforcement priorities and limited resources, we voted to dismiss all the allegations as a matter of prosecutorial discretion.<sup>19</sup>

### **b. The Violation OGC Alleged Was Not Properly Presented to the Respondents**

Alongside the impending statute of limitations, we also declined to move forward with OGC’s alleged debt-reporting violation out of concern for Respondents’ due process rights. Under the Act, all respondents in complaint-generated matters must be notified of the alleged violations and provided an opportunity to respond.<sup>20</sup> This affords them the most basic protection of due process: the right to receive notice of charges and to have an opportunity to be heard.<sup>21</sup> The Federal Election Commission is not excepted from the government’s obligation to provide due process; on the contrary, the Commission is under a special obligation to respect due process rights in light of the constitutionally sensitive area it oversees.<sup>22</sup> Failure to abide by these due process rights is grounds for dismissal.<sup>23</sup>

Contra OGC’s contention, the Trump Committee was not given fair notice or an opportunity to respond to OGC’s assertion that it misreported its debt obligations in the wake of the 2016 election. It was not one of the allegations listed in the underlying Complaint.<sup>24</sup> Nor was it specifically alleged as part of the Complaint’s factual assertions. Instead, OGC points to a single

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<sup>18</sup> Statement of Reasons of Vice Chair Dickerson and Commissioners Cooksey and Trainor at 2 (May 10, 2021), MURs 7265 and 7266 (Donald J. Trump for President, Inc., *et al.*); *see also* Statement of Reasons of Chair Shana M. Broussard and Commissioner Ellen L. Weintraub at 2 (May 7, 2021), MUR 7395 (Heller for Senate, *et al.*) (“[I]n light of the imminent statute of limitations and other priorities on the Commission’s docket, we voted to dismiss the allegations.”).

<sup>19</sup> Certification (July 27, 2021), MUR 7220 (Make America Great Again PAC *et al.*).

<sup>20</sup> 52 U.S.C. § 30109(a); 11 C.F.R. §§ 111.5, 111.6.

<sup>21</sup> *See* Herbert Broom, *A Selection of Legal Maxims* 89 (1900) (“audi alteram partem,” translated as “listen to the other side”); *see also* Henry J. Friendly, “*Some Kind of Hearing*”, 123 U. Pa. L. Rev. 1267, 1267–81 (1975) (including among the necessary procedures for a hearing to satisfy due process: notice of the proposed action, an opportunity to present reasons and evidence why the proposed action should not be taken, and the right to have a decision based on the evidence presented).

<sup>22</sup> *Buckley v. Valeo*, 424 U.S. 1, 41 n.48 (1976) (per curiam). *See also* *FCC v. Fox Television Stations*, 567 U.S. 239, 253 (2012) (“[T]wo connected but discrete due process concerns [are]: first, that regulated parties should know what is required of them so they may act accordingly; second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way. When speech is involved, rigorous adherence to those requirements is necessary to ensure that ambiguity does not chill protected speech.”); *Am. Fed’n of Lab. & Cong. of Indus. Organizations v. FEC*, 333 F.3d 168, 170 (D.C. Cir. 2003).

<sup>23</sup> Statement of Reasons of Commissioner Goodman at 4 (Mar. 29, 2016), MUR 6775 (Ready for Hillary PAC *et al.*); *see also* Statement of Reasons of Chair Weintraub and Commissioner Thomas at 2–3 (April 24, 2003), MUR 5338 (Leadership Forum) (noting the due process concerns raised by the failure to notify respondents of charges OGC raises outside of a complaint); Statement of Reasons of Vice Chairman Petersen and Commissioners Hunter and McGahn at 1–2, 13–14 (July 1, 2009), MUR 5835 (Quest Communications, Inc./DCCC) (discussing the concerns that arise when respondents in enforcement matters are not provided an opportunity to respond to allegations raised by OGC before the Commission votes on whether to find reason to believe).

<sup>24</sup> Complaint at 10–16 (Mar. 2, 2017), MUR 7220 (Make America Great Again PAC *et al.*).

paragraph of the Complaint to support its contention that the Trump Committee was on notice of this potential violation.<sup>25</sup>

But that paragraph simply notes that the Trump Committee had initially reported no debt, which is insufficient to put the Respondents on notice that they may be subject to investigation or enforcement on the issue. It is not respondents' obligation to defend themselves against every hypothetical charge that OGC might assert against them outside of a complaint. The Constitution and our statutes demand that they be given notice and an opportunity to respond. Without that, the FEC cannot fairly proceed with enforcement, and risks judicial intervention if it does. Accordingly, we voted to dismiss OGC's added allegation.

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The Federal Election Commission's docket mismanagement is not an excuse to deprive respondents of their due process rights. Nor should the Commission continue to throw good money after bad in pursuit of a matter that is effectively lost. Given the Commission's enforcement backlog, other enforcement priorities, and limited resources, we voted to dismiss this matter as an exercise of prosecutorial discretion.



Allen Dickerson  
Vice Chair

September 21, 2021

Date



Sean J. Cooksey  
Commissioner

September 21, 2021

Date



James E. "Trey" Trainor, III  
Commissioner

September 21, 2021

Date

<sup>25</sup> First General Counsel's Report at 16 & n.58 (July 13, 2021), MUR 7220 (Make America Great Again PAC *et al.*) (citing the Complaint at ¶ 3).