



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)
)
Greitens for Missouri) MUR 7422

STATEMENT OF REASONS OF CHAIR JAMES E. “TREY” TRAINOR III

I. INTRODUCTION

Upon joining the Federal Election Commission (the “FEC” or “Commission”) on June 5, 2020, I learned that the FEC had not yet acted on the complaint in this matter (and furthermore, was in jeopardy of being held in contempt of court for its failure to do so), and that the five-year statute of limitations had less than a year left. When this matter came before me, I voted to dismiss this matter on the grounds of prosecutorial discretion, as explained below.

II. BACKGROUND

The Federal Election Campaign Act (“FECA” or “the Act”) grants the Commission “exclusive jurisdiction with respect to civil enforcement” of the Act.¹ A majority vote of the members of the Commission is required for, *inter alia*, any action in an enforcement matter, to initiate offensive litigation, to authorize defense of suits against the Commission brought under 52 U.S.C. §30109(a)(8), and to authorize any appeal in any litigation.²

The Complainant in this matter is a group called Citizens for Responsibility and Ethics in Washington (“CREW”). CREW touts its use of “aggressive” and “high-impact legal actions,”³ regularly sues the FEC to try and advance its preferred policy positions via judicial opinions rather than through the legislative process,⁴ and publicly attacks groups and individuals with whom it disagrees.

¹ 52 U.S.C. §30106.

² 52 U.S.C. §§30106, 30107, and 30109.

³ CREW, “Who We Are”, available at: www.citizensforethics.org/who-we-are/ (accessed Aug 14, 2020).

⁴ For a complete list of lawsuits brought by CREW against the FEC, visit https://transition.fec.gov/law/litigation_CCA_Alpha.shtml#C.

CREW's complaint in this matter alleged the existence of a scheme to make contributions in the name of another, in violation of the Act. In support of this allegation, the complainant repackaged information previously gathered and published by the Missouri House of Representatives Special Investigative Committee on Oversight during its investigation of Friends of Eric Greitens, the campaign committee of then-Governor Eric Greitens.

The complaint was filed in July 2018 and was amended in August 2018 and again in November 2018. Respondents were notified of the complaint by the Commission's Office of General Counsel ("OGC"), and the last respondent's reply was received by OGC on December 22, 2018. As of September 1, 2019, when the Commission lost a quorum due to the resignation of Commissioner Matthew Petersen, OGC had not yet made a recommendation to the Commission on how to proceed in this matter.

On September 16, 2019, 16 days after Commissioner Petersen's resignation and the Commission's loss of a quorum, CREW filed suit in the United States District Court for the District of Columbia under 52 U.S.C. §30109(a)(8)(A), seeking injunctive and declaratory relief for the Commission's failure to act on its complaint in this matter (the "a8 suit"). When CREW filed the a8 suit, it was aware that the Commission lacked a quorum and was therefore statutorily prohibited from acting on the complaint or defending itself in the a8 suit. Nevertheless, CREW persisted.

In November 2019, OGC circulated its First General Counsel's Report ("FGCR") recommending the Commission find reason to believe as to some respondents (and authorize an investigation) and take no action as to others (pending the outcome of the proposed investigation).⁵ But the Commission still lacked a quorum, and was therefore statutorily prohibited from acting on the recommendations.

On January 6, 2020, CREW sought a default judgment against the FEC for its failure to file an answer in the a8 suit ("the delay claim"). Of course, as CREW was fully aware, the FEC could not have filed an answer, because it still lacked a quorum. CREW also declined bringing this to the Court's attention (and the FEC was legally prohibited from appearing itself). Nevertheless, CREW persisted, and even sought court costs from the FEC.⁶

I was sworn in as an FEC Commissioner on June 5, 2020, thereby restoring a quorum. On June 23, 2020, at the first Executive Session after I joined the Commission, we considered OGC's recommendations in this matter. After a presentation of the case by OGC, at my request the matter was held over for two days so that I could consider all the available information. At

⁵ MUR 7422 (Greitens for Missouri, *et. al.*), FGCR at 2-3. For an explanation of the "reason to believe standard", see Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process, 72 Fed. Reg. 12545 (Mar. 16, 2007).

⁶ On April 9, 2020, the Court entered a default judgment against the Commission, and gave the Commission 90 days to conform.

the continuation of the Executive Session, the Commission again considered the matter, at which time OGC explained its plan to use compulsory process to not only investigate the respondents named in their recommendations, but also to “uncover” the identities of additional respondents they believed were involved in the purported scheme alleged in the complaint. Ultimately, after considering the entire record and applicable legal standards, I concluded that this matter should be dismissed on the grounds of prosecutorial discretion.

III. LEGAL STANDARD

Executive branch agencies are afforded broad prosecutorial discretion, in particular, when it comes to decisions not to prosecute or enforce. In *Heckler v. Chaney*, the U.S. Supreme Court explained that “an agency’s decision not to prosecute or enforce, whether through civil or criminal process, is a decision **generally committed to an agency’s absolute discretion**,” a conclusion “attributable in no small part to the general unsuitability for judicial review of agency decisions to refuse enforcement.”⁷ The Court enumerated a number of reasons for “this general unsuitability,” including:

- “an agency’s decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise”;
- “the agency must assess not only whether a violation has occurred, but whether agency resources are best spent on this violation or another”; and
- the agency must consider “whether [it] is likely to succeed if it acts.”⁸

Ultimately the Court reached the inevitable conclusion that an agency is “far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities.”⁹

Moreover, an agency’s refusal to institute proceedings shares the characteristics of the decision of a prosecutor in the Executive Branch not to indict¹⁰ – a decision which has long been regarded as the special province of the Executive Branch.”¹¹ This principle was recently reiterated and applied by the United States Court of Appeals for the District of Columbia in matter of *In re: Michael T. Flynn*.¹² The Court wholly rejected the trial court’s attempt to prevent the Department of Justice from exercising its prosecutorial discretion in deciding to

⁷ 470 U.S. 821, 831 (1985) (emphasis added). *See also* *CREW v. FEC*, 475 F.3d 337, 340 (D.C. Cir. 2007) (“The Supreme Court in *Akins* recognized that the Commission, like other Executive agencies, retains prosecutorial discretion.”).

⁸ 470 U.S. at 831.

⁹ *Id.* at 831-2.

¹⁰ As the D.C. Circuit recently recognized, “[u]nder the APA, agency attorneys who bring civil enforcement actions are engaged in ‘prosecuting functions.’” *CREW/CHGO*, 892 F.3d at 438 (citing *3M Co. v. Browner*, 17 F.3d 1453, 1456–57 (D.C. Cir. 1994)).

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

¹² No. 20-5143 (June 24, 2020).

dismiss the indictment against Flynn, noting the inappropriateness of the trial court’s attempt to substitute its judgment for that of the Executive Branch. As the Court held, “decisions to dismiss pending criminal charges – no less than decisions to initiate charges and to identify which charges to bring – lie squarely within the ken of prosecutorial discretion.”¹³ The Court also applied the rule that the presumption of regularity to which the government is entitled can only be overcome by clear evidence to the contrary.¹⁴

IV. ANALYSIS

I supported dismissing this matter on the grounds of prosecutorial discretion after weighing OGC’s recommendations for moving forward against factors such as the looming statute of limitations and the best use of Commission resources.

The Act imposes a five-year statute of limitations. 52 U.S.C. §30145. As the Supreme Court has recognized, “[s]tatutes of limitation . . . in their conclusive effects are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.”¹⁵ In this matter, as a result of the length of time it took OGC to make its recommendation at the initial stage of the enforcement process, and the prolonged period the Commission lacked a quorum, such concerns were present.¹⁶ Additionally, in this matter:

- OGC was uncertain about how long their proposed investigation would take, and about the size of the universe of unknown respondents, not named in the complaint, whose identities they wanted to “uncover”;
- OGC’s initial recommendation was to take no action against some named respondents, presumably to later consider what recommendations, if any, to make with respect to that group of named respondents; and
- Based on evidence in the record, it seemed possible if not likely that some respondents would not cooperate with OGC’s investigation, slowing it down, and potentially necessitating the Commission going to court to enforce compulsory process.

¹³ *Id.* at 5 (citing *United States v. Fokker Servs. B.V.*, 818 F.3d 733, 742 (D.C. Cir 2016)).

¹⁴ *Id.* at 6-7 (citing *United States v. Armstrong*, 517 U.S. 456, 464 (1996)). The Court took the extraordinary step of granting Flynn’s request for a writ of mandamus to prevent judicial usurpation of executive power, indicated by the trial court’s appointment of an amici to present arguments against the Executive Branch, who “relied on news stories, tweets, and other facts outside the record to contrast the government’s grounds for dismissal” in the Flynn case with rationales for prosecution in other cases. *Id.* At 8-10.

¹⁵ *Order of R. Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 348-49 (1944).

¹⁶ The complaint cites activity from “early 2015,” and “the summer of 2016.” MUR 7422 (Greitens for Missouri, *et. al.*), Complaint at 1, 2. *See also FEC v. Williams*, 104 F.3d 237, 241 (9th Cir. 1996) (due to the Act’s mandatory notice and conciliation requirements, the statute of limitations on violations of the Act effectively expires prior to the end of the five-year limitations period).

In light of these facts, I had doubts as to whether there would have been sufficient time left to complete OGC's proposed investigation and wrap everything up with respect to all the respondents prior to the expiration of the statute of limitations.

Furthermore, bearing in mind the extensive backlog of pending enforcement matters at the FEC (largely the result of the extended lack of a quorum),¹⁷ I considered whether moving forward with this matter was the best use of agency resources, especially as there are other matters currently on the agency's docket with similar alleged violations of the law.¹⁸ Furthermore, in voting to dismiss this matter, I took into account that the state of Missouri (where the conduct at issue in this matter was focused) had already conducted a lengthy investigation and made its findings public, and that there was some question as to whether the conduct at issue was properly within the FEC's jurisdiction.¹⁹ Weighing all these factors, I concluded that the prudent course of action is to focus Commission resources on other matters.

V. CONCLUSION

For the reasons set forth above, I supported dismissing MUR 7422 on the grounds of the agency's exercise of its prosecutorial discretion.²⁰ My motion to dismiss the matter and close the file failed by a vote of 2-2, with Vice Chair Walther and Commissioner Weintraub, who both indicated support for OGC's recommendations, voting no.²¹

¹⁷ As of June 25, 2020, OGC advised the Commission that there were 333 matters outstanding, of which 257 were active. *See also* Statement of Commissioner Ellen L. Weintraub on the Restoration of the Federal Election Commission's Quorum (June 18, 2020), available at: https://www.fec.gov/resources/cms-content/documents/2020-06-18_ELW_quorum_restoration_statement.pdf (discussing the backlog).

¹⁸ *See* *CREW/CHGO*, 892 F.3d at 440 n.9 (rejecting abdication of statutory responsibilities as a basis for judicial review of an FEC non-enforcement decision where the complainant's own submission showed that the FEC routinely enforces the election law violations alleged in its administrative complaint). The FEC routinely considers cases involving alleged contributions in the name of another. *See e.g.* MURs 7472 (Vincent Barlett); 7031 & 7034 (Children of Israel, LLC); 7014/7017/7019/7090 (DE First Holdings, *et al.*); 7005 & 7056 (TransGas Development Systems, LLC); 7248 (Cancer Centers of America Global, Inc.); 6969 (MMWP12 LLC, *et al.*); 6968 (Tread Standard LLC); 6930 (Prakazrel "Pras" Michel); 6922 (ACA International Political Action Committee); 6920 (American Conservative Union, *et al.*); 6711 (Specialty Investments Group, Inc., *et al.*); 6488 (Steven J. Lund, *et al.*); 6487(F8, LLC, *et al.*); 6485 (W Span LLC, *et al.*); 6234 (Arlen B. Cenac Jr. *et al.*); 5643 (Carter's, Inc.); 5628 (Acme Construction Management, Inc.); 5357 (Centex Corporation).

¹⁹ *See* MUR 7422 (Greitens), Response of Freedom Frontier at 2 (Freedom Frontier could not have violated the Act as a matter of law because "the underlying purpose of the donation [as alleged in the complaint] would have been to influence an election for a state, rather than a federal office.") (citing *Van Hollen v. FEC*, 811 F.3d 486, 488 (D.C. Cir. Jan. 21, 2016) ("[T]he FEC's purpose requirement is consistent with the purpose-laden definition of 'contribution' set forth in FEC's very own definitional section," which requires an intent for it to be used to influence a federal election)). The existence of this jurisdictional question increases the agency's risk of facing litigation (and the costs thereof), a factor that counsels against proceeding when viewed through a resource-allocation lens.

²⁰ *See* *CREW/CHGO*, 892 F.3d at 439-440 (rejecting *CREW*'s argument (in a procedurally similar case) that whenever the Commission exercises its prosecutorial discretion to decline an enforcement action, it acts "contrary to law).

²¹ MUR 7422 (Greitens for Missouri), Certification dated June 25, 2020.

But that isn't the end. Due to procedural disfunction at the FEC, this matter and the associated litigation remain in limbo.²²



8/28/2020

James E. "Trey" Trainor III
Chairman

Date

²² See Statement on FEC Procedural Disfunction by Chair James E. "Trey" Trainor III (Aug. 28, 2020).