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

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	MUR 7491
American Ethane Co., LLC, *et al.*	)	
	)	

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

While American corporations have a constitutional right to make contributions to independent-expenditure-only committees,[1] most companies are prohibited from giving directly to candidates, political parties, and garden-variety political committees.[2] In this Matter, American Ethane Co., LLC[3] made $36,200 in such prohibited contributions,[4] and the Federal Election Commission unanimously voted to punish it for doing so.[5]

However, our Office of General Counsel ("OGC") and three of our colleagues believed that American Ethane not only made illegal corporate contributions, but also violated the foreign national prohibitions of the Federal Election Campaign Act of

[1] *SpeechNow.org v. Fed. Election Comm'n*, 599 F.3d 686 (D.C. Cir. 2010) (*en banc*). These groups are often casually referred to as "Super PACs." *E.g.* Alex Altman, "Meet the Man Who Invented the Super PAC," Time Magazine, May 13, 2015 (discussing the genesis of the *SpeechNow.org* decision); *available at*: https://time.com/3856427/super-pac-david-keating/.

[2] *See Fed. Election Comm'n v. Beaumont*, 539 U.S. 146 (2003).

[3] American Ethane elects to be taxed as a corporation and is treated accordingly under our regulations. Second Gen'l Counsel's Report ("SGCR") at 4, MUR 7491 (American Ethane), Feb. 11, 2021; *cf.* 11 C.F.R. § 110.1(e).

[4] *Id.*

[5] Certification at 1, MUR 7491 (American Ethane), June 22, 2021 (authorizing pre-probable cause with American Ethane on a 5-0 vote, with one commissioner abstaining); Certification at 1, MUR 7491 (American Ethane), Sept. 21, 2022 (accepting a conciliation agreement with American Ethane on a 5-0 vote, with one commissioner abstaining).

1971, as amended ("FECA" or the "Act").[6] We disagreed, and in accordance with governing law, we provide this Statement of Reasons explaining why.[7]

I. Factual Background

On July 23, 2019, our predecessors voted to find reason-to-believe ("RTB") that American Ethane had made illegal contributions and authorized OGC to conduct an investigation.[8] Shortly thereafter, the Commission lost its quorum, which it did not consistently regain until December 2020. We were presented with OGC's findings several months later, including a recommendation that "the Commission authorize pre-probable cause conciliation with American Ethane…for making and consenting to make prohibited foreign national and corporate contributions."[9]

But American Ethane is not a foreign national—it is an American corporation that was founded in Louisiana in 2014 "to liquefy and export ethane."[10] In 2018, American Ethane made $66,200 in contributions to seven federally-regulated committees, and one Louisiana political committee.[11] Five of these contributions went

[6] Certification at 1-2, MUR 7491 (American Ethane), June 22, 2021 (3-3 vote on alleged foreign national violations).

[7] *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).

[8] Certification at 1-2, MUR 7491 (American Ethane), July 23, 2019 ("Find[ing] reason to believe that American Ethane Co., LLC and John Houghtaling violated 52 U.S.C. § 30121(a)(l)(A) by making prohibited foreign national contributions; or in the alternative, find reason to believe that American Ethane Co., LLC and John Houghtaling violated 52 U.S.C. § 30118(a) by making prohibited corporate contributions").

[9] SGCR at 3.

[10] *Id.* at 4.

[11] *Id.* at 9-10.

to federal candidate committees or leadership PACs, one went to a federal Super PAC, and another went to a state committee supporting the incumbent attorney general of Louisiana.[12] As a U.S. corporation, American Ethane was barred by law[13] from making some of these contributions, namely $36,200 to federally-regulated political committees, but it was not prohibited from making "a $15,000 donation to a state political action committee and a $15,000 contribution to" a Super PAC.[14]

OGC's post-RTB investigation did not uncover evidence that those two $15,000 contributions were illegal. It merely affirmed that American Ethane is a U.S. company that is taxed as a corporation[15] and has "a U.S. citizen CEO."[16] However, OGC's investigation did ascertain that American Ethane was not doing very well at the time it made those contributions. Despite "signing ethane export contracts with officials in China in November 2017,"[17] "develop[ing]…its facilities in Houston, Texas," and "enter[ing] into agreements to construct ships and a pipeline," the company was not profitable.[18] American Ethane "did not move beyond the business development stage and had not made any sales of ethane in either its domestic or overseas operations" when it made the contributions at issue here.[19]

These economic circumstances constituted the crux of OGC's argument that we proceed on a foreign national violation against Respondents. American Ethane's initial capital came from both American and Russian persons, and the company "had not generated any income from its business activities and was funding its business

[12] *Id.* Evidently "American Ethane attempted to make more political contributions, but those recipient committees never deposited American Ethane's checks." *Id.* at 11.

[13] 52 U.S.C. § 30118(a).

[14] *Id.* As discussed *supra* at n.1, corporations may give directly to independent-expenditure-only organizations. And while corporate contributions to most committees are illegal at the federal level, Louisiana allows for corporations to make such contributions to state organizations. Inst. for Free Speech, "The Free Speech Index: Grading the 50 States on Political Giving Freedom" at 49, Mar. 2018; *available at*: https://www.ifs.org/wp-content/uploads/2018/03/IFS-Free-Speech-Index-Grading-the-50-States-on-Political-Giving-Freedom.pdf.

[15] SGCR at 4-5.

[16] *Id.* at 12.

[17] *Id.* at 8.

[18] *Id.* at 7.

[19] *Id.*

operations" using that initial capital.[20] Therefore, OGC contended that American Ethane's contributions were made with Russian funds, and that the company thus violated both our foreign national and our corporation contribution rules.[21]

II. Legal Analysis

We disagreed with OGC's conclusions because they were based upon an expansive, and in our view impermissible, reading of prior Commission advisory opinions. Shorn of that support, OGC's theory fails under the plain language of our governing statute and regulations.

a. Advisory opinions are shields, not swords.

At the outset, the advisory opinion process is not a means of promulgating new rules for use in future enforcement actions. Rather, it exists so that the Commission may provide guidance as to how FECA applies to a requestor's specific circumstances. These opinions "may be relied upon by…any person involved in the specific transaction or activity with respect to which such advisory opinion is rendered" and by "any person involved in any specific transaction or activity which is indistinguishable in all its material aspects from the transaction or activity with respect to which such advisory opinion is rendered."[22] Furthermore, FECA immunizes "any person who [so] relies upon any provision or finding of an advisory opinion…and who acts in good faith in the accordance with the provisions and findings of such advisory opinion."[23]

In short, advisory opinions exist to provide clarity in specific circumstances and to protect those who rely upon our advice. They are a one-way ratchet that can only protect requestors. While perhaps informative, the Commission's choice *not* to bless a particular course of action does not create a future rule of enforcement, as has been recognized many times.[24]

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[20] *Id.* at 7-8.

[21] *Id.* at 24.

[22] 52 U.S.C. § 30108(c)(1)(A-B).

[23] 52 U.S.C. § 30108(c)(2).

[24] *E.g.* Statement of Reasons of Vice Chairman Petersen and Comm'rs Hunter and McGahn at 4, n.16, MUR 6020 (Nancy Pelosi for Congress, *et al.*), June 11, 2009 ("Without judging whether these opinions were decided properly, we note first that it is improper for the Commission to use advisory opinions as swords instead of as shields…The purpose of advisory opinions is to *protect* any party involved in a specific transaction or activity that is indistinguishable in all material aspects from the subject of the advisory opinion from being subject to any sanction") (emphasis in original); Statement of Reasons of

More importantly, the Act specifically forbids the offensive use of advisory opinions. FECA's "rule-of-law" provision explicitly provides that we many only propose a rule by regulation; "when [the Commission is] faced with a gap in our regulatory scheme[,] we are not permitted to fill it using our enforcement process."[25] Yet that is what we were asked to do here.[26]

b. OGC's theory of enforcement rests on the misapplication of materially distinguishable advisory opinions.

While FECA prohibits foreign corporations from making political donations, the Commission has permitted some contributions from domestic subsidiaries of foreign parent corporations.[27] These advisory opinions recognized that while "the government may bar foreign citizens (at least those who are not lawful permanent residents of the United States) from" making "political contributions and express-advocacy expenditures,"[28] U.S. companies with foreign parents still have the ability

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Vice Chairman Peterson and Comm'rs Hunter and McGahn at 4, MUR 5642 (George Soros) ("In sum, the Commission, by statute and regulation, is prohibited from establishing new regulatory requirements through this or any enforcement matter").

[25] Statement of Reasons of Vice Chair Dickerson at 11, MURs 7165/7196 (Jesse Benton), Oct. 12, 2021; *id.*, n.50 (citing at 52 U.S.C. § 30108(b) ("Any rule of law which is not stated in this Act or in chapter 95 or chapter 96 of Title 26 may be initially proposed by the Commission only as a rule or regulation pursuant to procedures established in section 30111(d) of this title").

[26] 52 U.S.C. § 30108(b).

[27] *E.g.* Advisory Opinion 2006-15 (TransCanada) at 2, May 19, 2006 ("Yes, GTN and TC Hydro may make corporate donations and disbursements in connection with State and local elections to the extent permitted by State and local law, provided that: (1) the donations and disbursements derive entirely from funds generated by the Subsidiaries' U.S. operations; and (2) all decisions concerning the donations and disbursements will be made by individuals who are U.S. citizens or permanent residents, except for setting overall budget amounts"); Advisory Opinion 1992-16 (Nansay Hawaii) at 1-2, June 26, 1992 ("Nansay Hawaii ('the company') is a wholly owned subsidiary of Nansay Corporation (Japan), which is a privately held corporation…Nansay Hawaii wishes to make contributions to state and local candidates"); Advisory Opinion 1989-20 (Kuilima Development Company, Inc.) at 1, Oct. 27, 1989 ("You state that Kuilima proposes to 'establish' a political action committee which will make contributions to candidates in state and local elections in Hawaii. According to your request, Kuilima is a wholly owned subsidiary of Asahi Jyuken (U.S.A.), Inc. ('Asahi USA'), which is, in turn, a wholly owned subsidiary of Asahi Juken Co., Ltd. ('Asahi Japan'). Kuilima and Asahi USA are incorporated under the laws of Hawaii, while Asahi Japan is incorporated under Japanese law. The principal places of business and the executive and administrative offices of Kuilima and Asahi USA are located in Hawaii. All of the directors and officers of those two companies are Japanese nationals…")

[28] *Bluman v. Fed. Election Comm'n*,800 F. Supp.2d 281, 288 (D.D.C. 2011) (three-judge court); *aff'd* 565 U.S. 1104 (2012).

to make such contributions so long as they are made pursuant to certain safeguards against direct foreign funding and control.[29]

In recommending that we enforce against Respondents here, OGC relied upon several of those advisory opinions,[30] as well as the Commission's 1994 decision in MUR 2892 (Royal Hawaiian Country Club, *et al.*), which in turn relied upon a similar set of advisory opinions.[31]

But those advisory opinions have no force here because the circumstances of those requests are materially distinguishable.[32] American Ethane is not a domestic subsidiary corporation, and it has no foreign national parent.[33]

In fact, OGC found that there was *no* foreign control of American Ethane's political giving. After a thorough investigation, OGC concluded that (1) "the available information does not suggest that American Ethane intended to inject foreign funds into American elections,"[34] and that (2) "there is no evidence that *any* of American Ethane's foreign national investors played a role in the decision to make the contributions."[35]

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[29] *E.g.* Advisory Opinion 1992-16 (Nansay Hawaii) at 3 ("In order to avoid contributions to candidates by the foreign parent through the subsidiary (i.e. foreign funding of these contributions), however, certain conditions should be met").

[30] SGCR at 14-16, *id.* at 15, n.61 (*see* citing to Advisory Opinions 2006-15 (TransCanada), 1992-16 (Nansay Hawaii), 1989-20 (Kuilima Development Company, Inc.)).

[31] *Id.* at 15-16; Gen'l Counsel's Report ("Royal Hawaiian GCR") at 7-8 , MUR 2892 (Royal Hawaiian Country Club), Dec. 15, 1993 ("In a number of Advisory Opinions involving domestic subsidiaries of foreign corporations, the Commission has employed a two-factor test to determine the legality of the subsidiaries' contributions: whether the funds used for the contributions have a domestic source, and the nationality status of the contribution decision-makers") (*see* citing to Advisory Opinions 1992-16 (Nansay Hawaii), 1989-29 (GEM Political Action Comm.), 1985-3 (UTDC, Inc. (USA))).

[32] 52 U.S.C.§ 30108(c)(1)(B) ("…any specific transaction or activity which is *indistinguishable in all its material aspects* from the transaction or activity with respect to which such advisory opinion is rendered…") (emphasis supplied).

[33] SGCR at 6-10 (discussing American Ethane's corporate structure and its decision-making procedures for making political donations).

[34] *Id.* at 18.

[35] SGCR at 9 (emphasis supplied). Indeed, OGC's investigation showed that the impetus for making political contributions came from Mr. Houghtaling, the company's American citizen CEO, who arranged for the contributions to be made only after discussing the possibility with other American nationals. SGCR at 8-11. *Compare with* MUR 7613 (Zekelman Indus., Inc., *et al.*) (finding RTB and

OGC's enforcement recommendation, then, rested on a simple category error. OGC mistook foreign investment for foreign parentage.[36] American corporations are permitted to raise capital internationally; they do not thereby become domestic subsidiaries of a foreign corporation. Nor do they revert to being an American corporation upon earning domestic income. There is simply no legal support for that approach, and such a rule would pose insurmountable practical difficulties since an enormous number of corporations avail themselves of international capital markets.[37]

c. American Ethane is an American company, not a foreign national, and it did not violate the foreign national prohibition.

OGC's decision to rely upon past Commission practice is understandable. But the Commission's past errors cannot change the underlying law we are entrusted with enforcing. Putting aside weaponized advisory opinions and a mistaken 28-year-old enforcement action, we are left with the plain text of the statute.

The Act's foreign national prohibition defines a "foreign national" (other than an individual) by reference to the Foreign Agents Registration Act's definition of a "foreign principal."[38] That term has three relevant categories—none of which apply to American Ethane. American Ethane is not "a government of a foreign country" or

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ultimately conciliating where a foreign national CEO and owner explicitly involved himself in the political giving decisions of a U.S. company).

[36] OGC made a similar error in MUR 2892. There, it applied advisory opinions regarding wholly-owned domestic subsidiaries of foreign national parent companies to a number of Hawai'i corporations because it considered "domestic corporations majority-owned by foreign national individuals," there a company where "4 of the 5 owners are foreign nationals," to be a "parallel situation." Royal Hawaiian GCR at 8. While respondents in that matter conciliated, this approach nevertheless violated the Act's rule-of-law provision. 52 U.S.C. § 30108(b).

[37] The Bureau of Economic Analysis at the U.S. Department of Commerce has estimated that "foreign direct investment in the United States position increased $506.1 billion to $4.98 trillion at the end of 2021…mainly reflect[ing] a $378.4 billion increase in the position from Europe, primarily the Netherlands and the United Kingdom." Bureau of Economic Analysis, "Direct Investment by Country and Industry, 2021," July 21, 2022, *available at*: https://www.bea.gov/data/intl-trade-investment/direct-investment-country-and-industry.

[38] 52 U.S.C. § 30121(b)(2). Our regulation, 11 C.F.R. § 110.20(a)(3)(i-ii), simply provides that "[f]oreign national means…[a] foreign principal, as defined in" 22 U.S.C. § 611(b); or...[a]n individual who is not a citizen of the United States and who is not lawfully admitted for permanent residence."

"a foreign political party."[39] Nor is it a "person outside of the United States."[40] Finally, it is not "a partnership, association, corporation, organization, or other combination of persons organized under the laws of or having its principal place of business in a foreign country."[41] To the contrary, the evidence shows that American Ethane is a wholly domestic corporation headed by an American CEO with a principal place of business in the United States.

In such circumstances, where the evidence conclusively demonstrated that American Ethane was a going, albeit unsuccessful, concern and not a mere pass-through entity, there was no need for American Ethane to raise additional revenue beyond its initial capitalization before it could make legal corporate contributions to a Louisiana state political committee and a federal Super PAC.[42]

CONCLUSION

We joined our colleagues in unanimously finding that American Ethane made unlawful corporation contributions, and imposed an appropriate penalty for that violation. We could not agree, however, that the ban on foreign contributions was also violated. As already noted, OGC's investigation proved that American Ethane is an American corporation controlled by U.S. citizens, and that there was no evidence that its leadership intended to funnel foreign funds into U.S. election or that its foreign investors sought to do so.

We recognize the concerns that have motivated people of good will to search for tools that may forestall foreign influence in U.S. elections. But OGC's position in this case is not the law, and we declined to cut a great road through the law even for the best of intentions.

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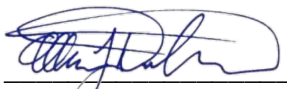
[39] 22 U.S.C. § 611(b)(1).

[40] 22 U.S.C. § 611(b)(2). Even if it were, American Ethane would qualify for the exception provided by (b)(2) because "it is established…that such person is…not an individual," "and is organized under or created by the laws of the United States or of any State or other place subject to the jurisdiction of the United States and has its principal place of business within the United States."

[41] 22 U.S.C. § 611(b)(3).

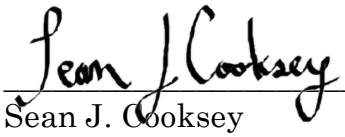
[42] *See Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 350 (2010) ("The rule that political speech cannot be limited based on a speaker's wealth is a necessary consequence of the premise that the First Amendment generally prohibits the suppression of political speech based on the speaker's identity").

For the foregoing reasons, we voted not to proceed with enforcement against Respondents on a foreign national violation, to dismiss that allegation, and to conciliate the corporate contribution violation.[43]



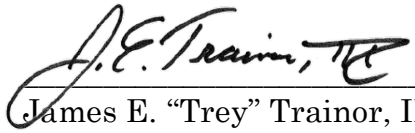
Allen Dickerson
Chairman

October 27, 2022
Date



Sean J. Cooksey
Commissioner

October 27, 2022
Date



James E. "Trey" Trainor, III
Commissioner

October 27, 2022
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[43] *Supra* at nn. 5-6.