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

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matters of	)	
	)	MURs 7859/7860
Citizens for a Working America, *et al.*	)	
Jobs and Progress Fund, Inc., *et al.*	)	
	)	

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

The Commission's "exclusive" jurisdiction over civil enforcement of the Federal Election Campaign Act of 1971 ("FECA" or the "Act"), as amended, is not indefinite.[1] In creating this agency, Congress subjected our authority to a five-year statute of limitations.[2]

It is undisputed that these Matters concerned alleged violations more than five years old. Nevertheless, our Office of General Counsel ("OGC") contended that our

[1] 52 U.S.C. § 30107(e) ("Except as provided in section 30109(a)(8) of this title, the power of the Commission to initiate civil actions under subsection (a)(6) shall be the exclusive civil remedy for the enforcement of the provisions of this Act"). Section 30109(a)(8) provides for complainants to seek relief in the United States District Court for the District of Columbia in cases where the Commission either fails to act on a complaint or dismisses it.

[2] 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").

jurisdiction was intact[3] and certain of our colleagues agreed.[4] Because we believe Congress spoke clearly, and that the expiration of the statute of limitations deprived us of authority to pursue these matters, we voted to dismiss the allegations.[5]

I. Background

The only relevant fact here is that the alleged "activity occurred more than five years ago."[6] While there are many powers that four votes of the Commission may invoke, it cannot turn back time.

Nevertheless, OGC argues that, the passage of more than five years notwithstanding, we retain authority over these Respondents. This is not the first time that the Commission has seen this argument, and we again reject it.[7]

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[3] First Gen'l Counsel's Report ("FGCR") at 1, MUR 7859 (Citizens for a Working Am., *et al.*), Aug. 24, 2021 ("EXPIRATION OF SOL: Oct. 1, 2016—Ongoing"); FGCR at 1, MUR 7860 (Jobs and Progress Fund), Aug. 27, 2021 ("SOL EXPIRATION: Oct. 1, 2018-Oct. 1, 2021").

[4] *See* Statement of Reasons of Comm'r Weintraub, MUR 7860 (Jobs and Progress Fund, *et al.*), Dec. 3, 2021.

[5] Pursuant to the instructions of the federal judiciary, we provide this Statement to explain our reasoning. *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 2, MUR 7860 (Jobs and Progress Fund); FGCR at 3, MUR 7859 (Citizens for a Working Am., *et al.*) (Respondent "may have become a political committee in 2011").

[7] Earlier this year, in MUR 7181 (Independent Women's Voice), we rejected OGC's similar contention that the Commission possessed jurisdiction over alleged violations of the Act that took place in "the 2010, 2012, and 2014 federal elections." Statement of Reasons of Vice Chair Dickerson and Comm'rs Cooksey and Trainor at 2, MUR 7181 (Independent Women's Voice), Mar. 18, 2021.

OGC's case, like many would-be miracle cures, relies on a misleading sleight of hand. It contends that an order requiring the filing of reports with the Commission, unlike the imposition of a civil fine, falls outside the general statute of limitations codified at 28 U.S.C. § 2462 because it is "equitable relief."[8]

Specifically, OGC argued that "[o]nce [a respondent] became a political committee" within the meaning of FECA, "it also [incurred]…an *ongoing* obligation to file disclosure reports with the Commission"[9] and therefore "[t]he statute of limitations does not bar the Commission from finding reason to believe…and seeking injunctive relief, including compelling [the respondent] to register as a political committee and file reports for all of its receipts and disbursements since" it triggered that status.[10] It is this reasoning that allows OGC to claim perpetual jurisdiction over alleged political committees.[11]

II. Legal Analysis

OGC's analysis is mistaken. The theory that the statute of limitations prevents us from imposing fines but does not bar equitable relief has been rejected by the courts. Most damningly, in *Federal Election Commission v. Williams* – which was not cited by OGC in any of its papers – this very agency "argue[d]" to the U.S. Court of Appeals for the Ninth Circuit "that § 2462 does not apply to actions for injunctive relief."[12] This position was flatly rejected as "directly contrary" to Supreme Court case law, and we were told that where "the claim for injunctive relief is connected to the claim for legal relief, *the statute of limitations applies to both*."[13] So it is here.

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[8] FGCR at 16, MUR 7860 (Jobs and Progress Fund, *et al.*).

[9] FGCR at 12, MUR 7859 (Citizens for a Working Am., *et al.*) (emphasis supplied).

[10] FGCR at 16, MUR 7860 (Jobs and Progress Fund, *et al.*).

[11] This would be a very unusual statute of limitations. As the Supreme Court recently noted, "[t]he purpose of statutes of limitations includes fixing a date after which the potential defendants in government enforcement actions may obtain 'repose'…certain knowledge that their 'exposure to the specified [g]overnment enforcement effort ends.'" Michael Columbo and Allison Davis, "Age Before Equity? Federal Regulatory Agency Disgorgement Actions and the Statute of Limitations," 7 HARV. BUS. LAW REV. ONLINE 32, 35 (Apr. 4, 2017) (quoting *Gabelli v. Securities and Exch'g Comm.*, 568 U.S. 442, 448 (2013)) (brackets in original, ellipses supplied).

[12] *Fed. Election Comm'n v. Williams*, 104 F.3d 237, 240 (9th Cir. 1996)

[13] *Id.* (emphasis supplied) (citing to *Cope v. Anderson*, 331 U.S. 461, 464 (1947) for its holding that "equity will withhold its relief in such a case where the applicable statute of limitations would bar the concurrent legal remedy").

Nor does the Ninth Circuit stand alone. As our own attorneys have explained in a federal court filing, a number of "courts of appeal[] have held that the statute of limitations contained in 28 U.SC. § 2462 also applies to claims for equitable relief."[14]

Undaunted, OGC notes that we once forced a respondent to file make-up paperwork after the passage of the statute of limitations,[15] and that a federal district court, in a case to which the Commission was not a party and where the court was not discussing the effect of any statute of limitations, determined that a plaintiff had standing because "a court may order defendant to disclose activity post-dating the alleged conduct in the administrative complaint when fashioning an equitable remedy."[16] Neither argument is persuasive when measured against the clear language of the Act and the circuit authority just cited.

CONCLUSION

This Commission's authority is subject to the limited authority that Congress provided us, including our five-year statute of limitations. That statute has elapsed, and OGC's argument that our jurisdiction continues due to the availability of equitable remedies is wrong. In such circumstances, "[t]o have invoked prosecutorial discretion…would have implicitly suggested, contrary to our statute, that the Commission could have proceeded but declined to do so."[17]

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[14] Def. Rep. Mem. in Supp. of Mot. for Summ. J. at 9-12, *Citizens for Responsibility and Ethics in Wash. v. Fed. Election Comm'n*, No. 15-2038 (D.D.C. Nov. 10, 2016) (citing *Fed. Election Comm'n v. Williams*, 104 F.3d 237 (9th Cir. 1996); *Sierra Club v. Otter Tail Power Co.*, 615 F.3d 1008 (8th Cir. 2010) and *Fed. Election Comm'n v. Nat'l Right to Work Comm., Inc.*, 916 F. Supp. 10 (D.D.C. 1996)).

[15] FGCR at 12, MUR 7859 (Citizens for a Working Am., *et al.*) FGCR at 16 (citing to the Commission's action in MUR 6838R (Americans for Job Security)) FGCR at 16, MUR 7860 (Jobs and Progress Fund, *et al*) (same).

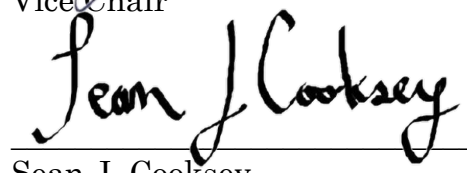
[16] FGCR at 16, n.66, MUR 7860 (*cf.* citing to *Citizens for Responsibility & Ethics in Wash. v. Am. Action Network*, No. 18-945, 2019 WL 4750248 at *14 (D.D.C. Sept. 30, 2019).

[17] Statement of Reasons of Vice Chair Dickerson and Comm'r Trainor at 3, MUR 6992 (Trump), Aug. 31, 2021; *see also Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101 (1998) ("Hypothetical jurisdiction produces nothing more than a hypothetical judgment").

Accordingly, we rejected OGC's recommendation that we exercise discretion we did not have and voted to dismiss the allegations due to the expiration of the statute of limitations.

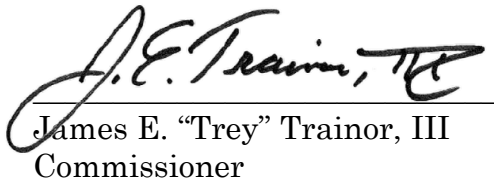
Allen Dickerson
Vice Chair

December 17, 2021
Date



Sean J. Cooksey
Commissioner

December 17, 2021
Date



James E. "Trey" Trainor, III
Commissioner

December 17, 2021
Date