



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

**STATEMENT OF COMMISSIONERS
ALLEN J. DICKERSON AND JAMES E. “TREY” TRAINOR, III
REGARDING THE COMMISSION’S NEWLY ADOPTED DIRECTIVE CONCERNING
INVESTIGATIONS CONDUCTED BY THE OFFICE OF GENERAL COUNSEL**

Today, a bipartisan majority acknowledged the need to reform the Federal Election Commission’s approach to investigating potential violations of law. While we preferred the original draft circulated by Commissioner Dickerson (“Draft A”), we voted in favor of Chair Lindenbaum and Commissioner Broussard’s revised proposal (“Draft B”).

The differences between the two drafts are important, but they do not diminish the Commission’s striking agreement on key points. The revised directive prohibits the Office of General Counsel (“OGC”) from conducting self-directed investigations and instead requires it to present the Commission with a formal Investigative Plan for approval. It recognizes that the Commission cannot allow OGC to conduct open-ended investigations that reach beyond the legal theory adopted by the Commission. And it ensures that there is no “informal” government action; OGC’s investigations must be conducted formally, pursuant to Commission approval and explicit limitations.

It also bears special emphasis that both the decision to find reason to believe (“RTB”) a violation has occurred – the statutory predicate to any investigation – and the “conduct” of any investigation are entrusted to the Commission and not to the Office of General Counsel. Congress chose to separately enumerate the Commission’s investigative authority and to require four votes for its exercise.¹ This Directive binds OGC, but it does not limit commissioners’ responsibility to exercise their best judgment in enforcement matters, including by conditioning their RTB votes where appropriate.²

I. Experience compelled a reconsideration of the Commission’s approach to investigations.

The Commission lacks the authority to enforce the Federal Election Campaign Act (“FECA”) directly. If a respondent declines conciliation, the Commission’s only

¹ 52 U.S.C. § 30109(a)(2)

² See, e.g., *Heckler v. Chaney*, 470 U.S. 821 (1985).

recourse is to the federal courts. Moreover, the Commission’s enforcement efforts operate on a challenging timeline: it must evaluate a complaint and response, find RTB, investigate, find probable cause, engage in mandatory conciliation efforts, and file a civil enforcement action – all within a five-year statute of limitations.³ And each step of this process, especially its investigative efforts, require extraordinary sensitivity to the First Amendment interests of respondents.⁴ The Commission conciliates the vast majority of cases where it finds that a violation may have occurred, but against this difficult legal backdrop it has struggled to bring more complex or contested matters to a successful conclusion.

We concluded, on the basis of experience, that our old process was not up to this difficult task. While several of the Matters that convinced us of the need for these reforms are still outstanding, and we are prohibited from opining on them due to the Act’s confidentiality provisions,⁵ others have concluded. Matters where the conduct of the Commission’s investigation raised substantial legal concerns include the following.

- In MURs 7165/7196, the Commission found reason to believe⁶ that Jesse Benton knowingly and willfully violated the foreign national prohibition by soliciting a \$2 million contribution from a person he believed to be an agent of a Chinese national.⁷

³ 28 U.S.C. § 2462; *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”).

⁴ *Fed. Election Comm’n v. Am. Fed’n of Labor-Congress of Indus. Orgs.*, 333 F.3d 168, 170 (D.C. Cir. 2003) (“Unique among federal administrative agencies, the Federal Election Commission has as its sole purpose the regulation of core constitutionally protected activity—the behavior of individuals and groups only insofar as they act, speak[,] and associate for political purposes”) (citation and internal quotation marks omitted, brackets supplied); *Fed. Election Comm’n v. Machinists Non-Partisan Pol. League*, 655 F.2d 380, 387 (D.C. Cir. 1981) (“This novel extension of the Commission’s investigative authority warrants extra-careful scrutiny from the court because the activities which the FEC normally investigates differ in terms of their constitutional significance from those which are of concern to other federal administrative agencies whose authority relates to the regulation of corporate, commercial, or labor activities. The FEC does not oversee fair dealings in commerce, or insure adequate corporate disclosures, or guarantee fair labor standards, all of which are areas where only the minimal limitations upon the commerce power are usually implicated”).

⁵ 52 U.S.C. § 30109(a)(12)(A) (“Any notification or investigation made under this section shall not be made public by the Commission or by any person without the written consent of the person receiving such notification or the person with respect to whom such investigation is made”).

⁶ The RTB finding was by a vote of 4-1, with Commissioner Cooksey dissenting and Commissioner Trainor recused. Cert. at 1, MURs 7165/7196 (Great Am. PAC), Feb. 25, 2021.

⁷ Fortunately, this person turned out to merely be a British journalist masquerading as a campaign-finance middleman.

OGC failed to notice that Mr. Benton had filed a designation-of-counsel form by fax, as explicitly permitted by our regulations,⁸ and sent discovery requests to an address on file for Mr. Benton, rather than to his attorney. As a result, those discovery requests went (properly) unanswered. No other investigation was conducted, other than sending letters (which also went unanswered) to the foreign newspaper. More than half a year later, with the statute of limitations rapidly approaching, the Commission was left with no new information at the probable cause stage.⁹ While we voted not to find probable cause because of a legal defect in the Commission’s theory of enforcement, an effective investigation may have substantially altered the record before us; Mr. Benton was later convicted of a near-identical scheme involving a (this time real) Russian national.¹⁰

- In MUR 7464, the Commission unanimously found RTB that two organizations, the Independence and Freedom Network and LZP, LLC, had violated the Act’s straw donor prohibition and had funneled funds to LZP from an unknown source. Although the investigation quickly established that the funds for LZP originated with a group called Ohio Works, “OGC sought, informally and without Commission approval, information about, *inter alia*, the financial supporters of Ohio Works. Government agents in turn spoke to some of those persons, despite there being no evidence that those contributors gave to Ohio Works for the purpose of giving money to LZP.”¹¹

Meanwhile, OGC attorneys conducting the investigation were the only witnesses to certain alleged statements that the Office relied on in its probable cause brief, statements that respondents swore, under oath, they did not make. In order to preserve the option of litigation, and to protect the agency and its personnel, the Commission was forced to take the unusual step of formally voting to exclude information in the probable cause brief from its consideration of probable cause.¹²

⁸ 11 C.F.R. § 111.23.

⁹ Statement of Reasons of Vice Chair Dickerson, MURs 7165/7196 (Jesse Benton), Oct. 13, 2021.

¹⁰ Office of Public Affairs, “Political Consultant Sentenced for Scheme Involving Illegal Foreign Campaign Contribution to 2016 Presidential Campaign,” U.S. Dep’t of Justice, Feb. 17, 2023.

¹¹ Statement of Reasons of Vice Chairman Cooksey and Comm’rs Dickerson and Trainor at 4, MUR 7464 (“LZP, LLC”), July 7, 2023 (emphasis supplied).

¹² Cert. at 1, MUR 7464 (LZP, LLC), Mar. 28, 2023.

OGC’s sprawling investigation “took almost two years,”¹³ and the preparation of a First General Counsel’s Report initially took nearly a year to complete, was subsequently withdrawn, and was not re-circulated until April 2021.¹⁴ “[B]ecause virtually all of the case had been lost to the statute of limitations by the time we voted [in 2023], there was little upside to compensate for the[] risks” of going to court, and risking invasive discovery directed at OGC, on the basis of “recommendations...directly contradicted by sworn testimony.”¹⁵

Of course, this did nothing for the Ohio Works donors who were unlawfully unmasked by OGC’s improper expansion of its investigation. Recognizing the danger, the Commission voted to redact their names from the public record.¹⁶ Those donors were, nevertheless, still disclosed on the agency’s website, causing the initial complainant to triumphantly declare that this invasion of privacy was a victory in itself.¹⁷ While this leak of private, constitutionally-protected information was doubtless inadvertent, it would not have been possible without OGC’s initial overreach.

- In MUR 7271, the Commission unanimously voted to find RTB¹⁸ based on a complaint which “rel[ied] exclusively upon a January 11, 2017[] *Politico* article” alleging “that the DNC and [Ms. Alexandra] Chalupa ‘sought and received political opposition research from Ukrainian government officials, knowing that it would be of value to the Democratic National Committee and Hillary Clinton’s presidential campaign.’”¹⁹ The Commission approved an

¹³ Statement of Reasons of Vice Chairman Cooksey and Comm’rs Dickerson and Trainor at 7, MUR 7464 (“LZP, LLC”), July 7, 2023.

¹⁴ First Gen’l Counsel’s Report (“FGCR”) at 1, MUR 7464 (LZP, LLC), Aug. 8, 2019 (“DATE OF COMPLAINT: Aug. 9, 2018”), Mem. to Comm’n, MUR 7464 (LZP, LLC) – Withdrawal of First Gen’l Counsel’s Report, Nov. 18, 2020; FGCR, MUR 7464 (LZP, LLC), Apr. 23, 2021.

¹⁵ Statement of Reasons of Vice Chairman Cooksey and Comm’rs Dickerson and Trainor at 8, MUR 7464 (“LZP, LLC”), July 7, 2023.

¹⁶ Cert. at 2, MUR 7464 (LZP, LLC), June 1, 2023.

¹⁷ Matt Corley, “FEC investigation spurred by CREW complaint reveals Ohio dark money secrets,” Citizens for Responsibility and Ethics in Wash., Oct. 17, 2023 (“In that sense, the fact that the FEC actually investigated a dark money group, traced the funds an obscure LLC contributed to a super PAC back to its true sources, and released its findings publicly, is a triumph for transparency”).

¹⁸ Cert. at 1, MUR 7271 (Dem. Nat’l Comm.), July 25, 2019.

¹⁹ FGCR at 2-3, MUR 7271 (Dem. Nat’l Comm.), Mar. 15, 2019 (citation omitted). The FGCR’s substantive factual analysis is solely predicated on the *Politico* article. FGCR at 2-6.

investigation, including compulsory process for depositions, interrogatories, and subpoenas.²⁰

OGC's investigation quickly revealed that *Politico* was not only mistaken but, in fact, most likely the recipient of literal Russian disinformation.²¹ Undeterred, OGC fashioned a new legal theory, unsupported by the Commission's RTB vote or the accompanying Factual and Legal Analysis, in an effort to nail Respondents who were, we must stress, probably the victims of a foreign influence campaign. The Commission rejected this effort on a 4-2 vote.²²

- There remain several outstanding Matters where the Commission cast RTB votes in 2021 and 2022 and where investigations are ongoing many months later. While we cannot yet comment on these Matters, they influenced our belief that reform was necessary.²³

These examples help illustrate the pressing need for the modest reforms adopted today.

II. The new Directive substantially improves the Commission's operations.

The Commission's new directive requires OGC to provide the Commission with an Investigative Plan for formal approval containing "(a) a brief narrative overview of the investigation and the information OGC intends to seek, (b) the amount of time OGC believes the investigation will consume, (c) each identified respondent subject to the investigation, (d) each witness, category of witnesses, and category of documents to be consulted, and (e) the proposed discovery methods OGC intends to use during the investigation."²⁴ Generally speaking, and with a few exceptions, OGC is not permitted to go beyond its Investigative Plan without Commission approval.²⁵

²⁰ Cert. at 1, MUR 7271 (Dem. Nat'l Comm.), Aug. 30, 2019.

²¹ Second Gen'l Counsel's Report at 14-16, MUR 7271 (Dem. Nat'l Comm.), Jan. 13, 2021.

²² Cert. at 1-2, MUR 7271 (Dem. Nat'l Comm.), Apr. 8, 2021.

²³ *E.g.*



²⁴ Draft B at 1, ¶ 3.

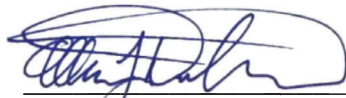
²⁵ *Id* at 2.

Moreover, once an investigation is approved, OGC must “provide periodic updates to the Commission in writing via email or an informational memo” on a regular schedule.²⁶

We believe that this new directive more properly calibrates the Commission’s mission with its sensitive constitutional backdrop, the competencies of its staff, and the need for Commission accountability for investigations. It is a significant improvement over the “fire and forget” investigatory approach that has hampered the Commission’s ability to bring even garden-variety FECA violations to a successful conclusion.

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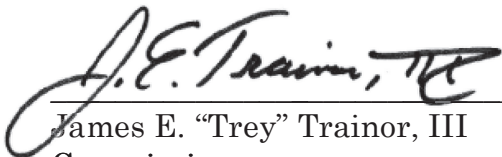
While we believe the Commission should have gone further, the adopted Directive is clearly superior to preserving the status quo. We appreciate the work of our colleagues in reaching bipartisan agreement on these points and look forward to implementing these important changes.



Allen J. Dickerson
Commissioner

November 2, 2023

Date



James E. “Trey” Trainor, III
Commissioner

November 2, 2023

Date

²⁶ *Id.* at 1, ¶ 4.