No Bark, No Bite, No Point.

The Case for Closing the
Federal Election Commission
and Establishing a New System
for Enforcing the Nation's
Campaign Finance Laws

Project FEC | 2002

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Introduction

The Federal Election Commission (FEC) is beset with a constellation of problems that has resulted in its failure to act as a "real law enforcement agency."[1] Among the major reasons for this failure are the ineffectual structure of the Commission, the politicization of the appointment of commissioners, and congressional interference with the agency.

In the fall of 2000, Democracy 21 Education Fund initiated PROJECT FEC to develop and introduce into the national debate a new and comprehensive approach for effectively enforcing the nation's campaign finance laws.

The effort was undertaken in response to the widely acknowledged failure of the FEC to enforce existing campaign finance laws, and in recognition of the fact that no campaign finance laws – whether existing or proposed – are likely to achieve their goals if not effectively enforced.

While there have been various proposals pending for addressing virtually every other aspect of the campaign finance agenda, a comprehensive proposal for solving the campaign finance *enforcement* problems has not been under public discussion.

To develop a proposal and promote a national discussion of the enforcement issue, Democracy 21 Education Fund established a blue-ribbon citizen task force composed of some of the nation's most experienced and respected campaign finance and law enforcement experts. For more than a year, the members of the bipartisan PROJECT FEC Task Force have brought a wealth of experience in law enforcement, campaign finance laws, and codes of ethics to the task of analyzing existing enforcement problems and developing a new approach for effective enforcement of the federal campaign finance laws.

Among the 14 members of the Task Force are a former Democratic Deputy Attorney General of the United States and a former Republican Chairman of the FEC; a former Democratic Attorney General of Massachusetts and a former Republican Attorney General of Rhode Island; the Executive Director of the New York City Campaign Finance Board and a former Executive Director of the Los Angeles City Ethics Commission (two of the country's most

highly regarded campaign finance enforcement bodies); and two former chairmen of the American Bar Association's Committee on Election Law, Administrative Law Section. *(See page 3 for a list of the* PROJECT FEC Task Force *members and their professional affiliations.)*

The Report

The analysis and recommendations of the PROJECT FEC Task Force are set forth in this report, *No Bark, No Bite, No Point*, which makes the case that the FEC has failed to carry out its enforcement responsibilities and should be replaced by a new enforcement body.

Part I, "WHAT'S WRONG WITH THE FEC," summarizes the fundamental problems with the FEC, and the central role the agency has played in creating and perpetuating campaign finance problems.

Part II, "RECOMMENDATIONS," sets forth the proposal of the PROJECT FEC Task Force for solving these problems. The proposal incorporates five foundational principles:

1. **A new agency headed by a single administrator should be established with responsibility for the civil enforcement of the federal campaign finance laws.**

2. **The new agency should be independent of the executive branch.**

3. **The new agency should have the authority to act in a timely and effective manner, and to impose appropriate penalties on violators, including civil money penalties and cease-and-desist orders, subject to judicial review. A system of adjudication before administrative law judges should be incorporated into the new enforcement agency in order to achieve these goals.**

4. **A means should be established to help ensure that the new agency receives adequate resources to carry out its enforcement responsibilities.**

5. **The criminal enforcement process should be strengthened and a new limited private right of action should be established where the agency chooses not to act.**

Part III, "CASE STUDIES," sets forth in greater detail the problems with the FEC, and the case for closing the agency, that are summarized in Part I.

The Task Force members recognize that there are different philosophies and views about the laws that should apply to the financing of federal elections. While Task Force members support reforming the federal campaign finance laws, they do not necessarily support the same reforms.

The Task Force study and recommendations, however, are not about the substantive provisions of the campaign finance laws. Rather, they reflect the Task Force view that whatever the campaign finance laws are, they need to be effectively enforced in order to achieve their goals. The Task Force recommendations are based on the view that the campaign finance laws are not being effectively enforced today and that a new enforcement system is essential to enforce the existing laws or any new laws that may be enacted.

Acknowledgments

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Carnegie Corporation of New York. Without their generous support, PROJECT FEC would not have been possible.

The PROJECT FEC recommendations and proposal set forth in this report were developed by, and represent the views of, the PROJECT FEC Task Force members.

Fred Wertheimer, President of Democracy 21 and Democracy 21 Education Fund, managed PROJECT FEC. Trevor Potter, General Counsel of the Campaign and Media Legal Center and former Chairman of the FEC, and Donald J. Simon, outside General Counsel of Common Cause, served as Senior Advisers to the project. Simon and Wertheimer served as principal writer and principal editor of the Task Force report.

Professor Ernest Gellhorn of George Mason University School of Law and Professor Jeffrey Lubbers of Washington College of Law at American University, two of the nation's leading administrative law experts, served as consultants to the Task Force and provided a background paper on administrative law matters. The Task Force also was assisted by Larry Noble, Executive Director of the Center for Responsive Politics and former General Counsel of the FEC, who provided expertise on enforcement practices and experiences, and by Meredith McGehee, Senior Vice President of Common Cause, who provided expertise on enforcement approaches.

Staffing for PROJECT FEC included Rebecca Ávila who served as Research Associate; Jennifer Fuson who served as Research Associate and Media Coordinator; Elise D. García, who served as Writer and Editor; Jackie Howell, who served as Production Director and Communications Consultant; and Dibby Johnson, who served as Administrative Director.

Lynda Dodd and Josh Galper, lawyers with Sidley, Austin, Brown and Wood, provided *pro bono* research and writing assistance, and Layth Elhassani, a staff attorney with Common Cause, provided legal research assistance. Wilmer, Cutler and Pickering provided *pro bono* administrative support for the project.

Project FEC Task Force

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PART I

What's Wrong With The FEC:

The Case for Closing the Federal Election Commission

"Anyone intent on circumventing the law runs little risk of detection."

– DAVID MASON, CHAIRMAN, FEDERAL ELECTION COMMISSION

***USA TODAY*, MARCH 19, 2002**

Since the creation of the Federal Election Commission (FEC) in 1974, it has been called many names:[2]

- "toothless tiger"[3]
- "toothless dog"[4]
- "pussycat agency"[5]
- "watchdog without a bite"[6]
- "muzzled watchdog"[7]
- "wobbly watchdog"[8]
- "weak, slow-footed and largely ineffectual"[9]
- "more of a dithering nanny than the tough cop it was supposed to be"[10]
- "FECkless"[11]
- "designed for impotence"[12]
- The "Failure-to-Enforce Commission"[13]
- "The Little Agency That Can't."[14]

Established to administer and enforce the federal campaign finance laws, the FEC is widely regarded as a failure. Ironically, the same issues that gave rise to its establishment – particularly the lack of effective enforcement of then-existing campaign finance laws – are at the heart of today's concerns about the FEC. *(See "A Brief History of the FEC" on page 7.)*

The FEC is viewed as a weak agency, structured by Congress to be slow and ineffective, composed of commissioners whose appointments are tightly controlled by the Members of Congress and political parties they regulate, and hobbled by a chronic lack of funds.

A regulatory regime is, in the final analysis, only as good as its means for enforcement. A system of laws, however well crafted, will not work if the laws are not effectively enforced.

Nowhere has this been clearer than in the federal campaign finance system: the failures of the FEC have severely undermined the effectiveness of the nation's campaign finance laws.

A 1990 study of the FEC conducted by award-winning investigative journalist Brooks Jackson noted the consequences of this enforcement failure:

> The FEC's weak enforcement has made the campaign finance laws a fraud on the public. Such sham reform not only breeds contempt for those laws among the lawmakers themselves, but also produces in turn contempt among the voters for politicians and the political process. This should not be surprising, since even the most honest candidates, seeing violations by their opponents going unpunished, feel tremendous pressure to cheat. This leads to a competitive cycle in which a loophole opened by one side is widened by the other, so that eventually there is little left of the original intent of the law.[15]

The FEC is viewed as a weak and ineffectual agency, structured by Congress to be slow and ineffective, composed of commissioners whose appointments are tightly controlled by the Members of Congress and political parties they regulate, and hobbled by a chronic lack of funds.

The federal campaign finance laws are, all too often, not taken seriously by candidates, parties, donors, and, increasingly, the public. The regulated community has less and less incentive to comply with campaign finance laws because the participants in the system believe that those laws can be violated with virtual impunity.

The conventional wisdom – borne out by experience – is that a violator will not get caught by the FEC; or, if caught, the agency will have insufficient resources to pursue an investigation; or, if pursued, the investigation will take years to complete; and, in the end, even if a civil penalty is ultimately imposed, it will be little more than a minor financial annoyance that fails to rise above the "cost of doing business."

Given these circumstances, the threat of any real enforcement sanctions that would compel compliance with the law are viewed as speculative and remote at best, when balanced against the financial and campaign pressures on candidates and parties to evade or ignore the law for political advantage. Former Senator Robert Kerrey (D-NE) made this point when he said:

> If I win an election by accepting illegal campaign contributions, the FEC, one of the most toothless organizations I've ever come up against, might levy a $50,000 fine on me three years after the fact.
>
> You know, I can raise that in a single night in a campaign event. So that's hardly what I would call a deterrent against illegal behavior . . . on the part of the politician soliciting [improper funds].[16]

Former U.S. Representative Tony Coelho (D-CA), a key Democratic fundraiser while in Congress, has said: "There's no fear of the FEC because by the time it gets there, elections are over and there's not much it can do. You may pay a fine, but you've won the race and it's over with."[17]

Reflecting on the same reality, Representative Christopher Shays (R-CT) noted, "We have developed a philosophy that says, break the law, break the spirit of the law, don't abide by the regulations – and pay the fine."[18]

In one area – administering the disclosure laws – the FEC is viewed as having effectively carried out its responsibilities. The agency is widely credited with doing a good job of ensuring that campaign finance information is made available to the press and the public. But the FEC's success here only highlights by contrast its more general failures in enforcing and administering the campaign finance laws.

When FEC Chairman David Mason recently said that "anyone intent on circumventing the law runs little risk of detection," he sent a clear message to the regulated community that it faces no real enforcement by the FEC of the new campaign finance law. He also clearly demonstrated why a new approach to enforcing the law is essential.

Three Major Problems with the FEC

Among the host of problems with the FEC, there are three major systemic issues that have severely undermined the agency's effectiveness:

1. The FEC was structured to be ineffective.

It has been said that if the FEC was a car, Congress lavished attention on the brakes and

A Brief History of the FEC

The Federal Election Commission (FEC) was created in 1974 specifically to remedy the lack of effective enforcement of federal campaign finance laws.

Laws to regulate the money in federal elections were first enacted by Congress in 1907 and 1911. They included disclosure requirements and a ban on corporate contributions. These laws were strengthened in the Federal Corrupt Practices Act, passed in 1925, which required political committees active in two or more states to file quarterly financial reports in non-election years. But this law did not mandate publication of the reports, nor that the public was entitled to access them, nor did it ensure that reports would be accurate or even filed at all.

There were no provisions for enforcement.[1]

Congress designated that the Clerk of the House and Secretary of the Senate receive and keep disclosure reports from House and Senate candidates, but gave neither office any enforcement power.[2] Indeed, the law was little more than a suggestion for voluntary disclosure: the House clerk testified in 1924 that "[i]t is not for me to say whether an organization, politically active, comes within the purview of the law or not. That was for the officers of such associations to determine."[3] One researcher at the time said the reports were "so carelessly drawn as to be valueless."[4]

Weak Laws and No Enforcement

By the 1950s and 1960s, little had improved. The disclosure reports were only

largely ignored the engine. As has been wryly noted, the FEC is really one of the great success stories of Washington since it is the weak and ineffective agency that Congress intended it to be.

It has been said that if the FEC was a car, Congress lavished attention on the brakes and largely ignored the engine.

Leading up to the FEC's birth in 1974, many Members of Congress feared that this enforcement agency would become too powerful and ferocious. Representative Dawson Mathis (D-GA) warned: "We are going to set up a bunch of headhunters down here who are going to spend their full time trying to make a name for themselves persecuting and prosecuting Members of Congress. … Members had better watch their heads once the Commission is established."[19]

To ameliorate these fears, Congress structured an agency with a cumbersome enforcement process, an inability to find violations, and a system for deadlocked decision-making on key issues. To a large degree, Congress designed the FEC to fail as an enforcement agency.

The FEC is composed of six members, no more than three of whom can be members of the same political party. In practice, this has meant that the agency has had three Republicans and three Democrats as commissioners.

sporadically available to scholars or researchers at the discretion of the House Clerk and Senate Secretary. A researcher in 1960 wrote that the reports were "generally of little value."[5]

Nor was there any enforcement. There was only one case ever brought under the Corrupt Practices Act disclosure requirement, and that case resulted in an acquittal. In 1969, the House Clerk sent the new attorney general, John Mitchell, a list of committees that had failed to file a single report during the 1968 elections, including 107 congressional committees that had violated disclosure requirements. In 1970, the Justice Department announced that it would take no action.

Investigative journalist Brooks Jackson in his study of the FEC summarized the failure this way:

For nearly half a century, an earlier disclosure law, the 1925 [Federal] Corrupt Practices Act, had proved to be a failure. Candidates got around it with ease, using such gimmicks as unregulated campaign committees in the District of Columbia. One of the most criticized features of the old act was its nearly total lack of enforcement machinery; Senate candidates filed their reports – such as they were – with the secretary of the Senate, and House members filed theirs with the clerk of the House. Any optimists who expected tough enforcement were disappointed; congressional employees weren't in a position to quarrel with their bosses. In practice, many lawmakers simply ignored the law. Campaigns were financed in part with unreported cash that lobbyists

This has been a recipe for stalemate and inaction on key questions. While on most matters the commissioners have reached majority votes, on important questions the votes all too often have been cast on a partisan basis, resulting in 3-3 deadlocks. The deadlock problem is compounded by the requirement, written into the FEC's statute, that the affirmative votes of four members are necessary for the agency to act. Thus, 3-3 ties result in inaction.

Examples of such deadlocks include:

- **The Georgia run-off case** – In 1993, the Democratic Senatorial Campaign Committee (DSCC) filed a complaint alleging that the National Republican Senatorial Committee (NRSC) violated the limit on coordinated party expenditures by making expenditures in connection with a run-off election in the 1992 Georgia Senate campaign. The three Democrats on the Commission voted to find reason to believe the NRSC violated that Act. The three Republicans voted against such a finding.

- **The GOPAC appeal** – The Commission in 1996 lost a controversial case in district court against GOPAC, a political group associated with former House Speaker Newt Gingrich (R-GA). The three Democrats voted to appeal the case but the two Republicans (the third seat was vacant) voted to drop the matter.

- **The Dole/RNC Case** – The Commission found that the 1996 Dole for President Committee had *received* illegal contributions from the Republican National Committee (RNC), but then deadlocked on whether to find that the RNC had *made* the contributions. The

handed over in white envelopes and brown paper bags. Blatantly illegal donations from corporations and labor unions were commonplace.[6]

Congress enacted the Federal Election Campaign Act (FECA) in 1971 and, for the first time, required comprehensive disclosure of campaign contributions and expenditures by federal candidates, political parties, and political committees.[7]

Although the Senate-passed bill provided for the creation of an independent commission to administer the law, this idea was rejected by the House, which instead divided administration of the new disclosure law among three offices: the House Clerk for House candidates, the Senate Secretary for Senate candidates, and the comptroller general of the General Accounting Office (GAO) for presidential candidates.

Unlike the congressional offices, GAO undertook a serious effort during the 1972 presidential election to carry out its enforcement responsibilities.

The Act authorized each office to refer violations of the law to the attorney general. The GAO took the position that it would refer serious violations only, while the other two offices chose to refer all violations.

By choosing to report all violations, the two congressional offices undermined enforcement by failing to distinguish serious from incidental violations. As one commentator noted, "The effect of including the few cases of calculated concealment among the vastly more numerous errors of the inexperienced was to camouflage the former."[8]

In the end, however, the attorney general did little, even about the seri-

three Democrats voted for the FEC general counsel's recommendation to pursue an enforcement action against the RNC, while the three Republican commissioners voted against it.

- **The Haley Barbour Case** – In 1999, the general counsel recommended the FEC find probable cause to believe that the RNC and a related nonprofit corporation called the National Policy Forum violated the law by accepting foreign donations and using those to influence federal elections. The three Democrats voted in favor of the general counsel recommendation and the three Republicans voted against it.

- **The *Shrink Missouri* amicus brief** – In 1999, in an important Supreme Court case in which the constitutionality of campaign contribution limits was challenged, the Commission split 3-3 on whether to ask the U.S. Solicitor General to participate as *amicus curiae* to defend the limits. The three Democrats voted in favor of requesting the participation while the three Republicans opposed making the request.

- **The September 11th advisory opinion** – Following the September 11, 2001 terrorist attacks, the DNC asked the Commission to liberalize its soft money accounting rules on a temporary basis to allow the parties more flexibility in the wake of the interruption in their fundraising. The RNC opposed the request. The three Democrats voted in favor of the DNC's request, while the three Republicans opposed it.

- **The "express advocacy" appeal** – The FEC deadlocked in 2001 on whether to appeal a decision by the Fourth Circuit striking down an FEC regulation defining "express

ous problems referred by the GAO concerning the Nixon Committee to Re-elect the President, which had tried to conceal its use of campaign contributions to finance the Watergate break-in. "Action by the Department of Justice was generally too late and too limited to be of value in administering the law," Comptroller Elmer Staats, the head of GAO, later told Congress.[9]

The three offices in charge of administering the law had little ability to effectively monitor compliance or enforce the law. They had no subpoena power and no ability to initiate legal action. Their ability to refer violations to the Justice Department was of little enforcement value, and "those wanting to conceal transactions found it easy to do," according to Staats.[10]

Watergate Builds Pressure for Independent Enforcement Agency

In the climate of the Watergate scandals after the 1972 campaign, support grew for an independent enforcement agency.

The Senate Watergate Committee said that establishment of "an independent, nonpartisan Federal Elections Commission" would be "the most significant reform that could emerge from the Watergate scandal."[11] The Senate passed legislation in both the summer of 1973 and early 1974 that contained provisions for an independent FEC with enforcement authority. But the provisions were strongly opposed in the House by Representative Wayne Hays (D-OH), chairman of the committee with jurisdiction over the issue and an ardent foe of any effort to create an independent enforcement agency.

advocacy." The FEC's general counsel recommended the agency appeal the decision, and the three Democrats voted to appeal the case while the three Republicans voted not to appeal it.

- **The Wyly Brothers case** – In 2002, the Commission voted 3-3 not to investigate whether a group called "Republicans for Clean Air," funded by Sam and Charles Wyly, had violated the law in spending $2 million for a televised advertising campaign attacking presidential candidate Senate John McCain and praising his opponent, then-Governor George W. Bush, in the week before the 2000 Super Tuesday primaries. The ads were run in California, New York, and Ohio, three of the most important primary states. The three Democrats voted to investigate the complaint and the three Republicans voted not to investigate.

  As *The Washington Post* has noted:

  Intense partisanship envelops almost every major decision the FEC's six commissioners make. … Time and again partisan standoffs have prevented the Commission from pursuing enforcement actions against major politicians and powerful interest groups, even when the FEC's general counsel recommends going forward.[20]

  The politicization of FEC votes is also illustrated by cases where commissioners of both parties have joined together to reject the recommendations of their professional staff, thereby serving the interests of both parties. Examples of this include:

Hays wanted a commission that was comprised of the House Clerk, the Senate Secretary, the comptroller general, and four other congressionally appointed members. He wanted the commission to be weak, so that all enforcement authority was to be retained by the Justice Department, and all agency regulations to be subject to a congressional veto.

On the other hand, Representative Bill Frenzel (R-MN), an advocate for a strong commission, explained why an effective independent agency was needed:

> Historically, campaign finance reform legislation has been a failure because of the lack of effective enforcement. The [Federal] Corrupt Practices Act was almost never effective in its 50-year life. The failure of the Justice Department to prosecute in 1972 is widely known. No administration or enforcement agency that is in any manner politically encumbered has ever done an adequate, consistent job in administering and enforcing election law.[12]

FEC Born Out of Compromise

Ultimately, Hays bowed to public pressure and agreed to a compromise creating a stronger version of the agency, which had been approved by the Senate.

This resulted in the form of the FEC, established by the 1974 campaign finance law, that combined features of both the House and Senate plans: six commissioners, with no more than three from one party, with two appointed by the President, and the remaining four appointed one each by the Speaker of

- **The General Motors advisory opinion** – In response to a request for an advisory opinion, the general counsel recommended that the Commission not allow General Motors to provide free cars to the Democratic and Republican Parties in connection with their 1988 presidential conventions, in exchange for "promotional consideration." The Commission voted to reject the general counsel's recommendation.

- **The 1996 presidential audits** – After the 1996 presidential election, the FEC auditors and general counsel recommended that the Commission find that the Dole and Clinton presidential campaigns had received illegal soft money contributions from their respective parties in the form of coordinated "issue ads." The Commission voted 6-0 to reject the advice of the professional staff and not require repayments of public funds from the presidential campaigns.

- **Appeal of the Christian Coalition case** – A district court in Washington dismissed an enforcement action brought against the Christian Coalition for illegally coordinating expenditures with various Republican campaigns. The court based its decision on a narrow interpretation of what activity constitutes "coordination." But because it recognized the novelty of the question, the court invited the Commission to appeal its decision, and its general counsel recommended it do so as well. The Commission voted 4-2 not to appeal the case, with Commissioners Scott Thomas and Danny McDonald voting to proceed.

- **The 2000 joint fundraising committees complaint** – In response to a complaint, the general counsel recommended that the Commission find reason to believe that various

the House, the Senate Majority Leader, and the House and Senate minority leaders, and all confirmed by both houses of Congress.

This system was designed to maintain as much congressional control over the agency as possible.

The FEC was given exclusive civil enforcement authority, while criminal authority remained in the Justice Department. The agency's regulations were subject to a veto by either house of Congress.[13]

That right of veto was exercised quickly by the Congress, which struck down two sets of regulations issued by the new agency in its first year. The Senate rejected a regulation that would have subjected congressional "office" accounts (otherwise known as "slush funds") to regulation under the FECA. The regulation would have made these office accounts subject to contribution limits and disclosure requirements.

And the House vetoed a regulation that would have required candidates to file disclosure reports initially with the FEC, rather than with the Clerk of the House or Secretary of the Senate. *(See page 71 for more on this and the effort to regulate slush fund accounts.)*

In 1976, the FEC as established by Congress in the 1974 law was found to be unconstitutional.

The Supreme Court in *Buckley v. Valeo* held that the law's method of appointing commissioners violated the Appointments Clause of Article II, Section 2 of the Constitution. Because the FEC exercises executive power in administering and enforcing the law, its members are "officers" of the United States and have to be nominated by the President and con-

Democratic and Republican Senate campaigns in the 2000 elections violated the law by forming joint fundraising committees to raise soft money, which was used to promote their Senate elections. The Commission voted 5-1 to reject the recommendation, with one Democrat, Commissioner Thomas, voting to proceed.

The structural problems of the FEC are compounded by the extraordinarily cumbersome enforcement procedures built into the statute – what *Congressional Quarterly* referred to as "procedures mandated by Congress and designed to protect incumbents and challengers from overly aggressive investigators."[21] Respondents who are the subject of investigations by the agency are granted elaborate opportunities to contest agency action at multiple stages of the administrative enforcement process. This invariably slows agency enforcement actions to such an extent that cases often languish for years before final agency decisions are made.

Commissioner Thomas notes that even "a fairly routine matter can easily take one year if the matter proceeds to probable cause under the procedural requirements of the Act. Of course, if a matter is factually complex and requires an extensive formal investigation, the resolution of the case can take much longer. … Under the enforcement procedures mandated by the Act, it is virtually impossible for the Commission to resolve a complaint during the same election cycle in which it is filed."[22]

Congress created an enforcement agency that, on its own, can do little to actually enforce the law.

firmed by the Senate. The requirements that congressional leaders nominate four of the commissioners and that both houses of Congress confirm the nominees were held to be constitutionally impermissible.

The FEC was reconstituted in 1976 by Congress, but not without a fight on the legislation. The bill passed by the House maintained the congressional right to veto FEC regulations and also required the FEC to get congressional approval for its advisory opinions. The Senate again supported a stronger agency. The final compromise legislation reauthorized the FEC as an agency whose members are nominated by the President, subject to confirmation by the Senate. No requirement for the agency to get congressional approval for its advisory opinions was added to the law. That is the structure of the Commission as it stands today.

FEC's Initial Credibility Eroded by Weak Structure & Partisanship

At the outset of the FEC, following the Watergate scandals, the agency served as a credible enforcement body and helped to achieve widespread voluntary compliance with the campaign finance laws.

Over time, however, the structural and institutional problems of the Commission combined with the politicization of the commissioners and their perceived responsiveness to the regulated community at the expense of the larger public interest seriously undermined the agency's performance and public credibility. This ultimately resulted in the widespread view that the FEC has failed to meet its basic responsibility of providing effective and credible independent enforcement of the campaign finance laws.

Equally constraining have been the powers denied to the agency. The Commission cannot make its own findings that a violation occurred, cannot seek court injunctions to halt illegal activity while it is occurring, and cannot conduct random audits of campaigns.

In short, Congress created an enforcement agency that, on its own, can do little to actually enforce the law.

Although the agency, by a mandated process of conciliation, can attempt to settle cases and negotiate the payment of civil penalties by respondents, it has (with limited exceptions) no power to actually adjudicate complaints itself or to require that violators face sanctions. The only power to act that the agency has at the end of its elaborate enforcement proceedings – which often take years to complete – is to file a civil lawsuit against a respondent and thereby *initiate* an enforcement action in court, which itself will likely take additional years to complete.

Unlike many other administrative agencies that possess their own enforcement authority, such as those that regulate banking, securities trading, and surface mining, the FEC has been deprived of any actual powers to find violations and impose penalties.

These structural problems are exacerbated by the fact that Congress granted the FEC exclusive civil jurisdiction over all enforcement of the federal campaign finance laws. No matter how dilatory the agency's proceedings, complainants are barred from seeking direct civil enforcement of the law through the courts. All complaints must be filed with the FEC and the FEC has exclusive civil authority to act on them.

[1] *See generally* R. Mutch, Campaigns, Congress and Courts, Praeger 1988, pp. 24-25. The discussion in this section is generally drawn from the excellent history of the federal campaign finance laws contained in this book.

[2] *See id*. at p. 25.

[3] *Id*.

[4] *Id.*

[5] *Id*. at p. 26.

[6] B. Jackson, "The Case of the Kidnapped Agency," Broken Promise, Priority Press 1990, p. 24.

[7] *See* FECA, Pub. L. No. 92-225, 86 Stat. 3 (1972) (codified as amended at 2 U.S.C. §§ 431-55).

[8] R. Mutch, *supra* n. 1, at p. 86.

[9] *Id*.

[10] *Id*.

[11] *Id*. at p. 87 (quoting Senate Report 93-981 [93-2], 564 (citations omitted)).

[12] *The Failure-to-Enforce Commission: A Common Cause Study of the Federal Election Commission*, Common Cause, Sept. 1989, at 7.

[13] This "one-House veto" provision was subsequently declared unconstitutional by the Supreme Court in INS v. Chadha, 462 U.S. 919 (1983).

A narrow opportunity is granted by statute for complainants to challenge in court the agency's failure to pursue a complaint. The complainant initially can ask the court to order the Commission to act on the complaint. If the FEC continues to fail to act, the court can allow the complainant to bring an action directly against the respondent.

This has proven to be an ineffective means to ensure proper enforcement of the law, because the FEC has successfully challenged the standing of complainants to bring these cases against it, and because courts typically defer to the agency's judgments about how to allocate its enforcement resources.

"It seems to me [the FEC's] structure can be summed up in one way. It is a road map for how not to do it," according to Ernest Gellhorn, who served as a chairman of the rulemaking committee of the former Administrative Conference of the United States, a federal agency that advised others on administrative procedures.[23]
(See page 49 for a more detailed examination of the FEC's structural problems.)

2. The commissioners appointed to the agency have been chosen on the basis of their political allegiances rather than their qualifications and commitment to effective administration and enforcement of the law.

The FEC is a classic example of a "captured" agency – one that has become attuned to serving the interests of the community it is supposed to be regulating. In this instance, the "regulated community" comprises those elected officials and party leaders who have the power to appoint the FEC commissioners in the first instance.

When Congress first created the agency, it attempted to ensure that it retained direct control over choosing the commissioners to serve on the agency. The 1974 statute that created the FEC established a system where the leaders of Congress could actually appoint four of the six commissioners. The President was given the power to appoint the other two commissioners.

The FEC is a classic example of a "captured" agency – one that has become attuned to serving the interests of the community it is supposed to be regulating.

In 1976, however, the Supreme Court in the *Buckley v. Valeo* case threw out this system as a violation of the President's appointment authority in Article II of the Constitution. The Court found that because the commissioners exercise administrative and enforcement powers, they are "officers" of the United States, and must therefore be appointed pursuant to the provisions of Article II, which require nomination by the President and confirmation by the Senate.

Congress then established a new appointments process in 1976 by amending the statute to provide that, as a formal matter, FEC commissioners are to be appointed the same way as members of other administrative agencies – nominated by the President and confirmed by the Senate.

Successive Congresses and Presidents, however, have simply conspired to do in practice what the Court said should not be done. As *National Journal* has noted, "Although the Buckley arrangement still stands, the nomination process in practice resembles the old version – with the President usually deferring to Congress and to the political parties."[24]

It is common knowledge that FEC appointments work this way. *Congressional Quarterly* says, "Commissioner nominations are supposed to originate with the President and be confirmed by the Senate, but an informal understanding gives Congress control over who is nominated."[25] *Roll Call* notes, "Nominees to the FEC are usually selected by party leaders in Congress and made official by the White House."[26] *National Journal* similarly notes that, even after *Buckley*, "Congress has continued to exercise considerable power over FEC appointments – with the acquiescence of the White House, which often solicits FEC nominations from congressional party leaders."[27]

An April 2002 article in *Roll Call* reaffirms the widespread understanding that this is how the appointments process works. In discussing the selection of a successor to Commissioner Karl Sandstrom, a Democrat, who remains on the agency as a holdover after the expiration of his term, *Roll Call* noted that Sandstrom's successor, "while officially nominated by Bush, is actually handpicked by House Minority Leader Richard Gephardt (D-Mo.) in consultation with [Senate Majority Leader Tom] Daschle."[28]

In the few instances where the President has objected to a choice promoted by Congress, the congressional leaders have usually insisted on their nominee, and have usually won.

Few FEC commissioners have come to the agency with a background in enforcing laws. Instead, most commissioners have come from the community that the FEC is responsible for overseeing – Congress, the political parties, the campaign finance defense bar, or other players in the campaign finance system.

The appointment of Michael Toner to the agency in 2002 illustrates the problem. Toner served as the general counsel to the Republican National Committee prior to his appointment to the FEC, and before that he was counsel to the Bush for President campaign committee.

The partisan splits on key issues that have occurred, among other things, reinforce the notion that the parties and their elected officials expect their FEC appointees to protect their partisan interests.

As former FEC Commissioner Frank Reiche said, "Congress views the FEC as a partisan body – quite fiercely partisan. They view the members of the Commission as representatives of their party – you can't have a successful campaign finance commission if that is the premise upon which appointments are made."[29] (Reiche is one of the few former commissioners who had previous enforcement experience, having served on the New Jersey Election Law Enforcement Commission. After serving one term on the FEC, he was not reappointed to the Commission.)

The most telling example of how much control Congress wields over FEC appointments was illustrated by the appointment in 2000 of Bradley A. Smith as a commissioner. The Smith case showed that an avowed opponent of the federal campaign finance laws – an individual who had called the laws unconstitutional and urged their repeal – could be forced onto the Commission by his Senate sponsors over the stated objection of the President, who nevertheless nominated him. After months of resistance, President Clinton named Smith to the Commission after Senate Republican leaders insisted on the nomination.

The inappropriateness of Smith serving on the Commission was only confirmed when in February 2002 he actively participated in the efforts being undertaken in the House of Representatives by reform opponents to kill pending campaign finance reform legislation. Smith joined with another member of the Commission, FEC Chairman David Mason, who has also been hostile to the campaign finance laws. The two commissioners injected themselves into the battle taking place on the House floor on the Shays-Meehan campaign finance reform bill, providing help and assistance to House Republican leaders who were working to defeat the bill.

When debate on the Shays-Meehan bill started on the morning of February 13, 2002, a controversy immediately erupted about the meaning of a transition provision in the bill that would allow the national parties to spend down their soft money on hand as of the effective date of the legislation, November 6, 2002, to retire debts and obligations arising from the 2002 elections.

Republican opponents of the legislation claimed that this provision allowed the parties to spend soft money to retire pre-election hard money debts, an interpretation that the sponsors of the legislation stated was wrong. The opponents of the legislation insisted their interpretation was correct in order to build support for an amendment that would have effectively killed the bill.

According to a report in *Roll Call*, Smith received a call from the office of House Majority Whip Tom DeLay (R-TX), the leading opponent of the bill, asking what Smith thought of the transition provision.[30]

According to *Roll Call*, Smith initially declined to provide a written opinion on the provision, and instead suggested that DeLay's office get former FEC Commissioner Lee Ann Elliot, also a Republican, to respond. "[B]ut when Elliot could not do so in ample time, he and Mason decided to weigh in with their statement."[31] According to *Roll Call*, Smith said, "They called me back and said, 'We've got four minutes left in the debate – would you be willing to put that in a letter?'"[32]

Smith and Mason sent a joint letter to Congress setting forth their interpretation of the controversial transition provision, which supported the position being taken by the opponents of the legislation. This letter was read on the floor by opponents of the bill to bolster their case for an amendment to kill the bill. Mason also stated that he went up to the House to be available to talk to Members about the meaning of this provision.[33]

The disputed transition provision was ultimately modified on the floor. But if this provision had been enacted, the FEC commissioners would have had the responsibility to interpret it, after accepting comments from competing points of view as to what the provision meant.

Instead, Smith and Mason compromised their positions as commissioners by leaping into a political battle and providing opponents of the legislation with an on-the-spot interpretation of the provision, outside of any FEC process and without providing competing views an opportunity to be heard.

Columnist Albert Hunt in *The Wall Street Journal* said this episode illustrated the "flagrant politicization" of the FEC and represented "an inexcusable partisan intervention by regulatory officials whose task it would be to implement any law."[34] Smith and Mason, he noted, "acted for all practical purposes as appendages of the House Republican leaders" during the debate.[35]

More broadly, Smith and Mason expressed unequivocal opposition to the campaign finance reform bill they would be responsible for administering and enforcing if it were enacted. Mason, on the day of the House debate, gave a speech that declared the bill to be "flatly unconstitutional."[36] Smith called it "sham campaign finance reform" and decried the "intellectual bankruptcy" of its supporters.[37] In another broadside attack against not just the bill, but the entire reform movement, Smith wrote, "Pro-reform organizations have used their massive war chests to run one of the most cynical campaigns in the history of cynical Washington."[38]

Never before have FEC commissioners so visibly and vociferously become public partisans in the policy debates on the election laws. Commissioner Thomas noted that "there is a perception problem if a commissioner somehow gets involved to the point where there's an appearance of bias against the law that's being contemplated – it raises later a question about their ability to enforce it."[39]

Roll Call notes that Smith's and Mason's behavior raises the question of whether "the hostility of FEC commissioners to a law they may be required to enforce should make them think about quitting – in good conscience."[40]

On April 10, 2002, the principal sponsors of the new campaign finance law, Senators John McCain (R-AZ) and Russ Feingold (D-WI), and Representatives Christopher Shays (R-CT) and Marty Meehan (D-MA) wrote to Commissioners Smith and Mason and called on them to recuse themselves from participating in the rulemakings required to implement the new law.

The lawmakers wrote, "By your inappropriate and ill-advised intervention into the Congressional debate, and through other actions opposing passage of the Act, you have impaired your ability to credibly fulfill your duties as Federal Election Commissioners to fairly write implementing regulations for this new law."[41]

(See page 60 for details on how the politicized quest for the "right stuff" in Commission appointments renders gridlock and partisan decision-making.)

3. Congress has abused its budget and oversight authority over the FEC to hobble the agency's operations.

Congress has interfered with and undermined the operation of the FEC in numerous ways: it has cut its budget, tried to fire key staff officials, and launched intrusive unjustified audits and investigations of agency practices. Former longtime Commissioner Joan Aikens, one of the original members of the agency, noted that, "Nobody likes the IRS because they regulate you. We are in the same position with candidates who become members of Congress."[42]

Congress has chronically underfunded the FEC. In so doing, it has deprived the agency of the resources necessary to conduct effective enforcement and administration of the law.

The impact of the harassment is clear, as columnist David Broder put it in 1995, because "the easiest way to gut regulation is to hobble the regulator."[43]

Former FEC Chairman Trevor Potter has noted the inherent conflict in having Congress control an agency whose mission is to oversee Members of Congress: "Many regulated entities would rather their regulators went easy on them. But not many regulated entities actually get to vote to do that."[44]

The FEC's Failures Cannot Be Blamed on the Courts

The FEC has an image of getting "slaughtered" when it goes into court to enforce the campaign finance laws. Similarly, campaign finance laws have an image of being overturned when they are challenged in court on constitutional grounds.

Contrary to this conventional wisdom, however, the courts, and in particular the Supreme Court, have generally upheld the constitutionality of the campaign finance laws, with some important exceptions. Similarly, the enforcement problems of the FEC, with some important exceptions, have stemmed from the failures of the agency itself, not from the courts blocking the agency's enforcement efforts.

Since the 1974 passage of the Federal Election Campaign Act (FECA), the Supreme Court has upheld the constitutionality of the limits on individual contributions to candidates and political parties, the limits on political action committee (PAC) contributions to candidates and political parties, the limits on individual contributions to PACs, the ban on corporate and labor union contributions, the ban on corporate independent expendi-

The courts, and in particular the Supreme Court, have generally upheld the constitutionality of the campaign finance laws, albeit with some important exceptions.

Most obviously, Congress has chronically under-funded the agency. In so doing, it has deprived the agency of the resources necessary to conduct effective enforcement and administration of the law. "Over the years," former Representative Coelho has noted, "there's basically been an attempt on the part of people to try to make the FEC noneffective by withholding money. And they succeeded to a great extent."[45]

Commissioner Thomas illustrates this point in a law review article by noting that the Commission's budget has lagged far behind the growth of its work. Although campaign spending on federal elections rose by 256 percent from 1980 to 1996 – from $768 million to $2.7 billion – the Commission's staff increased only 14 percent in the same time period, from 270 fulltime equivalent staff to 308.5. The staff size actually then declined in 1998.[46]

Congress has handcuffed the enforcement process by limiting the number of attorneys available to work on enforcement matters. According to *Congressional Quarterly*, for instance, the FEC had only 26 enforcement attorneys working in 1997, down from 32 the previous year.[47] In 1999, it had only about 24 attorneys available to handle enforcement matters.[48] More than two-thirds of the FEC's pending cases were "inactive" – meaning that they were awaiting an available attorney to work on them.

In 2001, the FEC still had only about 27 staff attorneys available to take assignments.[49] As of November 2001, 54 out of 135 cases on the Commission's docket were unassigned for lack of staff, and therefore "inactive."[50]

By comparison, Commissioner Thomas notes that the Department of Justice had assigned

tures, the system of public financing and spending limits for presidential campaigns, the limits on political party spending in coordination with their candidates, and comprehensive campaign finance disclosure laws.

The Supreme Court has rejected as unconstitutional mandatory limits on campaign spending by a candidate, mandatory limits on the use of personal wealth in a campaign by a candidate, and mandatory limits on independent expenditures by individuals and groups.

The Court also has established an "express advocacy" standard and a "magic words" test to determine whether communications made by non-candidates and outside groups that deal with federal candidates are "campaign communications" covered by campaign finance laws or "issue discussion communications" that constitutionally cannot be made subject to such laws.

The "magic words" test provides that a communication must contain words of express advocacy, such as "vote for" or "vote against" a specific federal candidate, in order to be subject to federal campaign laws, regardless of how the ad otherwise promotes or attacks the federal candidate.

It is in this area – where the Supreme Court has narrowly defined what constitutes a "campaign communication" in order to provide broad constitutional protection for unrestricted "issue discussion" by individuals and outside groups – that the FEC and its efforts to enforce the law have encountered ongoing and serious problems in the lower courts.

The FEC has undertaken various enforcement actions and adopted regula-

more than 125 staff attorneys to the investigation of the 1996 campaign finance scandal, more than the FEC had working in the entire Office of General Counsel on all matters, including its own investigation into the 1996 election.[51]

To keep its staff focused on the most important cases, the agency in 1993 adopted an "Enforcement Priority System" to dismiss low priority or "stale" cases it cannot handle. In 1997 alone, the agency dismissed 208 pending cases, a staggering 41 percent of the total cases then open. Over the course of 1998 and 1999, it dismissed about 119 cases for low ratings and 104 cases for being "stale."[52]

As Commissioner Thomas, then serving as FEC Chairman, said of the agency's lack of resources, "It makes it harder and harder for us to maintain a credible threat in areas of the law, because fewer and fewer people are going to feel the bite."[53] In another interview, Commissioner Thomas noted, "We're already at the point where our enforcement resources have dwindled, and we can now [pursue] only about 30 percent of the cases in our enforcement division. At a certain point, people will just stop complying with the law altogether, because they don't fear any FEC action."[54]

Commissioner John McGarry made a similar point in 1997: "The situation is deteriorating by the day. It's a pathetic state. We will have to dismiss cases wholesale. We have no other choice."[55]

The agency's general counsel similarly noted, "[T]here are cases that we should be han-

tions intended to prevent outside groups from spending unregulated funds, or soft money, to influence federal elections. The lower courts, with few exceptions, have rejected these efforts and left the Commission with little room to address this important question.

In the area, however, of spending by the *political parties* on so-called "issue ads" about federal candidates – the area where much of the "issue ad" spending occurs – it is the FEC, not the courts, that has caused the problems that have occurred.

The FEC commissioners – without challenging the practice – have allowed the political parties to blatantly inject tens of millions of dollars of soft money into federal campaigns, in the form of "issue ads" promoting and attacking federal candidates. The commissioners have simply failed to challenge the position taken by the parties that party ads about federal candidates are not subject to federal campaign finance laws, and therefore can be funded with soft money, as long as they do not contain "magic words."

The commissioners have taken this position, furthermore, despite recommendations from the agency's professional staff that this use of soft money by the parties to finance ads in federal campaigns should be challenged as illegal, and despite Supreme Court language that rejects the position taken by the parties.

To put it simply, the Supreme Court has never held that ads by candidates or political parties require express advocacy, or "magic words," in order to be covered by federal campaign finance laws.

In fact, when the Supreme Court in Buckley established the "magic words" test for campaign communications, it

dling that we can't handle and there are cases that are taking far too long because we don't have the resources."[56]

The agency's budget problem has eased in recent years with the departure from Congress of Representative Robert Livingston (R-LA), who served as Chairman of the House Appropriations Committee from 1995 through 1999, and had long worked to cut the agency's budget.

The FEC also has been exposed to harassment and retaliation by Members of Congress. Unlike other administrative agencies, which typically regulate private individuals or entities, the FEC is charged with regulating Members of Congress, in their capacity as candidates – the very people who oversee the agency. This unique relationship places the agency in a position that is unusually vulnerable to retaliation by Members.

Retaliation has taken various forms.

Members of Congress have attempted to oust key FEC staff officials in response to the pursuit of enforcement matters. In 1998, bills were introduced in the House and Senate to require the general counsel and staff director of the FEC to be affirmatively reappointed by a vote of four commissioners every four years. This was widely viewed as a thinly veiled attempt by Congress to "fire" then-General Counsel Larry Noble. According to a "GOP source" quoted in *Roll Call*, the term-limit language was targeted by Republicans "at an enforcement program they don't like that has been fairly aggressive with important constituencies of the leadership."[57]

expressly did so only for ads run by non-candidates and outside groups. The Court made clear that it was not creating the "magic words" test for ads run by candidates or political parties.

As the Court stated in *Buckley*, public communications by candidates and political committees – including political party committees – "are, by definition, campaign related."[1] Expenditures for public communications by candidates and parties "can be assumed to fall within the core area" of the campaign finance laws, according to the Court.[2]

In short, so-called "issue ads" undertaken by political parties "are, by definition, campaign related" and therefore covered by the federal campaign finance laws, whether they contain "magic words" or not.

The explosive growth of soft money-funded "issue ads" run by political parties about federal candidates has taken place simply because the FEC commissioners

The explosive use of soft money on so-called "issue ads" by political parties has taken place because the FEC has let the parties get away with it, and has rejected the recommendations of its professional staff to pursue enforcement actions.

The congressional effort to fire the general counsel was ultimately unsuccessful after public attention was focused on the effort.

Congress has also used audits and investigations in an effort to intimidate the agency. In 1995 and again in 1998, Representative Livingston launched major audits of the FEC. The audits disappointed congressional critics of the FEC by largely exonerating the agency from suspected wrongdoing, but they nevertheless diverted the agency's energy and funding, and sent a clear signal that efforts at strong enforcement would be subject to congressional retaliation. *(See page 71 for a comprehensive survey of Congress's budget freezes and slashes, intimidation of FEC staff, and investigative assaults.)*

FEC Is Responsible for the Most Serious Campaign Finance Problem: Soft Money

The problems – and failures – of the FEC are nowhere better illustrated than in the story of the creation and growth of soft money in American politics. *(See page 81 for a more detailed analysis of the FEC's role in creating and perpetuating the soft money problem.)*

Little more than a system for cheating on the federal campaign finance laws, soft money has reintroduced into federal elections, on a massive scale, the unlimited and unregulated contributions that federal law explicitly prohibits in federal campaigns to prevent corruption and the appearance of corruption.

The soft money problem is a creation of the FEC, not the Congress.

In the 1970s, the FEC opened the door to the use of soft money to influence federal elections through its administrative interpretations of the Federal Election Campaign Act.

have let the parties get away with it. The political parties have been hiding behind a "magic words" screen that doesn't apply to them – and the FEC commissioners have joined in the ruse.

The failure of the FEC to enforce the law here – standing idly by while both political parties spend huge sums of soft money on thinly veiled campaign ads about federal candidates – is the agency's own fault, and cannot be blamed on any cases the FEC has lost in court on the *express advocacy issue.* *(See page 117 for an analysis of the role of the courts in election law.)*

[1] Buckley v. Valeo, 424 U.S. 1, 79 (1976).

[2] *Id.*

In the 1980s, the FEC refused, despite repeated requests, to close that door as the soft money problem grew.

In the 1990s, the FEC stood silently by as presidential and congressional candidates, and their political parties, pushed the door wide open and the use of soft money exploded in federal campaigns.

When the FEC's professional staff recommended that enforcement actions be pursued against the massive soft money violations that had occurred in the 1996 presidential election, the commissioners rejected the staff recommendation and refused to bring any enforcement actions. When the FEC's professional staff urged the Commission to issue new regulations to ban soft money, the commissioners failed to take any action.

Thus, what began as a trickle of soft money in federal elections turned into a flood. In 1988, the two parties raised a total of some $45 million in soft money. In 1992, the figure increased to $86 million. By 1996, soft money contributions to the parties had tripled to $262 million. In the 2000 cycle, the amount of soft money raised by the parties almost doubled again, to $496 million – just shy of a half-billion dollars, according to the FEC.

For nearly a century, federal law has prohibited corporations from making contributions to influence federal elections.[58] For more than half a century, federal law has prohibited labor unions from making contributions to influence federal elections.[59] For more than a quarter century, federal law has prohibited individuals from contributing more than $1,000 per election to a federal candidate, more than $20,000 per year to a national political party, and more than an aggregate of $25,000 per year to all recipients for the purpose of influencing federal elections.[60]

These laws have been rendered almost meaningless by the improper use of soft money in federal elections.

News reports and congressional investigations are replete with stories of corporations, labor unions, and wealthy individuals contributing huge sums of soft money to the political parties. These contributions are solicited for the parties by federal officeholders and candidates who provide access and influence to the donors in return for the contributions. In turn, the political parties spend soft money in ways that undeniably are intended to – and clearly do – influence federal elections, such as for political party ads to promote federal candidates or attack their opponents.

FEC Creates Soft Money Problem with Legal Fiction

The soft money system is premised on a legal fiction created by the FEC.[61] As journalist Brooks Jackson has noted:

> The cause of the soft money calamity is widely misunderstood. It began with a policy reversal by the FEC in 1978, and not, as many have reported, with amendments to the federal election law a year later. The FEC, not Congress, created the problem and refused – despite criticism, lawsuits and court orders – to do anything about it.[62]

The fiction promulgated by the FEC has been that the soft money raised and spent by the parties and their federal candidates for voter activities and ads about federal candidates can be treated as only affecting *non-federal* elections, and therefore does not need to comply with federal contribution limits.

But far from being grounded in reality, the FEC's theory always has been a myth. The theory was first created by the FEC in a 1978 advisory opinion, when it reversed a position it had taken in an advisory opinion just two years earlier, in 1976.[63]

The FEC held in the 1976 advisory opinion that since get-out-the-vote and voter registration activities by state parties benefited, at least in part, federal candidates as well as state candidates, the activities had to be paid for solely with hard money – that is, monies raised under the limits of federal law. This was necessary in order to prevent federally illegal funds, such as corporate and labor union contributions, from being used to affect and influence federal elections.

In a 1978 advisory opinion, however, the Commission reversed itself and held that such *mixed* activities could be financed with a combination of federal and non-federal funds, allocated to reflect the relative impact of the activity on federal and non-federal campaigns.[64]

The determination in 1976 by the FEC that there was no way to draw a line distinguishing when voter registration and get-out-the-vote activities were affecting federal elections and when they were affecting state elections gave way in 1978 to the myth that such a distinction *could* be drawn. The FEC concluded that an artificial allocation formula could be devised consisting of part soft money and part hard money to pay for these activities, with the soft money being legally deemed as only affecting non-federal voter activities and the hard money as only affecting federal voter activities.

Under this theory, none of the federally illegal soft money funds would have any impact on the federal races even if they were used for activities that brought voters to the polls to vote in federal elections.

In the early 1980s, according to journalist Brooks Jackson:

> The FEC allowed parties exceptionally wide scope in choosing how much of a particular item would have to be paid with hard money and how much could be paid with soft. The regulations didn't set a ceiling on the proportion of expenses that could be allocated to nonfederal activity and paid for with soft money. The only requirement was that the allocation be done on a "reasonable basis," which wasn't defined.[65]

In other words, the FEC simply left it up to the parties to decide on the proper mix of federal and non-federal funding for their "mixed activities."[66]

The allocation system approach to dealing with soft money was fatally flawed from its inception.

It was based, as noted, on the legal fiction that the non-federal impact of a voter activity affecting both federal and state elections somehow could be segregated from its federal impact, and that non-federal money could be apportioned to pay only for the non-federal impact, without having any effect on the federal campaign. This assumption was wrong in principle and has proven disastrous in practice, opening the door to huge sums of soft money being spent to support federal candidates.

The allocation system has meant, in practice, that federal officeholders and candidates are raising soft money and then spending it on ads and voter activities to support their federal campaigns. By creating the legal fiction, the FEC gave federal candidates and their political parties license to raise huge amounts of federally illegal funds and to spend these funds through the parties to influence federal elections.

Legal Fiction is Challenged

On November 5, 1984, Common Cause filed a petition for rulemaking at the FEC, requesting that the agency ban the soft money practices that had developed under its rules.

The petition noted that "[S]oft money is being used in federal elections in a manner that violates and severely undermines the contribution limits and prohibitions contained in the fed-

eral campaign finance laws. While these practices and abuses have received considerable public attention, the Federal Election Commission to our knowledge has failed to take any formal action in this area."[67]

In response, the FEC initiated a process that resulted in denying the petition in 1986 on the grounds that there was no evidence to support the claim that soft money was being used to influence federal elections.

Common Cause sued the FEC for failing to act and, in 1987, a U.S. district court in Washington found that the FEC had failed to provide adequate guidance to the political parties to prevent soft money abuses of the allocation system. Judge Thomas Flannery found that the FEC's failure to take regulatory action on soft money was "contrary to law" and "flatly contradicted Congress's express purpose," and he ordered the FEC to issue new regulations.[68]

The court also noted that while it rejected Common Cause's argument the agency was required as a matter of law to ban soft money, the FEC could reach its own conclusion that mixed voter activities should be paid for entirely with federally legal funds, or hard money, to prevent soft money abuses.

After the FEC failed for a year to take any action in response to the court order, the court in 1988 issued a second order to the agency calling for new regulations on its allocation system, stating, "[I]t is undisputed that there is a public perception of widespread abuse, suggesting that the consequences of the regulatory failure identified a year ago are at least as unsettling now as then."[69]

Judge Flannery further stated in his opinion, "The climate of concern surrounding soft money threatens the very 'corruption and appearance of corruption' by which the 'integrity of our system of representative democracy is undermined,' and which the [post-Watergate reform law] was intended to remedy."[70]

Three years later, in 1991, the FEC finally carried out the court's order to issue new regulations to deal with soft money. The new rules, however, simply codified the existing practices under which the soft money system had been operating and flourishing, and thereby set the stage for the even greater abuses that have since occurred. (The FEC in its final regulations did impose requirements for the first time that the political parties disclose their soft money contributions and expenditures. These disclosures, starting with the 1992 elections, have provided a basis documenting the soft money problem as it grew throughout the 1990s and in the 2000 elections.)

Meanwhile, as the FEC engaged in its protracted seven-year rulemaking odyssey, the soft money problem in federal elections dramatically increased in the 1988 presidential campaign.

The presidential campaign of Democratic nominee Governor Michael Dukakis started it off with an effort to raise $100,000 contributions for the Democratic Party to spend on so-called "party building" activities that were in fact expenditures to support the Dukakis presidential campaign.

The initial reaction of Vice President George Bush's presidential campaign to the Dukakis soft money effort was reflected in the statement of Bush's deputy campaign manager who called it "illegal on its face."[71] Shortly thereafter, however, the Bush campaign launched its own soft money effort for the 1988 presidential campaign.

Soft money became an integrated part of the Bush and Dukakis presidential campaigns, with the chief fundraiser for each of the presidential campaigns taking on the responsibility to raise the soft money, and with presidential campaign officials involved in directing the spending of the soft money by party committees to benefit their respective presidential campaigns.

By the end of the 1988 presidential race, each presidential campaign had raised some $25 million in soft money from federally prohibited sources, and soft money had exploded into federal elections.

Soft Money Use Explodes in 1996 Presidential Election

Soft money exploded again to new levels in the 1996 presidential election cycle. The amount of soft money tripled over the 1992 election cycle and for the first time a presidential candidate, Bill Clinton, decided to spend soft money to finance a multimillion-dollar TV ad campaign promoting his reelection.

In effect, President Clinton and his campaign ran two parallel presidential campaigns – one financed with public funds received by the Clinton campaign in return for limiting its campaign spending, and the other financed with soft money raised by the Clinton campaign and spent through the Democratic party, and outside the Clinton campaign's legal spending limits, on TV ads promoting Clinton's reelection.

By 1996, both major party presidential candidates and their parties felt free to raise and spend tens of millions of dollars of soft money on TV ads promoting their candidacies.

After President Clinton initiated his soft money-funded ad campaign, Republican presidential nominee Senator Bob Dole and his campaign moved to undertake a similar effort. In the end the two 1996 major party presidential candidates spent a total of more than $50 million on soft money-funded ad campaigns, injecting this federally illegal money directly into the heart of the presidential campaign.

Soft money was now being used not just to finance "party building" activities – such as get-out-the-vote drives – to support federal candidates, but also to fund so-called "issue ads" to support federal candidates.

This new use of soft money on expensive TV advertising, not surprisingly, fueled the demand for soft money. And in the case of President Clinton and his campaign, it embroiled them in the worst campaign finance scandals since Watergate.

The sale of presidential meetings, the White House coffees, the Lincoln Bedroom sleepovers, the Buddhist temple fundraiser, the illegal foreign contributions, the roles of John Huang, Charlie Trie, and Pauline Kanchanalak, the Roger Tamraz fiasco – all were among the parade of massive campaign finance abuses that marked the 1996 Clinton presidential campaign.

At the heart of these scandals were soft money contributions being raised to finance the ad campaign being run to promote Clinton's reelection.

The New York Times noted about the 1996 presidential campaign that, "Had there been an aggressive and vigilant Federal Election Commission, both campaigns might not have been able to make a mockery of campaign restrictions enacted in the 1970's."[72]

The FEC, meanwhile, did nothing about the massive violations that had occurred in 1996.

The agency's professional staff did try to deal with the problem, twice recommending that the agency pursue actions against the Clinton and Dole presidential campaigns. But each time the commissioners rejected the staff recommendations and refused to pursue any action.

The professional staff's first recommendation came during the audit of the presidential campaigns and involved the question of whether the "issue ads" violated the spending limits agreed to by the presidential campaigns which would require repayment of public funds. The staff recommended that such repayments should be made by the presidential campaigns, but the commissioners rejected this position in a 6-0 vote.

The staff's second recommendation was that the FEC pursue an enforcement action against the

1996 Clinton and Dole presidential campaigns for illegally using soft money in their campaigns. The FEC commissioners in a series of 3-3 votes rejected pursuing the matter and took no further action.

In an interview after the Commission had deadlocked in this enforcement matter, Commissioner Thomas told a reporter that the message of the vote was clear: "You can put a tag on the toe of the Federal Election Commission."[73]

Senate Joint Fundraising Committees Expand Soft Money Use in 2000

By 2000, soft money had grown to become a half-billion-dollar political influence-buying industry in both congressional and presidential races.

By the 2000 elections, the soft money system had grown to a half-billion-dollar problem. And in the Senate, another new "breakthrough" was devised to further expand the dangerous role of soft money in federal elections.

The new device, known as a "joint fundraising committee," was pioneered by some two dozen Republican and Democratic Senate candidates. It allowed them to directly solicit and raise soft money in their own names for their own fundraising committees. This created precisely the kind of direct nexus between Senate candidates and big givers that the federal contribution prohibitions and limits were enacted to prevent.

The first major joint fundraising committee effort in the 2000 Senate elections was undertaken by New York Democratic Senate candidate Hillary Clinton. She was later joined by a number of other Senate candidates, including then-Senator, and now Attorney General, John Ashcroft.

Here is how the scheme worked. A joint fundraising committee was formed to represent and raise money jointly for the candidate's campaign committee and the candidate's Senate party committee – the Democratic Senatorial Campaign Committee (DSCC) or the National Republican Senatorial Committee (NRSC).

The Senate candidate would then directly solicit and raise both hard money and soft money contributions for the "joint fundraising committee." The soft money raised would be transferred to the senatorial party committee, which in turn would transfer the funds to the Senate candidate's state party to spend on "issue ads" and other activities promoting the candidate's election.

In this way, Senate candidates were now directly raising soft money contributions in their own name – despite the fact such funds were barred from use in federal campaigns – and using these funds through their state parties to promote their federal campaigns.

Common Cause and Democracy 21 filed a complaint with the FEC challenging the legality of this soft money scheme. In September 2001, the FEC general counsel recommended to the commissioners that the agency pursue an enforcement proceeding against the Senate campaigns of Clinton, Ashcroft, and others, along with the national and state party committees, on the grounds that the joint fundraising committee scheme violated the federal campaign finance laws.

In October 2001, the commissioners, once again, rejected their general counsel's recommendation to undertake an enforcement action and dismissed the complaint without taking any further action.

2002: Still No FEC Action in Sight

In May 1997, the Commission received two petitions for rulemaking – one from five Members of Congress, and the other from President Clinton – asking the Commission to ban soft money.

Three years later, in September 2000, the FEC general counsel recommended that the Commission issue the requested rule and ban soft money:

> [T]he Office of General Counsel believes that, with regard to the national party committees, the allocation rules are no longer adequately serving the purpose for which they were promulgated. The rules are allowing national party committees to channel significant amounts of soft money into activities that influence federal elections. … Therefore, the Office of General Counsel recommends that the Commission promulgate new rules to limit the receipt and use of soft money by the national party committees.[74]

As of April 2002, a year and a half later, the Commission has failed to take any action on the recommendation and it remains unscheduled for consideration.

Meanwhile, a new law has been enacted to ban soft money.

And now the same Commission that created and perpetuated the soft money system in the first place will be responsible for issuing regulations to ensure that the new soft money ban enacted into law is effectively implemented.

Other Problems Created by the FEC

While soft money is the most serious and damaging campaign finance problem created by the FEC in administering the federal campaign finance laws, it is by no means the only one. The FEC has undermined the federal campaign finance laws in a number of areas through its decisions and regulations, and its delays and inaction in dealing with enforcement proceedings.

Soft money is the most egregious but hardly the only problem created by the FEC.

Here are four areas, covered in detail in Part III, where this has occurred:

Coordination

Under federal law, if an outside group coordinates campaign-related expenditures with a federal candidate, the expenditures are treated as a contribution to the candidate and must meet federal contribution limits. This longstanding doctrine is necessary to prevent an outside group from evading the limit on its contributions to a federal candidate by instead simply spending unlimited amounts in accord with the candidate's wishes to help the candidate's campaign.

The FEC has accepted and adopted into regulations an unrealistically narrow definition of "coordination." The Commission brought – and lost – a case in federal district court alleging that the Christian Coalition had coordinated its campaign-related expenditures with several Republican candidates in the 1990, 1992, and 1994 elections, thereby violating the limits on contributions to the candidates. Rather than appeal the controversial decision, as the district court all but invited the FEC to do, the agency instead adopted the court's decision in a new regulation that provided a roadmap for how to evade the federal contribution limits.

The district court in the *Christian Coalition* case established a much tougher standard for

finding that coordination had occurred than had previously existed under the law and FEC interpretations. The court found (among other things) that the candidate and the spender had to be "partners or joint venturers" in order to find coordination.

This new standard opened the door wide to outside groups, allowing them to easily coordinate their expenditures to promote federal candidates with those candidates, without such activities being treated as "legal" coordination and thereby subject to federal contribution limits.

The federal judge in this case, recognizing the controversial nature of her narrow definition of what constitutes coordination, invited the FEC to appeal the decision and get a more determinative finding from the court of appeals.

The FEC general counsel recommended to the commissioners that they appeal the decision. The commissioners, however, not only rejected any appeal of the decision, but they instead incorporated a variation of the court's narrow coordination standard into an FEC regulation defining what constitutes coordination between a candidate and an outside group.

Based on this narrow new rule, the commissioners then proceeded to dismiss two major pending investigations arising from the 1996 campaign that they had previously approved – one alleging improper coordination between the AFL-CIO and the Democratic Party and the other alleging improper coordination between the Coalition, a business organization, and the Republican Party. The FEC found that its new restrictive standard of coordination was not met in either case.

Thus, when faced with a controversial district court decision that greatly increased the opportunities for outside groups to coordinate with candidates their supposed "independent" expenditures to benefit those candidates, the commissioners prevented their general counsel from appealing the decision, converted the decision into an FEC regulation, and then used the decision and regulation as the basis to dismiss two important investigations concerning illegal coordination that the FEC had itself initiated.

In the recently enacted campaign finance law, Congress repealed the FEC's narrow regulation on coordination and directed the Commission to issue new regulations.

Publicly financed party conventions

The 1974 campaign finance law provided political parties with the option to receive public funds to finance their presidential nominating conventions in return for agreeing not to raise or spend any private money. The purpose of this provision was to end the financing of the national party conventions with large, private influence-buying contributions.

> The political conventions have become their own mini-soft money system because of the way in which the FEC has progressively weakened the law.

Since 1976, the major parties have accepted public funds and agreed to forgo private money for every one of their nominating conventions. At the same time, the FEC, through a series of advisory opinions and rulemakings, has repeatedly created loopholes in the public financing system and opened the door to more and more private funding of the conventions by corporations, labor unions, and wealthy individuals, to the point where a majority of the money for these "publicly funded" conventions now comes from private interests.

By allowing the creation of "host committees" to help pay for the conventions, which could

receive corporate and union funding, by allowing business contributions in exchange for "promotional consideration," and by allowing the provision of goods and services at discounted rates, the FEC has allowed private funds to virtually swamp the public financing provided for the conventions and thereby undermined a basic goal of the 1974 law.

Party Building Funds

The 1974 campaign finance law allowed political parties to raise and spend soft money to defray the costs "for construction or purchase of any office facility," as long as it was not acquired for the purpose of influencing the election of a federal candidate.

This provision had one purpose: to authorize the use of soft money to fund the "construction or purchase" of an "office facility."

In the 1980s, the FEC reaffirmed this singular purpose, stating that the provision did not apply to payments for "ongoing operating costs as property taxes and assessments," or to payments for rent, building maintenance, utilities, office equipment expenses, and other administrative costs of a party headquarters.

The FEC has now taken the position that the parties may use building-fund soft money not only to pay for buildings, but also for virtually any piece of furniture or equipment that goes into a building.

By 2001, however, the FEC commissioners, in response to a political party request and over the objections, once again, of their general counsel, found, in a strained decision, that the provision to allow parties to use soft money to purchase or construct an office facility also allowed the parties to spend soft money on virtually anything that can fit into a building – office equipment, furniture, fixtures, telephone banks, computer software, and the like.

Enforcement Proceedings

The FEC is notorious for its lengthy, dilatory, and often inconclusive enforcement proceedings. Two cases demonstrate what has been a pattern of inaction and ineffective action.

One classic case involved a complaint filed with the FEC charging that the Montana Republican party had violated the limits on coordinated expenditures by a political party with its candidates in a 1988 Senate race.

The FEC investigated this case for three years, and each of the five commissioners who voted found that the law had been violated. Since, however, there were not four commissioners willing to vote for any particular violation charge, the FEC dismissed the case in 1994 without taking any action, notwithstanding the fact that all of the commissioners agreed that the law had been violated.

Two years later, following a court appeal of the FEC's dismissal of the case, the court remanded part of the case back to the FEC and directed the agency to proceed on the matter. In 1997, more than six years after the complaint had been filed, the Commission dismissed the case on the grounds that it was now too "stale" to pursue.

Another classic example involved an individual who wanted to admit that he had violated the campaign finance laws.

In September 1994, Thomas Kramer, a foreign national, wrote a letter to the FEC stating

that he had made hundreds of thousands of dollars of illegal campaign contributions because he had been unaware of the ban on contributions from foreign nationals. Kramer's attorneys shortly thereafter submitted a list of the contributions to the FEC.

Despite Kramer's voluntary admission of violating the law, the FEC sat on the case for almost two years. The agency did not contact Kramer until July 1996, after which it entered into a conciliation agreement with him and Kramer agreed to pay a substantial fine. Thus it took some two years to resolve an enforcement matter that began with an admission of guilt.

(See page 97 for detailed case studies of coordination, convention funding, building funds, and enforcement.)

PART II

Recommendations:
Creating a New System for Enforcing the Nation's Campaign Finance Laws

No law will be effective if the agency responsible for its enforcement interprets the law contrary to its basic purposes and intent, administratively creates gaping loopholes in the law, and tolerates widespread evasion of the law.

In order for existing and any new federal campaign finance laws to be effectively interpreted, administered, and enforced, it is essential that a new enforcement system be established. The enforcement problems detailed in this report, furthermore, require fundamental, not incremental change in order to be solved.

The FEC's enforcement problems require fundamental, not incremental, change in order to be solved.

Successful campaign finance enforcement can be achieved.

The New York City Campaign Finance Board, for example, is widely praised as an effective enforcement agency that has implemented a law that "greatly reduced the role of large contributions in New York City races and … greatly improved the local political culture."[75]

In describing the Board's role in overseeing the New York City campaign finance system, *The New York Times* has said that "on the whole the system worked remarkably well" and "[t]he positive experience is a tribute to the Campaign Finance Board charged with enforcing the rules."[76]

The Board has been described by one commentator as "nonpartisan, impartial, independent, patronage-free and fearless since its creation in 1989."[77]

According to the Board's executive director, the essentials for effective enforcement include a number of elements: a non-partisan enforcement agency, meaningful enforcement powers, aggressive enforcement policy, a comprehensive program of reform, operational integrity, and public support.[78]

The Los Angeles Ethics Commission also has been praised for its oversight and enforcement of the Los Angeles campaign finance and ethics laws. In a February 2001 editorial headlined, "Ethics Panel Proving Its Worth," the *Los Angeles Times* said:

> Los Angeles' city Ethics Commission is reminding voters again why its approval by voters in 1990 was so critical. … The Ethics Commission can continue to do its job without fear because, unlike the Police Commission, for example, it has strong protections against political interference.

In contrast, an editorial in *The Washington Post* summarizing the FEC's problems, concluded: "[T]he entire authority to enforce the civil side of the campaign finance law is entrusted to an organization that, under the best of circumstances, is ill-positioned to act decisively – often to the frustration of its own staff. The FEC, quite simply, does not run like a real law enforcement agency."[79]

After more than a year of studying the enforcement issue, the PROJECT FEC Task Force has concluded that the FEC must be replaced by a new agency that can "act decisively" and serve as "a real law enforcement agency." The Task Force has identified five foundational principles for establishing such an agency:

1. **A new agency headed by a single administrator should be established with responsibility for the civil enforcement of the campaign finance laws;**

2. **The new agency should be independent of the executive branch;**

3. **The new agency should have the authority to act in a timely and effective manner, and to impose appropriate penalties on violators, including civil money penalties and cease-and-desist orders, subject to judicial review. A system of adjudication before administrative law judges should be incorporated into the new enforcement agency in order to achieve these goals;**

4. **A means should be established to help ensure that the new agency receives adequate resources to carry out its enforcement responsibilities; and**

5. **The criminal enforcement process should be strengthened and a new limited private right of action should be established where the agency chooses not to act.**

The FEC: A Model To Avoid

The recommendations of the Task Force incorporate basic principles that other democracies have found of fundamental importance in structuring enforcement mechanisms for their election laws.

A comprehensive study of campaign finance law enforcement, issued in 1998 by a British parliamentary commission, set forth principles similar to those that underlie the Task Force recommendations. The British study also made a telling reference to the FEC as a model to avoid:

> Those who have advocated the establishment of an Election Commission have been emphatic that it should be independent both of the government of the day and of the political parties. We agree. An Election Commission in a democracy

> like ours could not function properly, or indeed at all, unless it were scrupulously impartial and believed to be so by everyone seriously involved and by the public at large.
>
> In our view, a number of important consequences follow. The first is that the members of the Commission should not, in the normal course of events, be people who have previously been involved in any substantial way in party politics. *The second is that the UK Election Commission, unlike the U.S. Federal Election Commission, should consist of independent persons and not party representatives.* The third is that the method adopted for choosing the members of the Commission should itself be independent of the parties. The fourth is that, nevertheless, the individual members of the Commission should be acceptable to the leaders of the main parties, who should be consulted in the course of their appointment. The fifth is that, once appointed, the members of the Commission should hold office for a considerable period of years and should enjoy substantial security of tenure.[80] (emphasis added.)

Canada's enforcement system is based on an enforcement agency headed by a single individual in order to prevent political partisanship in regulating Canada's elections.[81] A parliamentary publication describes the Canadian system as follows:

> [O]ne of [the] most significant developments in the history of the Canadian political system is that the organizational procedures and procedural rules have been progressively removed from partisan political control and intervention. The system is now administered by a neutral, impartial and independent set of officials, although the laws continue to be passed by politicians.[82]

The enforcement system in the United States for federal campaign finance laws requires fundamental changes to achieve the independence, credibility, and effectiveness that are essential to a workable system.

The PROJECT FEC Task Force believes that these changes can be achieved through the implementation of five basic principles:

1. A new agency headed by a single administrator should be established, with responsibility for the civil enforcement of the federal campaign finance laws.

The Task Force has concluded that the establishment of a new enforcement system headed by a single administrator with a long term of office and limited grounds for removal is necessary in order to obtain effective, fair, and publicly credible enforcement of the nation's campaign finance laws.

The Task Force therefore recommends that the FEC be replaced by a new campaign finance enforcement agency headed by a single administrator.

Such a restructuring would best focus authority and public accountability for the actions of the enforcement agency, and provide the best opportunity for obtaining a highly qualified and publicly credible person to lead the agency who could command the nation's respect and confidence.

A new system based on the appointment of a single administrator with a long term of office and limited grounds for removal offers the best chance for effective, fair, and publicly credible enforcement of the nation's campaign finance laws.

The single-headed agency approach would unify the administration of the agency under one clearly accountable head and obviate many of the partisan and political problems that have plagued the six-member FEC and helped create its culture of stalemate and inaction on major matters.

The Task Force believes that the appointment of a highly visible, publicly credible administrator would also help to ensure ongoing public attention and pressure on the President and Congress to fund the enforcement agency adequately.

In recommending a new agency, The Task Force believes that this agency could utilize much of the professional staff from the current FEC, and that some of the agency's functions could continue to be performed with little change, such as the agency's administration of campaign finance disclosure requirements, a function that the agency has generally discharged well.

There are precedents for a single-headed agency approach. A number of important agencies are headed by a single administrator, including two independent agencies – the Social Security Administration (which was separated from the Department of Health and Human Services in 1994), and the Office of Special Counsel, an agency that protects whistleblowers (which was removed from the Merit System Protection Board in 1989).

These two agencies are considered "independent" because the head of the agency has a statutory term and is protected from removal from office by a "for cause" requirement. In addition, the agencies are structured with limitations on White House interference with testimony, reports, or budget requests.

Key law enforcement and oversight agencies also are headed by a single administrator. Responsibility for the enforcement of federal laws, for example, is vested in the Justice Department, headed by the U.S. Attorney General. Responsibility for conducting and coordinating domestic federal investigations is placed in the Federal Bureau of Investigations (FBI), headed by the FBI Director. Responsibility for serving as the investigating arm of the Congress is placed in the General Accounting Office (GAO), headed by the Comptroller General.

Vesting civil enforcement of the campaign finance laws in the hands of an agency headed by a single administrator raises the question of whether that would leave enforcement potentially subject to partisan actions by that individual. (This question, of course, also exists for the attorney general, who has overall responsibility for the criminal enforcement of federal campaign finance laws, and for the director of the FBI, who has investigative authority over criminal campaign finance violations.)

The Task Force believes that this potential concern is addressed by a number of protections, including the proposed appointment process for the office, the public climate that would be created for fair and impartial enforcement of the law, and the new administrative enforcement process being proposed, including the use of impartial administrative law judges to consider enforcement cases.[83]

The Task Force also believes that the current multi-member FEC is hopelessly entangled in partisanship and politics, which have rendered the agency ineffective and not credible, a result which has fundamentally undermined the campaign finance laws.

The Washington Post noted in an editorial about the current FEC and the fact that it is "weak by design":

> A far better model would put civil enforcement under the direction of one person, who – like the FBI director – would serve a term of years not corresponding to that of the President who appoints him or the senators who confirm him. This person would not be nearly so answerable to the regulated community as are the current commissioners.[84]

The significance and importance of the appointment of the enforcement agency head, the public attention it would draw and the underlying premise of impartial enforcement that would be established, all would help to ensure the appointment of a well-qualified impartial individual who could command public confidence.

The requirement for Senate confirmation of the agency head would provide further strong protection against the appointment of a partisan individual to this job. By establishing, in effect, a 60-vote requirement for confirmation, given the Senate's filibuster rules, each party would have a veto power over any nominee it viewed as too partisan to hold the position.

Some may argue that a single administrator would lead to the same problems that occurred in the Independent Counsel system and led to Congress' decision to let the Independent Counsel Act lapse.

The Task Force disagrees with this position and notes that there are basic differences between the proposed new single administrator agency and the Independent Counsel system. The appointment of the administrator would be subject to the checks and balances of scrutiny by both parties, unlike the former Independent Counsels who were selected by, and responsible to, a federal court.

Strong additional protections against partisan decisions would be provided by the establishment of a system of adjudication before administrative law judges, as proposed by the Task Force in Recommendation Three. *(See page 40.)* This would establish a major role for impartial administrative law judges to hear enforcement cases and make decisions about potential violations of the campaign finance laws.

The new enforcement administrator would have only civil enforcement authority, unlike the Independent Counsels, who had criminal prosecutorial power.

Ironically, some have attempted to justify the 3-3 Democratic and Republican makeup of the FEC by approvingly citing the Senate Ethics Committee 3-3 makeup as the basis for this structure.

The Senate Ethics Committee, however, is widely perceived to be an ineffective and inactive oversight body. As Dennis Thompson, a nationally regarded congressional ethics expert who teaches at Harvard University, has noted, the ethics oversight process in Congress reflects "an attitude of 'mutual deterrence' under which both parties seek to avoid damaging cases."[85]

The administrator of the new agency should receive a lengthy term of office, such as for 10 years, to further help remove the office from partisan politics. The administrator should not, however, be eligible for reappointment at the end of the term. This would help to protect against an administrator's decisions potentially being influenced by the impact those decisions might have on a possible reappointment to the position.

The FBI director currently has a 10-year term, members of the Board of Governors of the Federal Reserve System have 14-year terms, and the Comptroller General has a 15-year term.[86] These long terms exist in order to take the office beyond partisan politics and presidential election cycles.

The new agency head should be provided a salary at Executive Level I, similar to that of the commissioner of the Social Security Administration and Cabinet secretaries.

In addition, a high standard for presidential removal of the agency head should be established in the authorizing legislation in order to protect the independence of the office. Numerous regulatory statutes governing independent agencies provide that the members may only be removed for "inefficiency, neglect of duty, or malfeasance in office." In the case of the new agency head, the standard could be even stronger, such as by requiring that cause for removal also has to be "clearly established."

Further, the authorizing statute should specify benchmark qualifications for the agency head, such as, for example, high qualifications and appropriate experience for the position, law enforcement or judicial experience, and public credibility as an impartial decision-maker. Such provisions are not uncommon among regulatory agencies – a review showed that 12 agency statutes (including those of the Federal Reserve Board, National Transportation Safety Board, and the U.S. International Trade Commission) set forth requirements relating to ability, expertise, qualifications, geography, or affiliation.[87]

The statute also should provide for a deputy administrator, with temporary authority to exercise the administrator's responsibilities in the event of a vacancy in the office of the administrator.[88]

In summary, the proposal to have a single administrator in charge of the civil enforcement of federal campaign finance laws builds on successful proven models for independent, impartial administration and oversight, and is critical to establishing a new, workable, and effective system for enforcing the campaign finance laws.

2. The new enforcement agency should be independent of the executive branch.

The legislation that creates an agency determines whether it is considered to be an independent agency or a purely executive agency. Congress may supply the agency with various attributes of independence from the White House in the agency's organic act.

Under the Constitution, all agency heads must be appointed by the President and confirmed by the Senate.[89] But the Constitution is silent about removal (other than impeachment), and perhaps the key distinguishing feature of an independent agency is that the Congress has placed some limitations on the President's removal of the agency head(s).

However, independent agencies often have other distinguishing features beyond "tenure" protection for their leaders.[90] Many statutes also contain provisions that allow the agency to litigate in court with some independence of the Justice Department and/or to bypass the White House (Office of Management and Budget) in budgetary and legislative submissions.[91]

It almost goes without saying that any agency set up to oversee and enforce campaign finance laws, including laws that apply to presidential elections, should have a high degree of independence from the White House. The new agency should therefore be established as an independent agency, with restrictions on the President's ability to remove the head of the agency, as explained earlier. Moreover, the agency should have its own authority to make independent budget requests and legislative proposals to Congress.

Models of Agency Structure

In the federal government, there are various alternative existing models of agency structure.

An agency's structure is established in the agency's organic act, enacted by Congress. Agencies can be headed by a single official (for example, the Secretary of Agriculture or the Administrator of the Environmental Protection Agency) or by a collegiate body such as a board or commission. An agency can be called a department, bureau, division, board, council, commission, administration, etc. Under the Administrative Procedure Act (APA), "agencies" can also be within agencies (for example, the Food and Drug Administration is within the Department of Health and Human Services).[1]

One important dividing line is between those agencies headed by a single administrator (sometimes referred to as "single-headed" agencies) and those run by a multi-member board or commission.

Most, but not all, multi-member agencies are established as so-called "independent" agencies, meaning that they have been given a significant degree of independence from White House control. Most multi-member agencies have an odd number of three to seven members (most often five) with a requirement that there be no more than a bare majority from the same political party.

The FEC and the U.S. International Trade Commission are the two exceptions in that each has six members, normally resulting in an equal split of members from the two major parties.

An important variable in the make-up

The new agency should be an independent agency, with restrictions on the President's ability to remove the agency's head. The agency should have its own authority to make independent budget requests and legislative proposals to Congress.

The new agency should also be authorized to handle its own litigation independently of the Department of Justice. This should include the restoration of its authority to represent itself before the Supreme Court. The FEC had such authority for 20 years, until the solicitor general challenged it and the Court determined that Congress had not specifically granted the FEC this authority.[92]

Congress should grant the FEC this authority (and thereby consciously depart from the prevailing practice in the federal government) since it is imperative that this agency's independence from the White House be clearly established, and since the Department of Justice functions in many ways as the White House's legal office. The solicitor general would still, of course, have the ability to appear separately before the Court on campaign finance matters.

3. **The agency should have the authority to find violations, to act in a timely and effective manner, and to impose appropriate penalties, including civil money penalties and cease-and-desist orders, subject to judicial review. A system of adjudication before administrative law judges should be incorporated into the new agency in order to achieve these goals.**

of regulatory boards and commissions is the power of the chairman. Some agencies have a tradition (often backed by statutory powers) of a strong chairman vis-a-vis the other members. Other agencies may have a weaker chairman and/or a tradition of collegial power sharing.

The FEC has an especially weak chairman. Unlike most independent agencies, the FEC chairman is not designated by the President but is elected by the members on a rotating basis (so that each member usually serves one year as chairman during his or her term). The vice-chairman must be from a different party than the chairman. The chairman's term is only for one year and the chairman plays no special role in selecting the staff director or general counsel, both of whom must be chosen by affirmative vote of a majority of the Commission.[2]

In most other boards and commissions, however, Congress has, through a series of reorganization plans and other statutes, gradually assigned more and more power to agency chairmen to control the day-to-day operations of the agencies.[3]

Another variable, which often serves as a surrogate for the perceived importance of the agency and the strength of the chairmanships is the salary of the chairman and the members.

Agency chairmen are typically paid somewhat more than their colleagues. Presidential appointees are paid at one of five levels. The commissioner of the Social Security Administration is paid at Executive Level I ($151,800 as of January 1, 1999), the same rate as Cabinet secretaries. As of January 1, 1999, the chairmen of the Federal Reserve Board and the Nuclear Regulatory Commission (NRC) were the highest-paid

The administrative enforcement procedures currently in existence at the FEC should be streamlined to enable the new agency to operate in a timely and effective manner. Under current law, except for a pilot program covering reporting violations, the existing enforcement process requires that the Commission can only seek a conciliation agreement, and without a settlement must pursue a *de novo* civil action in federal court.[93]

This limitation, combined with the complex internal FEC procedures that exist for enforcement matters, have led to long and untimely delays in resolving enforcement matters. The multiple opportunities for delay inherent in this enforcement process must be eliminated if the agency is to have credibility.

To help accomplish these goals, the new agency should be empowered directly to impose appropriate penalties for violations of the law, a power that, with a minor exception, does not exist in the FEC's current enforcement system. These penalties should include both civil money penalties, as well as cease-and-desist orders.

Before such penalties could be imposed, however, alleged violators (respondents) would be offered an opportunity for a hearing under the Administrative Procedure Act (APA) before an administrative law judge (ALJ).[94]

Under this administrative imposition approach – used extensively by other enforcement agencies in the federal government – an appropriate penalty could be assessed by agency enforcement staff, but would be subject to offering the respondent a right to a hearing before, and an initial decision by, an ALJ.

heads of multi-member agencies, with both paid at Executive Level II ($136,700). The Environmental Protection Agency (EPA) administrator and deputy Cabinet secretaries also received this rate of pay.

The FEC chairman and most regulatory commission chairmen were paid at Executive Level III ($125,900), as were non-chairman members of the NRC and the Federal Reserve Board. The non-chairman members of most multi-member commissions are paid at Executive Level IV ($118,400 in January 1999).[4] As of April 15, 2002, the FEC commissioners continue to receive compensation at Executive Level IV ($130,000).[5]

[1] "[A]gency means each authority of the Government of the United States, whether or not it is within or subject to review by another agency [excepting Congress, the courts, the D.C. government and other entities]." 5 U.S.C. § 551(1). Nor does it include the President. *See* Franklin v. Mass., 505 U.S. 788 (1992).

[2] *See* M. Breger & G. Edles, *Established by Practice: the Theory and Operation of Independent Federal Agencies*, 52 Admin. L. Rev. 1111, 1255-56 (2000).

[3] *See id*. at 1164-82.

[4] *See id*. at 1164-65. These salary statistics take account of Exec. Order 13,106, 63 Fed. Reg. 68,151 (Dec. 7, 1998), reprinted in 5 U.S.C.A. § 5332 (2000 Supp.).

[5] *See* 2 U.S.C. § 5315 (FEC commissioner salary information available at FEC Press Office).

A discretionary appeal from any decision of an ALJ could be taken by either party to the administrator (or his or her delegate, such as a "judicial officer" or special appeals board),[95] and the final agency decision against a respondent would be subject to judicial review on the record developed before the ALJ. Judicial review of the agency's orders should be available in the federal circuit courts of appeals.[96]

This proposal is not a novel procedure. Congress began to incorporate this "administrative imposition model" in numerous enforcement statutes in the 1970s[97] after a study described the problems with traditional civil penalty statutes that required agencies to collect penalties after a district court trial.[98] In 1977, in the case of *Atlas Roofing v. Occupational Safety and Health Review Commission*,[99] the Supreme Court upheld this procedure against a challenge that it violated the right to a jury trial. Lower court decisions have followed *Atlas Roofing* in upholding various civil money penalty statutes against constitutional challenges.[100]

In many statutes Congress has specified the now-standard type of administrative imposition model.[101] It is used in the Occupational Safety and Health Act,[102] the Clean Water Act,[103] the banking[104] and securities laws,[105] and numerous other health and safety and financial regulatory statutes.[106]

As more fully discussed in Exhibit 1 *(see page 49)*, the FEC's statute does contain a provision for a two-year pilot program (which ended December 31, 2001) to administratively assess penalties for reporting violations.[107] In this program Congress authorized an *informal* agency hearing process, perhaps due to the small penalties and the clear-cut nature of the evidence in reporting violations cases.[108]

While Congress has sometimes in other agency programs also authorized the use of informal adjudication procedures to adjudicate civil penalties, especially in the case of small fines for environmental violations,[109] the PROJECT FEC Task Force believes that it is more appropriate for most campaign finance law violations to offer respondents full APA hearings, presided over by ALJs.[110] It may be appropriate, however, to make permanent the informal process for the reporting violations covered by the pilot program.

The value of this revised enforcement process, centering on ALJ adjudication, is twofold. First, ALJ adjudication provides additional insulation of the enforcement process from partisan politics. The ALJ has decisional independence, and the administrator would have to write a convincing opinion to overturn an ALJ decision (which would of course also be subject to judicial review).

Second, the process would provide the agency with the ability to find violations of the law and impose appropriately calibrated sanctions, as contrasted with the agency's very weak current authority which allows it only to determine there is "probable cause" that the law has been violated, following which it can only file a lawsuit and seek sanctions from a court.

At the time of the creation of the FEC in the 1970s, it was relatively uncommon for administrative agencies to have the power to impose sanctions. Granting this power to agencies has become a basic feature of most regulatory programs. Such authority should exist in the new agency responsible for enforcing campaign finance laws.

One goal of the new system should be to provide "real time" penalties for violations of the campaign finance laws, where possible, in order to remove the perception that there is "no cost" to violating the law. To help meet this goal, the administrator should be required to establish procedures and schedules for agency adjudication that would ensure timely enforcement of the law.[111] Moreover, in those instances where the administrator believes that interim injunctive relief is warranted to stop a threatened or ongoing violation of the law, the administrator should be authorized to seek such relief in federal district court.

The goal should be to provide "real time" penalties for violations of the campaign finance laws where possible.

Congress should also restore to the new agency the power to conduct random audits that the FEC had when it was created in 1974 and that Congress stripped from the agency later in the 1970s. Random audits are an important means for ensuring voluntary compliance with the law and are used by other agencies, such as the IRS, to accomplish this purpose.

4. A means should be established to help ensure that the agency receives adequate resources to carry out its enforcement responsibilities.

An enforcement agency must be adequately funded to be effective.

The FEC, however, unlike other agencies in government, is responsible for overseeing and regulating the activities of the very individuals who are responsible for funding the agency and overseeing its activities. And Congress has chosen to exercise these powers by chronically under-funding the FEC and by undermining its enforcement efforts by imposing unreasonable constraints on the use of the resources it was given. *(See page 71 for details.)*

A process, therefore, needs to be established to help ensure that Congress provides adequate funds for the enforcement agency and does not continue to use its appropriation authority to undermine the agency's ability to carry out its statutory responsibilities.

The General Accounting Office (GAO) should be asked to conduct a study and make recommendations on what levels of funding would be necessary for the new enforcement agency to properly do its job of overseeing and enforcing the federal campaign finance laws. The GAO also could be assigned responsibility for making ongoing public recommendations about the agency's budgetary needs. Funding provided for other enforcement agencies of the government should be reviewed as part of an effort to establish an adequate funding level for the new agency.

The agency should be funded on a multi-year basis to provide stability in funding, to conform resources to the election cycles of presidential and congressional campaigns, and to help insulate the agency's funding from congressional efforts to restrict the agency's enforcement efforts.

Some kind of measurable standard also could be statutorily established to help ensure the

agency receives adequate resources to carry out its responsibilities, such as using the growth of campaign spending over time as one trigger for increasing agency funding, and taking into account the increased workload for the agency in presidential election years over non-presidential ones.

The Committee on Standards in Public Life, which has studied and reported on the funding of political parties in the United Kingdom, recognizes the importance of independent budgeting:

> One of the main prerequisites of the independence of the Commission would be its independence of budget. A body whose budget was determined through a government department and which consequently had to fight for resources against competing priorities in government could never be perceived as truly independent. We therefore believe it is essential that a mechanism should be developed for setting the Commission's budget which stresses the Commission's independence while at the same time retaining a degree of accountability to Parliament for the proper expenditure of public funds.[112]

5. The criminal enforcement process should be strengthened and a new limited private right of action should be established where the agency chooses not to act.

The campaign finance laws have provided only for misdemeanor penalties in the case of criminal violations of the law, even where major knowing and willful criminal violations of the law occurred. This has discouraged investigations and criminal prosecutions by the Justice Department, which has not deemed it a priority to devote resources to activities that involve misdemeanor offenses.

As in the case of statutes covering other areas of law, felony penalties are necessary for major knowing and willful violations of the federal campaign finance laws. This would help to ensure that serious criminal campaign finance activities are treated in a serious and appropriate manner and would increase the potential for the Justice Department to move forward in investigating and prosecuting such activities when they take place.

As in the case of statutes covering other areas of law, felony penalties are needed for major knowing and willful violations of federal campaign finance laws.

The statute of limitations established in the 1974 law for criminal violations of the campaign finance laws was set at only three years, making it inconsistent with the five-year statute of limitations found in many other federal statutes. This unexplained and unjustifiable shorter time period for pursuing violations of the campaign finance laws has hampered the ability of the government to conduct investigations and bring cases that would otherwise be pursued.

The statute of limitations for campaign finance violations should be five years, which would bring it into conformity with many other federal statutes.

The campaign finance reform bill passed by Congress on March 20, 2002 addressed these issues, establishing felony penalties for major federal campaign finance violations and a five-year statute of limitations for campaign finance violations following the 2002 elections.

In addition, in order to help ensure that a criminal investigation is initiated whenever it becomes clear that such a matter should be undertaken, the administrator of the new agency should be given statutory authority to refer potential criminal matters to the Justice Department at whatever stage in the agency's enforcement proceedings the administrator concludes such a referral is appropriate.

The Justice Department's handling of campaign finance investigations during the Clinton Administration was a matter of great controversy, particularly in regard to the campaign finance abuses that occurred in the 1996 presidential election. The GAO should undertake an examination of the Justice Department's responsibilities to enforce the criminal provisions of the campaign finance laws and make appropriate recommendations as to how to improve such enforcement, including recommendations about appropriate and necessary resources.[113]

Under current law, the FEC has exclusive jurisdiction to bring civil proceedings to enforce the campaign finance laws. As a limited check, the law provides that any person who files a complaint with the FEC, and is aggrieved because the agency dismisses the complaint or fails to act on it, can file suit against the FEC and request the court to order the agency to pursue the matter. The court cannot, however, decide the merits of the case.

The law further says that if the FEC continues to fail to act after being ordered to, the court can authorize the complainant to proceed against the respondent in court. But this has rarely, if ever, been done.

This system has proven to be an inadequate check on the Commission's lax record of enforcement and should be strengthened to deal with the ongoing problem of courts too often deferring to unreasonable FEC delays in acting on enforcement matters.

In order to provide a stronger check against civil violations being ignored, a limited private right of action also should be established, like the one used by the Equal Employment Opportunities Commission, whereby the agency could authorize a private complainant to pursue a matter directly in court on the merits if the agency decides not to act on an enforcement matter brought to it by a private complainant.[114]

Under this procedure, the new enforcement agency would have the discretionary authority to issue a "right to sue letter" to a private complainant who has raised a matter before the agency that the agency chooses not to pursue. After receiving such a letter, the complainant could pursue the matter directly in court by filing a lawsuit against the alleged violator. The complainant would litigate the alleged illegality in the place of the enforcement agency, and could seek a remedy from the court.

This would provide for some recourse when the administrator has exercised discretion not to proceed, and increase the deterrent function of the law by providing for the possibility of enforcement even when the administrator declines to act.

This "right to sue" process allows an agency to select its own enforcement priorities, but also provides an alternative enforcement route for the agency to use in certain cases where the agency decides not to take any action. This becomes, in part, a means for an agency to supplement its resources by permitting private complaints to be used in certain circumstances to achieve civil enforcement of the laws.

Establishing this process would result in a statutory requirement for one of three possible outcomes occurring within an established time period – for example, 180 days after a complaint is filed with the agency:

- The administrator could decide to close the case without issuing a "right to sue" letter. In such an event, the complainant could seek judicial review of the decision to close the case.

- The administrator could close the case and issue a "right to sue" letter. In this instance, the private complainant could bring a case against the respondent directly in court.

- The administrator could decide to keep the case open and continue to pursue an investigation. In these circumstances, the complainant could then seek judicial review of the agency's pursuit of the case at any point where the complainant believes there is an unreasonable delay in the agency action. And if the administrator ultimately closed the investigation, the agency could still choose to issue a "right to sue" letter at that time.

Conclusion

Congress has enacted a new campaign finance law to help restore the integrity of our democracy.

But, as *The Washington Post* has noted in an editorial, "[N]o significant overhaul of campaign finance is likely to succeed without a concomitant invigoration of the FEC."[115]

The FEC is a failed agency. This has been a central factor in the creation of dangerous and corrosive campaign finance problems in the country and in reaching the point where the political community believes that "anything goes" when it comes to campaign finance practices.

If the newly enacted campaign finance law is to accomplish its goals, and if the credibility and effectiveness of existing campaign finance laws are to be restored, it is essential to establish a new system for enforcing the nation's campaign finance laws.

PART III

Case Studies:
Detailing the Problems

Part I of this report sets forth what's wrong with the Federal Election Commission (FEC) and the case for closing the agency. Part II sets forth a proposed solution.

Part III of this report expands on the discussion in Part I and documents the problems with the FEC in greater detail in a series of six exhibits.

The exhibits cover the structural problems with the FEC *(page 49)*, the politicization and partisanship of the commissioners *(page 59)*, congressional interference with the FEC *(page 71)*, the role of the FEC in creating and perpetuating the soft money problem *(page 81)*, other campaign finance problems caused by the FEC *(page 97)*, and the limited role of the courts in causing campaign finance problems *(page 117)*.

EXHIBIT 1

The Structure of the Commission:
Weak, Slow-Footed, and Ineffectual

Leading up to the creation of the FEC in 1974, Members of Congress feared that a campaign finance enforcement agency would become too powerful and troublesome. To deal with these concerns, Congress created a new agency with a cumbersome enforcement process, no power to find violations and impose penalties, and a structure designed for partisan deadlock and inaction.

The Commission was established with exclusive civil jurisdiction over matters arising under the federal campaign finance laws, but the agency can do little on its own to actually enforce the law. The singular power that the Commission wields is the power to file a civil suit against a respondent in court. Yet this authority can only be exercised after the agency's exhaustive and lengthy internal enforcement process has run its course, and conciliation with the respondent has failed. And, even then, the result is the initiation of another long legal process.

In response to the Watergate campaign finance scandals, Congress, in 1974, amended the Federal Election Campaign Act (FECA)[116] to provide the most sweeping campaign finance laws ever enacted. In addition to limiting contributions and establishing a public financing system for presidential elections, the legislation established the Federal Election Commission (FEC).[117]

With many Members of Congress concerned that a new enforcement agency would be too powerful and threatening, Congress created an institution designed to be weak – with an unwieldy enforcement process, limited enforcement powers, and politicized commissioners.

The FEC is an independent agency with "primary and substantial responsibility for administering and enforcing the Act"[118] and exclusive jurisdiction for civil enforcement of the Act.[119] The Commission is vested with "the 'sole discretionary power' to determine in the first instance whether or not a civil violation of the Act has occurred."[120] As such, the FEC has the authori-

ty to conduct investigations, authorize subpoenas, receive evidence, administer oaths, and initiate civil actions to enforce the Act.[121]

Despite these tools, however, the Commission has been unable and unwilling to overcome its inherent structural and systemic problems, and has failed as an enforcement agency.

Internal Procedures: A Cumbersome Enforcement Process

A cumbersome enforcement process has hindered the ability of the Commission to act effectively. The process, with its numerous steps, has led to many inconsistencies and delays. As current FEC Commissioner Scott Thomas has written, "[P]rocedural requirements and their attendant time allowances make it difficult – if not impossible – for the Commission to resolve a complaint in the same election cycle in which it is brought."[122]

"[P]rocedural requirements and their attendant time allowances make it difficult — if not impossible — for the Commission to resolve a complaint in the same election cycle in which it is brought."
– FEC Commissioner Scott Thomas

Cases enter the FEC enforcement process through both internal and external methods. Internally generated cases result from field audits and referrals from either the Reports Analysis Division (RAD) of the FEC, or from other agencies like the Department of Justice. Externally generated cases are complaints filed by individuals or groups who believe violations of the Act have been committed.[123]

Here's how the process works:

Step 1: The complaint is ranked by its significance.

External complaints to the FEC must meet basic procedural criteria in order to be accepted by the Office of the General Counsel (OGC). Once a complaint meets these criteria, it enters the Enforcement Priority System that manages the Commission's caseload by assigning a ranking of significance to each case. Standards used in this ranking process include "the intrinsic seriousness of the alleged violation, the apparent impact the alleged violation had on the electoral process, the topicality of the activity, and the development of the law and subject matter."[124]

Step 2: The staff analyzes the case and makes a recommendation.

Limitations in staff and resources mean that eligible cases wait long periods of time before being assigned, and cases that are frequently most significant (involving a large number of respondents, and intricate details and transactions) require a heavier concentration of staff resources. These factors cause additional delays and bottlenecking during the OGC's analysis and determination of the case. Not infrequently, cases are dismissed as stale if they are never activated under the ranking system.

If a case is activated after the ranking assigned to it, the OGC writes an analysis of the

factual and legal issues in the case (the First General Counsel's Report), and recommends whether the Commission should find "reason to believe" that a violation of the Act has occurred. The general counsel recommends that the Commission either move forward with "reason to believe," or recommends that there is no reason to proceed and suggests that the case be closed.[125] The commissioners vote on the recommendation of the general counsel, with four votes needed either to drop the case or pursue the investigation further in order to find possible violations.

Step 3: The commissioners authorize an investigation.

If the commissioners find reason to believe a violation has occurred, an investigation is initiated and the FEC enjoys broad investigative authority.[126] It can issue subpoenas for documents and testimony and take depositions. However, a subpoenaed person may, within five days of receipt, file a motion to quash the subpoena.[127] If the motion to quash is denied but the respondent nonetheless refuses to comply with the subpoena, the Commission must go to court to enforce the subpoena. These proceedings can add significant time delays to the enforcement process, as motions to quash or enforce subpoenas can be tied up in court for years at a time.[128]

Step 4: The commissioners find "probable cause to believe."

Once an investigation is completed, the general counsel prepares a brief detailing the counsel's position, based on the factual and legal evidence in the case, and provides both the commissioners and the respondent with a copy.[129] The general counsel notes if the investigation warrants a finding that there is "probable cause to believe" or no "probable cause to believe" a violation of the law has occurred.[130]

Fifteen days are afforded the respondent to submit a response brief to the general counsel's report, but the respondent may request an extension of time.[131] The commissioners review both briefs and vote on the recommendation of the general counsel. Again, four affirmative votes are required of the commissioners to find "probable cause."

Step 5: The Commission attempts to resolve the matter by conciliation.

If the Commission finds that there is no probable cause to believe, the case is closed and the parties are notified. If the Commission finds that there is probable cause to believe a violation of law has occurred, the Commission is required to attempt to resolve the matter by "informal methods of conference, conciliation, and persuasion" within 90 days.[132] If a mutually acceptable conciliation can be reached, the agreement takes effect upon approval with four affirmative votes by the commissioners. (Commission regulations also provide that a conciliation agreement may be reached before the general counsel provides the commissioners with a "probable cause to believe" brief.[133])

Step 6: The Commission resorts to the courts.

Cases not resolved in conciliation within 90 days can end in litigation. The Commission has the authority, with "an affirmative vote of four of its members, [to] institute a civil action for relief, including a permanent or temporary injunction, restraining

order, or any other appropriate order … in the district court of the United States for the district in which the person against whom such actions [are] brought is found, resides, or transacts business."[134] This is the only power the Commission has in terms of acting on an alleged violation (except for the recently instituted administrative fines program for minor violations).

Alternatively, the Commission may dismiss the case because it lacks resources to pursue the issue in court.

In court, the FEC may seek the maximum statutory penalty – 100 percent of the violation or $5,000 – whichever is greater.

If the Commission pursues the respondent as a knowing and willful violator of the law, it may ask the court to increase the penalty to 200 percent of the actual violation or $10,000, whichever is greater. Respondents run the risk, however, of the court deciding to impose a greater penalty than that for which the Commission was willing to settle. On the other hand, the Commission runs the risk that the court might impose a penalty smaller than what the respondent was willing to accept as part of a conciliation agreement.

Lack of Statutory Enforcement Powers and Inability to Find Violations

The Commission is constrained by its lack of powers and authority. The Commission was established as the only agency with civil jurisdiction over matters arising under the federal campaign finance laws, but the agency can do little on its own to actually enforce the law. At no point in the lengthy enforcement process detailed above does the agency have power to find that a violation has occurred – it is only given options of finding "reason to believe"[135] and "probable cause to believe."[136]

Additionally, through the process of conciliation, the Commission can attempt to negotiate civil penalties and settle matters under review, but it cannot adjudicate complaints or require sanctions for violations.

Private citizens and organizations must file all complaints with the FEC, which has exclusive civil jurisdiction to act on them. They cannot go directly to court. While there is a narrow statutory means by which private complaints may eventually be heard in court by challenging the FEC's failure to pursue a complaint, this mechanism has proven ineffectual as a means of forcing the agency to act.

The single power that the Commission wields is the power to file a civil suit against a respondent in court. Other than the ability to impose fines for minor reporting violations, this is the Commission's only authority for formal action on an alleged violation. Yet this authority can only be exercised after the exhaustive internal enforcement process has run its course and conciliation has failed, and is only an *initiation* of another process of research, briefs, presenting arguments, and seeking action. Litigation adds years to the already-lengthy enforcement process and the Commission's pursuit of a case in court represents a substantial expense of already tightly constrained human resources and capital.[137]

Furthermore, the Commission has no power to seek court injunctions to halt illegal activity while it takes place or to act expeditiously in a pre-election time frame. Nor does the Commission have the authority to conduct random audits of candidate campaign committees.

Deadlocked Commissioners

The Commission is made up of six commissioners. The Act provides that "no more than 3 members of the Commission … may be affiliated with the same political party."[138] This clause is a recipe for inaction on major matters – politically dividing the Commission with three Republicans and three Democrats. *(See page 59 for more on the politicization of Commission appointments and its hobbling impact on the FEC.)*

The situation is exacerbated by the statutory requirement that a majority vote of the commissioners – four votes – is necessary for the agency to make any decision or take any action. Thus, in any enforcement case where a 3-3 vote occurs, the enforcement matter is dropped. As *National Journal* has noted, "With the FEC often resembling a three-on-three tag-team wrestling match, important matters become trapped in gridlock."[139]

A 3-3 deadlock can occur at any stage of the enforcement process and kill the proceeding – from a decision to open a case, to find reason to believe that a violation has occurred, to find probable cause, to file a case in court, or to appeal a case. When deadlocked votes occur early in the enforcement process, investigations into allegations, no matter how serious they are, simply end before questions can be asked or answers obtained.

An investigation into allegedly illegal spending by the Montana Republican party provides a classic example of how a partisan division of the commissioners can block an enforcement action. *(See page 114 for a detailed discussion of this investigation.)*

There are numerous other examples where 3-3 votes have blocked Commission proceedings in important cases:

- **The Dole/RNC Case**

  A decision following the investigation into the 1996 fundraising scandals illustrates the problem. The FEC found that the 1996 Dole for President campaign had received illegal contributions from the Republican National Committee (RNC). The Dole committee entered into a settlement with the Commission to resolve the matter. But having found that the Dole committee *received* illegal contributions from the RNC, the Commission deadlocked on whether to find that the RNC had *made* the illegal contributions.

  The investigation arose out of the fact that in the spring and summer of 1996, when the Dole campaign was short of funds prior to the Republican Convention, 12 Dole staffers went onto the RNC payroll. Once the Dole campaign received its grant of public funding for the general election, 11 of these same 12 staffers transferred back to the Dole campaign payroll.

  The general counsel recommended that the Commission investigate whether the RNC's payment for the staffers during the spring and summer was an in-kind contribution to the Dole campaign. The three Democrats voted for the general counsel's recommendation to pursue an enforcement action against the RNC, while the three Republican commissioners voted against it. The Republicans claimed that it was unproven whether the

  Having found that the Dole campaign *received* illegal contributions from the RNC, the Commission deadlocked on whether to find that the RNC had *made* the illegal contributions.

staffers were working for the Dole campaign, as opposed to the party, and therefore whether the RNC really had made a contribution to the Dole campaign. Absent a fourth vote to proceed, the investigation was dropped.

In a Statement of Reasons issued by the Democratic commissioners, they noted,

> [T]he evidence on which the Commission relied to find probable cause to believe that the Dole Committee violated the law in accepting these services from the RNC is no less compelling in determining whether the RNC violated the law in providing the services. Unless the RNC made an excessive contribution, it is hard to fathom how the Dole Committee accepted an excessive contribution. It is this stark inconsistency that renders [the Republicans'] decision not to proceed in this matter inexplicable.[143]

- **The Haley Barbour Case**

In 1999, the general counsel recommended that the FEC investigate whether the RNC and a related nonprofit corporation called the National Policy Forum (NPF) illegally accepted foreign donations and used those undisclosed funds to influence federal elections.

The charge was based on a complaint filed by the Democratic National Committee (DNC) that the National Policy Forum was not a separate group at all, but a project of the RNC. The complaint further alleged that the RNC "loaned" more than $2 million to the NPF, and that the NPF then used foreign money to repay the loan to the RNC, right before the 1994 elections, in time for the RNC to then use those funds in the elections.

The general counsel recommended that the Commission find probable cause to believe the RNC, and its chairman, Haley Barbour, solicited and accepted a $1.6-million contribution from a foreign national.

The three Democrats on the Commission – Danny McDonald, Karl Sandstrom, and Scott Thomas – voted in favor of the recommendation, while Commissioners Lee Ann Elliot, David Mason, and Darryl Wold, the three Republicans, voted against it. Accordingly, because of the deadlock, the Commission closed the case without taking any action.

In a Statement of Reasons, Commissioners Thomas and McDonald noted that the question in the case was whether the RNC "could avoid public disclosure, the Commission's soft money regulations … as well as the foreign national prohibitions simply by setting up a shell organization which it asserted was separate from the national party. This so-called 'separate' organization, the National Policy Forum, was chaired by the RNC Chairman, staffed by RNC staff, and financed by RNC money."[141]

Commissioners Thomas and McDonald further noted:

> This is a very compelling case. Obviously, the RNC itself could not receive a bank loan guaranteed with foreign national money or directly receive money from a foreign national. To overcome this, the RNC developed a

> carefully thought out series of transactions designed to deposit additional money into its accounts. Structured through a loan repayment, the RNC used a shell organization it had established as the vehicle to route "urgently needed" foreign funds into the United States election process.[142]

The Democratic commissioners protested the refusal of the three Republicans to investigate the case:

> The Federal Election Campaign Act means very little if it can be so easily evaded. A national party committee should not be able to get around public disclosure requirements and fund allocable activities entirely with soft money merely by setting up a straw organization. A national party should not be able to evade the prohibitions on the use of foreign national money through such a charade and, thus, be able to do indirectly what it can't do directly. By approving such trickery, our colleagues' decisions in this matter are plainly contrary to both the plain language of the statute and the Commission's regulations.[143]

- **Decisions To Appeal**

Partisan deadlocks also have occurred on whether to appeal significant cases.

After the Commission in 1996 lost a federal district court case against GOPAC, a political group organized by former House Speaker Newt Gingrich (R-GA), the three Democrats voted to appeal the decision but the two Republicans, Commissioners Joan Aikens and Elliot (the third Republican seat was vacant), voted to drop the matter. As a result of the partisan split, the case was dropped, without an appeal.

The commissioners also deadlocked on whether to appeal to the Supreme Court a Court of Appeals decision from the Fourth Circuit that struck down the FEC's regulations on defining "express advocacy." The Commission's regulation defined express advocacy to include ads that "could only be interpreted by a reasonable person" as advocating the election or defeat of a candidate, in addition to ads using "magic words" such as "vote for" and "vote against." The regulation was based on a ruling made by the Ninth Circuit Court of Appeals.

When the Fourth Circuit found the regulation unconstitutional, the three Democrats voted to appeal to the Supreme Court, but the three Republicans voted against appeal. Because of the deadlock, the case was not appealed.[144]

The commissioners also split 3-3 along party lines on whether to request the U.S. solicitor general to participate in the Supreme Court as *amicus curiae* in *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377 (2000). This was an important case that challenged the constitutionality of contribution limits.

Even though the FEC was not a party to the case because it involved a state-law limit, the Court's ruling was expected to directly relate to the contribution limits contained in federal law. As a result of the split, "the expert agency responsible for the administration

of the nation's campaign finance laws will have no voice in one of the most significant election law cases of the last quarter century," according to two of the Commissioners who supported the request.[145]

- **Advisory Opinions**

  Deadlocked votes also can occur in the advisory opinion and rulemaking processes, again blocking action.

  The FEC, for example, deadlocked on a request by the DNC to liberalize soft money accounting rules in the wake of the September 11, 2001 terrorist attacks. The three Democratic commissioners voted for the request while the three Republicans opposed it. While Democrats have been associated with stronger soft money rules and Republicans with looser rules, in this case, in response to the DNC's request, the Democratic commissioners favored looser rules while the Republican commissioners opposed them.

The FEC is not the only federal administrative agency to be headed by an equal number of members; the International Trade Commission (ITC) also has six members, with three representatives of each party.[146] However, the ITC differs from the FEC because Congress stipulated that whenever the ITC has a tied vote regarding whether or not an investigation will be conducted, "such investigation shall thereupon be carried out."[147] The FEC lacks such a provision and is afforded no recourse for tie votes at any stage of the enforcement process.

As *The Washington Post* observed:

> Intense partisanship envelops almost every major decision the FEC's six Commissioners make. … Time and again partisan standoffs have prevented the Commission from pursuing enforcement actions against major politicians and powerful interest groups, even when the FEC's general counsel recommends going forward.[148]

While one of the six commissioners heads the Commission as chairman, this title conveys little real power to its holder. The chairman serves a one-year term as the head of the agency, and plays only a ceremonial role consisting of presiding over meetings, signing documents, and setting agenda. The chairman does not direct daily operations or hire or fire employees. The six commissioners must collectively decide all of these actions. As in decisions on enforcement, these are also subject to the same factors that can lead to deadlock.

The Commission splits by 3-3 votes in only a relatively small number of the decisions it makes.[149] But those decisions tend to be, according to the FEC itself, on "difficult, controversial issues affecting party entities or other players in the political process," as opposed to routine matters.[150]

The problem here is not the number of 3-3 votes at the Commission, but rather the fact that these partisan deadlocks occur on key matters that establish broader ground rules for enforcing, or failing to enforce, the campaign finance laws.

Efforts by the FEC To Address Structural Limitations

The Commission has taken some steps in an effort to increase its efficiency and work through its caseload. On July 15, 2000, the FEC began an "Administrative Fines Program" to assess civil penalties for the following three violations: "failure to file reports on time, failure to file reports at all, and failure to file 48-hour notices."[151]

The Commission stated that the program "has a twofold purpose: to free critical Commission resources for more important and complex enforcement efforts, and to reduce the number of financial reports filed late or not at all."[152] The amendments were meant to "expedite and streamline the Commission's enforcement procedures."[153]

The program is a good one in principle and appears to have had the effect of reducing late- and non-filers. But there is also a danger in such a program that enforcement resources can be diverted to relatively minor infractions at the cost of dealing with more major violations. This program, although meritorious, is no substitute for effective enforcement of the law as a whole.

A second program enacted at the same time is the Alternative Dispute Resolution (ADR) Program. In July 2000, the Commission approved the ADR program to encourage compliance through settlement outside normal enforcement proceedings. The program seeks to "resolve complaints and audit referrals faster; increase the number of complaints and referrals processed; reduce costs for respondents; ensure greater satisfaction for the respondents involved; and enhance FEC enforcement efforts by freeing up resources from less compelling complaints."[154]

Again, ADR allows the FEC to deal more expeditiously with some enforcement cases, a worthy goal.

However, the program only addresses non-controversial cases where the respondents are willing to negotiate a conciliation agreement without being investigated by the general counsel's office. Again, there is a potential danger that the Commission may set aside or delay more important and controversial cases while significant staff and financial resources are spent on non-controversial cases with inconsequential outcomes. In this regard, the ADR program also is no substitute for effective enforcement of the FECA.

EXHIBIT 2

The Commissioners:
Party Machinery

A key problem with the Federal Election Commission (FEC) is that those who are regulated by the campaign finance laws appoint those who regulate them. The appointments process works in a way that in practice evades a ruling of the Supreme Court that declared it unconstitutional for Members of Congress to appoint commissioners to the agency.

A symbol of the inherent problems with the FEC appointments process is the appointment of Bradley A. Smith to the agency. Smith is an avowed foe of campaign finance laws who declared they were unconstitutional and should be repealed. Smith's appointment was successfully demanded by Senate Republicans opposed to the campaign finance laws, and forwarded to the Senate by a President who acceded to the practice of allowing congressional leaders to choose FEC commissioners.

By law, the Federal Election Campaign Act (FECA) requires that the President nominate FEC commissioners, subject to confirmation by the Senate. In practice, however, the leadership of the Congress plays a central role in dictating the membership of the agency.

U.S. News & World Report describes the practice this way: "Congress controls who becomes a commissioner: The President merely rubberstamps recommendations from Capitol Hill. That means commissioners owe their ... jobs to party machinery. When the regulated control the regulators, oversight goes soft."[155]

This politicized practice has hobbled the FEC and ignores the spirit of a Supreme Court ruling that congressional appointment of FEC commissioners is unconstitutional.

Appointments Process in Practice Flouts Constitutional Ruling

As a historical matter, Congress actually created an appointments role for its own Members in the original 1974 legislation that established the FEC. The 1974 statute provided for the leaders of each party in the House and Senate to appoint four of the six commissioners, and the President the other two.[156]

But the Supreme Court in *Buckley v. Valeo* declared that plan unconstitutional because it violated the Appointments Clause of Article II of the Constitution, as well as the principle of separation of powers. The Court noted that, "[T]hose who sought to challenge incumbent Congressmen might have equally good reason to fear a Commission which was unduly responsive to members of Congress whom they were seeking to unseat."[157] The Court held that *all* commissioners had to be nominated by the President, and then confirmed by the Senate.

In the wake of *Buckley*¸ Congress re-created the Commission to require nomination of all six commissioners by the President, with confirmation by the Senate. The purpose of the new legislation was to fulfill the Court's directive that the principle of separation of powers prohibits direct congressional involvement in the appointment of commissioners to the FEC.

Since the re-creation of the FEC, however, Congress – in collaboration with the President – has followed, in practice, the very same approach to appointments that was struck down by the Supreme Court in *Buckley*.

Thus, although the President is formally required to nominate all FEC commissioners, in practice, the White House and Congress have divided the Commission up in the same way contemplated by the original statute. This has resulted in two FEC commissioners controlled by the White House, two by the Senate leadership, and two by the House leadership. (The party out of power traditionally gets to name one of the two commissioners controlled by the White House.)

For the four congressional seats, the majority and minority party leaders in both chambers of Congress take turns sending to the President the names of the individuals they want appointed to the FEC. In practice, the President almost invariably accepts the names submitted by the congressional leadership, even when he is personally opposed to the proposed nominee.

This custom (or tradition) of allowing party leaders to *de facto* choose the nominees for the FEC – a practice with no basis in the FECA – has assumed the status of virtually a binding obligation. Neither party wants to give up its control over half of the FEC's make-up.

As *National Journal* has noted, "Although the *Buckley* arrangement still stands, the nomination process in practice resembles the old version – with the President usually deferring to Congress and to the political parties."[158]

Politicized Quest for "Right Stuff" Renders Gridlock

In addition to being in direct conflict with the ruling in *Buckley*, congressional control over much of the appointments process hobbles the FEC, often resulting in extended unfilled vacancies on the Commission or lengthy extensions of the terms of incumbent commissioners.

As a campaign finance historian has written, "Congress wants more than the statutory balance between Republicans and Democrats on the Commission – Congress wants the right kinds of Republicans and Democrats, preferably ones who are both partisan and closely tied to congressional party leaders."[159]

And, it has usually gotten the "right kinds" of commissioners for its purposes.

Of the 20 commissioners who have served on the FEC since its inception, only two have had strong backgrounds in enforcement. Frank Reiche, a Republican appointee who served on the FEC from 1979-1985, previously served as the first chairman of the New Jersey Election Law Enforcement Commission. According to observers, Reiche was not reappointed to the FEC after serving only one term, apparently because he was perceived to be too independent.

Scott Thomas, a Democrat, was appointed to the Commission in 1986 by President Reagan, and is now in his third term. Prior to his appointment, he was a lawyer in the FEC's Office of

Of the 20 commissioners who have served on the FEC since its inception, only two have had a background in enforcement.

General Counsel, where he worked on enforcement matters and served as Assistant General Counsel in the Enforcement Division.

But the great majority of the commissioners (16 of 20) have come from, or had ties to, the regulated community, including five commissioners who had been Members of Congress (Curtis, Staebler, Thomson, Tiernan, and Springer), four who had served as congressional or White House staff (Friedersdorf, Mason, McGarry, and Sandstrom), three who came from political party positions or backgrounds (Aikens, Josefiak, and Toner) and four who had worked for, or represented, campaign finance players (Elliott, Harris, Potter, and Wold) *(See page 62)*.

While this thumbnail sketch is not intended to be a comprehensive account, it does show that the FEC commissioners have largely been drawn from, or had ties to, the regulated community – including Congress, the political parties, and major campaign finance players – and have not been individuals with enforcement and administrative oversight backgrounds.

In addition to Reiche, there have been a few other commissioners who have been viewed by outside observers as operating with some degree of independence from their parties. But the norm has been a politicized agency, with commissioners viewed as representing and responding to the parties and party leaders who have appointed them.

Congress has not only played a central role in choosing commissioners but at times has left longstanding vacancies on the agency that hobbled its operations and ability to enforce the law. At other times, by not filling a vacancy, Congress has allowed "holdover" commissioners to remain on the agency long after their terms of office expired. (Under the FECA, when a commissioner's term expires, the commissioner can continue sitting as a member of the FEC until a successor has been appointed and confirmed.)

All of these problems – the failure to fill seats, lengthy holdover terms, and the congressional role in appointments – are illustrated by the FEC's history during the Clinton Administration.

Here is what happened with four of the FEC seats that opened for appointment during the eight years of the Clinton presidency:

When Bill Clinton won the presidency in 1992, Senator Robert Dole (R-KS) pressed the Administration to continue the tradition of congressional control of FEC appointments, while reform groups urged the President to nominate impartial candidates.[160]

Not surprisingly, Senator Dole's position prevailed, and the victory appeared to have immediate results.

In 1993, Commissioner Lee Ann Elliott was seeking to be re-appointed to her third six-year term,[161] an appointment that required Senator Dole's support.[162] While seeking reappointment, Commissioner Elliott declined to recuse herself from FEC enforcement actions relating to Dole's 1988 presidential campaign committee and a political action committee (PAC) over which he still retained control.[163] Despite the circumstances, and with Senator Dole's endorsement,[164] President Clinton agreed to nominate Elliott to a third term in 1994.

In October 1995, when Trevor Potter left the Commission with two years remaining in his term, a saga of inaction, delays, and withdrawals began to unfold that would last three years, leaving three Commission seats in limbo.

Potter's departure actually created a third vacancy. A Democratic seat held by John McGarry and a Republican seat held by Joan Aikens were both open as well, although both incumbents were still sitting as holdover commissioners.

Critics of the Commission urged President Clinton to seize this opportunity "to reinvigorate the FEC"[165] by appointing independent-minded individuals to the three open seats.

Clinton at first appeared prepared to move in this direction by considering whether to nominate former Representative Karen Shepherd (D-UT) to replace McGarry on the Commission. Shepherd had been an advocate for campaign finance reform while she was in the House and had been defeated in her first reelection bid the prior November.

Months passed without President Clinton taking action to forward the Shepherd nomination.[166]

This was no great surprise. There are few incentives for Democratic congressional leaders to nominate a reform advocate, or even an independent-minded commissioner. Doing so would, in the minds of party leaders, constitute the equivalent of "unilateral disarmament." With three slots available to each party on a six-member Commission, filling even just one slot with a person who might act independently or vote even occasionally against the party's interests was seen as potentially disastrous.[167]

Indeed, *both* Democrats and Republicans regarded the tenure of Trevor Potter – who often voted independently of Republican Party interests – as providing a cautionary tale. According to press reports, Shepherd's nomination was delayed by concerns by some in the White House that she "might prove too unpredictable a vote."[168]

Shepherd's nomination to the FEC was delayed by concerns of some in the White House that she "might prove too unpredictable a vote."

In February 1996, Senator Dole forwarded his recommendation of Washington lobbyist Edwina Rogers to fill one of the open

FEC Commissioners

Thomas B. Curtis

(1975-1976)

Thomas Curtis was the first Chairman of the FEC. A Republican from Missouri, Curtis, served nine terms in the U.S. House of Representatives. In 1976, Curtis resigned after Congress reconstituted the agency, saying the legislation did not preserve the independence of the Commission.

Neil Staebler

(1975-1978)

Neil Staebler, a Democrat, was a former Member of the U.S. House of Representatives. He served as chairman of the Michigan Democratic State Committee, and as a member of the Democratic National Committee and the National Democratic Finance Council.

Joan D. Aikens

(1975-1998)

Joan Aikens, a Republican, was an executive with a public relations firm in Pennsylvania before joining the FEC. She was a member of the Pennsylvania Republican State Committee, served on the board of the National Federation of Republican Women, and served as Chairperson of the Republican National Committee Women's Division.

Republican seats. Rogers had been a fundraiser for the Fair Government Foundation, a group that opposed the efforts to strengthen the FEC's enforcement function. If confirmed, the Capitol Hill newspaper *The Hill* reported, Rogers would "represent a new style Republican commissioner, one who would be more intent on reining in the scope of the FEC."[169] Senator Dole's choice for the other Commission seat was Rusty DePass, a former chair of the South Carolina State Election Commission, who was supported for the job by Senator Strom Thurmond (R-SC).

Again, the White House took no action on the nominations.

Four months later, in June 1996, in the final days of his tenure as Senate Majority Leader, Dole forwarded to President Clinton his request for the appointment of the Secretary of the Senate, Kelly Johnston, to the FEC. At this point, the status of Rogers and DePass as Dole's earlier choices was unclear.[170]

Democrats and Republicans who favored a weak Commission were benefiting from these continuing delays. Even with Commissioners Aikens and McGarry continuing to serve as holdovers after the expiration of their terms, there was an absent seat left open by Potter. Because there were only five sitting commissioners, there was a smaller pool from which to gain the necessary four-vote majority to go forward with any enforcement action.[171] FEC aides began complaining about "the commission's inability to provide effective guidelines" during the 1996 election cycle.[172]

In September 1996, Clinton officially nominated Johnston to replace Aikens in one of the two open Republican seats. By this point, Shepherd had taken her name out of consideration for the open Democratic seat, which McGarry continued to fill. Some sources reported that there were debates between the White House, which was now leaning toward reappointing McGarry, and the Democratic leadership in the Senate, "who wanted to give the slot to an experienced Hill hand."[173]

Thomas E. Harris
(1975-1986)

Thomas Harris, a Democrat from Arkansas, served as Associate General Counsel to the CIO – and to the AFL-CIO after the two unions merged – from 1948 to 1975. Previously, he was an attorney in private practice.

Robert O. Tiernan
(1975-1981)

A Democrat from Rhode Island, Robert Tiernan served four terms in the U.S. House of Representatives. He previously served in the Rhode Island State Senate and held various national and state party positions.

Vernon W. Thomson
(1976-1979 and 1981)

Vernon Thomson, a Republican from Wisconsin, served in the U.S. House of Representatives from 1961 to 1975. Previously, he served as Governor of Wisconsin, Attorney General of the state, and as Speaker of the Wisconsin State Assembly.

(Continued on page 64)

In January 1997, President Clinton finally announced that he was re-nominating McGarry to serve another six-year term, but the Senate failed to schedule confirmation hearings.[174] Because of the delay in scheduling a hearing, Johnston withdrew his name from consideration. By this time, not only was the term for Potter's vacant seat expiring, but the term of another Democrat, Scott Thomas, was expiring as well. Thus, there were now four vacancies on the six-member Commission (albeit with three hold-over commissioners).

By June 1997, new Senate Majority Leader Trent Lott (R-MS) had begun taking a far more assertive role in the FEC appointment stalemate. Senator Lott informed President Clinton that he planned to block Senate action on all presidential nominations, except for the military, "until the four expired seats on the FEC are filled to our mutual satisfaction."[175] Senator Lott had submitted his own recommendations, Margo Carlisle and Darryl Wold, to fill the two expired Republican seats.[176]

At the same time, the White House was receiving criticism from friendlier quarters. President Clinton's chosen "advisors" on campaign finance reform legislation, former Democratic Vice President Walter Mondale and former Republican Senator Nancy Kassebaum Baker, publicly urged the President to fill all the vacancies remaining at the FEC with new, independent-minded candidates, and not to continue to wait for recommendations from Capitol Hill.[177] In a letter to the White House, they wrote, "[W]e need a clean break from the past" in appointments to the FEC.[178]

The White House responded quickly by announcing the next day that the President would make official nominations "within the next week on all four vacancies."[179] It announced that President Clinton would re-nominate both incumbent Democrats, McGarry and Thomas.

The White House's resort to simple re-nomination of the incumbents was an indication that neither party wanted to rock the boat by appointing an "unknown" to the Commission.[180]

William L. Springer
(1976-1978)

William Springer was a Commissioner of the Federal Power Commission from 1973 to 1975. Springer, a Republican from Illinois, served in the U.S. House of Representatives from 1950 to 1972.

John Warren McGarry
(1978-1998)

A Democrat from Massachusetts, McGarry served as a special counsel on elections to the Committee on House Administration for six years before being appointed to the FEC. Prior to that, McGarry served as Assistant Attorney General for Massachusetts.

Max L. Friedersdorf
(1979-1980)

Max Friedersdorf, a Republican, served as Staff Director of the Senate Republican Policy Committee prior to his appointment to the FEC. From 1971 to 1977, he served in several White House posts, including serving as President Ford's Assistant for Legislative Affairs.

The two Republican candidates were, of course, to be selected by Republican party leaders. Senator Lott responded to the White House announcement by announcing that he would "go back to forwarding other nominations" for other offices as soon as the FEC nominations were officially forwarded to the Senate.[181]

But no action was taken in July, in part because Senator Lott's choice for one of the Republican seats, Margo Carlisle, asked that her name be withdrawn, and then a proposed replacement for her, Richard Soudriette, declined to accept.[182] According to *Roll Call*, however, Soudriette "was simply not partisan enough to satisfy the GOP Senators who would be voting to confirm him. Some Senators felt Soudriette 'wouldn't bring a sufficiently rigorous Republican point of view to the commission. … A lot of Members felt that they got burned with Trevor Potter in that respect. You couldn't count on him to be sufficiently partisan.'"[183]

Senator Lott's third pick, David Mason, a senior fellow at the Heritage Foundation, then agreed to join Wold as the two Republican recommendations for seats on the FEC.[184]

In February 1998, when none of the four nominees had yet been officially confirmed by the Senate, Democrats faced a setback when McGarry asked President Clinton to withdraw his nomination for a fourth term on the Commission.[185] No replacement was named until May, when the White House announced that it would nominate Karl Sandstrom to serve on the Commission.

Finally, in July 1998, the Senate held a confirmation hearing on the four nominees that would give the FEC its full complement of six commissioners.[186] For the nearly three years following Potter's resignation in October 1995, the FEC had been operating with only five of its six seats filled, and for part of that time, only two of those five seats were filled by commissioners whose terms had not already expired.

Frank P. Reiche

(1979-1985)

Frank Reiche, a Republican, was Chairman of the New Jersey Election Law Enforcement Commission. He served as Chairman of the Steering Committee of Interstate Agencies, which led to the organization of the Council on Governmental Ethics Laws in 1978. Reiche also served as a Republican County Committeeman in New Jersey.

Lee Ann Elliott

(1981–2000)

Elliott, a Republican, was a vice president of a political consulting firm. For 18 years she was an executive of AMPAC, the American Medical Association's PAC, and served on the boards of directors of the American Association of Political Consultants and the Public Affairs Committee of the U.S. Chamber of Commerce.

Danny L. McDonald

(1981-present)

A Democrat from Oklahoma, McDonald was an administrator of the Oklahoma Corporation Commission. He served as secretary of the Tulsa County Election Board and as chief clerk. He was a member of the Advisory Panel of the FEC's National Clearinghouse on Election Administration.

(Continued on page 66)

Mr. Smith Goes to the FEC and Illustrates All That's Wrong with the Process

Everything wrong about the FEC appointments process is illustrated by the appointment to the agency of Bradley A. Smith, who was nominated to fill the fifth seat to open at the agency during the Clinton years. The Smith nomination showed just how much control Congress has over FEC appointments, and how even an avowed and adamant foe of the campaign finance laws could be forced onto the agency that enforces those laws – even over the objection of the President.

In 1999, Senator Lott, acting at the behest of Senator Mitch McConnell (R-KY), proposed that President Clinton name Smith to the Republican seat held by Elliott, whose third term had expired.[187]

The nomination ignited a political firestorm.

Critics of the FEC expressed a mixture of disbelief and outrage, declaring that Smith was not simply an opponent of *new* campaign finance reforms, but also a vehement critic and opponent of the *existing* laws he would be charged with enforcing.[188]

As Professor of Law at Capital University School of Law and as an adjunct fellow at the Cato Institute, Smith had a long trail of publications, reports, and testimony expressing his profound disagreement with the campaign finance laws overseen and enforced by the FEC.

In a telling statement, written in a 1997 op-ed in the *Wall Street Journal*, Smith declared that the "most sensible reform is a simple one: repeal of the Federal Election Campaign Act" – the legislation that created the very Commission to which he now hoped to be appointed.[189] Smith had also called the FECA "profoundly undemocratic and profoundly at odds with the First Amendment."[190]

A supporter of the campaign finance laws said that appointing Smith to administer and

Thomas J. Josefiak
(1985-1991)

A Republican from Massachusetts, Josefiak served the FEC as Special Deputy to the Secretary of the Senate for five years prior to his appointment as Commissioner. He was legal counsel to the National Republican Congressional Committee and was minority special counsel for federal election law to the Committee on House Administration.

Scott E. Thomas
(1986-present)

A Democrat, Scott Thomas joined the FEC as a legal intern in 1975. He was Assistant General Counsel for Enforcement and then served as commissioner Thomas Harris' Executive Assistant before succeeding him as commissioner.

Trevor Potter
(1991-1995)

A Republican, Trevor Potter was a partner in the law firm Wiley, Rein, and Fielding, where he specialized in campaign and election law. Previously, Potter served as Assistant General Counsel at the Federal Communications Commission from 1984 to 1985, and as an attorney at the Department of Justice from 1982 to 1984. He was a counsel to the 1988 Bush presidential campaign.

enforce those laws was like appointing as warden someone who does not believe in the prison system.[191]

Supporters of Smith countered that reformers were opposed to Smith only because they wanted to add "another" pro-reform activist to the FEC,[192] and when these goals were thwarted, Smith's opponents attempted to demonize him, and to unfairly question his integrity.[193]

President Clinton initially paid heed to the unusually loud protests to the Smith nomination, declaring that he would take some time to consider his options. However, rather than simply reject Senator Lott's suggestion and replace it with his own (as President Reagan had proposed doing to Democrats in 1985),[194] President Clinton instead asked Lott to present another candidate. But Senator Lott and Senator McConnell (who was viewed as Smith's principal Senate sponsor) dug in their heels and insisted on Smith's nomination.

Smith declared that the "most sensible reform is a simple one: repeal of the Federal Election Campaign Act" – the legislation that created the very Commission to which he now hoped to be appointed.

The Smith nomination became the ultimate bargaining chip for Republicans. The nomination of Richard Holbrooke, President Clinton's choice to serve as U.S. Ambassador to the United Nations, was finally approaching a vote on the Senate floor in July 1999.[195] Immediately after the Foreign Relations Committee sent out the nomination for a confirmation vote, Senator Lott announced that there had been "holds" placed on the nomination by several

David M. Mason
(1998- present)

David Mason, a Republican, served as Senior Fellow of Congressional Studies at the Heritage Foundation prior to his appointment to the FEC. He previously served as Deputy Assistant Secretary of Defense and served on the staffs of Senator John Warner, Representative Tom Bliley, and then-House Republican Whip Trent Lott.

Karl J. Sandstrom
(1998-present)

Karl Sandstrom, a Democrat, came to the Commission from the Department of Labor, where he served as Chairman of the Administrative Review Board. Sandstrom was Staff Director of the House Subcommittee on Elections from 1988 to 1992 and Staff Director of the Speaker of the House's Task Force on Electoral Reform and served as the Deputy Chief Counsel to the House Administration Committee.

Darryl R. Wold
(1998-2002)

Prior to his appointment to the FEC, Darryl Wold, a Republican, had been in private law practice in Orange County, California. His practice included election law litigation and enforcement defense matters.

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"unnamed" Senators. It was soon revealed that Senator Lott himself was one of those "anonymous" Senators, and Senator McConnell was another. Both were protesting President Clinton's refusal to name Smith as the Republican nominee to the FEC.[196]

Senators Lott and McConnell eventually allowed Holbrooke to go forward; he was confirmed notwithstanding the White House's continuing failure to nominate Smith. However, the battle continued. The Republican-controlled Senate, in the final year of Clinton's second term in office, could cause serious trouble for the Administration. The Senate leadership threatened to hold judicial nominations hostage until Smith was nominated.[197]

President Clinton finally succumbed and nominated Smith, stating that he disagreed with Smith's views but was naming Smith to the FEC only in order to move forward the judicial nomination process.[198] Even Vice President Al Gore opposed the nomination, calling Smith "unfit for the office."[199] Vice President Gore said, "It's the first time I've called for the defeat of a presidential nominee [under Clinton]."[200]

Senator Robert Torricelli (D-NJ), a member of the Senate Rules Committee, agreed with the Vice President's criticism, but said, "FEC nominees are chosen by their respective parties, and the Republican Party has the right to make the wrong choice."[201]

The next day Senator Lott announced an end to the Republican effort to block Senate consideration of all of Clinton's judicial nominees.[202]

Smith then faced a battle for confirmation in the Senate.

Complaining that his scholarship as a whole was being ignored, Smith charged his opponents with being on a witch-hunt to grab quotes out of context.[203] He also argued that he recognized Congress's constitutional responsibility for creating the nation's campaign finance laws, stating that, if confirmed, he would enforce those laws as commissioner.[204]

His opponents were not convinced by either defense. In the weeks leading up to the Sen-

Bradley A. Smith
(2000-present)

Prior to his appointment to the FEC, Bradley Smith, a Republican, was Professor of Law at Capital University Law School in Columbus, Ohio, where he taught election law-related classes. Previously, Smith practiced with the law firm Vorys, Sater, Seymour & Pease and served as U.S. Vice Consul in Guayaquil, Ecuador.

Michael Toner
(2002-present)

Michael Toner, a Republican, was Chief Counsel to the Republican National Committee after serving as General Counsel of the Bush-Cheney 2000 presidential campaign. Prior to that, he was Deputy Counsel at the RNC from 1997 to 1999. Toner also served as counsel to the Dole-Kemp presidential campaign in 1996, and was a lawyer in private practice representing corporate clients and political committees in election law and other matters.

ate confirmation vote, Josh Rosenkranz of the Brennan Center for Justice reminded Senators that any regulatory scheme leaves ample scope for interpretation and the exercise of discretion. Rosenkranz argued that Smith, as FEC commissioner, would have plenty of opportunities to promote his anti-FECA stance through a wide range of votes on enforcement matters.[205]

Smith was confirmed by the Senate on May 24, 2000.[206] There were not sufficient votes to block a vote on his nomination, in large part because a number of Democratic Senators opted to characterize their position as a vote in support of the Senate's customary role in the selection of FEC commissioners.[207]

On June 26, 2000, Smith was sworn into office at the Cato Institute by retired Judge James L. Buckley, who as a U.S. Senator from New York had led the challenge in the Supreme Court to the constitutionality of the landmark campaign finance reform legislation enacted in 1974.[208]

Shortly after he assumed office, Smith published a book, *Unfree Speech: The Folly of Campaign Reform*, setting forth his views opposing the campaign finance laws.[209] Smith, along with Commissioner Mason, later played an active role in helping the House Republican leadership in its efforts to defeat the Shays-Meehan bill that proposed to ban soft money. Smith also criticized Congress for passing the soft money ban legislation and urged President Bush to veto the reform legislation if it reached the Oval Office.[210] *(See page 17.)*

Smith criticized Congress for passing the McCain-Feingold bill banning soft money, helped congressional opponents in their efforts to defeat the Shays-Meehan version in the House, and urged President Bush to veto the reform legislation.

Thus, Smith, who made clear his adamant opposition to existing campaign finance laws, as well as to the newly enacted law, now has a principal role to play in administering and enforcing the new law. Commission Chairman Mason is in a similar position.

EXHIBIT 3

Congressional Interference with the FEC:

Muzzled Agency

The history of the Federal Election Commission (FEC) has been defined in significant part by its difficult and troubled relationship with Congress. The roots of these tensions run deep and have seriously hampered the agency and its enforcement efforts.

A fundamental problem here stems from the reality that the agency which oversees the campaign finance activities of Members of Congress is itself overseen by Congress which has a central role in naming FEC commissioners and which controls the agency's funding. Congress has used its powers through the years to constrain the FEC through budgetary means, and through intimidation and harassment of its commissioners and staff. As Washington Post *columnist David Broder observed: "[T]he easiest way to gut regulation is to hobble the regulator."*[211]

Throughout the history of the FEC, Congress has used its powers in an effort to control and intimidate the agency. Congress has restricted the agency's budget, launched inappropriate audits and investigations of the Commission's practices, and attempted an unprecedented effort to fire key professional staff of the agency.

These congressional efforts have contributed to the FEC's ineffectual record in overseeing and enforcing the campaign finance laws.

Hampered from the Start: The Early Years

Tensions between the FEC and Congress during the 1970s foreshadowed the struggles to come. Congress asserted its authority over the agency during its earliest days by exercising its power to veto regulations issued by the FEC. Congress struck down two sets of regulations issued by the new agency in its first year of operation.

First, the Senate rejected a regulation that would have subjected congressional "office"

The right of veto was exercised quickly by Congress, which struck down two sets of regulations issued by the FEC in its first year.

accounts (otherwise known as "slush funds") to Federal Election Campaign Act (FECA) contribution limits and disclosure requirements. These unregulated funds had traditionally supplemented the operations of congressional offices, providing support for activities related to constituent service, including travel and newsletters. Members of both parties objected to the proposed regulation because these "essentially unaccountable" funds were a popular means of supporting congressional office operations.[212] The Senate exercised its legislative veto power and rejected the FEC rule by a one-vote majority.[213]

The other early regulation that inspired a congressional veto concerned changing "the point of entry" for the submission of FEC disclosure reports. Congress had prescribed that the initial filings be made through the House Clerk and the Senate Secretary, who would then forward them to the FEC.

To reduce processing delays and increase overall efficiency, the FEC attempted to change the system to mandate that candidates submit their reports directly to the agency. The House killed this regulation and did so by a substantial margin.[214] As observers have noted, Congress probably did not view the "point-of-entry" issue as a substantive policy debate but instead wanted to use this opportunity to demonstrate its power over the agency.

Stopping Random Audits and Tightening Control of Purse Strings

Congressional foes of the FEC on both sides of the aisle also sought to undermine the power of the agency through traditional legislative means and tough budget restrictions. The first major confrontation between Congress and the FEC contained both these elements and served as a defining moment for future struggles.

The issue concerned the agency's power to conduct random audits. In 1975, FEC commissioners introduced the possibility of implementing a random audit program to review congressional campaign committee disclosure reports for accuracy and compliance with the FECA.[215] This is an approach that had been used by other agencies, such as the IRS, both to promote voluntary compliance and to help ensure that the laws were being followed.

Congress received this proposal against a backdrop of frustration. The FEC had already angered Congress because of its investigations into largely baseless allegations of illegal financing against two House Members, first-term Representative Willis D. Gradison, Jr. (R-OH) and veteran Representative Charles Rose (D-NC). These probes, which arose from false or anonymous complaints, failed to find any wrongdoing and elicited commissioners' regrets in having initiated the investigations. Consequently, most Members strenuously objected to becoming subject to random FEC audits.

The fight over this issue erupted publicly during the first month of the agency's existence. Representative Wayne Hays (D-OH), then chairman of the House Administration Committee and a powerful FEC opponent, spoke for most in Congress when he sharply criticized the random audit proposal during an oversight hearing.

Representative Hays had been a major obstacle to the creation of the FEC and his committee had responsibility for authorizing the agency's funding. During congressional debate over

the creation of the FEC, Representative Hays had preferred a weaker administrative model that would have placed the agency under stronger, more direct congressional control. Having lost that battle, he continued to oppose the FEC through his authority over its funding.[216]

During the hearing in which random audits were proposed, Representative Hays voiced his opposition to the plan and "shouted down the new [FEC] chairman [former U.S. Representative Thomas Curtis] when the latter said it was possible that Hays himself might be audited."[217] To Curtis, Hays blustered, "Are you coming to my district without a complaint to audit me? ... [I]f you're getting your authorization from my committee, you won't. ... I don't trust you or anybody on spot-checking. I'm telling you over my dead body are you sending anybody anywhere unless you send them everywhere."[218]

At the same infamous hearing, Representative Hays acted on his disdain by exercising the most potent form of power Congress could wield over the FEC – control of the purse strings. Curtis had requested a $20 million, two-year authorization for funding, inspiring ire from his congressional supervisors. In crass terms, Representative Hays bluntly rejected the idea: "You're not going to set the ground rules. The Committee is. As Chairman, I'll tell you. You're coming back every year for authorization."[219] For fiscal year 1976, the FEC received only $6.5 million.

The agency was ordered to return to Congress annually for authorization of its budget instead of operating through multi-year budgets. Indeed, this confrontation would preview many future budget struggles to come.

Ultimately, the FEC did implement a random audit program in 1976. Under its program, 10 percent of all House and Senate seats up for election that year would be randomly chosen for audit purposes. The FEC also decided to audit national and state party committees, significant political action committees (PACs), and randomly selected small PACs.[220]

As soon as the FEC initiated this program, bipartisan coalitions in both chambers attempted to strip the agency of this power, or at least restrict the use of authorized funds for random audit purposes through various amendments.

Finally, in 1980, Congress succeeded in repealing the FEC's ability to conduct random audits altogether. The FEC was then left only with discretionary "for cause" audits of campaign committees, which had to be based on established criteria and approved by a vote of the commissioners. These became increasingly difficult to undertake, too, because of limited agency resources.

As Brooks Jackson noted in 1990, "In effect, Congress put itself on the honor system. The FEC may now audit candidates only when gross discrepancies show up on the face of their reports, but even that requires a four-vote majority decision by the commissioners. In practice, candidates are now audited hardly at all."[221]

Congressional Battles Against FEC Intensify in the 1990s

The most recent era of intense congressional antagonism toward the FEC began just after the 1994 elections, when Republicans gained majorities in both the House and the Senate. In fact, observers have noted that the FEC's budget was never more under siege than after the Republican takeover of Congress in 1995.[222] During this time, Congress also acted to intimidate and even tried to remove key FEC staff, and bullied the agency through its power to investigate.

"Never in its 20-year history has the FEC received more attention from its congressional masters than the new Republican majority is directing right now. ... Whatever the intent, the effect may well be to keep the political corruption cops from doing their job," *The Washington Post*'s syndicated columnist David Broder observed in 1995.[223]

Budget Assaults

From 1995 to 1999, Congress assaulted the FEC through its powers of appropriation. It variously froze the FEC's budget, slashed it, and earmarked or attached strings to it.

1995 Freeze & Slash

The budget-slashing efforts in 1995 came at a time when the demands on the FEC had increased due to the ratcheted-up political activities of the 1994 elections. Congressional spending in the 1994 elections had increased 54 percent over 1992.[224]

Two factors were key to the start of the budget wars.

First, in 1995, Representative Robert Livingston (R-LA) became chairman of the House Appropriations Committee when the Republicans took control of the House.

According to *National Journal*,

> Livingston has long argued that the FEC dumps too much money into investigations and enforcement, and not enough into simply collecting and publicizing candidates' contribution and spending records. One of the ways he's reined in what he regards as the FEC's overzealous enforcement efforts has been to explicitly require the agency to use large chunks of its budget only for computer modernization projects."[225]

In reviewing the agency's budget and activities for the 1995 round of appropriations, Representative Livingston claimed to be outraged that the FEC had targeted its enforcement cases against organizations associated with the Republicans, including the Christian Coalition and House Speaker Newt Gingrich's (R-GA) GOPAC. Representative Livingston charged the agency with unfairly targeting conservative groups (even though none of the investigations could have gone forward without the vote of at least one Republican commissioner).[226]

Second, the FEC implemented tougher rules regarding the personal use of campaign funds. The new regulations, which affected all Members of Congress, prevented Senators and Representatives from using money raised for their reelection efforts to pay for personal expenses such as country club dues, car leases, rent, and meals.[227] Members of Congress strongly opposed the regulation of these practices, which had become ingrained in congressional culture.

Indeed, many observers believe that later budget battles between the Congress and the FEC were direct retaliation for the FEC's attempt to prohibit the personal use of campaign funds by Members of Congress. "We are being penalized for proceeding on 'personal use' regulations,"[228] FEC Chairman Trevor Potter said in 1994, echoing the sentiment of other FEC commissioners and staff.

In the opening round of the budget battles, Representative Livingston called for a 10-percent cut in funding that was already approved for the agency in 1995, reducing the $27.1-million budget by $2.8 million. Representative Livingston made a case for the cuts by arguing that, while its budget had been rising over the years, the FEC was not progressing fast enough in modernizing its computer operations and that it lagged in enforcement efforts.[229] In addition, he questioned the need for the FEC to employ five people in its press office, dismissing the idea that the FEC required a full-fledged press operation to inform the public of campaign violations and disseminate campaign finance disclosure data and news about enforcement, disclosure, and compliance efforts.

Congressional motives for this action were viewed as transparent and disingenuous. *The Washington Post* wrote in an editorial that the cut was "not about deficit reduction. It's about

the controversy inevitably generated around the agency whose job it is to police the way members of Congress ... finance their campaigns for office."[230] Columnist David Broder saw it as a dismayingly effective strategy, noting "the easiest way to gut regulation is to hobble the regulator."[231]

The ramifications of the cut would have been serious, resulting in staff reorganization, possible layoffs, the interruption of ongoing investigations, and the elimination of a toll-free, public information telephone line.

According to one observer, the cuts would have meant that "[i]t's likely to be years before the FEC gets around to auditing the voluminous piles of reports filed for 1994."[232] In the end, the Senate refused to meet the House on the amount of the cut, and the final reduction was halved to $1.4 million.

1996-1997 Slashing & Earmarking

Budget prospects for the FEC did not improve in the next two years.

For fiscal year 1996, the agency requested $29 million but received only $26.5 million. Furthermore, Congress specifically ordered that $1.5 million of these funds be used for modernizing the agency's computer system, forcibly diverting money that could otherwise have been spent on enforcement matters and staffing.

For fiscal year 1997, the FEC requested $30.8 million, believing it would need the added funding boost to support election-monitoring and enforcement efforts in connection with the 1998 elections, and to complete work left over from the 1996 fundraising scandals.

As an independent agency, the FEC also had to submit its funding request to the Clinton Administration's Office of Management and Budget (OMB), which scaled back the request to $29.3 million. The House Oversight Committee, along party lines, ultimately voted for a spending freeze at the previous year's budgetary level of $26.5 million. Although the House Appropriations Committee increased the figure by $1 million, it made an unusual decree that the FEC should reduce its press office from five staffers to two.

The press office cuts could have crippled an important mechanism of the FEC – its public communications function. According to news accounts based on FEC figures at the time, the agency press office handled about 100 calls a day from reporters, provided periodic summary reports of campaign finance activity by candidates and PACs, and processed hundreds of Freedom of Information Act requests submitted by the press.[233] FEC officials claimed they were already understaffed in this area and that a bottleneck would occur with the loss of 60 percent of their press staff. "Reducing the press office to just two persons will sharply reduce the FEC's ability to enforce the nation's campaign laws through public disclosure, a more potent instrument than complaints, hearings, findings, and penalties," *Roll Call* wrote at the time.[234] Furthermore, agency officials and their supporters viewed this directive as an overreaching attempt to micromanage the agency.

House Democrats charged that both moves – the attempted freeze and the decree to cut press staff – were driven in part by the FEC's decision to release thousands of pages of documents in its failed case against Speaker Gingrich's GOPAC.[235] Absent from the House Democrats' criticism, however, was the fact that the Clinton Administration itself had been complicit in reducing the amount of money for fiscal year 1997 through OMB's reduction in the initial funding request.

In the end, the press jobs were spared in the bill reported by the House-Senate conference. Negotiators agreed to only one cut to the press staff, which would be resolved by not filling a then-existing vacancy. As for funding, the FEC emerged with a budget of $28.7 million, an

increase from the original House figure of $27.5 million but still less than the agency initially requested. Furthermore, the House succeeded in attaching strings to the budget, including providing only $208,000 for the agency's travel budget, an inadequate amount for investigative work associated with the presidential campaigns of 1996.[236]

"No" to 1997 Supplemental Funds Request

As a result of the lower-than-requested 1997 allocation, the FEC had to file a supplemental request for $6.6 million (spread out over two years) in early 1997 to handle the continuing work associated with the 1996 election problems. These investigations included probes into soft money, fundraising by foreign nationals, unreported spending on issue advertisements by labor and business, and party coordination with independent political expenditures.[237] In making the request, FEC Chairman John McGarry (a Democrat) and Vice Chairman Joan Aikens (a Republican) both "blamed the agency's problems on [a] lack of resources and its congressionally mandated procedures" and said that recent budget cuts had forced the agency to cut back on personnel in its enforcement branch.[238] Eventually, President Clinton, too, joined the call for additional funding.[239] President Clinton, in his request to Congress, noted that the commissioners had called their agency "overworked, underfunded and unable to address the many issues raised in recent elections."[240]

In hearings on the issue, Representative Livingston and his fellow FEC skeptics appeared to be initially sympathetic to the agency request. However, Livingston's position became clear when Members said they would approve the first chunk of supplemental funding ($1.7 million) only if it was earmarked for "internal automated data processing systems," or, plainly put, computer modernization.[241]

The FEC and its congressional allies denounced the move, calling it absurd because the agency required more staff to perform its enforcement responsibilities, not better computers. Commissioner Aikens had testified to Congress that the agency needed "investigators, attorneys, auditors, systems analysts, and clerical support staff to uncover the extent of the potential violations."[242] As FEC General Counsel Larry Noble noted at the time, "Computers don't take depositions and computers don't write interrogatories and computers don't write reports."[243] Furthermore, as Representatives Carolyn Maloney (D-NY) and Marty Meehan (D-MA) pointed out, the FEC's computerization program was "already funded and on schedule" despite Representative Livingston's assertions to the contrary.[244] Angered by FEC complaints and criticism by his colleagues about the earmark, Representative Livingston deleted the supplemental provision, and the agency did not receive *any* extra funds.

In the 1998 budget, Representative Livingston went further in his effort to bully the agency and earmarked $750,000 for a management review and technology performance audit of the FEC.

1998 Earmarking

In the budget for 1998, Representative Livingston went further in his effort to bully the agency and earmarked $750,000 for the General Accounting Office (GAO) to hire a private accounting firm to conduct a management review and technology performance audit of the FEC.[245]

Livingston's stated rationale for the audit was to determine whether the agency spent its money wisely. Many saw this use of FEC

funds as a waste because the FEC did not even receive sufficient funds to properly support its investigations. In addition, there was no guarantee that the FEC would be able to support the improvements suggested by an auditor.

1999 Reauthorization Hearing

The budget skirmish for fiscal year 1999 featured a blunt-edged attempt to send a message to the FEC that, if the agency would not implement reforms to Congress's liking, then Congress would do so itself. This budgeting episode began with a rare reauthorization hearing for the agency through the House Oversight Committee, which has jurisdiction over the FEC. The practice had developed of the House Appropriations Committee annually funding the agency after receiving rubberstamped authorization from the House Oversight Committee, without any actual FEC reauthorization legislation being enacted. Indeed, the agency had not been reauthorized since 1981, despite former Chairman Hays' threats to the contrary.

The FEC had requested $36.5 million in funding for 1999, a 15-percent increase from its 1998 level, to be spent primarily on staff.[246] In 1998, the FEC had only 37 investigators, auditors, attorneys, and other support staff for enforcement and compliance issues, representing a significant personnel shortfall for the heart of the agency's work. In addition, the presidential matching-fund program had only five temporary staffers, and four people were slotted for training and support for computers.[247]

Consequences for understaffing the agency's enforcement arm were becoming pronounced. In 1997, the FEC dismissed 55 percent of all its cases to clear the backlog.

Consequences for understaffing the agency's enforcement arm were becoming pronounced by this time. The enforcement priority system allows for case dumping, even for potentially significant matters, if the FEC is unable to handle all of its cases. In 1997, the FEC dismissed 55 percent of all its cases to clear the backlog. Of 244 total matters open, 101 were dismissed because they were rated as low priorities and 32 were disposed of because they were considered stale.[248] There was a direct relationship between the agency's budgetary situation and the handling of its caseload.[249]

Tide Turns in 2000

The FEC's budgeting process for fiscal year 2000 was dominated by the results of an independent audit authorized by Congress in 1998. *(See page 79.)* This produced a certain irony: after all the years of rejected entreaties to Congress for more funding, the agency finally had credible and convincing support to ask for a larger budget. At the same House reauthorization hearing in which the FEC outlined improvements based on the audit report, agency officials sought $38.5 million to support a proposed staff increase, representing a 4.5-percent increase in funds and a 9.5-percent increase in personnel over the 1999 budget.[250]

Using the audit report to buttress the request, FEC Vice Chairman Darryl Wold contended that additional staff members were necessary for the enforcement programs. Specifically, three new staffers were needed for the audit department to assist with the 2000 presidential election and six for compliance efforts in the Office of General Counsel.

Congress reacted more positively to the FEC request than it had in the previous five years. By the end of budget season, the agency had not only secured $38.2 million but also received support for its effort to require electronic filing for all House candidates, PACs, and most national party committees by 2002. In addition, the final budget contained provisions for changing the reporting period for campaigns from calendar year to campaign cycle and implementing a new administrative financial penalty system for less substantial FECA infractions.[251]

Without fanfare, the 2000 budget period appeared to end the difficult cycle of budget battles between Congress and the FEC that had taken place during Representative Livingston's reign as Chairman of the House Appropriations Committee. In addition to the departure of Livingston from Congress in 1999, the make-up of the agency itself had changed with the appointment of new commissioners, whose views about the law and its administration more closely resembled the views of leading congressional opponents of various parts of the campaign finance laws.

Nevertheless, there is no basis for concluding that the agency is now receiving the funds it needs to effectively and credibly administer and enforce the federal campaign finance laws, including the newly enacted McCain-Feingold reform law.

Congressional Intimidation of FEC Staff

Congress also has tried to exercise control over the agency by forcing the removal of key professional staff members of the Commission.

In 1998, the House Oversight Committee, chaired by Representative Bill Thomas (R-CA), held a reauthorization hearing to approve a bill requiring that the FEC staff director and general counsel be subject to reappointment every four years by a vote of at least four of the six commissioners. Senator Mitch McConnell (R-KY), a staunch opponent of campaign finance reform and the FEC, introduced a similar measure in the Senate.

Under existing law, there were no term limits for these two key staff officials, and the removal of staff from these positions required the vote of four commissioners. Given the evenly divided partisan split of commissioners at 3-3, the proposed change would have had major implications, shifting the burden from removing the key professional staff members to retaining them – by allowing a 3-3 divided vote to remove the key staff members rather than leaving them in place.

Observers agreed that this was a thinly veiled attempt by Republicans in Congress to oust Larry Noble, the FEC's general counsel since 1987. During his tenure, Noble had angered some Republicans through actions his office had taken on matters dealing with soft money and sham "issue ads." Some Republican Members viewed him with particular concern for enforcement cases he had pursued involving the Christian Coalition and GOPAC, although, as noted earlier, none of these investigations could have gone forward without the vote of at least one Republican commissioner.

If four votes were required to retain him in his position, rather than remove him, congressional opponents would stand a better chance of seeing Noble removed from his position. In criticizing the proposal, Representative Sam Gejdenson (D-CT) called it "vengeance for the FEC, vengeance for the counsel. ... It's about vendettas. It's about politics. It's not about good government and clean elections."[252]

In the end, with public attention focused on the effort being made in Congress to remove Noble as general counsel, the proposal was blocked, although the agency still faced difficulties in obtaining the funding it had requested for that year.

Assaults Through Audits and Investigations

The power to investigate is another weapon Congress has deployed in efforts to intimidate and control the activities of the FEC, albeit a more subtle form of manipulation than budgetary bludgeons or staffing restraints.

Two recent examples are a 1995 investigation undertaken by a House Appropriations Subcommittee and a 1998 independent audit conducted by PricewaterhouseCoopers.

1995 House Appropriations Investigation

Eager to examine the inner workings of the FEC in his new role as chairman of the House Appropriations Committee, and already perceiving the FEC as unfair and inefficient, Representative Livingston launched an investigation of the FEC in 1995.

Predictably, the report of the House investigation found various flaws with the FEC.

First, the report criticized the agency for procedural changes in the Office of General Counsel that established a new priority system for handling enforcement matters more efficiently.

In particular, the report expressed concern about the FEC's discretionary power to label certain cases as high priorities (resulting in the allocation of budgetary resources) and others as low priorities, which were to be dropped as enforcement matters. Furthermore, the report stated that because the FEC could control the enforcement workload through its own adjustment of prosecutorial thresholds and criteria, the agency could manipulate and increase enforcement efforts "to justify any desired funding increase." In this respect, and in what has become a famous – if inexplicable – comment, the report analogized the FEC to a "self-licking ice cream cone."[253]

Second, the House report charged that the agency had failed to plan adequately for computer modernization, both in internal automated data processing and in preparing for electronic filings by candidates and committees.[254] Investigators were troubled by the fact that no concrete steps had been taken to accomplish these tasks, and that FEC officials appeared to be unwilling to do so.[255] According to the report, "FEC officials are reluctant to devote resources to detailed automation planning without specific direction from the Congress and assurance they will not have to divert resources from enforcement and disclosure efforts. This defiant approach demonstrates an attitude which says, give us the money first and *then* we will tell you how we are going to spend it."[256]

Finally, investigators took issue with what the report called "a policy of proactive disclosure."[257] As part of the FEC's statutory disclosure function, the agency provides campaign finance information about candidates through an online subscriber service. The FEC can provide data in other requested formats, which may consist of reformatting the data. Investigators suggested that this practice becomes a problem when the FEC publicly broadcasts this information in what the report call "selective analysis."[258] According to the report, "There is some concern over this situation since the power to selectively release information on the intimate details of portions of the American political process, regardless of the worthiness of the justification for doing so, carries with it an immense responsibility to insure that each release is carried out in an unbiased and even-handed manner."[259]

In the end, the charges leveled by the audit report did not amount to legitimate criticisms of the agency and the report was never officially released to the public. As a *Wall Street Journal* article noted, "Although the report was never released publicly, copies were widely circulated in Washington. It was summarily dismissed as inadequate."[260]

But the report served its purpose when it came to congressional action. Representative Livingston and his allies used its findings as ammunition in FEC funding debates for sev-

eral years with respect to computer modernization, the press staff, and other issues. Although Representative Livingston could not fulfill all his objectives, he and his allies were able to make use of the report as a basis for rejecting FEC attempts to increase funding during this period.

PricewaterhouseCoopers Investigation

By contrast, the PricewaterhouseCoopers (PwC) audit results in 1998 did not prove to be as successful a tool for congressional enemies of the FEC, mainly because the findings of this study, conducted by an outside audit firm, were not as negative or politically charged. Even though the PwC audit backfired on Representative Livingston and other congressional critics of the FEC, the fact remains that Congress forced the FEC to spend $750,000 of its fiscal year 1998 budget for the study.

Representative Livingston and his allies used the House report's findings as ammunition in FEC funding debates on modernization, staffing, and other issues.

As a result of the GAO-managed audit, PwC issued a 186-page report (compared to the 28-page 1995 House report) that pronounced the agency to be "a competently managed organization with a skilled and motivated staff, although it has its shortcomings."[261]

The PwC report spelled out the following steps for improving FEC efficiency: (1) requiring candidates and committees to file reports electronically; (2) standardizing reporting periods on an election-year basis instead of by calendar year; and (3) transferring the filing of Senate candidate committee reports from the Secretary of the Senate to the FEC.[262]

In fact, the FEC itself had pressed Congress to make these same changes. PwC also suggested that the FEC implement, as it now has, a type of traffic-violation fine system to remove fairly routine and unintentional infractions, such as improperly completed reports or missed filing deadlines, from the formal enforcement process.

In the end, the Livingston effort to embarrass the FEC through the PwC audit failed. Representative Maloney noted, "The Majority asked for this audit because they thought it would embarrass the FEC. Instead, it embarrasses the Republican leadership by exposing as groundless their continued attacks on the agency's integrity."[263]

But the audit, nevertheless, did hurt the agency by diverting funding, attention, and staff resources. And it remains an example of how Congress has attempted to harass the agency and its employees as a means of exercising control over its activities.

EXHIBIT 4

Soft Money:
The Half-Billion Dollar Scandal Staged by the FEC

Nowhere are the problems – and failures – of the Federal Election Commission (FEC) better illustrated than in the story of soft money.

Little more than a system for cheating on campaign finance laws, soft money reintroduced into federal elections, on a massive scale, precisely the kinds of unlimited and unregulated money that federal laws explicitly prohibit. With soft money came the kind of actual and apparent corrupting influences that the federal laws were enacted to prevent.

Soft money was created by the FEC, not by Congress, and its explosive growth in American politics was perpetuated by the agency.

In the 1970s, the FEC established the soft money system through its administrative rulings. In the 1980s, the agency refused to act, despite repeated requests, as soft money grew into a major problem in the presidential elections. In the 1990s, the FEC stood idly by as the soft money problem exploded to new levels, and as presidential and congressional candidates and their parties engaged in massive and blatant soft money abuses.

When the agency's professional staff recommended that enforcement actions for soft money violations be pursued against the major party presidential candidates after the 1996 election and against Senate candidates after the 2000 elections, the commissioners rejected the staff recommendations and dropped the cases. When the agency's professional staff recommended that the FEC issue a regulation to ban soft money, the commissioners simply failed to take any action at all.

Soft Money Turns The Law on Its Head

What began as a trickle of soft money in the 1970s turned into a torrent by the 2000 elections, all but washing away the nation's campaign finance laws.

In 1988, the two major parties raised some $45 million in soft money.[264] In the 1992 elections,

that figure almost doubled to $86 million.[265] By the 1996 elections, soft money contributions to the national parties had tripled to $262 million.[266] And in the 2000 election cycle, soft money to the parties almost doubled again to $496 million – that is, nearly a half-billion dollars.[267]

For nearly a century, federal law has prohibited corporations from making contributions or expenditures to influence federal elections.[268] For more than half a century, federal law has prohibited labor unions from making contributions or expenditures to influence federal elections.[269] And for more than a quarter century, federal law has prohibited individuals from contributing more than $1,000 per election to a federal candidate, more than $20,000 per year to a national political party, or more than an aggregate of $25,000 per year to all recipients for the purpose of influencing federal elections.[270]

Soft money, simply put, is money that does not comply with these laws.

News reports and congressional investigations have been replete with example after example of corporations, labor unions, and wealthy individuals making huge soft money contributions to the national political parties each year. The soft money is raised for the parties by federal officeholders and candidates from donors, who in turn receive special access and treatment from the officeholders and candidates. The soft money is spent on federal candidate-specific campaign ads and voter activities that undeniably are intended to – and clearly do – influence federal elections.

1978: FEC Creates Soft Money Problem with Legal Fiction

The soft money system rests on a fiction promulgated by the FEC. As journalist and author Brooks Jackson has noted:

> The cause of the soft money calamity is widely misunderstood. It began with a policy reversal by the FEC in 1978, and not, as many have reported, with amendments to the federal election law a year later. The FEC, not Congress, created the problem and refused – despite criticism, lawsuits and court orders – to do anything about it.[271]

The soft money system rests entirely on a fallacy promulgated by the FEC.

The theory promulgated by the FEC is that the soft money raised and spent by the parties to pay for campaign ads about federal candidates, get-out-the vote drives, and other voter activities can artificially be treated as influencing only *non-federal* elections. Under this theory, and for this reason, the FEC's position is that the money involved does not need to comply with federal contribution limits and prohibitions.

But far from being grounded in reality, the FEC's theory always has been a myth. The theory was first set out by the FEC in Advisory Opinion 1978-10, which reversed a position the FEC had taken just two years earlier, in a 1976 Advisory Opinion.[272]

The FEC had held in 1976 that state parties that funded get-out-the-vote drives and voter registration activities that benefited both state and federal candidates had to pay for those activities using solely hard money – that is, monies raised under the limits of federal law – because the activities, even in part, affected federal elections. The FEC in this opinion did not think there was any reasonable means to distinguish between the money spent for such mixed activities that impacted federal campaigns and the money that impacted state campaigns.

In its 1978 advisory opinion, the FEC reversed itself and held that such mixed activities – activities that affect both federal and state elections – could be financed with a combination of federal and non-federal funds, allocated to reflect the relative impact of the activity on federal and non-federal campaigns.

Thus, the FEC promulgated the myth that soft money could be treated as impacting only non-federal elections – and as having no impact on federal elections – and that allocation formulas could be used to apportion the mixed-activity expenditures between soft money and hard money accordingly.[273]

The FEC promulgated the myth that soft money could be treated as impacting only non-federal elections – and as having no impact on federal elections. This was wrong in principle and has proven disastrous in practice.

This ruling opened the door to soft money being raised and spent to influence federal elections, by allowing state parties to spend money raised outside the restrictions of federal law on so-called "mixed activities" – such as get-out-the-vote drives – that would, at least in substantial part, affect federal elections.

A state party's mixed activities, under the Commission's reasoning, could be funded with money apportioned between federal and non-federal funds, thus creating a system of allocation.

Not surprisingly, the national parties soon followed suit. In 1979, the very next year, the FEC told the national parties that they too could open non-federal accounts to raise non-federal money and the same allocation principles would apply to national party expenditures.[274]

In the early 1980s, according to journalist Brooks Jackson:

> The FEC allowed parties exceptionally wide scope in choosing how much of a particular item would have to be paid with hard money and how much could be paid with soft. The regulations didn't set a ceiling on the proportion of expenses that could be allocated to nonfederal activity and paid for with soft money. The only requirement was that the allocation be done on a "reasonable basis," which wasn't defined.[275]

In other words, the FEC largely left it up to the political parties to decide on the proper mix of federal and non-federal funding they would use to pay for their "mixed activities."[276]

The allocation system, from its inception, was fatally flawed.

It was based on the legal fiction that non-federal money somehow could be apportioned to pay only for non-federal activities, without having any impact on federal elections. This assumption was wrong in principle and has proven disastrous in practice.

What it has meant, simply, is that money that is illegal in federal campaigns could be raised by federal officeholders and candidates and spent by their parties to support their federal campaigns. With this legal fiction, the FEC gave license to federal officeholders, candidates, and their parties, to raise and spend money outside federal law to influence their federal elections. And, that is precisely what happened.

1984: The Legal Fiction Is Challenged

In November 1984, Common Cause petitioned the FEC to institute a rulemaking to ban soft money, arguing that it was being used in a wholesale manner to influence federal elections.

The petition alleged:

> [I]t appears clear that soft money in fact is not being raised and spent solely for nonfederal election purposes. Such funds are being channeled to state parties with the clear goal of influencing the outcome of federal elections.
>
> Under the federal campaign finance laws soft money is prohibited from being spent "in connection with" federal elections. There is no question that soft money currently is being spent "in connection with" federal elections, if that term as used in the federal campaign finance laws is to be given any realistic meaning. If the Commission leaves such soft money practices unchecked it will be implicitly sanctioning potentially widespread violation of the current federal campaign finance laws.[277]

The petition argued that the soft money system was reintroducing into federal elections precisely the types of money that the federal laws were intended to exclude – corporate and union treasury funds, and large contributions from wealthy donors. Instead of being given directly to federal candidates, however, the money was being raised by these candidates and given to their parties, which then spent the funds on activities to support the campaigns of the candidates.

This system, in effect, reestablished the dangerous nexus between influence-seeking donors of large contributions, on one hand, and federal officeholders and candidates, on the other. It was precisely this nexus that the federal laws were designed to prevent.

The Common Cause petition called on the FEC to investigate how soft money was being raised and spent, and to issue rules to shut down the soft money system. After a two-year process, the FEC found that Common Cause "has not presented evidence of instances in which 'soft money' has been used to influence federal elections. ... Most of the examples it cites to support its allegations consist of anecdotal and boastful comments of party officials and campaign staff that have been quoted in the press."[278] The Commission accordingly denied the petition.

1987: The Court Rules Against FEC in Soft Money Rulemaking

Common Cause sued the FEC in federal court for abuse of discretion in denying its request to issue new regulations.

The district court in a 1987 opinion found that the failure of the FEC to provide guidance as to how money was to be allocated to pay for mixed activities was contrary to law - and did not protect against soft money being used to pay for activities in connection with federal elections. The court held that the FEC had interpreted the statute "in a way that flatly contradicts Congress's express purpose"[279]:

> The plain meaning of the FECA [Federal Election Campaign Act] is that any improper allocation of nonfederal funds by a state committee would be a violation of the FECA. Yet, the Commission provides no guidance whatsoever on what allocation methods a state or local committee may use; the potential for abuse, intended or no, is obvious. Thus, a revision of the Commission's regulations to ensure that any method of allocation used by state or local party committees is in compliance with the FECA is warranted.[280]

While the court rejected Common Cause's argument that the FEC was *required* under existing law to ban soft money from being used to pay for mixed activities, it explicitly noted that the agency *could find* that mixed activities should be paid for entirely with hard money:

> Indeed, it is possible that the Commission may conclude that *no* method of allocation will effectuate the Congressional goal that *all* monies spent by state political committees on those activities permitted in the 1979 amendments be 'hard money' under the FECA.[281]

In August 1987, the court ordered the FEC to issue new regulations regarding the funding by parties of mixed activities. After a year passed with no action taken by the FEC, the court issued a second order to the agency to issue new regulations. The court noted in its 1988 opinion that "it is undisputed that there is a public perception of widespread abuse, suggesting that the consequences of the regulatory failure identified a year ago are at least as unsettling now as then."[282] The court again ordered the agency to act.

Finally, in 1991, the FEC promulgated new regulations on soft money.[283]

The new regulations, however, simply codified the existing practices under which the soft money system had been functioning and did nothing to stem the growth of soft money being used to influence federal campaigns.[284] The regulations did, for the first time, require the national parties to disclose their soft money.

FEC Fails To Act; Soft Money Explodes in 1988 Presidential Election

While the FEC was engaged in its protracted rulemaking process, the use of soft money in federal campaigns underwent dramatic change in the 1988 presidential election.

Soft money was a cheating system from the outset.

For the first time, soft money became an integrated part of the major party presidential campaigns, organized and directed by the top strategists and fundraisers of these campaigns. Democratic nominee Governor Michael Dukakis and Republican nominee Vice President George Bush, in conjunction with their national parties, systematically solicited six-figure contributions from individuals, far in excess of federal contribution limits, and their campaigns were involved in directing the use of those funds to benefit their presidential campaigns.

According to *The Wall Street Journal*, at one point a senior Bush fundraiser said that 267 contributions of more than $100,000 each had been received from individuals and corporations, while the top Dukakis fundraiser said "his $100,000 club numbered 130 individuals."[285]

In the 1988 election, each presidential campaign raised more than $20 million in soft money from federally prohibited sources. These funds were then channeled to state parties and spent on activities to influence the presidential campaigns.

The spiral of soft money fundraising began with the Dukakis campaign, which initiated a program to solicit $100,000 contributions from wealthy individual donors. This soft money fundraising effort was led by Robert Farmer, who served as treasurer and chief fundraiser for the Dukakis campaign. The soft money was handled by the Democratic National Committee's Victory Fund '88 committee, which had the same address as Dukakis's national campaign headquarters in Boston, Massachusetts.

At first, the Bush campaign attacked the Dukakis soft money operation as illegal. Bush Deputy Campaign Manager Richard Bond called the Dukakis campaign's soft money drive "illegal on its face."[286] Shortly thereafter, however, the Bush presidential campaign moved to

match and out-raise the Dukakis soft money effort. The Bush "Team 100" soft money fundraising campaign was headed by Robert Mosbacher, who had been serving as the chief fundraiser for the Bush presidential campaign.

Thus, the soft money fundraising drives for the major party candidates in the 1988 presidential election were headed by the two individuals who served as the chief fundraisers for the presidential candidates.

The 1988 presidential campaigns were not only involved in raising soft money but in spending the money as well. According to *The New York Times*, Dukakis fundraiser Farmer "encouraged contributors to give to the Democratic National Committee and not directly to the state parties so the campaign could have more influence on how the money was spent. 'We tried to funnel everything into the DNC to have greater control over our electoral strategy,' he said."[287]

Soft money was used in the 1988 presidential election to perform vital functions for the presidential campaigns – such as get-out-the-vote and other field operations (known as the "ground war"). In Illinois, for example, *The New York Times* reported that the Dukakis campaign had only five paid staff members. But it shared office space with Campaign '88, a "state party" operation organized by the DNC and employing 115 workers across the state, paid for with a budget of $2 million in soft money.[288]

In short, the 1988 presidential election was based on the structure of two parallel presidential campaigns – an official campaign receiving and spending public funds, and an unofficial campaign raising and spending soft money.

State party campaign officials themselves admitted the obvious. For example, Peter Kelly, chairman of the California Democratic Party, told the *Times* that the "whole theory behind" the 1988 soft money effort was to raise enough to help Dukakis win the state.[289]

The New York Times editorialized on the day before the 1988 election:

> The corruption of public financing for Presidential elections is by now obvious to everyone but the Federal Election Commission, the agency charged with enforcing the rules. This year's brazen cheating by both Presidential candidates dramatizes the need for Congress to strengthen both the agency and the law.[290]

FEC Inaction Undermines Presidential Public Financing System

The effect of this expanded use of soft money – to fund the "ground war" as an integrated part of the presidential campaign effort – was to undermine the public financing system passed by Congress as a cornerstone of the post-Watergate reform effort.

The presidential public financing system, first implemented in the 1976 election, had been enacted to ensure that presidential campaigns were free from big money and its corrupting influences. In exchange for receiving public funds, presidential candidates agreed to abide by spending limits and, in the general election, to forgo raising any private funds for their campaigns.

This system had worked very well prior to the 1988 presidential election. In 1985, a bipartisan commission headed by two nationally prominent political figures, Republican Melvin Laird and Democrat Robert Strauss, examined the first three presidential contests under the 1974 law and concluded: "Public financing of presidential elections has clearly proved its worth in opening up the process, reducing undue influence of individuals and groups, and virtually ending corruption in presidential election finance. ... This major reform of the 1970s should be continued."[291]

The 1988 campaigns, however, changed the way presidential elections were conducted. That election saw, for the first time, the integration of major soft money efforts with the cam-

paigns of the presidential candidates, and it began the process of undermining the public financing system, which has progressively eroded through each election since then.

With the FEC's failure to deal with soft money in its rulemaking proceeding, the use of soft money to influence federal campaigns became firmly established in 1988.

1996 Presidential Election Witnesses New Explosion of Soft Money

If the 1988 election saw soft money being used to pay for presidential "ground war" activities, the 1996 election saw soft money begin financing presidential "air war" efforts.

In 1996, soft money was used for the first time in a presidential campaign to fund so-called political party "issue ad" campaigns. These ad campaigns were in reality soft money-funded TV ad campaigns controlled and run by the presidential campaigns.

1996 saw the beginning of soft money being used to pay for the presidential campaign "air war."

This radical departure took the soft money system to an entirely new level. Soft money was now being used not just to pay for get-out-the-vote drives to help federal candidates, but also to fund TV ad campaigns that promoted the presidential candidates by name and attacked their opponents by name.

This new use of soft money was initiated in 1995 by President Clinton, who played an active role himself in the design and implementation of the ad campaign, along with his top campaign officials. In so doing they brought soft money into the heart of the Clinton presidential campaign.

After President Clinton initiated this new level of soft money abuse, the Dole presidential campaign conducted its own soft money ad campaign, although the Dole efforts could not match the incumbent President in size and scope.

The new use of soft money for TV ads created an almost insatiable demand for the funds, given the high costs of buying TV time, and this in turn fueled an explosive growth in soft money fundraising. Not surprisingly, this also resulted in the most extensive campaign finance fundraising scandals since Watergate, led by the massive campaign finance abuses of the Clinton campaign.

FEC Opinion Shows Agency Role in Growth of Soft Money

The expanded role of soft money in the 1996 presidential election again illustrates the FEC's role in the growth of the soft money system.

The Commission first fueled the explosion when it held, in Advisory Opinion 1995-25, that "issue ads" run by the Republican National Committee (RNC) could be funded with an allocated mixture of hard and soft money.[292] This decision opened the door to paying for TV ads with soft money, even if the ads promoted a candidate, so long as certain words of express advocacy were not used.

Through the artifice of so-called "issue ads," both presidential candidates used soft money that is illegal in federal campaigns to pay for campaign ads in the 1996 election.

The presidential campaigns claimed that because the ads were "run" by the parties and did not contain certain "magic words" like "vote for" or "vote against," they did not have to be funded with hard money. But no court had ever held that "magic words" was the test for judging when a *party* or a *candidate* was running a campaign ad that had to be paid for with hard money.

The Supreme Court had created the "magic words" test for ads by non-candidates and outside groups, and explicitly excepted candidates and political parties from being covered by this standard since their ads and communications are "by definition, campaign-related."[293]

The use of soft money for TV ads created an almost insatiable demand for soft money funds. The result was the most extensive campaign finance fundraising scandals since Watergate.

The Clinton campaign simply made up the standard for its own activities, and the Dole campaign followed suit. The FEC did not try to stop them, either in its advisory opinions or its enforcement actions.

As a result, the 1996 presidential candidates each ran two parallel campaigns.

The first campaign was financed with public funds and subject to spending limits agreed to by the candidates.

The second campaign was funded by tens of millions of dollars of soft money spent by the presidential campaigns through their political parties. This second campaign involved off-the-books TV ad campaigns – controlled and coordinated by the same presidential campaign officials who were running the publicly financed campaigns – that were not counted against the spending limits the presidential candidates had accepted.

Thus, in mid-1995, the DNC, working under the direction and control of the Clinton reelection campaign, began to use soft money to fund an aggressive program of TV ads promoting President Clinton and his policies. As the evidence later showed, these ads were written, edited, produced, directed, and targeted by Clinton campaign officials, and the President himself was personally involved in the effort. The ads were run in key "battleground" states.

By early 1996, Republican nominee Senator Robert Dole (R-KS) and the RNC began running a similar TV ad campaign, using soft money to promote the Dole presidential campaign.

The two presidential campaigns and their parties ultimately spent more than $50 million during the 1996 campaign on ads that specifically mentioned and praised their candidate or mentioned and criticized the other candidate.

Much of these ad campaigns by both parties were funded with soft money raised by the presidential candidates. None of the money spent on the ads was counted against the spending limits that the presidential candidates had agreed to comply with in return for receiving public funds to finance their campaigns.

Fundraising Frenzy Breeds Unprecedented Scandals

The 1996 presidential campaigns, led by the Clinton campaign, engaged in an unprecedented frenzy of soft money fundraising activities.

The public was treated to a parade of fundraising excesses and abuses by the Clinton campaign: foreign money scandals; contributions laundered in the names of others; the sale of meetings with the President; the White House "coffees"; the Lincoln Bedroom sleepovers; the Buddhist temple fundraiser; the funding abuses of John Huang, Charlie Trie, and Pauline Kanchanalak; the Roger Tamraz fiasco; and other abuses.[294]

Johnny Chung, who gave more than $350,000 in soft money donations to the DNC in a successful effort to buy access to the White House, summed it up when he said, "[T]he White House is like a subway: you have to put in coins to open the gates."[295]

The fundraising scandals of the 1996 election led to a lengthy investigation conducted by the Senate Governmental Affairs Committee, which issued an extensive report documenting the abuses that had occurred.

The 1996 Scandals and Law Enforcement

In the fall of 1996, Common Cause submitted a complaint to the Justice Department that urged the appointment of an independent counsel to conduct a criminal investigation of the soft money abuses that had occurred in the 1996 presidential election. A parallel complaint was filed with the FEC, calling on the agency to pursue civil violations of the law.

After considerable and extended controversy within the Justice Department, Attorney General Janet Reno refused to appoint an independent counsel on the grounds that the campaign and party officials involved had relied on the advice of their counsel in this matter and therefore did not have the criminal intent necessary to find a criminal violation of the law.

In so doing the Attorney General ignored the advice she had received from Charles LaBella, the prosecutor she had brought in to oversee the Justice Department's investigation of the alleged campaign finance abuses, as well as FBI Director Louis Freeh, both of whom recommended the appointment of an independent counsel.

In closing the case, Attorney General Reno stated she was taking no position one way or the other on whether campaign finance violations had occurred, and she specifically referred the matter to the FEC to examine whether there were civil violations of the federal campaign finance laws.[296]

The FEC considered the legality of these 1996 Clinton and Dole soft money ad campaigns on two separate occasions. Each time the professional staff of the FEC concluded that the Clinton and Dole campaigns had illegally used soft money in their presidential campaigns and recommended that the agency pursue legal actions against the campaigns. Each time the commissioners rejected the staff recommendations – by votes of 6-0 and 3-3 – and refused to take any action against the campaigns.

FEC's First Review of 1996 Soft Money Ad Campaigns

The Commission's first review of the soft money-funded ad campaigns was in the context of the post-election audit conducted by the agency of both presidential campaigns. The FEC's general counsel concurred with the analysis of the Commission's Audit Division in recommending that the Commission require the Clinton and Dole campaigns to repay a portion of the public funds they received.

The general counsel reached this conclusion on the basis of his analysis that the so-called party "issue ads" were coordinated between the party and the candidates, and therefore were in-kind contributions made by the party to the candidate campaign. As such, they were both illegal soft money contributions to, and expenditures by, the candidates, and had to be counted against the candidate's spending limit.[297] Because of this, both campaigns had violated the spending limit.

FEC Staff Finds Evidence of "Coordination" in Soft Money Ad Campaigns

The general counsel first concluded that the DNC coordinated the ads with the Clinton Committee. He noted that, "[T]he record in the audit includes evidence of substantial com-

munication between the DNC and the Primary Committee on every facet of the media campaign." Indeed, the "evidence of coordination that the [Audit] Report details is such that it is difficult to distinguish between the activities of the DNC and the Primary Committee with respect to the creation and publication of the media advertisements at issue."[298]

FEC Staff Finds "Issue Ads" Contained Electioneering Message

The general counsel also reviewed the "purpose, content and timing" of the ads and determined that they contained an "electioneering message." The general counsel specifically noted in this context that "express advocacy" or the use of "magic words" is not required in order for the ads to be covered by and attributable to the candidate's spending limit. *(See page 121 for a discussion of the Supreme Court's distinction in the* Buckley *case between individuals and outside groups, on the one hand, and candidates and political parties, on the other, in terms of the need for express advocacy for ads to be covered by campaign finance laws.)*

In concluding that the ads contained an electioneering message, the general counsel noted that "the advertisements in question in the audit explicitly identify President Clinton and in some cases Senator Dole, who were both candidates at the time the advertisements aired. Moreover, it appears that these advertisements were aimed, at least in part, at President Clinton's campaign for the nomination. They address the policies of the president and his Republican opponents in a way which, on its face, appears calculated to encourage the viewer to vote for President Clinton."[299]

The general counsel concurred "with the proposed Audit Report's conclusion that the DNC and the Clinton campaign coordinated the media expenditures, that the advertisements contain an electioneering message and references to a clearly identified candidate, and that the advertisements should be considered an in-kind contribution to the Primary Committee."[300]

Commissioners Reject Staff Advice To Seek Campaign Repayments

The Commission rejected the advice of its general counsel and its audit staff, and voted 6-0 against requiring any repayments from the Clinton and Dole campaigns. In rejecting a repayment requirement for the money spent on these ads, the Commission said that it would have the opportunity to determine the legality of the ads in a separate enforcement action that would follow the audit.

FEC's Second Review of 1996 Soft Money Ad Campaigns

The Commission later considered the 1996 ads in an enforcement context. FEC Commissioner Scott Thomas called this matter "perhaps the FEC's greatest test to date."[301]

The general counsel again recommended that the Commission find the 1996 soft money ads to be in violation of the law, and further recommended that the Commission pursue enforcement actions against the presidential campaigns. In a January 12, 2000 report related to Matter Under Review 4713, the general counsel once again noted that "if expenditures for communications are made in cooperation with ... a candidate or campaign staff, the communication need not contain 'express advocacy' for the expenditure to be subject to federal regulation."[302]

FEC Staff Finds DNC & Clinton Campaign Violated Law; Recommends Enforcement Action

The FEC general counsel concluded that a number of the so-called party "issue ads" run in 1996 and funded by the DNC "each had the purpose of influencing the nomination and election of President Clinton. The advertisements all appear to champion the candidate's agenda on various campaign issues, and many also appear to denigrate Senator Dole's stand on those campaign issues."[303]

Based on this analysis, the general counsel recommended that the Commission find reason to believe that the DNC illegally made, and the Clinton Committee illegally accepted, a coordinated expenditure in the amount of the media disbursements, or $47,045,461.[304]

The general counsel also recommended that the Commission find that the DNC illegally made, and the Clinton Committee illegally accepted, this contribution from prohibited sources because the DNC used soft money to fund these ads.[305] Finally, the general counsel recommended that the commission find that the DNC and the Clinton Committee violated the spending limits and disclosure requirements of the law.[306]

The general counsel made similar findings about soft money spending by the RNC for "issue ads" promoting the Dole campaign.[307]

Commissioners Reject Staff Recommendation; Investigation Closed

On February 2, 2000, the Commission voted on the general counsel's recommendations in this enforcement matter – and deadlocked. Three of the six commissioners agreed with the general counsel and voted to proceed with an enforcement action. However, three commissioners voted against the general counsel. Since it requires the affirmative vote of four commissioners in order to proceed and find reason to believe that a violation occurred, the matter was deadlocked and the investigation closed.

These 3-3 votes were not along party lines. Rather, the Commission took a series of votes on different ads, and commissioners voted in different patterns in the votes, but the four votes necessary to proceed on the general counsel's recommendations were never achieved.

At the end of the process, the commissioners took no action at all against the massive use of soft money by the two presidential campaigns and their parties in 1996 to fund ad campaigns to support their presidential candidacies.

Thus, at the end of the process, the commissioners took no action at all against the massive use of soft money by the two presidential campaigns and their parties in 1996 to fund ad campaigns to support their presidential candidacies. Twice rejecting the advice of their staff and general counsel, the commissioners failed to make any finding or take any action to stop presidential candidates, working in coordination with their parties, from using soft money to buy TV ads to promote their campaigns.

In a press interview after the Commission deadlocked in the enforcement matter, Commissioner Thomas told a reporter that the message of the votes was clear: "You can put a tag on the toe of the Federal Election Commission."[308]

Joint Fundraising Committees Expand Use of Soft Money In 2000

Given the failure of the FEC to stop the explosive use of soft money in the 1996 election, it is little wonder that the 2000 elections saw yet another breakthrough occur in the use of soft money to support federal campaigns. This time the breakthrough occurred in Senate races.

The vehicle for the congressional expansion was the systematic use of "joint fundraising committees" by Senate candidates to raise soft money. First used in the 2000 Senate races by Senator Hillary Clinton's (D-NY) campaign, the technique was used by more than 20 Senate campaigns in 2000, including the campaigns of then-Senator John Ashcroft (R-MO) and Senator Debbie Stabenow (D-MI).

Here's how it worked:

1. **The candidate's campaign committee formed a "joint fundraising committee" with the senatorial campaign committee of the national party – either the Democratic Senatorial Campaign Committee (DSCC) or the National Republican Senatorial Committee (NRSC).**

2. **The Senate candidates then directly solicited in their own names soft money and hard money for their respective joint fundraising committee.**

3. **The hard money contributions raised by the Senate candidate would go to the candidate's campaign committee, and the unlimited soft money contributions raised by the Senate candidate – either corporate and union donations, or individual donations in excess of the federal contribution limits – would be sent to the party senatorial committee, which would place the money in earmarked party soft money accounts.**

4. **The Senate party committees would then transfer the money to the state party of the candidate who raised the money, which would then spend it for candidate-specific "issue ads" and other voter activities to support the Senate candidate and attack the candidate's opponent. There was evidence that the state party expenditures were coordinated with the Senate candidate.**

In April 2000, Democracy 21 and Common Cause filed a complaint with the FEC, alleging that these joint fundraising committees were an evasion of the campaign finance laws. The joint fundraising committees, according to the complaint, were being used to allow federal candidates to directly solicit their own soft money that was being illegally spent on Senate candidate ads and other voter activities intended to influence the Senate elections.

In September 2001, the Commission's general counsel recommended that the commission find "reason to believe" that the Clinton, Ashcroft, and Stabenow campaigns, along with their national and state party committees, had violated the FECA.[309]

The general counsel's report on the Clinton Senate campaign described in detail how this scheme worked. It traced the flow of soft money raised by Hillary Clinton to the joint fundraising committee and then to the DSCC and then to the New York Democratic Party. The money was used by the state party to pay for ads like one cited in the report, called "Future," which featured video footage of Hillary Clinton surrounded by crowds dressed in summer attire:

> ANNOUNCER: In farm fields and union halls, living rooms and lunch counters, there's a conversation going on about the issues and concerns closest to our hearts.
>
> About our children, and more teachers in the classrooms. About our families and the quality of health care we need. About helping seniors pay prescription costs. And jobs – good jobs – for a secure future right here. It's about leadership on our side.
>
> Call Hillary. Tell her to keep fighting for children, for families, for our future.[310]

The general counsel cited a press report that the state party chair discussed the ad on several occasions with Clinton advisers, and that the ad was in other ways coordinated between the state party and the Clinton campaign:

> Additionally, circumstantial evidence that NYSDC [the state party] and Clinton for Senate may have coordinated "Future" is to be found in the combination of the participation of the candidate committee in New York Senate 2000 [the joint fundraising committee], Senator Clinton's active involvement in the raising of funds by the joint fundraising committee, and the timing and amounts of the transfers of funds from the DSCC to the NYSDC in relationship to the latter committee's expenditures for the November television advertisement featuring Senator Clinton.[311]

The general counsel concluded:

> In summary, the NYSDC in 1999 and 2000 made expenditures of both federal and non-federal funds for at least two television advertisements that clearly identified federal candidates and that were intended to influence the 2000 election for the U.S. Senate in the State of New York. There is evidence that the NYSDC may have coordinated these advertisements with Clinton for Senate. Thus, on the basis of content and coordination, it appears that the NYSDC's expenditures for these communications constituted coordinated party expenditures on behalf of the Clinton campaign. ... As such, it appears they should have been made entirely with federal funds.[312]

In October 2001, the Commission voted to reject its general counsel's analysis and to dismiss the complaint without taking any action. Once again, the commissioners overruled their professional staff to reject an enforcement proceeding against the use of soft money by federal candidates to support their federal campaigns. Commenting on the dismissal, Commissioner Thomas said that as the 2002 elections approach, "once again the Commission may stand idly by while millions of dollars of soft money will be raised and spent on candidate-specific candidate ads."[313]

FEC Staff Recommends Revising Rules To Ban Soft Money

In May 1997, five members of Congress asked the FEC to issue new regulations to ban soft money. Shortly thereafter, President Clinton submitted a similar request. More than a year later, in July 1998, the Commission formally opened a rulemaking to examine the issue. The

agency received 73 written comments and held a full day of hearings on the matter.

More than two years later, in September 2000, the FEC general counsel forwarded his analysis and recommendation to the Commission. In it, he urged the Commission to adopt new regulations to ban soft money:

> [T]he Office of General Counsel believes that individuals, corporations and labor organizations are making soft money donations to the national party committees in a manner which circumvents the prohibitions and limitations in the [FECA], that these donations are increasing in frequency and amount, and that the resulting use of soft money by the national party committees is having a significant influence on federal elections.[314]

The general counsel's analysis directly challenged the legal basis for the current soft money system. The general counsel found that the allocation system – which was based on the theory that soft money was not being used to influence federal campaigns – was a failure:

> The Commission believed [an allocation] approach would adequately ensure that the national party committees would not use significant amounts of soft money to influence federal elections.
>
> However, circumstances have changed since promulgation of the allocation rules in 1990. Many recent developments raise questions as to whether the allocation rules have allowed the national party committees to use large contributions from prohibited sources and in excess of the hard dollar limits in ways that, in fact, influence federal elections, even though they are ostensibly being used for nonfederal election activity.[315]

The general counsel concluded that the record shows that soft money is in fact being used to influence federal elections:

> The record indicates that allowing national party committees to raise soft money and use it to pay for a portion of the costs of mixed activities results in the use of soft money to influence federal elections, thereby undermining the purposes of the Act.[316]

Accordingly, the general counsel recommended that the Commission act to end the soft money system at the national level:

> [T]he Office of General Counsel believes that, with regard to the national party committees, the allocation rules are no longer adequately serving the purpose for which they were promulgated. The rules are allowing national party committees to channel significant amounts of soft money into activities that influence federal elections. "Under the FECA's current system of contribution limitations ... soft money spending by political party

The new soft money ban law raises concerns that the FEC will fail to effectively administer and enforce the new law.

> committees eviscerates the ability of the FECA to limit the funds contributed by individuals, corporations or unions for the defeat or benefit of specific candidates."[317]
>
> Therefore, the Office of General Counsel recommends that the Commission promulgate new rules to limit the receipt and use of soft money by the national party committees.[318]

The Commission had still not acted on the general counsel's recommendation, when a year and a half later – on March 27, 2002 – President Bush signed into law a ban on soft money.

This ended the 18-year history of the FEC's persistent refusal to deal with the fundamental problem of soft money being used by federal candidates and their political parties to influence federal elections.

But the passage of the new law also opened the door to a new round of potential problems at the FEC on the soft money issue, beginning with the agency's immediate responsibility to develop regulations to implement the soft money ban. The new law raises concerns that the FEC will allow its own history to repeat itself by permitting massive evasions of the soft money ban by failing to effectively administer and enforce the new law.

EXHIBIT 5

Other Problems Created by the FEC:

Coordination, Convention Funding, Building Funds, and Enforcement

While the soft money system is the most serious problem caused by the Federal Election Commission (FEC) in administering the campaign finance laws, it is by no means the only one. Through its opinions, regulations, delays, inaction, and dismissals of cases, the FEC has severely undermined the campaign finance laws and engendered widespread belief that the laws may be violated with virtual impunity.

The following four case studies provide further examples of the campaign finance problems that have been caused by the FEC.

Case Study #1:

FEC Action on Coordination Undermined Contribution Limits

Effective rules dealing with the coordination between candidates and outside groups are a key to having effective contribution limits and prohibitions. That is because expenditures by an individual or group that are related to a candidate's campaign and are coordinated with that candidate constitute campaign contributions to the candidate under federal law and must comply with federal contribution limits and prohibitions.

The Commission, however, has rewritten its rules to greatly narrow the circumstances under which coordination can be found between a candidate and an outside spender, and thereby has substantially increased the ability to evade federal contribution limits and prohibitions.

The Commission rewrote its coordination rule after losing a federal district court case where the court adopted a very restrictive rule on coordination. The judge in the case recognized the controversial nature of her ruling and invited the agency to appeal it. The commissioners, however, rejected their general counsel's recommendation to appeal and instead dropped the case. The commissioners then rewrote the agency's coordination rules and codified the court's ineffectual standard. In so doing, the commissioners knew they would have to then dismiss two important pending enforcement cases, both of which depended on a realistic and effective coordination rule.

The importance of the coordination issue, and how the FEC defines "coordination," is illustrated by a Statement of Reasons issued by Commissioners Scott Thomas and Danny McDonald. The Statement was issued in conjunction with an FEC decision to drop an enforcement matter in light of the agency's adoption of a new narrow definition of the standard. The commissioners cited the following example:

> [S]uppose that Candidate Smith is slightly behind in the polls, low on money, and needs help. It is the week before the election and he knows that a corporation is planning to run an "issue" advertisement to assist the Smith campaign. Smith contacts the president of the corporation and complains that nobody has focused on an important matter in the campaign: various problems in the personal life of his opponent, Congressman Jones. Because of this oversight, candidate Smith believes that Congressman Jones is viewed in a better light by the electorate. Candidate Smith, however, does not want to run such an advertisement himself for fear of being accused of negative advertising.
>
> During his meeting with candidate Smith, the wealthy supporter says, "That's a great idea! Thanks for the information." After the meeting, the wealthy supporter changes the advertisement to say: "Congressman Jones is a liar, tax cheat and a wife-beater – keep that in mind on Tuesday." The advertisement runs on the weekend before the election. Is this a coordinated expenditure? As we understand the Commission's new regulations, there would be no coordination between the candidate and the spender since there was no "substantial discussion or negotiation" and no "request or suggestion" indicating "that a communication with a *specified content* would be valuable to a candidate or committee."[319]

Importance of Effective Coordination Rules

Effective coordination rules are a prime bulwark against cheating on the contribution limits and prohibitions in the federal law. They provide protection in two related ways.

1. Effective rules help ensure that the contribution limits of the law are not circumvented.

Federal law limits an individual from contributing more than $1,000 to a candidate per election, and a political action committee (PAC) from giving more than $5,000 to a candidate per election.

By contrast, there is no limit on the total amount an individual or group can spend independently on behalf of a candidate. The reason that "independent" spending is free from limitation is the Supreme Court's view in *Buckley* that there is no danger of corruption where an individual or PAC is spending money to influence an election independently of the candidates in that election. As the Court said in *Buckley*: "[T]he absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate."[320]

The line drawn between "independent" spending (not subject to limits) and "coordinated" spending (which is a contribution and subject to contribution limits) becomes crucial. If an individual or group could spend an unlimited sum of money in coordination with a candidate, then the contribution limits would lose their meaning.

2. Effective rules ensure that corporate or union treasury money cannot be spent on so-called "issue ads" to support a candidate in coordination with such candidate.

When a so-called "issue ad" or other public communication with an electioneering message is run by a spender in coordination with a candidate, the funding of the ad must comply with federal contribution limits on what the individual or group can contribute to such candidate. Thus, the definition of coordination plays a key role in determining whether soft money can be used to pay for so-called "issue ads," and, therefore, whether corporations and labor unions can spend money to help candidates in their elections.

If the definition of coordination is ineffective – that is, if it allows a spender and a candidate to work together on campaign ads by the spender to help the candidate – it will license cheating by spenders and open the door to corporations and unions spending illegal money to influence federal elections by running "issue ads" about named candidates that do not use "magic words," such as "vote for" or "vote against."[321]

The most recent coordination rules adopted by the FEC commissioners are narrow and lax and, in fact, open the door to such cheating. But it was not always this way, and the new campaign finance law requires the agency to go back to the drawing board and issue new coordination rules.[322]

Buckley Court Draws Line on Coordinated Expenditures

In its 1976 decision in *Buckley v. Valeo*, the Supreme Court held that "contributions" – that is, money given by a donor to a candidate – could be subject to campaign finance limits, but that "expenditures" – that is, money spent by a person to support a candidate – could not be limited, as long as the expenditures were "independent" from the candidate. In other words, the expenditures could not be "coordinated" between the spender and the candidate.[323]

In *Buckley*, the Court held that only expenditures made "*totally independent* of the candidate and his campaign" were free from contribution limits, whereas coordinated expenditures were contributions and could be subject to contribution limits.

The Court reasoned that a contribution posed a danger of *quid pro quo* corruption because the contributor gives the money directly to the candidate or his agents, and could reach a corrupt understanding with the candidate to give the money in exchange for influence. The Court, however, did not see a similar danger in spending by an individual or group in support of a candidate, so long as the spender operated with total independence from the candidate. The Court believed that ads run totally independent of a candidate might be as likely to hurt as help the candidate.

By the same reasoning, the Court recognized that an expenditure that was coordinated by a spender with a candidate poses exactly the same threat of corruption as a direct contribution. If a spender is working with a candidate or his agents by arranging his spending to meet the candidate's campaign needs, the spending would be the functional equivalent of a direct contribution and, in the Court's view, should be treated as such.

Thus, the Court found that if a spender could coordinate with a candidate to pay for a television ad provided by the candidate, the limits on contributions could be easily evaded "by the simple expedient of [a coordinated spender] paying directly for media advertisements or for other portions of the candidate's campaign activities."[324]

In order to "prevent attempts to circumvent the Act through prearranged or coordinated expenditures amounting to disguised contributions," the *Buckley* Court treated coordinated expenditures as contributions under the campaign finance laws.[325] Consequently, only expenditures made "*totally independent* of the candidate and his campaign" (emphasis added)[326] were free from contribution limits, whereas coordinated expenditures were contributions and could be constitutionally subject to contribution limits.

Congress Codifies *Buckley* Ruling on Coordination; FEC Writes Coordination Rules

Congress enacted amendments to the campaign finance laws in 1976 after the *Buckley* decision that included a codification of the distinction drawn by the *Buckley* Court between those expenditures that were totally independent of the candidate's campaign and those that were coordinated.[327] Accordingly, the 1976 amendments defined "independent expenditure" as "an expenditure by a person expressly advocating the election or defeat of a clearly identified candidate which is made *without cooperation or consultation* with any candidate, or any authorized committee or agent of such candidate, and which is *not made in concert with, or at the request or suggestion of*, any candidate, or any authorized committee or agent of such candidate." (emphasis added.)[328]

To implement the law, the FEC wrote regulations to further define coordinated expenditures. Most significantly, the FEC's regulations provided that an expenditure would not be considered independent if there was "[a]ny arrangement, coordination, or direction by the candidate or his or her agent prior to the publication, distribution, display or broadcast of the communication."[329]

The Commission's regulations established that an expenditure is presumed to be coordinated if it is either: (a) based on information about the candidate's plans, projects, or needs

provided to the expending person by the candidate, or by the candidate's agents, with a view toward having an expenditure made; or (b) made by or through any person who is, or has been, authorized to raise or expend funds or who is, or has been, an officer of an authorized committee.[330]

This approach was validated by the Supreme Court's subsequent opinion in *Colorado Republican Campaign Committee v. FEC*, 518 U.S. 604, 116 S. Ct. 2309, 2315 (1996), where the Court held that a state party expenditure would be treated as "independent" of a candidate because it was not made "pursuant to any general or particular understanding with" the candidate. The Court's language strongly suggested that spending based on even a "general understanding" with a candidate would, in the Court's view, be coordination.

20 Years Later: The *Christian Coalition* Case

In 1996, the FEC brought an enforcement action against the Christian Coalition in federal district court alleging that the organization had coordinated its activities in the 1990, 1992, and 1994 election cycles with a number of Republican campaigns and, in so doing, had violated the contribution limits of the law.[331]

The Commission alleged instances when the leaders of the Christian Coalition had privileged inside access to top Republican campaign personnel and offered campaign advice to them. The Christian Coalition's top two officials, Pat Robertson and Ralph Reed, had extensive discussions concerning the campaign's thinking on a number of strategic issues.[332]

The Commission alleged several instances when the leaders of the Christian Coalition had privileged inside access to top Republican personnel and offered campaign advice to them.

Further, the Christian Coalition leaders told campaign officials of their plans to distribute voter guides or conduct get-out-the-vote activities for several Republican campaigns. Because of its inside access and discussions the Christian Coalition was able to plan its spending with knowledge of the campaign's strategy so that the two efforts would dovetail. In the instance of the 1992 Bush presidential reelection campaign, the Christian Coalition gave the Bush campaign information on the costs of producing and distributing their voter guides, and President Bush's campaign then went out and helped raise the necessary funds to pay for the voter guides.[333]

District Court Formulates New Narrow Theory for Coordination; Invites Appeal To Higher Court

The district court in *FEC v. Christian Coalition* rejected the FEC's argument that these kinds of facts constituted coordination under the law and went on to formulate an entirely new theory of coordination for "expressive coordinated communications."[334] The court held that communications between a candidate and a spender become coordinated "where there has been substantial discussion or negotiation between the campaign and the spender over, a communication's (1) contents; (2) timing; [and] (3) location, mode or intended audience." [335] Restricting this standard even further, the court required that the "substantial discussion or negotiation" be "such that the candidate and spender emerge as partners or joint venturers in the expressive expenditure." [336]

Based on this standard, the court found that no coordination had occurred in five of the six instances presented to it by the FEC, because the discussions between the Christian Coalition and the campaigns were not so substantial as to rise to the level of a "joint venture."[337]

In making her findings, however, the district court judge acknowledged the difficulty and novelty of the case, and virtually invited the FEC to file an appeal. The judge specifically noted that her opinion involved questions of law "as to which there is substantial ground for difference of opinion," and that an "immediate appeal ... may materially advance" the litigation.[338]

Commissioners Reject Staff Recommendation To Appeal Court Decision

Despite the Judge's virtual invitation to appeal her decision, a majority of the commissioners – Lee Ann Elliott, David Mason, Karl Sandstrom, and Darryl Wold – rejected the recommendation of their general counsel and voted not to appeal the matter. The failure to appeal prompted a strong dissent from Commissioners Scott Thomas and Danny McDonald,[339] who criticized the Commission for failing to "carry out Congress' explicit 'mandate' to enforce the FECA [Federal Election Campaign Act]."[340]

Commissioners Thomas and McDonald also pointed out that the court in *Christian Coalition* ignored virtually all existing law: "Not only is the district court's narrow and restrictive standard of coordination found nowhere in the [FECA] and Commission Regulations, but also it runs directly contrary to *Buckley* where the Supreme Court considered independent expenditures as those made 'totally independent of the candidate and his campaign.'"[341]

Commissioners Thomas and McDonald also noted that the Commission's failure to appeal was the continuation of a "regrettable pattern" of the agency not appealing losses in lower court litigation. They said:

> Unfortunately, this approach unfairly places the Commission in a one-sided "sudden death" situation. If the Commission loses, no appeal is taken and the litigation is over. If the other side loses, it can appeal and fight another day. For example, if the FEC had prevailed in the district court, without question the Christian Coalition would have appealed this matter, if necessary, all the way to the Supreme Court.[342]

Commissioners Embrace and Codify Court's Restrictive and Ineffective Standard

Not only did the four-commissioner majority refuse to appeal the Court's restrictive new standard for coordination in the *Christian Coalition* case, they proceeded to embrace it wholeheartedly.

The FEC moved almost immediately to codify the Court's standard of coordination into its regulations, replacing the standard, derived from the Supreme Court's ruling in *Buckley*, that the Commission had used since 1976. The new regulation, 11 C.F.R. § 100.23, which took effect on May 9, 2001, defined coordination to be spending for either a communication at the request of a candidate or after the candidate has exercised control over the communication, or:

> After substantial discussion or negotiation between the purchaser, creator, producer or distributor of the communication and the candidate, the candidate committee, the party committee or their agents that results in collaboration or agreement

> about the content, timing, location, mode, intended audience, volume of distribution or frequency or placement of that communication.

The FEC's new regulation, which was based on the district court's new *Christian Coalition* standard, created a blueprint for the evasion of contribution limits by defining exactly how candidates and contributors can coordinate their expenditures without being subject to the FECA. (The regulation dealt with coordination between spenders other than political parties and did not address the issue of defining coordination between candidates and their political parties.)[343]

So long as the parties are careful not to reach an "agreement" or enter into "collaboration" through "substantial discussion or negotiation" about their plans, candidates and spenders can exchange strategic information and advice about the campaign and the campaign's needs – including non-public information.

As Commissioners Thomas and McDonald explained in dissenting on the dismissal of a subsequent enforcement action:

> Obviously, it is almost impossible to secure such evidence or meet such a high standard to establish coordination. Moreover, if a finding of coordination required some sort of "collaboration or agreement" between a candidate and a spender, a candidate could set up a meeting with an organization known to be planning campaign ads, and could discuss campaign strategy and the development of issues crucial to the campaign. The organization could then make "independent" expenditures based on this detailed knowledge and information. The only apparent restriction would be that a campaign could not "agree on" the final finished ad or actually authorize a buy for the timing and placement of the ad. Such a limited approach renders the coordination standard – and thus, the contribution limits – meaningless.[344]

Commissioner Thomas stated that the *Christian Coalition* standard of enforcement "is so narrow and limited that it threatens any effort to enforce the requirements of the Act in a serious manner" and "threatens to undermine the Act's limitations and prohibitions." At another point, Commissioner Thomas, joined by McDonald, said that by "too narrowly defining what constitutes coordination, these new regulations stifle rational analysis and encourage further widescale evasion of the restrictions carefully crafted by Congress."[345]

FEC Applies New Lax Standard to Pending Cases

In adopting the new coordination regulation, FEC commissioners knew that the new rule would effectively kill two major enforcement actions pending at the agency that the FEC had authorized and was pursuing.

Coordination Case Involving AFL-CIO and Democrats

In 1995, the Commission began investigating alleged coordination between the AFL-CIO and various Democratic candidates that took place in the 1996 election cycle. The investigation centered on whether the AFL-CIO coordinated $35 million of election-related TV ads and other communications with Democratic candidates or the Democratic Party. Such coordination would convert the expenditures from union treasury funds into illegal contributions to the candidates.

The AFL-CIO's "Coordinated Campaign" was a state-by-state campaign structure that linked each state's Democratic Party and Democratic candidates with allied organizations, such as the AFL-CIO, Emily's List, and the National Education Association.[346]

Each state's "Coordinated Campaign" was governed by a steering committee, which included state representatives of all Democratic candidates, as well as representatives of the major allied organizations. Before any state's campaign plan could be implemented, the Democratic National Committee (DNC) state representatives and the representatives of the allied organizations all had to approve the plan.

The FEC general counsel found that the AFL-CIO:

> had access to volumes of non-public information about the plans, projects, activities and needs of the DNC, the DCCC [Democratic Congressional Campaign Committee], the state Democratic parties and in some instances individual candidates for Federal office. Moreover, the evidence shows that the AFL-CIO had not merely access to, but authority to approve or disapprove the DNC's and the state Democratic committee's plans for "Coordinated Campaign" activity.[347]

The general counsel noted that when the investigation began, the Commission "took the position that coordination sufficient to taint the independence of an expenditure could come about as a result of either a 'general or particular understanding,'" a standard set forth by the Supreme Court in a 1996 case, *Colorado Republican Federal Campaign Comm. v. FEC*.[348] As the general counsel noted:

> From that position, the Commission emphasized in a series of enforcement matters that the passing of any information about a candidate or party committee's plans, projects or needs from the committee to an expending person may trigger a conclusion of coordination.[349]

In the AFL-CIO case, it was clear that this type of collaboration – which the general counsel referred to as an "extraordinary degree of interconnectedness"[350] – would have in the past supported a finding of coordination:

> Under the interpretation of the law put forward by the Commission in the *Christian Coalition* case and cases prior to it, the sharing of this much information about the potential recipient committee's plans, projects, activities and needs would have been more than sufficient to taint the independence of any subsequent election-related communications to the general public by the AFL-CIO. [351]

As the general counsel noted, "Where an outside group has veto power over party committee activities that eventually result in more than 24 million individual voter contacts by phone or mail, it is impossible to say that any communications made by either the outside group or the party committee have been made totally independently."[352]

In light of the *Christian Coalition* case and the Commission's refusal to appeal the decision, however, the general counsel applied the agency's new coordination standard – and found there was no coordination. The Commission accepted this analysis and closed the investigation.[353]

Coordination Case Involving the Coalition and Republicans

Following the *Christian Coalition* decision, the Commission also dismissed a parallel inves-

tigation into alleged coordination in the 1996 campaign between the Coalition – a group of business organizations, including the Chamber of Commerce and National Association of Manufacturers – and the Republican Party and several of its candidates.[354]

In 1996, according to press reports, the Coalition undertook a $5-million advertising campaign to defend House Republicans against the AFL-CIO's 1996 campaign activities.[355] The Coalition's advertising campaign began in July 1996 and aired in 41 congressional districts. The group also mailed out two million "report cards" on candidates.[356]

According to press reports, the FEC found that representatives of the Coalition's member groups met weekly with then-House Republican Conference Chairman Representative John A. Boehner (R-OH) to discuss strategies for enacting the Republican's "Contract with America" and for mobilizing Members.[357] The Coalition also showed Boehner's staff all of its test ads and actual ads for Republican candidates and Boehner's staff conducted polling to "shape the content of the Coalition's ads."[358]

FEC lawyers concluded that the "facts make for a compelling case" of illegal coordination under the rules in place during the 1996 campaign."[359] The general counsel investigated and found that the facts gathered through this investigation showed a pattern of communications and interactions between the Coalition's leaders and Representative Boehner, the Republican Conference, congressional candidates, and the Republican National Committee (RNC).[360]

The FEC's acting general counsel, Lois Lerner, concluded that this evidence did not meet the "loosened" *Christian Coalition* threshold for coordination or the Commission's new regulations.[361] Accordingly, the Commission voted to dismiss the case in mid-2001.[362]

Commissioners Thomas and McDonald noted this as an example of the "legacy of non-enforcement [that] we fear will be repeated as long as these new regulations remain in effect."[363]

In the campaign finance reform law enacted in March 2002, Congress repealed the Commission's regulations on coordination and called on the FEC to craft new rules.[364]

Case Study #2:

FEC Opinions on Party Convention Funding Dismantle Public Financing Scheme

The national party conventions have become their own mini-soft money systems. The financing of these conventions has developed from a system of public funding intended to eliminate special-interest influence to a spectacle of huge special-interest contributions playing the major role in paying for them.

The change has taken place through an inexorable dismantling of the public financing law on conventions, not by any act of Congress but solely through interpretations of the law made by the FEC in its advisory opinions and regulations.

Under the 1974 post-Watergate campaign finance reforms, national party conventions are supposed to be funded this way: The parties receive a grant of public funds to pay for their

quadrennial conventions in exchange for a promise to limit their spending to that amount, and not to raise any additional private money. The purpose of the law is to eliminate the role of big donors in funding party conventions, and to prevent those donors from buying access and influence in return.[365]

Here is how convention fundraising actually works today: the political parties take the public funds and agree in return to limit the spending for the conventions to that amount of money. Then, on top of these public funds, the parties – through so-called "host committees" and working with the convention city – raise six-and seven-figure donations and in-kind contributions from corporations, labor unions, and wealthy individuals to provide additional funding to pay for the conventions. In return, the big donors receive special access to, and treatment from, party leaders, federal officeholders, and federal candidates.

Virtually since the day the law was passed, the FEC has used its authority to open one loophole after another, until those loopholes have all but swallowed the law.

The statute covering the funding of conventions has remained largely unchanged since it passed Congress in 1974. Virtually since the day the law was passed, however, the FEC has opened up one loophole after another, until these loopholes have all but swallowed the law.

Origins of Public Financing of Conventions

In 1971, International Telephone and Telegraph (ITT) made a $400,000 contribution to the RNC to help it fund the party's 1972 presidential convention in San Diego. At around the same time, the Justice Department in the Nixon Administration settled a federal antitrust suit it had brought against ITT, and allowed the company to retain an insurance subsidiary whose proposed divestiture was at the heart of the case.[366]

The ITT contribution and the Justice Department settlement smacked of a *quid pro quo*, a suspicion held by the public that was reinforced when columnist Jack Anderson uncovered a memorandum written by ITT's Washington lobbyist to the company's Washington manager, appearing to acknowledge a deal.[367]

While Watergate investigators could never prove that the settlement of the suit was a direct *quid pro quo* exchange for ITT's contribution, Administration officials, including Attorney General Richard Kleindienst, were found guilty of false testimony about their roles in the matter.[368]

Congress' response to this scandal, and to other concerns about big money financing of the conventions, was to provide for public financing of the party conventions in the 1974 reform law.[369] The purpose of the law was to eliminate special-interest funding of conventions. By financing conventions with public funds, Congress intended to eliminate the parties' need to procure funds from corporations, labor unions, and wealthy individuals.[370]

The 1974 law required each party to establish a separate convention committee to accept and disburse funds in connection with its convention. Each party's convention committee would receive a grant of public money to pay the costs of the convention and in return the party would agree not to raise private contributions and to limit its convention spending to the amount of the grant.[371]

The amount of public funding for each convention under the 1974 law was $4 million, to be adjusted subsequently for inflation.[372] In 2000, each major party received more than $13 million to finance its presidential convention.[373]

Through a series of advisory opinions and regulations over the years, however, the FEC has

eviscerated the goal of the public financing scheme by allowing the parties, through "host committees," to raise unlimited amounts of private money on top of their public grants. In so doing, the agency has all but dismantled the public financing of conventions, allowing the conventions to become another soft money-type loophole in the law.

FEC Creates First Convention-Funding Loopholes in 1975

In its first advisory opinion on convention financing, in 1975, the FEC opened up the first loopholes in the new system when it permitted "local retail businesses" to donate money or in-kind contributions to local not-for-profit "civic associations" that were organized for the purpose of "encouraging" commerce.[374] These civic organizations could in turn use the businesses' donations for the party conventions. The FEC also allowed corporations to offer "discounts" to the parties, like bulk rate savings, if similar discounts were made available in the normal course of business.[375]

In a subsequent advisory opinion that year, the FEC expanded the category of "civic associations" to include "host committees," defined as "non-profit organizations whose basic purpose is the promotion of its city's commerce and image," such as a chamber of commerce, a real estate board, or a convention bureau.[376] In actuality, the "host committees" went on to become fundraising groups formed by a prospective convention city solely for the purpose of attracting and financing a political convention, and tied to the political parties and their elected officials in their fundraising efforts.[377]

The FEC has eviscerated the goal of public financing by allowing the parties, through "host committees," to raise unlimited amounts of private money on top of their public grants to fund their conventions.

The Commission "assumed" that host committees fell "within the ambit of the non-profit organizations," which were allowed to accept corporate donations under the local retail business exception.[378] As such, host committees could accept contributions from local retail businesses and make expenditures to defray convention-related costs, without such expenditures counting against the expenditure limit set forth in the regulations.[379]

Thus, in separate 1975 advisory opinions, the FEC opened two loopholes: it allowed host committees to accept corporate funds to be used for convention purposes, and it allowed local retail businesses to offer "ordinary" discounts to conventions. Of course, the Commission was careful to state that it would not allow these exceptions to turn host committees into "conduits for contributions which a corporation may not make directly."[380]

FEC Formalizes Loopholes in 1979 and Opens More: New York Yankees & Kelly Services

In 1979, the FEC formalized in its regulations the loopholes created by its 1975 advisory opinions.[381]

The FEC formally accepted the concept of "host committees" into the convention financing system, adopting regulations to permit such committees to spend money for the purpose of (1) "promoting the city and its commerce," or (2) "defraying convention expenses" without those expenditures counting against the party-spending limit.[382] The regulations also allowed

local retail businesses to give "normal discounts" directly to the national committees for convention purposes.[383]

In applying its new regulations, the FEC ruled in 1980 that the New York Yankees could donate 500 to 1,000 tickets to the host committee of the DNC for the party's 1980 convention under the authority of the regulation that allowed local businesses to donate funds or make in-kind contributions to a host committee for the purpose of promoting the convention city or its commerce.[384]

The FEC stretched the "local business" concept in another 1980 advisory opinion, concerning a donation of tote bags from Kelly Services, a "nationally known temporary help service firm," to the Republican National Convention.[385] That Convention took place in Detroit, which was the site of Kelly Services' headquarters. However, "to avoid claims of partiality," Kelly Services additionally wished to donate tote bags to the Democratic National Convention in New York. Kelly Services made no claim that it actually had offices in New York, or that it was a "local business" – as required by the regulation. However, the Commission glossed over the requirement that the business be "local" and allowed Kelly Services to donate to a convention city where it was not a local business.[386]

GM "Promotional Considerations" Pave Way for More Convention Loopholes in 1980s

Leading up to the 1984 nominating conventions, the FEC once again expanded the loophole for convention financing. In an advisory opinion to the City of Dallas, host of the 1984 Republican convention, the FEC permitted the city to use a "general promotional fund" – containing private money from corporate sources – to pay for services and facilities for the convention.[387]

The Commission reasoned that the FECA does not regulate how a city can raise its money, ignoring the fact that the fund was established for the Republican convention and the money was going to be used to pay for convention expenses.[388]

Thereafter, a city only had to characterize a fund to help pay for a presidential convention as a "general convention fund" to evade the ban on corporate donations.[389] The FEC later approved a comparable fund in San Francisco for the 1984 Democratic National Convention.[390]

In 1988, the FEC opened the door further to direct corporate donations. The General Motors Corporation (GM) proposed to give each convention city a fleet of cars, free of charge, through local GM dealers, which would then be returned to the dealers at the end of the convention. In approving the GM donation, the FEC created the "promotional considerations" exception for corporate contributions to presidential nominating campaigns: businesses of any type would be permitted to provide goods and services at no charge, in exchange for "promotional consideration," such as being designated "an official" sponsor or provider.[391]

The Commission acknowledged that the GM proposal "did not qualify for any specific exemptions delineated in the national nominating convention regulations" but approved it nonetheless.[392]

In 1994 FEC Codifies Opinions Allowing Flow of Corporate Funds

In 1994, the FEC promulgated new regulations on conventions, which again reflected prior advisory opinions, and wrote into the regulations many of the "exceptions" that allowed corporate money to finance and support the conventions.

The Commission revised the "local business exception" to eliminate the "complex distinction between businesses that are 'local,' 'retail,' and 'local retail,'" so that any "commercial vendor" could provide goods or services to convention committees at discounted rates, or for promotional consideration at no charge.[393]

Under the new regulation that followed the GM opinion, a corporation's provision of free goods or services in return for promotional value is not a contribution if made in the ordinary course of business.[394]

The 1994 regulations, and the advisory opinions upon which they were based, provoked considerable criticism by outside groups commenting at the public hearings held by the FEC on the subject. Common Cause, for example, challenged the 1988 GM opinion at the hearings:

> The Commission has also given its sanction to the use of in-kind contributions in ways that undermine the intent of the FECA. For example, in 1988, the Commission, against the recommendation of its legal staff, allowed the General Motors Corporation (GM) to provide free automobiles to the major parties' national presidential nominating conventions. According to one account, this cost GM anywhere from $375,000 to $750,000 in foregone revenues. The decision by the Commission to allow GM to provide cars to national political party conventions flies in the face of Congress' longstanding ban on corporate contributions.[395]

Common Cause also noted the potential for abuse of the host committee system: "Under the Commission's present policies, convention city 'host committees' accept huge contributions from corporations, labor unions, and wealthy individuals to supplement the federal funds provided to political parties for convention activities."[396]

FEC Rules in Action: The 1996 and 2000 Conventions

By 1996, the steady erosion of the convention rules had resulted in an almost complete collapse of the public funding system for conventions. Journalists estimated that corporations gave the two parties $50 million to run their 1996 conventions, which was double the public funds provided.[397]

Roll Call listed corporate donors that gave $100,000 or more each to the host committee of the 1996 Republican National Convention: "Abbott Labs, ARCO, AT&T, Baxter, Pacific-Telesis, Philip Morris, Time Warner Inc., and United Airlines, to name just a few."[398] In fact, United Airlines gave the Republican convention as much as $250,000 to be named the event's official airline.[399] Philip Morris, an industry with great stakes in a Republican victory in 1996, gave some $500,000 to the host committee financing the Republican Convention.[400]

By 1996, the steady erosion of the convention rules had resulted in an almost complete collapse of the public funding system for conventions.

Many corporations gave to both the Democratic and Republican host committees in 1996.[401]

For example, "in exchange for 'promotional considerations,'" United Airlines also gave the Democratic National Convention Committee (DNCC) at least 241 airline tickets that year.[402] AT&T, one of the Republican Party's top donors, contributed more than $71,500 to the DNCC for 142 desk phones and two laptop computers.[403]

Corporate spending further increased at the 2000 presidential nominating conventions.

The Republican Convention carried a price tag of more than $60 million:

- The U.S. Treasury contributed $13.5 million in public funds;
- Philadelphia, the convention city, contributed $7 million; and
- Corporations contributed another $40 million.[404]

Eight corporations donated more than $1 million each to the Republican convention: AT&T, Ballard Spahr, Comcast, General Motors, Microsoft, Motorola, PECO Energy, and Verizon Communications.[405] Topping the big donor list was Motorola, which contributed $8 million to become the Republican convention's official provider of cellular phones.[406]

The Democrats spent about $49 million on their Los Angeles convention, including more than $35 million that came from corporations and other private donors.[407] Microsoft was one of the principal corporate donors to the Democratic Convention, contributing $1 million in technology, equipment, and services. The company made a similar contribution for the Republican convention.[408]

If anything, the influence-peddling nature of convention-related fundraising became even more explicit in 2000, with parties promising specific rewards and political access for certain dollar amounts.

During its Los Angeles convention, the Democratic Senatorial Campaign Committee (DSCC) scheduled two dozen dinners, lunches, and receptions with Democratic Senators for party donors who contributed more than $15,000 each in soft money to the Committee.[409]

The Boston Globe reported that Representative Patrick Kennedy (D-RI), chairman of the DCCC, had established a "caste system" of benefits for donors at the convention:

> $5,000 donors are members of the "Chairman's Council" which entitled them to a room at the Le Merigot Santa Monica Beach Hotel. Donors of $50,000 have membership in the Lowes Hotel in Santa Monica. Those who donated $100,000 gain entry in "Team 2000," as well as three rooms at Loews and a dinner party with Kennedy and Representative Richard A. Gephardt of Missouri, the House Democratic leader.[410]

In short, the political conventions by 2000 had become a national forum for the exchange of unlimited special-interest money and political access and influence. The transformation by the FEC of the system of publicly funded conventions, to a convention financing system flooded by private-influence money, was complete.

Case Study #3:

Building on "Building Fund," FEC Opens Another Soft Money Loophole

The story of the "building fund" exemption provides another example of how the FEC has opened loopholes in the law by administrative interpretations. When Congress enacted amendments to the FECA in 1976, it provided the opportunity for political parties to raise money outside the limitations and prohibitions of the Act for the narrow purpose of funding the construction or purchase of buildings for party offices or headquarters.

In 2001, once again rejecting the advice of their general counsel, FEC commissioners advocated a new and bizarre reading of the "building fund" exemption that opened the door to the increased use of soft money to pay for ongoing party operating costs.

The significance of this story does not lie in the size or scope of the loophole that the commissioners opened, but rather in the extent to which the commissioners were willing to adopt an interpretation wholly at odds with the meaning and language of the provision involved, in order to accommodate the political parties.

The FECA provides an exemption from the definition of "contribution" for gifts to parties "specifically designated to defray any cost for construction or purchase of any office facility not acquired for the purpose of influencing the election of any candidate in any particular election for Federal office."[411]

In short, the building fund exemption allowed the parties to raise and spend a discrete pool of soft money for the sole and specific purpose of funding the "construction or purchase" of any "office facility." The expenditure of funds under this provision did not require a portion of hard money to be spent with the soft money, as has been required under the allocation formula for financing mixed-activity costs incurred by a party.

In 1983, the Commission construed the scope of the building fund exemption to cover the costs for the "purchase" of an office facility, but not to extend to payments for "ongoing, operating costs as property taxes and assessments."[412] In 1988, the Commission noted that building funds do *not* cover party expenditures for "operating or administrative costs" such as rent, building maintenance, utilities, office equipment expenses, and other administrative expenses of a party headquarters.[413]

In 1998, the Commission attempted to define more clearly how the building fund exemption could be used. The agency drew a parallel between the permissible uses of the building fund and the treatment of capital expenditures under the Internal Revenue Code.[414]

Under IRS law, business expenses are deductible, while capital expenditures are not. The Commission said, "[I]tems that would fall under the category of capital expenditures would also be considered the type of expenditures that are legitimately part of the construction of a Party office facility. Items which are classified as business expenses would be seen as operating expenditures that fall outside the scope of the Act's building fund exception."[415]

Relying on this distinction under tax law, the Commission approved a party's request to use its building fund soft money for renovation of an office building, including the construction of a new roof, the installation of new electrical wiring, and the expansion of the size of the building and the number of rooms. All these, the Commission held, would be treated as capital expenditures and thus would fall within the building fund exemption.

The Commission returned to this subject in early 2001. In Advisory Opinion 2001-01, it again noted the parallel between the building fund and the IRS treatment of capital expenditures. The agency concluded that architectural fees which are "directly and solely" related to the restoration and renovation of a party headquarters would be permissible building fund costs because architect fees are explicitly listed in IRS regulations as capital expenditures.[416]

IRS Comparison Stretched To Fit Expanded Use of Soft Money

In an October 2001 Advisory Opinion, the Commission again relied on the IRS analogy, but this time to inappropriately expand the scope of the building fund exemption, once again overriding the position taken by its general counsel.

In Advisory Opinion 2001-12, the Wisconsin Democratic Party asked if the soft money in its building fund could be used to pay for the purchase of "office machinery, equipment, furniture and fixtures and similar property."[417] In other words, the party wanted to use the building fund soft money exemption to pay for costs of items and equipment that were *in* the party headquarters, but not part of the building itself. (Otherwise the party would have to pay for these costs with a mixture of hard and soft money.)

In a proposed response drafted for the Commission's review, the general counsel recommended against this expansion of the building fund exemption.[418] The draft said:

> The Commission, however, concludes that the building fund does not allow payments for the purchase of office machines, equipment or furniture. These expenses, although treated as "capital expenditures" under the Internal Revenue Code, are not directly connected to the party committee's construction or purchase or renovation of an office building. Therefore, payments for such items are not included within the scope of the Act's exemption for the construction or purchase of an office facility.[419]

In October 2001, the Commission inappropriately expanded the scope of the building fund exemption, once again overriding the position taken by its general counsel.

The general counsel proposed that a party could use the building fund only to pay for "fixtures that are attached permanently to the structural features of its office building, whether the fixtures are attached to the party's existing office building, or to one that is purchased and renovated or newly constructed."[420] Office equipment – for example, copy machines or telephone systems – are not considered to be "fixtures."

The general counsel's draft acknowledged the prior FEC advisory opinions, which drew the parallel between the building fund and the treatment of capital expenditures under the Internal Revenue Code (IRC). The general counsel proposed that those opinions be read as limited to their facts, "holding only that certain specific expenditures described therein would come within the building fund exemption."[421] And to the extent that the prior opinions could be read more broadly, the general counsel proposed that they be "superceded and modified" by the new opinion.[422]

A majority of commissioners rejected the general counsel's recommendation and, despite the clear language contained in the FECA, the majority decided to broadly embrace the link between the building fund and all capital expenditures. In a memorandum to the Commission advocating this expansive reading of the building fund exemption, Commissioner Mason first argued that the statutory language permitting the use of the fund for "construction or purchase of any office *facility*" (emphasis added) should be read to include copy machines and other office equipment:

> [W]hile it may be reflexive to some to limit the reach of the term "facility" to buildings and fixtures therein, the word encompasses more. For FECA purposes, the ordinary and natural understanding of the term "office facility" would seem to extend the reach of the "building fund" exemption to the purchase of anything that promotes the ease of actions, operations, transactions or course of conduct, in an office, whether real or personal property. I can see no reason why a "building

> fund" can be used to pay for the computer and telephone wiring in a building's walls during the construction phase but not the computers and telephones as well at any time. Why allow the purchase and installation of electric wiring but nothing to plug into the outlets?[423]

Commissioner Wold, in a separate memorandum to the Commission, took the same position:

> The reliance on the capital expenditure distinction under the IRC is consistent with a literal and natural reading of the statutory provision. The question under the statutory provision is what is included in "office facility." ... Similarly, "office facility" implies more than the four walls of a building – it implies the usual and necessary items that enable an office to function, *including desks, chairs, computers, telephone equipment, and similar furnishings and equipment.* (emphasis added.)[424]

In the advisory opinion adopted by the Commission – by a 4-2 vote with Commissioners Thomas and Sandstrom dissenting – the Commission did not discuss at length its expansion of the building fund exemption. The agency said only that the Wisconsin party's proposal "for the most part falls within the parameters" set by the Commission's earlier opinions.[425] "Drawing a parallel to the description and treatment of capital expenditures under the Internal Revenue Code and related IRS regulations, the commission also has concluded that capital expenditures may be paid from a building fund."[426]

The FEC took the position that the parties may use building fund soft money to pay for not only buildings, but also virtually anything that goes into a building, in contravention of the plain and unambiguous language of the law.

The new campaign finance law enacted in March 2002 repeals the building fund exemption for national parties, beginning after the 2002 elections.[427] The law also provides that state and local parties can use any funds legal under state law to finance the construction and purchase of a building, and makes clear that "building" means "building."[428]

Case Study #4:

How FEC Enforcement, Or Lack Thereof, Undermines the Law

The FEC dismissed an enforcement case involving the Montana Republican Party even though every one of the five commissioners who voted in the case found that the law had been violated. The case was dismissed in 1994, three years after the investigation began, because the commissioners could not reach agreement on which violation was most actionable.

The Commission was sued for its failure to act in the matter and two years later, in 1996, a court ordered the agency to pursue a part of the enforcement case it had previously dismissed. In 1997, more than six years after the complaint had been first

filed against the Montana Republican Party, the Commission dropped the case on the grounds that so much time had passed that the case was "stale."

The FEC took two years to conclude another matter involving an individual violating the law, in which the individual notified the Commission of his own violation, admitting guilt in the matter.

The Montana Debacle

In 1988, Conrad Burns, a Montana Republican, ran for a seat in the U. S. Senate.

Two years later, in July 1990, John K. Addy, the Speaker of the Montana House of Representatives, and Common Cause filed complaints with the FEC, alleging that the National Republican Senatorial Committee (NRSC) and the Montana Republican Party (MRP) had violated federal disclosure requirements and contribution limits in the Burns Senate race.[429] Among other things, the complaints alleged unreported payments for mailings, a daily tracking poll, a voter list, a campaign worker who benefited Burns, and the solicitation and bundling of contributions on Burns' behalf.[430]

More than three years passed before the FEC announced the dismissal of the complaint, even though every one of the five voting commissioners concluded that violations of the campaign finance laws had occurred.

The complaints were based in part on a civil suit filed by a former Montana Republican Party executive director and administrative secretary who were fired after raising questions about the NRSC's and MRP's actions.[431]

Under the campaign finance laws and FEC procedures, the FEC has sole responsibility for investigating and pursuing potential civil violations of the law.[432] The complainant has no further role, and the FEC by statute is required to proceed in secret.[433]

More than three years passed before the FEC, in 1994, announced the dismissal of the complaint – even though every one of the five voting commissioners concluded that violations of the campaign finance laws had occurred. The commissioners, however, could not agree on the nature of the violations, and therefore could not obtain the four votes needed to proceed on any particular theory of wrongdoing.[434]

Lack of Agreement on Violations

As discussed earlier, the FEC's statutory structure mandating that no more than three commissioners be from any one political party, and that the votes of four of the six commissioners are necessary to proceed with enforcement actions, has led to partisan gridlock in a number of significant cases.[435]

In the Montana case, five commissioners participated in the decision (one of the Republican commissioners recused himself).[436] The three Democratic commissioners voted to find that serious violations, involving relatively large amounts of money, had occurred. The two Republican commissioners rejected this conclusion and thereby blocked Commission action, since four votes were not obtained.[437]

The two Republican commissioners voted to find that less serious violations of law had occurred. The three Democratic commissioners rejected this conclusion and thereby blocked Commission action, since four votes were not obtained.[438]

Unable to assemble four votes in favor of their respective findings that election law violations had occurred,[439] the gridlocked commissioners finally settled the matter by a unanimous vote, and dismissed the case without *any* finding of probable cause that a violation occurred. [440]

Montana Case Reviewed by District Court

Following the agency's dismissal of the case, Representative Addy and Common Cause sought judicial review of the decision in district court.[441] The court concluded that, under the Administrative Procedure Act, it should defer to the reasoning of the Commission unless that reasoning was "arbitrary and capricious."[442]

The court, surprisingly, then chose to give deference to the position taken by the two Republican commissioners, not the three Democrats.[443]

On that basis, and applying a deferential standard of review, the district court affirmed most of the FEC's decision. The court did find, however, that certain aspects of the FEC's decision were "arbitrary and capricious" and remanded those portions of the case back to the FEC for further action.[444]

Remanded Part of Montana Is Dismissed – Case Too Old!

In 1997, more than six years after the initial Montana complaint had been filed, the case was terminated by the FEC.[445] After taking more than three years to initially act on the case, the agency found that the part of the case the district court had remanded was no longer important enough to warrant an expenditure of the FEC staff's time.

Thus, in a case where every participating commissioner concluded that the law had been violated, and where the agency's own dilatory action played a major role in creating the staleness the agency cited as the basis for closing the case, no action was ever taken to enforce the law.

The Kramer Fiasco

In late 1994, Thomas Kramer, a foreign national who was barred by law from making campaign contributions, sent a letter through his counsel to the FEC voluntarily disclosing that he had made hundreds of thousands of dollars of illegal contributions because he had been unaware of the FECA prohibition on contributions by foreign nationals.[446] Weeks later, Kramer's counsel submitted a detailed list of the contributions.[447]

Despite Kramer's volunteered confession of campaign finance violations, it would take the FEC nearly two years before it even contacted him.

Despite Kramer's volunteered confession of campaign finance violations,[448] it would take the FEC nearly two years before it even contacted him. In July 1996 the agency finally got in touch with Kramer, and shortly after that Kramer entered into a Conciliation Agreement with the FEC, and agreed to pay a civil penalty of $323,000.[449]

More than a year after reaching this agreement with Kramer, the FEC began to consider bringing a case against Howard Glicken, who had solicited some of Kramer's contribu-

tions, as well as other contributions for Democrats.[450] In June 1997 – nearly three years after Kramer's confession of wrongdoing – the FEC sent a subpoena to the DSCC regarding Glicken. [451]

Although there was strong reason to believe that Glicken may have violated the campaign finance laws (indeed he later pleaded guilty to violations in a case brought by the Department of Justice[452]), the FEC dropped the Glicken matter.[453]

After the FEC had waited nearly two years to even contact Kramer about his admitted violations, and nearly three years before seeking out Glicken,[454] the FEC general counsel observed that the FEC was only months away from the end of the applicable five-year statute of limitations period when it dropped the matter.[455] By that time the contributions in question were part of an old election cycle anyway.

EXHIBIT 6

The Role of the Courts in Campaign Finance Law:

No Excuses Here for the FEC

"The FEC constantly loses. I have never seen a record like this outside of the old Chicago Cubs. I mean every time, it is like they march up the hill like Pickett's charge, and they get slaughtered at the district court level."[456]

- JOHN FUND, *WALL STREET JOURNAL* EDITORIAL BOARD

For some, the failure of the FEC as an enforcement agency can be attributed to the difficulties that the FEC and the campaign finance laws have had in the courts. The FEC has an image of getting "slaughtered" whenever it goes into court to enforce the campaign finance laws. Similarly, campaign finance laws have an image of being overturned whenever they are challenged in court on constitutional grounds.

Contrary to conventional wisdom, however, the courts, and in particular the Supreme Court, have generally upheld the constitutionality of the campaign finance laws, although with some important exceptions. Likewise, the enforcement problems of the FEC, with some important exceptions, have stemmed largely from the failures of the agency itself, not from the courts' blocking the agency's enforcement efforts.

Since the 1974 passage of the Federal Election Campaign Act (FECA),[457] the Supreme Court has upheld the constitutionality of the limits on individual contributions to candidates and political parties, the limits on political action committee (PAC) contributions to candidates and political parties, the limits on individual contributions to PACs, the ban on corporate contributions and expenditures, the system of public financing and spending limits for presidential campaigns, the limits on political party spending in coordination with their candidates, and comprehensive campaign finance disclosure laws.

The Supreme Court has rejected as unconstitutional mandatory limits on campaign spending by a candidate, mandatory limits on the use of personal wealth in a campaign by a candidate and mandatory limits on independent expenditures by individuals and groups. (*See sidebar below for list of principal cases.)*

The Court has also established an express advocacy standard and a "magic words" test to determine whether communications made by non-candidates and outside groups are "campaign communications" covered by the campaign finance laws, or "issue discussion communications" that constitutionally cannot be made subject to such laws.[458]

The "magic words" test provides that a communication must contain words of express advocacy, such as "vote for" or "vote against" a specific federal candidate, in order to be subject to federal campaign laws, regardless of how the ad otherwise promotes or attacks the federal candidate.[459]

It is in this area – where the Supreme Court has narrowly defined what constitutes a "campaign communication" in order to provide broad constitutional protection for unrestricted "issue discussion" by individuals and outside groups – that the FEC and its efforts to enforce the law have encountered ongoing and serious problems in the lower courts.

The FEC has undertaken various enforcement actions and adopted regulations intended to prevent individuals and outside groups from independently spending unregulated funds, or soft money, to influence federal elections in communications that avoid the use of the "magic words." The lower courts, with few exceptions, have rejected these efforts and left the Commission with little room to address this issue.

In the separate area, however, of spending by the *political parties* on so-called "issue ads" about federal candidates – the area where much of the "issue ad" spending has occurred – it is the FEC, not the courts, that has caused the problems that have occurred.

Campaign Finance and the Supreme Court: A Track Record of Constitutional Laws

The Supreme Court in a number of cases, starting with Buckley v. Valeo in 1976, has ruled on the constitutionality of various campaign finance laws enacted at the federal and state levels. The Court for the most part has upheld the laws as consistent with the First Amendment.

BUCKLEY V. VALEO, 424 U.S. 1 (1976). The Court in *Buckley* upheld the constitutionality of key elements of the 1974 Federal Election Campaign Act (FECA), but struck down important parts of the law as well. The Court upheld limits on contributions from individuals and PACs to candidates and political parties as necessary to protect against corruption and the appearance of corruption. It upheld a system of public financing and voluntary overall spending limits for presidential primaries and general elections. It upheld a comprehensive disclosure system for campaign contributions and expenditures. The Court struck down as unconstitutional mandatory limits on overall spending by a candidate and spending of a candidate's own personal wealth and mandatory limits on independent spending by individuals and outside groups. The Court also established an express advocacy standard and "magic words" test for communications made by non-candidates and outside groups.

CALIFORNIA MEDICAL ASSOCIATION V. FEC, 453 U.S. 180 (1981). The Court upheld limits on contributions by individuals and unincorporated associations to PACs.

The FEC commissioners – without challenging the practice – have allowed the political parties to blatantly inject tens of millions of dollars of soft money into federal campaigns in the form of "issue ads" promoting and attacking federal candidates. The commissioners have simply failed to challenge the position taken by the parties that party ads about federal candidates are not subject to federal campaign finance laws, and therefore can be funded with soft money, as long as they do not contain "magic words."

The commissioners have taken this position, furthermore, despite recommendations from the agency's professional staff that this use of soft money by the parties to finance ads in federal campaigns should be challenged as illegal, and despite Supreme Court language that directly conflicts with the position taken by the parties.

To put it simply, the Supreme Court has never held that ads by candidates or political parties require express advocacy, or "magic words," in order to be covered by federal campaign finance laws.

The Supreme Court has never held that ads by candidates or political parties require express advocacy, or "magic words," in order to be covered by federal campaign finance laws.

In fact, when the Supreme Court in *Buckley* established the "magic words" test for campaign communications, it expressly did so for ads run by non-candidates and outside groups. The *Buckley* Court made clear that it was not creating the "magic words" test for ads run by candidates or political parties.

As the Court stated in *Buckley*, in construing a disclosure provision applicable to "political com-

FEC V. NATIONAL RIGHT TO WORK COMMITTEE, 459 U.S. 197 (1982). The Court upheld the requirement that solicitations for political committees affiliated with membership corporations can be restricted to "members." The Court also found that the ban on corporate expenditures serves compelling governmental interests, and thus is consistent with the First Amendment.

BROWN V. SOCIALIST WORKER COMMITTEE, 459 U.S. 87 (1982). The Court established a narrow exception to the requirement of campaign disclosure by a minor political party, where there was evidence that disclosure would result in a probability of threats, harassment, or reprisals, and reaffirmed the constitutionality of comprehensive campaign finance disclosure laws, absent such a showing.

FEC V. NCPAC, 470 U.S. 480 (1985). The Court reaffirmed its finding in *Buckley* that limits on independent spending of hard money by outside groups are unconstitutional, striking down a limit on independent expenditures by political committees on behalf of publicly financed presidential candidates.

FEC V. MASSACHUSETTS CITIZENS FOR LIFE, 479 U.S. 238 (1986). The Court reaffirmed the express advocacy standard and "magic words" test it established in *Buckley* and found that a newspaper published by a pro-life group amounted to express advocacy – rejecting the group's argument that it was "issue discussion." The Court then upheld the ban on corporate contributions and expenditures by carving out a narrow exemption from the ban for incorporated nonprofit groups

mittees," public communications by candidates and political committees (including political party committees) "are, by definition, campaign related."[460] Expenditures for public communications by candidates and parties "can be assumed to fall within the core area" of the campaign finance laws.[461]

In short, the so-called "issue ads" undertaken by political parties "are, by definition, campaign related" and therefore are covered by the federal campaign finance laws, regardless of whether they contain "magic words."

There has been much confusion concerning court rulings on First Amendment protection of free speech around issues of express advocacy and the inclusion of "magic words" in political advertisements. At the heart of the confusion has been a blurring of distinctions between judicial treatment of candidates and political parties on one hand, and non-candidates and outside groups on the other.

In 1996, the Clinton and Dole presidential campaigns intentionally blurred these distinctions when they undertook multimillion-dollar television ad campaigns that blatantly promoted their federal candidacies and funded those ads with soft money.

The explosive growth of soft money "issue ads" run by the parties about federal candidates has taken place simply because the FEC has let the parties get away with it.

The explosive growth of soft money "issue ads" run by political parties about federal candidates has taken place simply because the FEC commissioners have let the parties get away with it. The political parties have been hiding behind a "magic words" screen that does not apply to them – and FEC commissioners have joined in the ruse.

that only raise and spend money provided by individuals.

AUSTIN V. MICHIGAN STATE CHAMBER OF COMMERCE, 494 U.S. 652 (1989). The Court upheld a state law banning independent expenditures by corporations on behalf of candidates, holding that a ban on corporate expenditures in campaigns prevents corruption and the appearance of corruption by reducing the threat that huge corporate treasuries will be used unfairly to influence elections.

MCINTYRE V. OHIO ELECTIONS COMMISSION, 514 U.S. 334 (1995). The Court invalidated a state law banning anonymous distribution of campaign literature, including discussion of issues in ballot initiative elections. In so doing, the Court expressly distinguished the campaign finance disclosure requirements for candidate campaigns that it had upheld in *Buckley*, and that it reaffirmed as justified by the compelling governmental interest in deterring corruption.

COLORADO REPUBLICAN CAMPAIGN COMMITTEE V. FEC, 518 U.S. 604 (1996)(*Colorado I*). The Court struck down a limit on independent expenditures of hard money in federal campaigns by political parties, but reserved for another occasion the question of the constitutionality of a limit on coordinated expenditures of hard money in federal campaigns by the parties.

NIXON V. SHRINK MISSOURI GOVERNMENT PAC, 528 U.S. 377 (2000). The Court reaffirmed its decision in *Buckley* that contribution limits are constitutional, in

The failure of the FEC to enforce the law here – standing idly by while both political parties spend huge sums of soft money on thinly veiled campaign ads about federal candidates – is the agency's own fault and cannot be blamed on any cases the FEC has lost in court on the express advocacy issue.

A Brief History of Express Advocacy

The express advocacy issue first arose in *Buckley*, when the Supreme Court struck down a provision in the FECA, which imposed a limit on independent expenditures "relative to" a candidate.[462] In evaluating this provision, the Court first considered whether it was unconstitutionally vague.

The Court proceeded to interpret the statutory language to save it from a void for vagueness challenge, by construing the phrase "relative to [a candidate]" to apply only to expenditures that "in express terms" advocate the election or defeat of a clearly identified candidate.[463] The Court said that this construction "would restrict the application" of this section "to communications containing express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' [and] 'reject.'"[464]

The *Buckley* Court was clear and precise about what was covered by the independent expenditure limit, and that provision was thus found not to be unconstitutionally vague. But the Court then found the provision unconstitutional on other grounds.[465]

To save the legislation from another vagueness challenge, the Court in *Buckley* also construed a disclosure provision that applied to expenditures "for the purpose of influencing" federal elections, by persons other than political committees or candidates, to cover only those funds "used for communications that expressly advocate the election or defeat" of a candi-

upholding the constitutionality of a state law contribution limit of just over $1,000.

FEC V. COLORADO REPUBLICAN FEDERAL CAMPAIGN COMMITTEE, 533 U.S. 431 (2001)(*Colorado II*). The Court upheld the constitutionality of limits on expenditures of hard money in federal campaigns by political parties that are coordinated with their candidates.

date.[466] Communications by candidates and political committees, the Court said, are "by definition, campaign related," and therefore the applicable disclosure provision is not subject to the narrowing test.[467]

In *FEC v. Massachusetts Citizens for Life (MCFL)*, the Court revisited this issue and again relied on the narrow express advocacy test. Here, the Court was deciding whether Section 441b – the general ban on corporate expenditures "in connection with" an election – applied to a newsletter published by an incorporated pro-life group. The Court held that the potential overbreadth of the statutory language required the same kind of limiting interpretation – that it be construed to apply only to an expenditure that constitutes express advocacy.[468]

But the *MCFL* Court further held that the newsletter at issue did amount to express advocacy even though the newsletter was more indirect in exhorting support for a candidate than the examples given by the Court in *Buckley*. The newsletter at issue urged voters to vote for "pro life" candidates, and then identified candidates meeting that description. The *MCFL* Court said the newsletter "provides, in effect an explicit directive: vote for these (named) candidates. The fact that this message is marginally less direct than 'Vote for Smith' does not change its essential nature."[469]

The Supreme Court has not returned to the express advocacy issue since a 1986 decision. Meanwhile, the problem has magnified dramatically.

The Supreme Court has not returned to the express advocacy issue since its *MCFL* decision in 1986. Meanwhile, the problem has magnified dramatically.

In 1986, the use of "issue ads" as a vehicle to influence federal elections was a marginal practice. Since then it has mushroomed into a huge problem with millions of dollars from corporate and labor groups – money that is banned in federal elections – flowing into federal campaigns in the form of "issue ads," and of federally illegal soft money being spent by political parties to influence federal campaigns.

The FEC has not addressed this problem, which has led to ever increasing amounts of corporate and union soft money being spent by political parties and outside groups on ads that are plainly – and plainly intended to be – campaign ads.

The federal courts, for the most part, have rejected the efforts made by the FEC to broaden or revise the interpretation of the "magic words" test established by the Supreme Court in *Buckley* insofar as spending by outside groups is concerned.

As a result, there has been a growing use in recent years of so-called "issue ads" that directly promote or attack federal candidates and are indistinguishable from "campaign ads," but that are not subject to any federal campaign finance limits or disclosure requirements because they do not use "magic words" like "vote for" or "vote against."

The question at the core of the problem is whether only communications containing the so-called "magic words" listed by the Court in *Buckley* and *MCFL* can be covered by campaign finance laws, or whether some different definition of express advocacy that avoids problems of vagueness and overbreadth can be formulated by Congress or by the FEC.

The FEC won an early test case on this issue. In *FEC v. Furgatch*,[470] the Ninth Circuit agreed with the FEC's claim that regulated campaign ads can include those ads which use phrases beyond the limited list of "magic words."

But a number of other federal courts have disagreed. When the FEC issued a regulation in 1995 to codify the *Furgatch* ruling, by defining express advocacy to include ads where "reason-

able minds could not differ as to whether [the ad] encourages actions to elect or defeat" a candidate, a district court in Maine held the regulation unconstitutional and the First Circuit Court of Appeals affirmed that decision.[471]

Similarly, several other circuit courts – including the Second, Fourth, and Fifth Circuits – have been sharply hostile to the Commission's attempts to apply campaign finance laws to communications that do not include "magic words."[472]

Some lower court rulings on this matter have expressed sympathy with the FEC's flexible position on "magic words" in light of the realities of modern campaign communication, but those courts have felt bound by the Supreme Court's rulings in *Buckley* and *MCFL*. They have been unwilling to expand the definition of express advocacy without a clear signal from the Supreme Court that it is permissible to do so.[473]

Although the Supreme Court has been asked several times, by parties on both sides of the issue, to review lower court decisions ruling on the scope of express advocacy, it has declined to take any case presented to it on this subject.

This issue, however, is expected to reach the Supreme Court as a result of the provisions in the McCain-Feingold campaign finance law enacted in March 2002, which apply campaign finance rules to include broadcast communications about federal candidates that are made close to an election.[474] Several cases have been filed challenging the constitutionality of these provisions.[475]

The recent and growing practice of political parties and their federal candidates raising and spending tens of millions of dollars in soft money to influence federal campaigns, is not the result of court decisions but rather of FEC inaction.

For example, when the 1996 Clinton and Dole presidential campaigns and their political parties began spending tens of millions of soft money dollars on ads blatantly promoting their federal campaigns, the FEC commissioners did nothing.

The presidential candidates and their political parties, meanwhile, defended their use of soft money to fund these multimillion-dollar ad campaigns by claiming they were "issue ads" that did not contain "magic words," and therefore did not have to be limited to regulated contributions.

Following the 1996 presidential election, the general counsel and audit staff of the FEC – consistent with the language of the Supreme Court in *Buckley* – twice rejected this argument.

First in its post-election audit of the 1996 presidential candidates, and then in the context of pursuing an enforcement matter, the FEC professional staff recommended that the Commission pursue legal action against the Clinton and Dole presidential campaigns.[476]

The professional staff recommended that the FEC find that a number of the ads were campaign ads in support of federal candidates, and as such could not be legally funded with soft money, regardless of whether they contained "magic words" or not.[477]

In both the audit proceeding and the subsequent enforcement proceeding, the FEC commissioners rejected the recommendations of their professional staff and refused to pursue any action against the presidential campaigns and their political parties.[478] The commissioners allowed the soft money-funded ad campaigns to stand unchallenged.

In so doing the FEC commissioners established that ads run by political parties, about federal candidates, that do not contain "magic words," could be financed by soft money raised by those federal candidates, no matter how much the ads promote or attack a federal candidate. The commissioners thereby sanctioned the blatant misuse of unlimited soft money by presidential and congressional candidates to support their federal campaigns.

This systemic abuse quickly spread to congressional races.

In the 2000 election cycle, numerous Senate candidates made the use of soft money even more blatant. Those Senate campaigns established joint fundraising committees with their

political parties, which directly raised soft money that was then spent by their political parties to support the campaigns. *(See page 92.)*

In conclusion, while efforts by the FEC to prevent the use of soft money by outside groups to influence federal campaigns were largely frustrated by the courts, the exploding use of soft money by federal candidates and their political parties to influence federal campaigns was a problem caused by the inaction of the FEC commissioners and did not arise from the courts.

Endnotes

[1] *Rethinking the FEC*, The Washington Post, Mar. 5, 1999.

[2] *See, e.g.*, Comm'r S. Thomas and J. Bowman, *Obstacles to Effective Enforcement of the Federal Election Campaign Act*, 52 Admin. L. Rev. No. 2 (Spring 2000) at 577.

[3] B. McAllister, *FEC Admits Failures in Plea for Funding; Agency Outlines Wide Probe of '96 Campaign*, The Washington Post, Jan. 31, 1997; A. LaForge, *The Toothless Tiger – Structural, Political and Legal Barriers to Effective FEC Enforcement: An Overview of Recommendations*, 10 Admin. L. J. 351 (1996).

[4] Statement of Senator Reid, 135 Cong. Rec. 21,329 (Sept. 21, 1989).

[5] *A Law and Order Issue*, The Washington Post, Sept. 28, 1998.

[6] D. Broder, *Watchdog Without a Bite?*, The Washington Post, May 21, 1995.

[7] *Muzzled Watchdog*, Roll Call, June 24, 1996.

[8] J. Barnes, *Wobbly Watchdog*, National Journal, April 2, 1994.

[9] B. Weiser and B. McAllister, *The Little Agency that Can't*, The Washington Post, Feb. 12, 1997.

[10] B. Jackson, *Open Up Federal Campaign Finance*, The Wall Street Journal, July 21, 1984.

[11] *FECkless: Daring Doolittle*, The Wall Street Journal, Jan. 17, 1997; *See also* A. Keller & R. Van Dongen, FECkless, Roll Call, June 23, 1997; C. Babcock, *FEC-less*, The Washington Post, Dec. 6, 1992.

[12] J. Shenk, *Designed for Impotence*, U.S. News & World Report, Jan. 20, 1997.

[13] *The Failure-to-Enforce Commission: A Common Cause Study of the Federal Election Commission*, Common Cause, Sept. 1989.

[14] B. Weiser and B. McAllister, *supra* n. 9.

[15] B. Jackson, "Introduction," Broken Promise (Priority Press 1990), p. 2.

[16] J. Price, *Kerrey Backs Crackdown on Candidate Using Illegal Funds*, The Washington Times, Nov. 3, 1996.

[17] J. Shenk, *supra* n. 12.

[18] E. Carney, *Besieged FEC Gets Dissed on All Sides*, National Journal, May 24, 1997.

[19] Statement of Representative Mathis, 120 Cong. Rec. 27,473 (Aug. 8, 1974). Many Members, however, feared that without such an agency, Congress would "remain open to charges of conflict of interest and public distrust." Statement of Representative Fascell, 120 Cong. Rec. 27,472 (Aug. 8, 1974).

[20] B. Weiser and B. McAllister, *supra* n. 9.

[21] J. Koszczuk, *Money Woes Leave FEC Watchdog with More Bark than Bite*, Congressional Quarterly, Feb. 28, 1998.

[22] Comm'r S. Thomas and J. Bowman, *supra* n. 2, at 589.

[23] J. Barnes, *supra* n. 8.

[24] M. Murray, *Help Wanted: The FEC's Familiar Refrain*, National Journal, Mar. 7, 1998.

[25] J. Koszczuk, *supra* n. 21.

[26] T. Curran, *Secretary of the Senate Gets Official Nod by the President to Become Member of the Federal Election Commission*, Roll Call, Sept. 30, 1996.

[27] P. Stone, *Teaching a Lap Dog to Bite*, National Journal, Dec. 4, 1993.

[28] A. Keller and M. Preston, *FEC Recess Appointment Irks Democrats*, Roll Call, Apr. 1, 2002.

[29] D. Davidson, *Who's Afraid of the FEC?*, Oct. 3, 2000 (available at TomPaine.com).

[30] A. Keller, *Debate Rocks FEC*, Roll Call, Mar. 4, 2002.

[31] *Id.*

[32] *Id.*

[33] D. Mason, *Don't Gag FEC Commissioners on Reform*, Roll Call, Feb. 28, 2002.

[34] A. Hunt, *Don't Stop at McCain-Feingold*, The Wall Street Journal, Feb. 21, 2002.

[35] *Id.*

[36] A. Clymer, *Foes of Campaign Finance Bill Plot Legal Attack*, The New York Times, Feb. 17, 2002.

[37] B. Smith, *Enron Didn't Corrupt Washington*, The Wall Street Journal, Feb. 12, 2002.

[38] B. Smith, *The Gaggers and the Gag-Making: Hypocrisy among the campaign-finance reformers*, National Review, Mar. 11, 2002.

[39] A. Keller, *supra* n. 30.

[40] *FEC Lobbyists*, Roll Call, Feb. 21, 2002.

[41] A. Keller, *FEC Recusals Sought*, Roll Call, Apr. 11, 2002.

[42] J. Cummings, *Louisiana Republican Gives Election Panel a 'No' Vote*, The Wall Street Journal (Interactive Edition), Dec. 15, 1997.

[43] D. Broder, *supra* n. 6.

[44] C. Babcock, *Master Gets Hot, Leaves Watchdog in a Fiscal Freeze*, The Washington Post, June 17, 1994.

[45] J. Shenk, *supra* n. 12.

[46] Comm'r S. Thomas and J. Bowman, *supra* n. 2.

[47] *See* J. Koszczuk, *supra* n. 21.

[48] *See* Comm'r S. Thomas and J. Bowman, *supra* n. 2, at 582.

[49] *See* Comm'r S. Thomas, Statement of Reasons, In the Matter of College Republican National Committee, Pre-MUR 395 (Nov. 9, 2001) at 3.

[50] *Id.*

[51] *See* Comm'r S. Thomas and J. Bowman, *supra* n. 2, at 583.

[52] *Id.* at 582.

[53] J. Koszczuk, *supra* n. 21.

[54] E. Carney, *supra* n. 18.

[55] A. Keller, *Despite 'Reason to Believe' Violation, FEC Drops Cases*, Roll Call, June 9, 1997.

[56] J. Friedly, *FEC, Swamped by Complaints, Dumps Dozens of Pending Cases*, The Hill, Jan. 28, 1998.

[57] A. Keller, *FEC Counsel Tries to Prevent His Ouster*, Roll Call, Oct. 1, 1998.

[58] *See* Federal Election Campaign Act of 1974 (the FECA), codified at 2 U.S.C. § 441b(a).

[59] *See Id.*

[60] *See Id.* at § 441a(a).

[61] *See generally* T. Corrado, "Money & Politics: A History of Federal Campaign Finance Regulation," *Campaign Finance Reform: A Sourcebook* (Brookings Institution Press 1997), pp. 25-60.

[62] B. Jackson, "The Case of the Vanishing Limits," Broken Promise (Priority Press 1990), p. 42.

[63] *See* FEC Advisory Opinion 1978-10 (AO 1978-10), pt A (Ltr. to G. Van Riper) (modifying and superceding the FEC responses to AO requests 1976-72, issued Oct. 6, 1976, and 1976-83, issued Oct. 12, 1976).

[64] *See* FEC AO 1978-10. One FEC Commissioner, Thomas Harris, said in dissent, "This sort of unexplained and inexplicable change of position on an important issue, which was carefully examined and decided two years ago, confuses those covered by the Act and discredits the Commission." *Id.* at 10,337 (Comm'r T. Harris dissenting).

[65] B. Jackson, *supra* n. 62, p. 47.

[66] Amendments to the federal election laws passed in 1979, codified at 2 U.S.C. §§ 431-439, were intended to encourage state parties to spend money on grassroots activities but the 1979 Amendments did not authorize the soft money system. Although the 1979 law held that money spent by state parties on certain grassroots activities were not subject to any limit on how much the state party could spend, the law expressly states that the money spent by the state parties for these activities had to be raised subject to federal election laws. Nonetheless, the FEC permitted the state parties to continue to allocate their spending for mixed activities between hard and soft money on the theory that the spending affected both federal and non-federal campaigns. *See, e.g.*, Pub. L. No. 93-187, 1979 U.S.C.C.A.N. (93 Stat. 1339).

[67] Common Cause v. FEC, 692 F. Supp. 1391 (D.D.C. 1987) (citing Exhibit A, Attachment 1, *Common Cause Petition for Rulemaking*, Rulemaking Record Before the Federal Election Commission, Nov. 7, 1984).

[68] Common Cause v. FEC, 692 F. Supp. 1391, 1396 (D.D.C. 1987).

[69] Common Cause v. FEC, 692 F. Supp. 1397, 1399 (D.D.C. 1988).

[70] *Id.* at 1401 (quoting transcript of hearing).

[71] F. Wertheimer, *Bush and Dukakis Took Illegal Money*, The New York Times, Feb. 1, 1989.

[72] *Waking Up the FEC*, The New York Times, Mar. 31, 1997.

[73] K. Doyle, *BNA Publishes Statements of Commissioners Who Voted to Dismiss 1996 Issue Ad Cases*, Money and Politics Report, July 20, 2000 (quoting Comm'r S. Thomas).

[74] L. Noble, FEC General Counsel, Recommendation, "Soft Money Rulemaking; Analysis, Recommendations and Draft Final Rules," Agenda Doc. No. 00-95 (Sept. 21, 2000) at 2.

[75] N. Gordon, *The New York City Model: Essentials for Effective Campaign Finance Regulation*, Journal of Law and Policy, vol. 6 no. 1, 1997, at 83.

[76] *Campaign Finance Reform, In Action*, The New York Times, Nov. 7, 1993.

[77] J. Newfield, *Time to Vote Out Board of Elections,* New York Post, Sept. 24, 1997.

[78] N. Gordon, *supra* n. 75, at 84-90.

[79] *Rethinking the FEC*, *supra* n. 1.

[80] "Standards in Public Life: The Funding of Political Parties in the United Kingdom," 5th Report of the Committee on Standards in Public Life (Oct. 1998) (available at www.public-standards.gov/uk).

[81] *See* "The Canada Elections Act," Bill C-2, cls. 13-21, 479-521 (Oct. 15, 1999, as revised Mar. 9, 2000), Royal Assent: May 31, 2000, Stats. of Canada 2000, c. 9 (available at www.elections.ca/content.asp).

[82] "The Canadian Electoral System," Parliamentary Research Branch (Mar. 1997) (available at www.elections.ca/content.asp).

[83] The Project FEC Task Force considered but rejected the idea of establishing an outside advisory board to over*see* the administrator. Although there are important roles an advisory board could play in insulating the administrator from outside interference and supporting the administrator's actions and budget requests, there are also dangers that the appointees to such an advisory board would be subject to the same political pressures that undermine the performance of the current FEC commissioners. The Task Force believes that adequate oversight will come through normal congressional procedures and through judicial review of agency actions.

[84] *Rethinking the FEC*, *supra* n. 1.

[85] H. Dewar, *Ethics: Can the Senate Police Its Own?*, The Washington Post, (Feb. 5, 2002).

[86] *See* 31 U.S.C. § 703(b).

[87] *See* M. Breger & G. Edles, *Established by Practice: the Theory and Operation of Independent Federal Agencies*, 52 Admin. L. Rev. 1111, 1255-56 (2000).

[88] The deputy administrator should also be a presidential appointment, confirmed by the Senate, with a salary in the range of Executive Level III (as are the deputy administrators of the EPA and NASA). *See* 5 U.S.C.A. § 5314 (listing positions at Level III). *See also* 5 U.S.C.A. app. 1, Reorganization Plan no. 3 of 1970 ("There shall be in the Agency a Deputy Administrator of the Environmental Protection Agency who shall be appointed by the President, by and with the advise and consent of the Senate. The Deputy Administrator shall perform such functions as the Administrator shall from time to time assign or delegate, and shall act as Administrator during the absence or disability of the Administrator or in the event of a vacancy in the office of the Administrator.").

[89] U.S. Const. Art. II, § 2, cl. 2 (Appointments Clause).

[90] *See generally* M. Breger & G. Edles, *supra* n. 87.

[91] *Id.*

[92] *See* FEC v. NRA Political Victory Fund, 513 U.S. 88, 115 S. Ct. 537, cert. dismissed for want of jurisdiction, (Dec. 6, 1994). *See generally* A. Tempchin, *Fall from Grace: Federal Election Commission v. NRA Political Victory Fund and the Demise of the FEC's Independent Litigating Authority*, 10 Admin. L.J. Am. U. 385 (1996).

[93] *See* 2 U.S.C. § 437g.

[94] Administrative law judges are a special class of federal employees provided with guarantees of decisional independence in the Administrative Procedure Act (the "APA"). While they are employed by the individual agencies, of which there are approximately 30, they are selected based on a merit selection process administered by the Office of Personnel Management, they can only be removed or disciplined for good cause after a hearing before the Merit Systems Protection Board, their salary is set by statute, they are not subject to performance ratings, and they cannot be supervised by prosecutors or investigators or assigned duties inconsistent with their role as judges. *See* 5 U.S.C. §§ 554(d), 1305, 3105, 3344, 5372, 7521. *See generally* J. Lubbers, *Federal Administrative Law Judges: A Focus on Our Invisible Judiciary*, 33 Admin. L. Rev. 109 (1981).

[95] Agencies are free to organize their appeals processes as they *see* fit under the APA. *See generally* R. Weaver, *Appellate Review in Executive Departments and Agencies*, 48 Admin. L. Rev. (1996).

[96] Congress should so specify in the statute, to avoid the default provision in the APA for district court review. District court review would be unnecessarily repetitive, since the agency would have already conducted a trial-type hearing. Direct review in the courts of appeals on the administrative record is therefore preferable. An alternative is to provide for exclusive review in one circuit court, such as the U.S. Court of Appeals for the Federal Circuit, which has exclusive jurisdiction over a number of disparate federal appeals, but the Task Force believes that the benefits of generalist review and convenience to the litigants outweigh the benefits of centralized review.

[97] C. Diver, *The Assessment and Mitigation of Civil Money Penalties by Federal Administrative Agencies*, 79 Col. L. Rev. 1435 (1979). In this survey of 348 civil money penalty statutes for the Administrative Conference of the United States, Professor Diver found that in 141 (41%), Congress had expressly conferred upon an agency the authority to "assess" the penalty. He called these statutes "administrative-assessment" statutes.

[98] H. Goldschmid, *An Evaluation of the Present and Potential Use of Civil Money Penalties as a Sanction by Federal Administrative Agencies*, Report to the Administrative Conference of the United States (1972) (cited in Atlas Roofing Co. v. OSHRC, 518 F.2d 990 (5th Cir. 1975), aff'd, 430 U.S. 432 (1977)). This report led the Administrative Conference of the United States to issue ACUS Recommendation 72-6, *Civil Money Penalties as a Sanction*, 38 Fed. Reg. 19,782 (July 23, 1973) (available at www.law.fsu.edu/library/admin/acus/acustoc.html).

[99] *See* Atlas Roofing, 430 U.S. 442, *supra* n. 98; Tull v. United States, 481 U.S. 412 (1987).

[100] In 1993, the Fourth Circuit rejected a claim that an administrative imposition of a civil penalty for violation of the Clean Water Act after an ALJ hearing violated the Seventh Amendment right to jury trial. *See* Sasser v. EPA, 990 F.2d 127 (4th Cir. 1993). A year later, the Ninth Circuit rejected claims that the administrative imposition system for violating banking laws violated separation of powers principles, the right to a jury trial and the right to due process. *See* Simpson v. Office of Thrift Supervision, 29 F.3d 1418 (9th Cir. 1994). *See also* Noriega-Perez v. United States, 179 F.3d 1166 (9th Cir. 1999) (upholding a civil penalty statute with penalty provisions for document fraud).

[101] *See* C. Diver, *supra* n. 97.

[102] Pub. L. No. 91-596, 84 Stat. 1606 (1970), codified at 29 U.S.C. § 651 *et seq*.

[103] *See, e.g.*, 33 U.S.C. § 1319(g).

[104] *See, e.g.*, The Financial Institutions Reform, Recovery and Enforcement Act of 1989, Pub. L. No. 101-73, 101 Stat. 183 (Title IX) (creating administrative civil money penalty authority in the various bank regulatory agencies).

[105] The Securities and Exchange Commission (SEC), for example, was given the authority to use an administrative imposition process in 1990. *See* A. Laby and W. Callcott, *Patterns of SEC Enforcement Under the 1990 Remedies Act: Civil Money Penalties*, 58 Albany L. Rev. 5 (1994).

[106] *See* C. Diver, *supra* n. 97.

[107] FECA, Section 309(a)(4), codified at 2 U.S.C. § 437(g)(a)(4). The Amendments were enacted as part of the Treasury and Government General Appropriations Act of 2000, Pub. L. No. 106-58, 106th Cong., § 640, 113 Stat. 430, 476-477 (1999).

[108] The FEC's implementing regulations for this provision are found at 11 C.F.R. pt 111, subpt B. The FEC issued proposed regulations to implement these provisions, Proposed Rules 11 C.F.R. pts 104, 111, 65 Fed. Reg. 16,534 (Mar. 29, 2000), and final regulations at 65 Fed. Reg. 31,787 (May 19, 2000). The preambles to the proposed and final rules address due process considerations for the purely written hearing offered under this provision. *See also* FEC Press Release, "FEC Issues Final Rules On Administrative Fines Procedure" (May 31, 2000) (available at www.fec.gov).

[109] *See generally* W. Funk, *Close Enough for Government Work? – Using Informal Procedures for Imposing Administrative Penalties*, 24 Seton Hall L. Rev. 1 (1993). For a description of the more typical APA adjudication process used by the EPA in larger penalty cases, *see* R. Wagner, *The U.S. EPA Administrator's Assessment of Civil Penalties: A Review of the Sources of Authority and the Administrator's Regulations*, 22 Wm. & Mary Envtl. L. & Pol'y Rev. 149 (1997).

[110] *See* Administrative Conference of the United States Recommendation No. 93-1, *Use of APA Former Procedures in Civil Money Penalty Proceeding*, 58 Fed. Reg. 45,409 (Aug. 30, 1993) (drawing from W. Funk, *supra* n. 109).

[111] *See* Administrative Conference of the United States, Recommendation No. 86-7, *Case Management as a Tool for Improving Agency Adjudication*, 51 Fed. Reg. 46,989 (Dec. 30, 1986), codified at 1 C.F.R. § 305.86-7.

[112] "Standards in Public Life: the Funding of Political Parties in the United Kingdom," *supra* n. 80, at 150.

[113] The Project FEC Task Force considered but rejected a proposal to reorganize the Criminal Division to create a separate section dedicated to enforcement of the campaign finance laws. The Task Force believes that experience with the Independent Counsel Act would likely undermine any effort to create a prosecution unit devoted solely to the campaign finance laws. The Task Force recommends that the GAO conduct a study of the Criminal Division to review whether there are additional measures that can be taken to improve enforcement.

[114] This procedure is authorized by 42 U.S.C. § 200e-5(F)(1). For a description of how the courts have reviewed EEOC right-to-sue letters, *see* B. Sullivan, *On the Borderlands of Chevron's Empire: An Essay on Title VII, Agency Procedures and Priorities, and the Power of Judicial Review*, La. State L. Rev. (forthcoming 2002).

[115] B. Weiser & B. McAllister, *supra* n. 9.

[116] FECA, Pub. L. No. 92-225, 86 Stat. 3 (1972) (codified as amended at 2 U.S.C. §§ 431-55).

[117] FECA Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (1994) (codified as amended at 2 U.S.C. §§ 431-55). The Senate passed the 1974 Amendments by a margin of 60-16. Cong. Rec. 34,392 (Oct. 8, 1974). The House passed the 1974 Amendments by a margin of 365-24. Cong. Rec. 35,148 (Oct. 10, 1974).

[118] Buckley v. Valeo, 424 U.S. 1, 109 (1976) (discussing the constitutionality of FEC powers to administer the Act). The FEC was established to "administer, *see*k to obtain compliance with, and formulate policy." 2 U.S.C. § 437c(b)(1).

[119] *See* 2 U.S.C. § 437d(e) ("Except as provided in sections 437g(a)(8) of this Title, the power of the Commission to initiate civil actions under subsection (a)(6) of this section shall be the exclusive remedy for the enforcement of the provisions of this Act.").

[120] FEC v. Democratic Senatorial Campaign Committee, 454 U.S. 27, 37 (1981) (quoting Buckley, *supra* n. 118, at 112).

[121] *See generally* FECA codified at 2 U.S.C. § 437d (explaining powers of FEC). Senator Clark noted the "special significance" of the "Commission's civil enforcement authority" because it would "help insure that correction of election law violations [would] not depend entirely on action by a Department of Justice that has traditionally ignored such abuses." 120 Cong. Rec. 35,377 (Oct. 8, 1974) (statement of Senator Clark); *See also* 120 Cong. Rec. 27,472 (Aug. 8, 1974)(statement of Representative Mathis) (stating "[t]here have been over 5,000 violations of the 1971 Act referred to the Department of Justice for prosecution, and I am informed that there have been *three* which have been followed through on.") (emphasis supplied.).

[122] Comm'r S. Thomas & J. Bowman, *supra* n. 2.

[123] *See* 2 U.S.C. § 437g(a)(1).

[124] FEC Annual Report 1999, at 17 (available at www.fec.gov).

[125] 2 U.S.C. § 437g(a)(2).

[126] *See* 2 U.S.C. § 437d.

[127] *See* 2 U.S.C. § 437g(a)(3).

[128] *See* FEC v. Lance, 617 F.2d 365, 367-68 (5th Cir. 1980). This subpoena enforcement case lasted three-and-a-half years.

[129] 2 U.S.C. § 437g(a)(3).

[130] *See Id.*

[131] *See Id.*

[132] 2 U.S.C. § 437g(a)(4)(A)(i).

[133] *See* 11 C.F.R. § 111.18(d).

[134] 2 U.S.C. § 437g(a)(6)(A).

[135] 2 U.S.C. § 437g(a)(2).

[136] 2 U.S.C. § 437g(a)(3).

[137] *See* Comm'r S. Thomas & J. Bowman, *supra* n. 2 (noting that "from 1980 to 1996, total election disbursements increased by 256.5%, yet the FEC staff increased by only 14%); *See also* PricewaterhouseCoopers, LLP, Technology and Performance Audit and Management Review of the FEC at ES-5, 11 (1999), available at www.gao.gov/special.pubs/publist.htm. ("Because of limited staff resources and increasing case complexity, current volumes of enforcement cases appear to exceed FEC disposition capacity. … Because of case complexity and the increasing number respondents, important enforcement actions may not be activated in the future or may be dismissed for lack of resources.").

[138] *See* FECA, 2 U.S.C. § 437c(a)(1).

[139] M. Murray, *supra* n. 24.

[140] Comm'rs D. McDonald, S. Thomas & K. Sandstrom, Statement of Reasons, In the matter of RNC, MURs 4382, 4401 (Dec. 7, 2001) at 1.

[141] Comm'rs S. Thomas & D. McDonald, Statement of Reasons, In the matter of RNC, MUR 4250 (Jan. 28, 2000) at 1.

[142] *Id.* at 12.

[143] *Id.* at 16.

[144] *See* K. Doyle, "FEC Deadlocked Vote Means Key Issue Will Not Be Presented to Supreme Court," BNA Money & Politics Report (Dec. 21, 2001) at 1 (citing Virginia Society for Human Life v. FEC, 4th Cir. Nos. 00-1252 and 00-1332).

[145] Comm'rs S. Thomas & D. McDonald, Statement for the Record, *Commission Failure to File an Amicus Brief in Support of the Petitioners in Nixon v. Shrink Mo. Gov't PAC* (May 28, 1999) at 1.

[146] *See* 19 U.S.C. § 1330(a) (1994).

[147] 19 U.S.C. § 1330(d)(5).

[148] B. Weiser & B. McAllister, *supra* n. 9.

[149] *See* Comm'r S. Thomas & J. Bowman, *supra* n. 2, at 46 (citing FEC study of 4,725 FEC votes from 1983 through 1999, which found that only 121 votes, or 2.56 percent, resulted in a 3-3 or 3-2 margin). *See* "Questions for the Record submitted by the House Appropriations Committee, Subcommittee on Treasury, Postal Service and General Government, in conjunction with the Hearing on FEC's FY 2000 Budget Request" (March 9, 1999) at 40.

[150] *Id.*

[151] FEC Information Division, Memorandum to Regulated Community re: 11 C.F.R. Parts 104, 111 (June 2000).

[152] FEC Press Release, "Committees Fined for Filing Reports Late" (Oct. 11, 2001).

[153] Summary notice 2000-10, 65 Fed. Reg. 31,787, *supra* n. 108.

[154] FEC Annual Report 2000, at 13-14 (available at www.fec.gov).

[155] J. Shenk, *supra* n. 12.

[156] The original statutory mechanism in the 1974 Act was for one commissioner to be selected by the majority leader in the Senate and one by the minority leader, one to be selected by the majority leader of the House and one by the minority leader, and two to be selected by the President. All six appointees were to be confirmed by a majority of both houses of Congress.

[157] Buckley, *supra* n. 118, at 111.

[158] M. Murray, *supra* n. 24.

[159] R. Mutch, Campaigns, Congress and Courts (Praeger 1988), p. 105.

[160] A. Kamen, Filling the FEC: Who Will Choose?, The Washington Post, Oct. 11, 1993.

[161] Prior to her second appointment in 1987, Commissioner Elliott, a former American Medical Association (AMA) PAC official, had voted against an investigation of the AMA's PAC. After accusing Elliott of unethical conduct, Representative Fortney (Pete) Stark (D-CA) sued the FEC, seeking a federal court order to reopen the AMA case.

[162] At the White House's request, Senator Dole submitted an alternative candidate for the White House to consider – an accommodating stance never adopted by the successor Republican Senate Majority Leader, Trent Lott.

[163] P. Stone, *supra* n. 27; cf. J. Barnes, *Sparks from an FEC Lightning Rod*, National Journal, Sept. 30, 1995.

[164] *Filling FEC Seats*, National Journal, Oct. 28, 1993. *See also* G. Simpson, *Dole Backs Elliott for Third FEC Term*, Roll Call, Sept. 30, 1993.

[165] J. Barnes, *Now a Third FEC Vacancy*, National Journal, Sept. 2, 1995.

[166] E. Zuckerman, *Memo to President Clinton: Seat at Federal Election Commission Has Been Vacant for Three Months*, Political Finance & Lobby Reporter, Jan. 26, 1996. With respect to Shepherd's known commitment to campaign finance reform, Zuckerman writes, "[This commitment] may be a laudatory position for a legislator, but it is a dangerous one for a potential FEC commissioner who must interpret and enforce the law as he or she believes it does require, not according to what one might believe it ought to require."

[167] Interview with Michael Waldman, in Washington, DC (2001). *See also* J. Barnes, *supra* n. 165 ("I think [appointing] philosophical independents makes sense. Practically, you've got to sell that to a Congress comprised of Republicans and Democrats, and they are going to ask, 'How do I know that they aren't going to vote for the other party?'").

[168] T. Curran, *Shakeup at Election Agency*, Roll Call, Sept. 4, 1995.

[169] C. Karmin, *GOP Nominee for FEC Has Ties to FEC's Critics,* The Hill, Feb. 21, 1996.

[170] T. Burger & T. Curran, *Dole Taps Senate Secretary for FEC*, Roll Call, June 6, 1996; E. Carney, *FEC Slots Likely to Stay on Hold*, National Journal, June 15, 1996 (stating that few expect Clinton to act before the 1996 election).

[171] *See* J. Shenk, *supra* n. 12.

[172] T. Curran, *Secretary of the Senate Gets Official Nod by the President to Become Member of the Federal Election Commission*, Roll Call, Sept. 30, 1996.

[173] *Id.*

[174] *See* A. Kamen, *A Familiar Face for a Fresh Look*, The Washington Post, Jan. 15, 1997.

[175] Associated Press, *Lott Vows to Block Nominations Until FEC Seats Filled*, The Washington Post, Jan. 16, 1997.

[176] When President Clinton declined to make a matching Democratic nomination, and the Senate Rules Committee failed to schedule a confirmation hearing, Johnston withdrew himself from consideration. See A. Keller & R. Van Dongen, *supra* n. 11.

[177] *Campaign Reform Advisers Tell Clinton to Fill Seats at Election Agency*, Political Finance & Lobby Reporter, June 25, 1997.

[178] *Id.*

[179] A. Keller & R. Van Dongen, *President to Move This Week on FEC Appointments*, Roll Call, June 23, 1997 (quoting White House Spokesman Joe Lockhart).

[180] Interview with Michael Waldman, *supra* n. 167.

[181] A. Keller & R. Van Dongen, *supra* n. 179. President Clinton's decision to renominate the two Commissioners holding Democratic seats was puzzling to observers who thought he would pay more attention to the Mondale-Kassebaum Baker letter calling for a "clean break with the past." *Campaign Reform Advisers Tell Clinton to Fill Seats at Election Agency*, *supra* nn. 177, 178.

[182] A. Keller, *Senate Republicans Scramble to Find Replacement for FEC Commissioner*, Roll Call, Sept. 15, 1997 (reporting that there arose doubts about Soudriette's ability to win confirmation because he "was not partisan enough to satisfy the GOP Senators who would be voting to confirm him").

[183] *Id.*

[184] A. Keller, *Hoping Fourth Time's the Charm, Lott Taps Heritage Foundation's Mason to Fill FEC Commissioner Spot*, Roll Call, Sept. 18, 1997.

[185] *See* M. Murray, *supra* n. 24.

[186] *See* A. Keller, *Stalled FEC Nominations Finally Move in the Senate*," Roll Call, July 23, 1998.

[187] When Smith's name first surfaced, it became clear that he was actually the hand-picked candidate of the most vehement and powerful opponent of campaign finance reform regulation, Senator McConnell, who apparently had successfully prevailed upon Senator Lott to support his choice. Indeed, at the time Smith's name was first mentioned in Washington as a likely FEC nominee, Senator Lott, when asked to comment on the rumors, was unable to recall who Brad Smith was.

[188] *See* J. Rosenkranz, *Brad Smith: Radically Wrong for the FEC*, Brennan Center for Justice, Mar. 6, 2000, at 1 ("Even [Smith] had trouble believing the nomination was serious. As he tells it, 'My first thought was, they've got to be looking at me to put my name on the list so that whoever they really want will look less radical.'") (available at www.brennancenter.org/programs).

[189] B. Smith, *Why Campaign Finance Reform Never Works*, The Wall Street Journal, March 19, 1997. In other writings, Smith does suggest that a post-FECA FEC would continue to have an important role to perform in monitoring disclosure requirements, but it was his adamant opposition to the contribution limit laws that provided most of his critics with their most serious objections to his candidacy.

[190] A. Keller, *Candidate for FEC Defends Record*, Roll Call, June 7, 1999.

[191] *See* A. Keller, *FEC Nominee Under Fire Democrats Attack Smith*, Roll Call, Feb. 24, 2000) (quoting Senator Charles Schumer (D-NY): "[P]utting [Smith] in charge of the FEC is like [appointing] as warden someone who opposes the prison system.").

[192] *See*, *e.g.*, R. Pilon, *Mr. Smith, Welcome to Washington*, Cato Institute Briefing Papers no. 49, July 30, 1999, at 4 (suggesting that the "troika" of campaign finance reform groups – Common Cause, Democracy 21, and the Brennan Center for Justice – has "turned increasingly to the FEC – an agency they have largely 'captured' – pressing it to make rules and bring enforcement actions ... to 'reform' the system along their favored lines.").

[193] *See also* Testimony of Bradley A. Smith, Nominee, Federal Election Commission, before the Senate Committee on Rules and Administration, 105th Cong., 1st Sess. (March 8, 2000) at 14-15, (suggesting that "certain outside groups and editorial writers opposed to this nomination have relied on invective and ridicule to try to discredit me.") (hereinafter, "Smith Senate Rules Committee Testimony"). Smith strongly objected to his opponents' analogies to controversial figures like Larry Flynt and James Watt. The purpose of the analogies was to make the *structural* point that appointing such a strong opponent of the FECA to the FEC was analogous to asking an opponent of obscenity regulations to enforce the Communications Decency Act, or a committed anti-environmentalist to head up the EPA. Senator John McCain's (R-AZ) choice of analogy was more flattering – appointing Smith would be like asking a conscientious objector to become Secretary of Defense – but the points underlying all such analogies were exactly the same.

[194] D. Hoffman, *Inside: The White House Resists 3rd Term for Democrat on FEC*, The Washington Post, Aug. 2, 1985 (noting that while "traditionally, presidents have honored the choice of congressional Democrats for a Democratic seat on the FEC[,] but [that] Reagan is balking at Harris"). Rather than wait for the Democrats to propose a second choice, President Reagan's Congressional Liaison Max Friedersdorf informed Senate Minority Leader Robert Byrd (D-WV) that President Reagan would instead choose a nominee with "impeccable Democratic credentials." The Senate Democratic leadership did not wait for President Reagan to propose his own choice, but instead sent a longer list of alternative choices. In the letter, they "reminded Reagan that Republicans in Congress 'fought long and hard' to prevent President Jimmy Carter from imposing an FEC appointment on them that they did not want. The Democrats pointed out that the Republicans established their 'right to participate' back then by sending the President a list, just as the Democrats [were] now giving Reagan." *Id.*

[195] The nomination had been held up by the White House while an ethics investigation was completed; the Senate Foreign Relations Committee had delayed the nominations for a number of months.

[196] *Bad Hold in the Senate*, The Washington Post, July 8, 1999. Senator Lott's own hold was placed just months after allegedly vowing to end the Senate custom of placing anonymous holds on bills and nominations. *See also* J. Bresnahan, *Lott's Secret Holbrooke Hold Spurs Criticism*, Roll Call, July 8, 1999.

[197] S. Taylor, Jr., *The President's Least Favorite Nominee*, National Journal, Feb. 26, 2000.

[198] *See* A. Keller, *Mr. Smith Finally Coming to Washington*, Roll Call, Feb. 14, 2000 (quoting White House Spokesman Joe Lockhart); R. Jackson & J. Gerstenzang, *Getting Clinton Seal of Disapproval*, Los Angeles Times, Feb. 17, 2000 (quoting Clinton's response to questions about Smith nomination at news conference).

[199] K. Seelye, *Gore Says Clinton Choice for Election Panel Is 'Unfit' for Office*, The New York Times, Feb. 16, 2000.

[200] A. Keller, *FEC Nominee Under Fire*, Roll Call, Feb. 24, 2000.

[201] *Id.*

[202] D. Boyer, *Lott Halts Move to Block Clinton Nominees*, The Washington Times, Feb. 11, 2000 (quoting White House Spokesman Jake Siewart).

[203] For example, during the debate over his nomination, Smith emphasized that even if his recommendations to wipe out all campaign finance limits were implemented, he would still support the FEC's continued existence as chief monitor of disclosure requirements.

[204] Smith Senate Rules Committee Testimony, *supra*, n. 193, at 16, 17 ("[S]hould you confirm my nomination to this seat, which I hope that you will, here is my pledge to you. First, I will defer to Congress to make law and not seek to usurp that function to an unelected bureaucracy. Second, when the Commission must choose under the law whether to act or not to act, or how to shape rules necessary for the law's enforcement, faithfulness to Congressional intent and to the Constitution, as interpreted by the courts, will always be central to my decision-making. Third, I will act to enforce the law as it is, even when I disagree with the law.").

[205] J. Rosenkranz, *supra* n. 188. ("One is forced to ask ... why an academic who has made his career by criticizing the nation's election laws would want the job of stoically enforcing those laws? The answer, of course, is that Brad Smith recognizes that federal election law, like any complex regulatory regime, is open to interpretation, and it is that process of interpretation that gives the law its meaning. Brad Smith's goal, whenever there is any room for interpretation, will doubtless be to allow federal campaign finance law to wither on the vine.").

[206] *See* D. Willis, *Mr. Smith Goes to Washington*, Campaigns & Elections, Aug. 2000.

[207] A. Keller, *supra* n. 191 (quoting Senator Robert Torricelli (D-NJ): "FEC nominees are chosen by their respective parties, and the Republican Party has the right to make the wrong choice.").

[208] D. Willis, *supra* n. 206.

[209] G. Seib, *A Campaign Cop Makes the Case against His Job*, The Wall Street Journal, Apr. 18, 2001 (citing B. Smith, Unfree Speech, (citations omitted)).

[210] J. Burns, *FEC Member Calls McCain-Feingold Bill a Corrupting Influence*, *Cybercast News* Service, April 17, 2001 (available at www.cnsnews.com).

[211] D. Broder, *supra* n. 6.

[212] *Id. See also* R. Mutch, *supra* n. 159.

[213] R. Mutch, *supra* n. 159, p. 89.

[214] *Id.* Ironically, years later, an independent audit would make this very recommendation.

[215] *Id.*

[216] One former Democratic Commissioner, Neil Staebler, recalled, "There was a serious problem ... when Wayne Hays was Chairman. ... He was against the [A]ct to begin with, and then after it was passed he tried to influence us to the extent of actually trying to change specific regulations. We strenuously resisted." B. Jackson, *supra* n. 62, p. 27.

[217] R. Mutch, *supra* n. 159.

[218] Campaign Practices Reports, May 19, 1975.

[219] *Id.*

[220] R. Mutch, *supra* n. 159, p. 96.

[221] B. Jackson, *supra* n. 62, p. 30.

[222] D. Sands, *GOP Ax Hangs Over FEC*, The Washington Times, June 11, 1996.

[223] D. Broder, *supra* n. 6.

[224] T. Curran, *Facing Cuts This Year, FEC Asks for Increase in '96 Budget Anyway*, Roll Call, Mar. 2, 1995.

[225] E. Carney, *The FEC Versus the GOP*, National Journal, July 11, 1998.

[226] J. Cummings, *supra* n. 42.

[227] D. Broder, *supra* n. 6.

[228] C. Babcock, *supra* n. 44.

[229] T. Curran, *FEC Warns of Drastic Cuts Ahead if Congress Approves 10% Decrease in Agency's '95 Funds*, Roll Call, March 13, 1995.

[230] *Regulating Congress*, The Washington Post, Mar. 8, 1995.

[231] D. Broder, *supra* n. 6.

[232] *Toothless Dog*, Roll Call, Mar. 2, 1995.

[233] D. Chappie, *FEC Ordered to Slash Staff in Its Press Office*, Roll Call, June 20, 1996.

[234] *Muzzled Watchdog*, *supra* n. 7.

[235] In March 1996, a federal judge had ruled against the FEC in a lawsuit about whether GOPAC should have registered and disclosed its activities. The FEC had claimed that GOPAC's mission was to elect a Republican Congress and that it was therefore subject to the federal election laws. Ultimately, the FEC declined to appeal the court's adverse ruling after a Republican-appointed commissioner switched from a vote supporting the lawsuit to one opposing it. *See generally*, FEC v. GOPAC, Civ. Action No. 94-0828 (D.D.C. Feb. 29, 1996).

[236] A. Shin, *The FEC Escapes the Budget Knife*, National Journal, Oct. 12, 1996.

[237] B. McAllister, *FEC Admits Failures in Plea for Funding; Agency Outlines Wide Probe of '96 Campaign*, The Washington Post, Jan. 31, 1997.

[238] *Id.*

[239] J. Harris, *Clinton Backs FEC on Funding Request*, The Washington Post, Apr. 8, 1997.

[240] A. Mitchell, *Clinton Requests More Money for Election Panel*, The New York Times, Apr. 8, 1997.

[241] In an ironic contrast to Representative Livingston's purported desire for modernization, it has been reported that Livingston's own campaign committee had been known to submit handwritten reports to the FEC: "When Livingston was demanding computers and electronic filing for candidates, there were others who simply wished Livingston would buy an old-fashioned typewriter for *his* campaign treasurer." *The Cost of Praise: $750,000 Audit Gives High Marks to FEC*, Political Finance & Lobby Reporter, Feb. 10, 1999 (emphasis supplied).

[242] A. Keller, *FEC Gets Cash for Computers, Not More Cash*, Roll Call, Apr. 28, 1997.

[243] J. Koszczuk, *supra* n. 21.

[244] Reps. C. Maloney & M. Meehan, *Obstructed View*, Letters to the Editor, Roll Call, May 4, 1998.

[245] R. Schlesinger, *Congress Turns the Tables on the FEC*, The Hill, Oct. 15, 1997.

[246] *See* M. Santora & A. Keller, *FEC Requests 15 Percent Increase in Budget, Staff*, Roll Call, Mar. 23, 1998.

[247] *Id.*

[248] A. Keller, *House Oversight Wants to Send Message with FEC Bill*, Roll Call, May 4, 1998.

[249] J. Koszczuk, *supra* n. 21.

[250] *See* A. Keller, *FEC Tries to Streamline Its Processes at House Hearing, Watchdog Agency Seeks $38.5 Million Budget for 2000*, Roll Call, May 20, 1999.

[251] *See* A. Keller and B. Pershing, *Morning Business*, Roll Call, Oct 4, 1999.

[252] A. Keller, *supra* n. 248.

[253] "Management and Operations of the Federal Election Commission," Treasury-Postal Service-General Government Subcommittee of the Committee on Appropriations, U.S. House of Representatives (June 20, 1995), Memorandum for the Chairman (June 13, 1995) at 3.

[254] *Id.* at 2.

[255] *See* "Management and Operations of the Federal Election Committee," Treasury-Postal Service-General Government Subcommittee of the Committee on Appropriations, U.S. House of Representatives, June 20, 1995, v.

[256] *See* "Management and Operations of the Federal Election Committee," Memorandum for the Chairman, *supra* n. 253 (emphasis in original).

[257] *Id.*

[258] *Id.*

[259] *Id.*

[260] J. Cummings, *supra* n. 42.

[261] *PricewaterhouseCoopers Report: Technology and Performance Audit & Management Review of the Federal Election Commission*, Executive Summary, p. ES-2 (Jan. 29, 1999).

[262] *See* A. Keller, *Audit of FEC Finds Overworked Agency*, Roll Call, Feb. 1, 1999.

[263] *Id.* "

[264] *See* "A Reporter's Guide to Money in Politics: Campaign 2000," Common Cause (Summer 2000), at A33 (citing FEC Reports).

[265] *See* "FEC Reports Increase in Party Fundraising for 2000," FEC Press Release (May 15, 2001) (available at www.fec.gov/press/051501partyfund).

[266] *See id.*

[267] *See id.*

[268] *See* 2 U.S.C. § 441b(a).

[269] *See id.*

[270] *See* 2 U.S.C. § 441a(a).

[271] B. Jackson, *supra* n. 62, p. 42.

[272] *See* FEC AO 1978-10, *supra* nn. 63, 64.

[273] *See* FEC AO 1978-10, *supra* n. 63 ("This sort of unexplained and inexplicable change of position on an important issue, which was carefully examined and decided two years ago, confuses those covered by the Act and discredits the Commission." Comm'r T. Harris, dissenting).

[274] *See* FEC AO 1979-17, Ltr. to RNC (July 17, 1979).

[275] B. Jackson, *supra* n. 62, p. 47.

[276] Amendments to the federal election laws passed in 1979, codified at 2 U.S.C. §§ 431-439, were intended to encourage state parties to spend money on grassroots activities but the 1979 Amendments did not authorize the soft money system. Although the 1979 law held that money spent by state parties on certain grassroots activities was not subject to any limit on how much the state party could spend, the law expressly states that the money spent by the state parties for these activities had to be raised subject to federal election laws. Nonetheless, the FEC permitted the state parties to continue to allocate their spending for mixed activities between hard and soft money on the theory that the spending affected both federal and non-federal campaigns. *See, e.g.*, Pub. L. No. 93-187, 1979 U.S.C.C.A.N. (93 Stat. 1339).

[277] F. Wertheimer, Ltr. to Lee Ann Elliott (Nov. 5, 1984); Rulemaking Petition: Notice of Availability, 50 Fed. Reg. 477 (Jan. 4, 1985).

[278] *Common Cause Petition for Rulemaking*, *supra* n. 67.

[279] Common Cause v. FEC, 692 F. Supp. 1391, 1396 (D.D.C. 1987) (quoting FEC Notice of Disposition, Apr. 17, 1986 (citations omitted)).

[280] *Id.*

[281] *Id.*

[282] Common Cause v. FEC, 692 F. Supp. 1397, 1401 (D.D.C. 1988).

[283] *See* 11 C.F.R. § 106.5; *see* also L. Utrecht, "Political Parties & National Party Conventions," Practising Law Institute (Sept. 2000).

[284] *See generally* 11 C.F.R. § 106.5 (setting forth several methods for allocation that depend on the kind of party committee doing the spending (national or state), whether the spending is in a presidential election year or not, and the kind of activity being funded - overhead, voter drive, generic advertising, or fundraising. The regulations also, for the first time, required the national parties to disclose their soft money receipts and disbursements.).

[285] B. Jackson, *Bush & Dukakis Presidential Campaigns Each Spent More than $100 Million*, The Wall Street Journal, Dec. 12, 1988.

[286] F. Wertheimer, *supra* n. 71.

[287] R. Berke, *Some True Tales of Campaign Cash*, The New York Times, Dec. 11, 1988.

[288] R. Berke, *In Election Spending, Watch Ceiling and Use a Loophole*, The New York Times, Oct. 3, 1988.

[289] R. Berke, *Contributors Help Dukakis by Avoiding Limits He Set*, The New York Times, Oct. 31, 1988; *see* also F. Wertheimer, *supra* n. 71.

[290] *The Campaign Sewer Overflows*, The New York Times, Nov. 7, 1988.

[291] F. Wertheimer & S. Weiss Manes, *Campaign Finance Reform: A Key to Restoring the Health of Our Democracy*, 94:4 Colum. L. Rev. 1143 (May 1994) (quoting testimony of F. Wertheimer, Senate Committee on Rules & Administration, 102d Cong., 1st Sess. 5 (1991)).

[292] FEC AO 1995-25, Ltr. to David A. Norcross.

[293] Buckley v. Valeo, *supra* n. 118, at 79.

[294] *See* Senate Committee on Governmental Affairs, "Investigation of Illegal or Improper Activities in Connection with 1996 Federal Election Campaigns," Final Report, No. 105-167 (Mar. 10, 1998).

[295] *Id.* at 783.

[296] *Notification to the Court Pursuant to 28 U.S.C. § 592(b) of the Result of Preliminary Investigation*, In re: William Jefferson Clinton (D.C. Cir., Indep. Counsel Div., Dec. 7, 1998), at 30.

[297] FEC General Counsel Memorandum Re: Proposed Audit Report on the Clinton/Gore '96 Primary Committee, Inc. - Media Advertisements Paid for by the DNC (LRA #485) (Oct. 27, 1998) at 2.

[298] *Id.* at 5-6.

[299] *Id.* at 10.

[300] *Id.* at 11. The General Counsel and the Audit Division reached substantially identical decisions about the Dole campaign and the RNC.

[301] Comm'r S. Thomas, Supplemental Statement of Reasons, In the matter of: The Clinton/Gore '96 Primary Committee, Inc., MURs 4553, 4671, 4713, 4407, 4544 (June 29, 2000).

[302] First FEC General Counsel's Report, In the matter of: The Clinton/Gore '96 Primary Committee, Inc., MUR 4713 (Jan. 12, 2000), at 18.

[303] *Id.* at 39.

[304] *Id.* at 56.

[305] *Id.*

[306] *Id.* at 58.

[307] K. Doyle, *supra* n. 73 (quoting Comm'r S. Thomas).

[308] K. Doyle, *supra* n. 73.

[309] First FEC General Counsel's Report, *supra* n. 302 (quoting Comm'r S. Thomas).

[310] *Id.* at 15

[311] *Id.* at 16.

[312] *Id.* at 27.

[313] Comm'r S. Thomas, Statement of Reasons in MUR 4994 at 1 (Dec. 19, 2001).

[314] *Id.* at 2.

[315] L. Noble, *supra* n. 74, at 32.

[316] *Id.* at 16.

[317] *Id.*

[318] *Id.* at 38.

[319] Comm'rs S. Thomas & D. McDonald, Statement of Reasons, In the matter of: The Coalition & National RNC, MUR 4624 (Sept. 7, 2001). (quoting 11 C.F.R. § 100.23(c)(2)(iii); 65 Fed. Reg. 76138, 76143 (Dec. 6, 2000)(emphasis added)).

[320] Buckley, *supra* n. 118, at 47.

[321] A provision of the new reform law prohibits the use of corporate or union treasury funds to pay for broadcast ads that mention a federal candidate within 60 days prior to a general, or 30 days prior to a primary, election, where the ad is targeted to the electorate of the candidate. *See* FECA Amendments of 2002, "Bipartisan Campaign Reform Act," H.R. 2356 (Jan. 23, 2002). But this provision does not prohibit the use of corporate and union funds on so-called "issue ads" broadcast outside those windows. *See id.*

[322] *See id.*

[323] *See generally* Buckley, *supra* n. 118.

[324] *Id.* at 46.

[325] *Id.* at 78. "We construed that term ['contribution'] to include not only contributions made directly or indirectly to a candidate, political party, or campaign committee, and contributions made to other organizations or individuals but earmarked for political purposes, but also all expenditures placed in cooperation with or with the consent of a candidate, his agents, or an authorized committee of the candidate."

[326] Comm'rs S. Thomas & D. McDonald, Statement for the Record Re: FEC v. Christian Coalition (Dec. 20, 1999) at 4 (quoting Buckley, *supra* n. 118, at 78).

[327] *See* FECA Amendments of 1976, Pub. L. No. 94-283, 90 Stat. 475 (codified at 2 U.S.C. § 431(17)).

[328] FECA, 2 U.S.C. § 431(17) (1994) (emphasis added).

[329] 11 C.F.R. § 109.1(b)(4)(i)(1999).

[330] *Id.* § 109.1(b)(4)(i) (A-B).

[331] *See generally* FEC v. Christian Coalition, 52 F. Supp.2d 45 (D.D.C. 1999).

[332] *See id.*

[333] *See id.*

[334] *Id.* at 91.

[335] *Id.*

[336] *Id.*

[337] *Id.*

[338] *Id.* at 98.

[339] *See* Comm'rs S. Thomas & D. McDonald, Statement For the Record Re: FEC v. Christian Coalition (Dec. 20, 1999).

[340] *Id.* at 1 (citing 2 U.S.C. § 437c(b)(1) (the Commission "shall ... *see*k to obtain compliance with" the FECA).

[341] *Id.* at 4 (quoting Buckley, *supra* n. 118, at 78).

[342] *Id.* at 3.

[343] *See* 11 C.F.R. § 100.23.

[344] Comm'rs S. Thomas and D. McDonald, Statement of Reasons, In the matter of: The Coalition & National RNC, MUR 4624 (Sept. 7, 2001).

[345] *Id.*

[346] FEC General Counsel Memorandum Re: Proposed Audit Report on the Clinton/Gore '96 Primary Committee, Inc. - Media Advertisements Paid for by the DNC (LRA #485), *supra* n. 297, at 12-20.

[347] *Id.* at 18

[348] Colorado Republican Federal Campaign Committee v. FEC, 116 S. Ct. 2309 (1996), on remand, 41 F. Supp.2d 1197 (D. Colo. 1999).

[349] FEC General Counsel Memorandum Re: Proposed Audit Report on the Clinton/Gore '96 Primary Committee, Inc. — Media Advertisements Paid for by the DNC (LRA #485), *supra* n. 297, at 7-8.

[350] *Id.* at 19.

[351] *Id.* at 18.

[352] *Id.* at 19.

[353] *See* K. Doyle, *FEC Closes Long-Running Probe of GOP Links to Business Groups*, BNA Money & Politics Report, June 11, 2001.

[354] The Coalition is comprised of several large business associations: the U.S. Chamber of Commerce, the National Association of Manufacturers, the National Restaurant Association, the National Association of Wholesalers-Distributors, and the National Federation of Independent Business. *See* G. Lardner Jr., *FEC Drops Business Group Probe; Staff Report is Critical but Says Ruling Making Case Untenable*, The Washington Post, June 19, 2001.

[355] *See id.*

[356] *See id.*

[357] K. Doyle, Counsel Found GOP-Business Links But Recommended That Case Be Closed, BNA Money & Politics Report, June 20, 2001.

[358] *Id.*

[359] G. Lardner Jr., *supra* n. 354 (quoting FEC lawyers).

[360] *See* Comm'rs S. Thomas & D. McDonald, *supra* n. 344.

[361] K. Doyle, *supra* n. 353 (citing FEC MUR 4624 (closed session)); *see also* Comm'rs S. Thomas and D. McDonald, *supra* n. 344.

[362] *See* G. Lardner Jr., *supra* n. 354.

[363] Comm'rs S. Thomas and D. McDonald, *supra* n. 344.

[364] *See* FECA Amendments of 2002, "Bipartisan Campaign Reform Act," *supra* n. 321.

[365] J. Salant, *Paying for the Convention*, CQ Monitor News, Aug. 6, 1996.

[366] *See id.*

[367] *See id.*

[368] *See* A. Keene, "Kleindienst, Richard G.," American National Biography Online (Oxford University Press 2001) (available at www.anb.org/articles/07/07-00730-article.html) (regarding Kleindienst's legal troubles that resulted from the ITT scandal).

[369] *See* FECA Amendments of 1974, *supra* n. 117.

[370] *See* J. Salant, *supra* n. 365.

[371] *See* 11 C.F.R. § 9008.3(a)(1), (2).

[372] *See* 11 C.F.R. § 9008.1(a).

[373] *See* P. Kane, *Microsoft Wires Party Conventions*, Roll Call, May 15, 2000.

[374] FEC AO 1975-1, Ltr. to RNC and DNC (July 15, 1975).

[375] *See* 11 C.F.R. § 9008.53(a), (b)(1)(i), (ii).

[376] FEC AO 1975-47, Ltr. to DNC (Oct. 17, 1975).

[377] G. Johnson, *Corporations Picking Up Tabs at LA Galas*, The Boston Globe, Aug. 12, 2000.

[378] A.O. 1975-47 at 2-3. This rule was codified in 11 C.F.R. § 9008.8(b)(2): "Expenditures made by the host committee shall not be considered expenditures by the national committee and shall not count against the expenditure limitations of the section."

[379] 11 C.F.R. § 9008.8(b)(2).

[380] FEC AO 1975-1, *supra* n. 374.

[381] *See* 44 Fed. Reg. 63036, 63037 (Nov. 1, 1979). The regulations proposed in the Federal Register were codified at 11 C.F.R. § 9008.7. Note, however, that Part 9008.7 was superseded by new rules promulgated in 1993 and 1994; the regulation of the receipt of corporate donations is now governed by the new rule, 11 C.F.R. § 9008.9.

[382] 11 C.F.R. § 9008.7(d)(2)(iii) & (3)(iii)(a). The definition and permitted expenditures of host committees were codified at 11 C.F.R. § 9008.7(d). Echoing FEC AO 1975-1, Part 9008.7(d) defined host committees as "any local organization, such as a local civic association, business league, chamber of commerce, real estate board, board of trade, or convention bureau: which is not organized for profit; whose net earnings do not inure to the benefit of any private shareholder or individual; and whose principal objective is the encouragement of commerce in the convention city, as well as the projection of favorable image of the city to convention attendees." *Id.* at 63041.

[383] *See* 11 C.F.R. § 9008.7c(1) (superseded by 11 C.F.R. Part 9008.9).

[384] FEC AO 1980-21.

[385] FEC AO 1980-53 at 1, Ltr. to C. Richner (June 17, 1980).

[386] *Id.*

[387] FEC AO 1982-27, Ltr. to L. Holt (May 3, 1982) at 1-2.

[388] *See id.*

[389] *Id.*

[390] FEC AO 1983-29, Ltr. to R. Kenealey (Oct. 21, 1983).

[391] FEC AO 1988-25, Ltr. to R. Bauer (June 29, 1988).

[392] *Id.*

[393] 59 Fed. Reg. 33606, 33610 (June 29, 1994) ("'Commercial vendor' is defined in 11 C.F.R. § 116.1(c) to mean persons providing goods or services to a candidate or political committee, whose unusual and normal business involves the sale, rental, lease or provision of those goods or services"); *see* also 11 C.F.R. § 9008.9(c) (stating that commercial vendors may also provide items of *de minimis* value, such as samples, coupons, maps and pens, at nominal or no cost).

[394] *See* 11 C.F.R. § 9008.9(b)(1) ("A commercial vendor may provide goods or services in exchange for promotional consideration provided that doing so is in the ordinary course of business."); *see* also § 9008.9(b)(2) for the definition of ordinary course of business: "The provisions of goods or services shall be considered in the ordinary course of business under this paragraph: (i) If the commercial vendor has an established practice of providing goods or services on a similar scale and on similar terms to non-political clients or; (ii) If the terms and conditions under which the goods or services are provided are consistent with established practice in the commercial vendor's trade or industry in similar circumstances."

[395] *See* "Comments of Common Cause on the Federal Election Commission's Notice of Proposed Rulemaking," 58 Fed. Reg. 43046, Governing Publicly Financed Presidential Nominating Conventions, at 2.

[396] *Id.*

[397] *See Corporate Bash*, Roll Call, Aug. 15, 1996.

[398] A. Keller, *As the Presidential Season Kicks Off, Convention Cities Get Ready to Party; Republicans Roll Out Carpet for Big Donors*, Roll Call, Feb. 22, 1996.

[399] *See id.*

[400] *See* M. Frisby, "The Republican Convention 1996: Tobacco Companies are Low Key in San Diego," The Wall Street Journal, Aug. 15, 1995.

[401] *E.g.*, AT&T, Abbott Labs, and United Airlines each gave the Democrats more than $100,000 to hedge their bets. *See* A. Keller, *supra* n. 398.

[402] L. Sweet, *At Conventions, Money'll Do Lots of Talking, Too*, The Chicago Sun-Times, Aug. 10, 1996.

[403] *See id.*

[404] *See Democracy at Work, Or Bigwigs at Play?*, The San Francisco Chronicle, Aug. 1, 2000.

[405] E. Shogren, *The Republican Convention: For Convention Donors, It's a Give and Take Proposition*, 140, July 31, 2000.

[406] *See id.*

[407] *See* K. Foskett, *Donors Want Access, And It Can Be Expensive*, The Dayton Daily News, Aug. 13, 2000.

[408] *See* P. Kane, *supra* n. 373.

[409] *See* G. Johnson, *supra* n. 377.

[410] *Id.*

[411] 2 U.S.C. § 431(8)(B)(viii) (emphasis supplied).

[412] FEC AO 1983-8, Ltr. to J. Baran (May 3, 1983).

[413] FEC AO 1988-12, Ltr. to J. Hall (May 27, 1988) (citing FEC AO 1983-8).

[414] FEC AO 1998-7, Ltr. to C. Tartaglione (May 22, 1998).

[415] *See id.*

[416] FEC AO 2001-01, Ltr. to S. Falmlen (Feb. 15, 2001) (citing 26 C.F.R. § 1.263(a)-2(d)).

[417] FEC Agenda Item 10-11-01 at 8; FEC AO 2001-12 (FEC Agenda, Oct. 11, 2001).

[418] *Id.*

[419] *Id.*

[420] *Id.*

[421] *Id.*

[422] *Id.*

[423] FEC Agenda Doc. 01-47-A (FEC Agenda, Sept. 20, 2001) at 2.

[424] FEC Agenda Doc. 01-52-A (FEC Agenda, Oct. 11, 2001) at 2 (emphasis supplied).

[425] FEC AO 2001-12, Ltr. to L. Honold (Oct. 25, 2001).

[426] *Id.*

[427] FECA Amendments of 2002, "Bipartisan Campaign Reform Act," *supra* n. 321.

[428] *Id.*

[429] *See id.*; Common Cause v. FEC, 108 F.3d 413 (D.C. Cir. 1997). *See* also MURs 3087 and 3204 (citations omitted).

[430] *See* G. Simpson, *Partisan Warfare Breaks Out at the FEC After the Collapse of a High-Profile Montana Case*, Roll Call, Sept. 26, 1994.

[431] *See id.*

[432] *See* 2 U.S.C. § 437d(e) (FEC's power to initiate civil actions shall be "the exclusive civil remedy" for enforcing the FECA).

[433] *See* 2 U.S.C. § 437g(a)(4)(B) & (a)(12) (FEC actions, notifications, or investigations shall not be made public without the written consent of the subject).

[434] *See* B. Weiser & B. McAllister, *supra* n. 9.

[435] *See id.*

[436] *See id.*

[437] *See id.*

[438] *See id.*

[439] *See* Common Cause v. FEC, *supra* n. 430 (citing 2 U.S.C. § 437c(c).

[440] *See id.*

[441] *See id.*

[442] *See generally* Common Cause v. FEC, *supra* n. 430 (quoting and discussing lower court ruling under Administrative Procedure Act).

[443] *See id.* (discussing lower court decision).

[444] *Id.* (discussing lower court remand of certain issues to FEC for further disposition).

[445] *See* B. Weiser & B. McAllister, *supra* n. 9.

[446] *See* J. Hickey, *Money Troubles for Democrats*, Insight on the News, Nov. 9, 1998.

[447] Kramer's counsel was Wilmer, Cutler & Pickering. Roger Witten, a partner in that firm, is a Project FEC Task Force member. Wilmer, Cutler supplied certain non-confidential information concerning the Kramer matter that is contained in this report.

[448] *See Fundraiser sentenced for soliciting an illegal contribution*, The Tampa Tribune, Nov. 26, 1998.

[449] *See* P. Kuntz, *Former Friend of Gore Agrees to Plead Guilty*, The Wall Street Journal, July 10, 1998.

[450] *See id.*

[451] *See FEC Imposes $40,000 Fine on Democratic Fund-Raiser*, The Washington Post, Jan. 24, 1999.

[452] *See id.*

[453] *See* T. Lytle, *Gore Camp is 'Shocked' at Reference to Friendship; A Letter Blasted the Federal Election Commission for Citing a Businessman's Connection to the Vice President When it Didn't Take Action Against Him*, The Orlando Sentinel, Feb. 21, 1998.

[454] *See* J. Hickey, *supra* n. 446.

[455] *See id.*

[456] "From the Ground Up: Local Lessons Fro [sic] National Reform," 27 Fordham Urb. L. J. 5 (1999) (remark by John Fund).

[457] *See* FECA Amendments of 1974, *supra* n. 117.

[458] *See generally* Buckley, *supra* n. 118.

[459] *See generally id.*

[460] *Id.* at 79.

[461] *Id.*

[462] *See generally id.*

[463] *Id.* at 45.

[464] *Id.*

[465] The Court found that this provision, as narrowly construed, would not effectively eliminate the danger of corruption because of the possibility of evasion of the spending limit, *see* Buckley, 424 U.S. at 45, and that in any event, independent spending does not pose a danger of "real or apparent" corruption because of "the absence of prearrangement and coordination of an expenditure with the candidate or his agent." *Id.* at 46-7.

[466] *Id.* at 80.

[467] *Id.* at 79.

[468] FEC v. Massachusetts Citizens for Life, Inc., 479 U.S. 238, 249 (1986).

[469] *Id.*

[470] FEC v. Furgatch, 807 F.2d 857 (9th Cir. 1987).

[471] Maine Right to Life Committee v. FEC, 914 F. Supp. 8 (D. Me. 1996), aff'd 98 F.3d 1 (1st Cir. 1996) *cert. den. sub nom.*, Federal Election Commission v. Maine Right to Life Committee, Inc., 522 U.S. 810, 811 (1997).

[472] *See* K. Doyle, *supra* n. 144 ("[T]hree federal appeals courts - the First Circuit, Second Circuit, and Fourth Circuit - have said that the FEC rule [flexibly applying the 'magic words' test] is unconstitutional. The Supreme Court in 1997 rejected a petition for review in the First Circuit case, FEC v. Maine Right to Life Committee, and the decisions of the other two circuit courts have not been appealed.").

[473] For instance, the district court in Maine Right to Life said, "[O]ne does not need to use the explicit words 'vote for' or their equivalent to communicate clearly the message that a particular candidate is to be elected. [The FEC regulation] appears to be a very reasonable attempt to deal with these vagaries of language and, indeed, is drawn quite narrowly to deal with only the 'unmistakable' and 'unambiguous' cases where 'reasonable minds cannot differ on the message.'" FEC v. Maine Right to Life Committee, *supra* n. 471.

[474] *See* FECA Amendments of 2002, "Bipartisan Campaign Reform Act," *supra* n. 321.

[475] *See*, e.g., National Rifle Association of America v. FEC, Case No. 02-0581 (CKK), *Complaint for Declaratory and Injunctive Relief* (D.D.C. Mar. 27, 2002).

[476] *See* House of Representatives Committee on Government Reform and Oversight, I*nvestigation of Political Fundraising Improprieties and Possible Violations of Law: Interim Report*, H.R. Rep. No. 105-829, ch. 5, at 3005-06 (1998).

[477] *See id.*

[478] *See* K. Doyle, *supra* n. 73 (citing FEC MURs 4713, 4407, 4454, 4453 and 4671 (citations omitted)).