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FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

AGENDA ITEM

For Meeting of 6-18-15

SUBMITTED LATE

MEMORANDUM

TO: The Commission

FROM: Steven T. Walther ^{STW}
Commissioner

SUBJECT: Motion to Authorize the Publication of, and Expenses for, a Forty Year Report

Attached is a motion to publish a Forty Year Report by the Federal Election Commission. I request that this memorandum and motion be made public and placed on the Commission's Open Meeting Agenda for June 18, 2015.

For each decade since the formation of the Federal Election Commission in 1975, the Commission has published a report commemorating that era of the Commission's existence and educating the public on a wide variety of issues. A copy of the Thirty Year Report, published in 2005, accompanies this motion. The Thirty Year Report is also available on the Commission's website at <http://www.fec.gov/info/publications/30year.pdf>, as well as the Twenty Year Report and the Ten Year Report. See <http://www.fec.gov/pdf/20year.pdf>; <http://www.fec.gov/pdf/firsttenyearsreport.pdf>. A suggested outline of a Forty Year Report, as prepared by staff and provided to the Commissioners, accompanies this motion.

It appears that there is some concern, discussed privately but not publicly, as to whether or not to publish a Forty Year Report. Some have even suggested that the Commissioners may not be able to agree on the contents of such a document. Yet the Commission regularly publishes a number of guides and reports – all available on its website (*see, e.g.,* <http://www.fec.gov/info/publications.shtml>) – that cover many of the substantive issues addressed in past decennial reports. It is no secret that Commissioners do not always agree on these issues, and there should be no hesitation to point this out. There have existed fundamental disagreements on numerous substantive issues since the beginning of the Commission; these disagreements are an important part of our evolution and history. The Thirty Year Report, in fact, notes the existence of different points of view of Commissioners on legal issues before the Commission at that time. *See, e.g.,* Thirty Year Report at pp. 20, 22.

The Chair recently recognized the Commission's Fortieth Anniversary by holding a small informal public reception. That event was primarily a social occasion rather than an educational event designed to inform the public about substantive issues that have come before us during the last ten years. In connection with that event, Commission staff created an informative Timeline of our Forty Year history, which was placed on the Commission's website at

http://www.fec.gov/pages/40th_anniversary/40th_anniversary.shtml. The Timeline, while providing valuable information in a chronological fashion, does not flesh out the numerous substantive issues that have come before the Commission over the past decade and how the Commission has dealt with those issues. A Forty Year Report would provide an additional beneficial service to the public, particularly for those who are not experts in the field. In fact, the failure to publish such a report, after doing so each and every decade of the Commission's existence, would deprive the public of a valuable historical link that would further its understanding of the Commission's history from its inception to the present.

The Federal Election Commission was created to be the one agency that provides transparency to the public regarding the financing of federal elections, which is a critical part of our democracy. The Commission's work is often unclear to the public and especially to those who do not follow campaign finance issues on a regular or extensive basis. Further efforts made by the Commission to promote transparency and understanding regarding all aspects of its operations would serve to bolster public confidence in its work.

The Commission has done an extraordinary job of providing transparency regarding contributions and expenditures made in connection with federal elections. While strong views have been expressed in recent months as to what should be done prospectively with respect to transparency – which has been a topic of great interest since the Supreme Court's *Citizens United* decision – the information that we all agree should be disclosed (and has been disclosed) provides an invaluable service to the public. This fine work and its public importance can get lost in the cacophony of conflicting views among Commissioners, which have been increasingly become a focus of media attention. These public debates should not in any way detract from the valuable work that the Commission performs for the public on an ongoing basis.

It is not too late to complete a Forty Year Report this year; the Thirty Year Report was completed and made public in September of 2005. With respect to finances, at this time in our fiscal year it is clear that there are sufficient finances available to pay for the cost of printing a reasonable number of reports. The cost of printing 1,000 copies, as requested in the motion, would be very modest and should not be a source of concern for any Commissioner. I am confident that the Commission could achieve consensus on the contents of a Forty Year Report and accomplish the task of publishing and printing such a report in a swift and efficient manner.

Attachment

MOTION TO PUBLISH FORTY YEAR REPORT

I move that the Commission:

- I. Direct the appropriate entities within the agency to begin to prepare, and to prepare, a thorough, comprehensive, and educational Forty Year Report comprised of categories of information the same as or substantially similar as those in past decennial reports made available to the public, as more fully set forth in the draft outline; and
- II. Direct and authorize the Chief Financial Officer to establish a line item for the estimated expenses, for the publication of 1,000 hard copies of a Forty Year Report, to be expended, to the extent necessary, before the end of the current fiscal year.

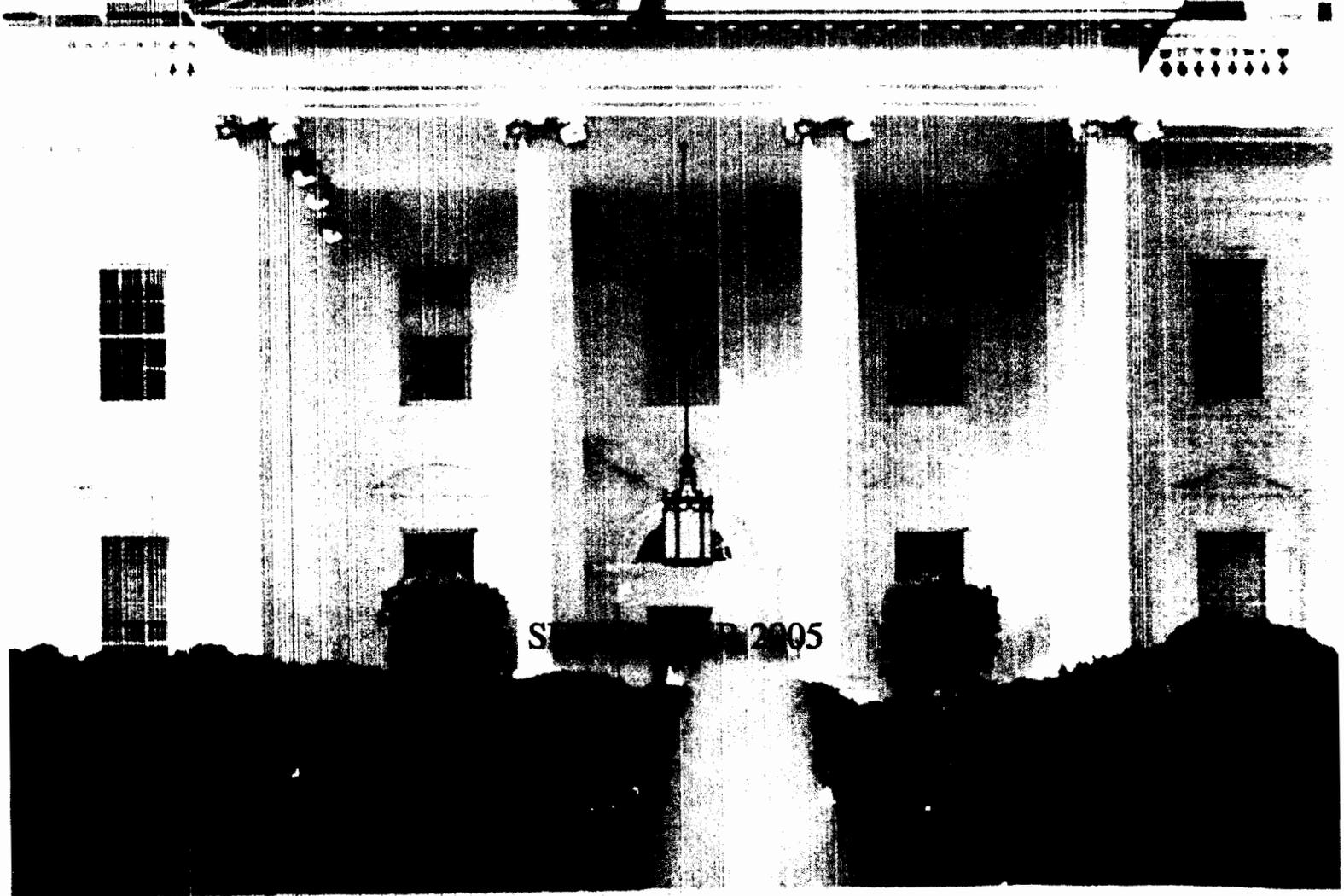
Attachments

Forty Year Report Draft Outline

- 1) Introduction
- 2) Chapter 1: Historical Context
 - a) Early Reform
 - b) The 1971 Election Laws
 - c) 1974 Amendments
 - d) *Buckley v. Valeo*
 - e) 1976 Amendments
 - f) 1979 Amendments
 - g) Other Amendments
 - h) Soft Money
 - i) The Bipartisan Campaign Reform Act
 - j) Constitutional Challenges to BCRA (*McConnell, Davis*)
 - k) Legislative Amendments
 - i) HLOGA
 - ii) Gabriella Miller Kids First Research Act (convention funding)
 - iii) 2014 appropriations act (new party limits)
 - l) Corporate/Labor Expenditures, Super PACs and Hybrid PACs
 - m) Contribution Limits: *McCutcheon v. FEC* and New National Party Limits
- 3) Chapter 2: Administering, Interpreting, Enforcing and Defending the FECA
 - a) Outreach and Disclosure
 - b) Interpreting the FECA
 - c) Disclosure
 - d) Compliance
 - e) Enforcement
 - f) Litigation
 - g) Presidential Public Funding
 - h) Audits
- 4) Chapter 3: Key Issues Before the Commission
 - a) Coordinated and Independent Expenditures
 - b) Political Committee Status
 - c) New Technologies
- 5) Chapter 4: Continuing Debate Over Reform
 - a) The Role of Political Parties
 - b) The Role of Independent Organizations
 - c) Presidential Public Funding
- 6) Conclusion
 - a) FEC Commissioners and Officers, 1975-2015

THE FEDERAL ELECTION COMMISSION

Thirty Year Report



September 2005

THE FEDERAL ELECTION COMMISSION

*Thirty Year
Report*

SEPTEMBER 2005

FEDERAL ELECTION COMMISSION

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Michael E. Toner, Vice Chairman (2005)

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INTRODUCTION

Thirty years ago, Congress created the Federal Election Commission (FEC) to administer and enforce the Federal Election Campaign Act (FECA)—the statute that governs the financing of federal elections. The regulation of federal campaigns emanated from a Congressional judgment that our representative form of government needed protection from the corrosive influence of unlimited and undisclosed political contributions. The laws were designed to ensure that candidates in federal elections were not—and did not appear to be— beholden to a narrow group of people. Taken together, it was hoped, the laws would sustain and promote citizen confidence and participation in the democratic process.

Guided by this desire to protect the fundamental tenets of democracy, Congress created an independent regulatory agency—the FEC—to disclose campaign finance information; to enforce the limits, prohibitions and other provisions of the election law; to interpret the FECA through the promulgation of regulations and the issuance of advisory opinions; and to administer the public funding of Presidential elections.

Fulfilling that mission places the agency at the center of constitutional, philosophical and political debate. On one hand, the Commission must administer, interpret and enforce the FECA,

which the Supreme Court has said serves a legitimate governmental interest. On the other hand, the Commission must remain mindful of the constitutional freedoms of speech and association, and the practical implications of its actions. The Commission, of course, does not bear this responsibility alone. Congress and the courts must also balance these competing interests.

This tension between valid governmental interests and certain constitutional guarantees frames many of the issues discussed in this report. While the report commemorates the Commission’s 30th anniversary, it does not chronicle the entire 30-year period. Instead, it offers a current snapshot of the agency, focusing on significant Commission actions of recent years.

Chapter 1 provides an historical context for the report.

Chapter 2 looks at the Commission’s administration, enforcement, interpretation and defense of the FECA.

Chapter 3 examines some of the key issues the Commission is currently debating or has recently resolved.

Chapter 4 offers FEC statistics to supplement the continuing national debate on the structure and role of the Commission, the place

of party committees in the electoral process and the influence of independent organizations on the electoral process.

What emerges from this discussion is a portrait of an agency that has accomplished much, even as it has grappled with difficult issues whose resolution has helped define the proper balance between governmental interests and constitutionally protected political activity. The Commission's administration and enforcement of the FECA have also helped ensure the continued legitimacy of our representative form of government.

CHAPTER 1

HISTORICAL CONTEXT

The origins of campaign financing in the United States date back to 1791, when groups supporting and opposing Alexander Hamilton published competing newspapers designed to sway the electorate. These minimal expenditures set the tone for campaigns over the next several decades.

In the Presidential election of 1832, however, the financing of campaigns changed. The Bank of the United States, whose charter-renewal was threatened by President Andrew Jackson, spent heavily to elect Henry Clay, who supported renewal of the bank's charter. The bank's tactics backfired, however, when Jackson characterized it as a "money monster," and won reelection.

During the 1840s and 50s, the size of the electorate grew and so did the amount of campaign spending. Still, during the pre-Civil War period, "costs were relatively moderate, corruption...was the exception rather than the rule, fundraising was conducted in an amateur fashion, and the alliance between economic interests and politicians, though growing, was loose and flexible."¹ By contrast, the postwar years have been called the most corrupt in U.S. history. Historian Eugene H. Roseboom describes financier Marcus A. Hanna's fundraising for President McKinley's 1896 campaign as follows:

"For banks the [campaign finance] assessment was fixed at one quarter of one percent of their

capital. Life insurance companies contributed liberally, as did nearly all the great corporations. The Standard Oil Company gave \$250,000 to Hanna's war chest. The audited accounts of the national committee revealed collections of about \$3,500,000."²

Early Reform

The drive to institute comprehensive campaign finance reform began around the turn of the century, when the muckrakers revealed the financial misdeeds of the 1896 election.³ Their stories of corporations financing candidates' campaigns in hopes of influencing subsequent legislation prompted President Theodore Roosevelt to proclaim: "All contributions by corporations to any political committee or for any political purpose should be forbidden by law." In 1907, Congress passed the Tillman Act, which prohibited corporations and national banks from contributing money to federal campaigns. Three years later, Congress passed the first federal campaign disclosure legislation. Originally, the law applied only to House elections, but Congress amended the law in 1911 to cover Senate elections as well, and to set spending limits for all Congressional candidates.

The Federal Corrupt Practices Act of 1925, which applied to general election activity only,

² CQ, *Dollar Politics*, p.3

³ The first campaign finance law actually predates these practices. Congress passed legislation in 1867 that prohibited federal officers from soliciting Navy Yard workers for contributions.

¹ Thayer, *Who Shakes the Money Tree*, p.35

strengthened disclosure requirements and increased expenditure limits. The Hatch Act of 1939 and its 1940 amendments asserted the right of Congress to regulate primary elections and included provisions limiting contributions and expenditures in Congressional elections. The Taft-Hartley Act of 1947 barred both labor unions and corporations from making expenditures and contributions in federal elections.

These legislative initiatives, taken together, sought to:

- Limit contributions to ensure that wealthy individuals and special interest groups did not have a disproportionate influence on federal elections;
- Prohibit certain sources of funds for federal campaign purposes;
- Control campaign spending, which tends to fuel reliance on contributors and fundraisers; and
- Require public disclosure of campaign finances to deter abuse and to educate the electorate.

None of these laws, however, created an institutional framework to administer and enforce the campaign finance provisions effectively. As a result, those provisions were largely ignored. The laws had other flaws as well. For example, spending limits applied only to committees active in two or more states. Further, candidates could avoid the spending limit and disclosure requirements altogether because a candidate who claimed to have no knowledge of spending on his behalf was not liable under the 1925 Act.

When Congress passed the more stringent disclosure provisions of the 1971 Federal Election Campaign Act (FECA), the shortcomings of the earlier laws became apparent. In 1968, still under the old law, House and Senate candidates reported spending \$8.5 million, while in 1972, after the passage of the FECA, spending reported by Congressional candidates jumped to \$88.9 million.⁴

4 Congressional Quarterly Weekly Report, Vol. xxvii, No. 49, December 5, 1969, p. 2435; Clark of the House, "The Annual Statistical Report of Contributions and Expenditures Made During the 1972 Election Campaigns for the U.S. House of Representatives" (1974), p. 161; Secretary of the Senate, "The Annual Statistical Report of Receipts and Expenditures Made in Connection with Elections for the U.S. Senate in 1972" [undated], p. 33

The 1971 Election Laws

The Federal Election Campaign Act of 1971 (P.L. 92-225), together with the 1971 Revenue Act (P.L. 92-178), fundamentally changed the federal campaign finance laws. The FECA, effective April 7, 1972, not only required full reporting of campaign contributions and expenditures, but also limited spending on media advertisements and limited spending from candidates' personal funds.⁵ (These limits were later repealed to conform with judicial decisions.)

The FECA also provided the basic legislative framework for corporations and labor unions to establish separate segregated funds,⁶ popularly referred to as PACs (political action committees). Although the Tillman Act and the Taft-Hartley Act of 1947 banned direct contributions by corporations and labor unions to influence federal elections, the FECA provided an exception whereby corporations and unions could use treasury funds to establish, operate and solicit voluntary contributions for the organization's PAC. These voluntary donations from individuals could then be used to contribute to federal campaigns.

Under the Revenue Act—the first of a series of laws designed to implement federal financing of Presidential elections—citizens could check a box on their tax forms authorizing the federal government to use one of their tax dollars to finance Presidential campaigns in the general election.⁷ Congress implemented the program in 1973 and, by 1976, enough tax money had accumulated to fund the 1976 Presidential election—the first publicly funded federal election in U.S. history.

Like its predecessors, the Federal Election Campaign Act of 1971 did not provide for a single, independent body to monitor and enforce the law. Instead, the Clerk of the House, the Secretary of the

5 "Contribution" is defined in 2 U.S.C. 431(8) and 11 CFR 100.51 to 100.57. "Expenditure" is defined in 2 U.S.C. 431(9) and 11 CFR 100.110 to 100.114.

6 "Separate segregated fund" is described at 2 U.S.C. 441b(b) and 11 CFR 114.5.

7 In 1966, Congress enacted a law to provide for public funding of Presidential elections, but suspended the law a year later. It would have included a taxpayers' checkoff provision similar to that later embodied in the 1971 law.

Senate and the Comptroller General of the United States, head of the General Accounting Office (GAO), monitored compliance with the FECA. The Justice Department was responsible for prosecuting violations of the law referred by the three supervisory officials. Following the 1972 elections, however, the Justice Department prosecuted few of the 7,100 cases referred to it.⁸

1974 Amendments

In 1974, following the documentation of campaign abuses in the 1972 Presidential elections, a consensus emerged to create an independent body to ensure compliance with the campaign finance laws. Comprehensive amendments to the FECA (P.L. 93-443) established the Federal Election Commission, an independent agency to assume the administrative functions previously divided between Congressional officers and GAO. The Commission was given jurisdiction in civil enforcement matters, authority to write regulations and responsibility for monitoring compliance with the FECA.

Additionally, the amendments transferred from GAO to the Commission the function of serving as a national clearinghouse for information on the administration of elections.

Under the 1974 amendments, the President, the Speaker of the House and the President pro tempore of the Senate each appointed two of the six voting members of the newly created Commission. The Secretary of the Senate and the Clerk of the House were designated as nonvoting, ex officio Commissioners. The first Commissioners were sworn in on April 14, 1975.

The 1974 amendments also expanded the public funding system for Presidential elections. The amendments provided for partial federal funding, in the form of matching funds, for Presidential primary candidates and also extended public funding to political parties to finance their Presidential nominating conventions.

Complementing these provisions, Congress also enacted strict limits on both contributions to and expenditures by candidates for federal office.⁹ Expenditures by other persons relative to a candidate were also limited. Another amendment relaxed the prohibition on contributions from federal government contractors. The FECA, as amended, permitted corporations and unions with federal contracts to establish and operate PACs.

Buckley v. Valeo

The constitutionality of key provisions of the 1974 amendments was immediately challenged in a lawsuit filed by Senator James L. Buckley (Conservative Party, New York) and Eugene McCarthy (former Democratic Senator from Minnesota) against the Secretary of the Senate, Francis R. Valeo. The Supreme Court handed down its ruling on January 30, 1976. *Buckley v. Valeo*, 424 U.S. 1 (1976).

In its decision, the Court upheld contribution limits because they served the government's interest in safeguarding the integrity of elections by preventing even the appearance of corruption of public officials. However, the Court overturned the expenditure limits, stating: "It is clear that a primary effect of these expenditure limitations is to restrict the quantity of campaign speech by individuals, groups and candidates. The restrictions...limit political expression at the core of our electoral process and of First Amendment freedoms." Acknowledging that both contribution and spending limits had First Amendment implications, the Court stated that the new law's "expenditure ceilings impose significantly more severe restrictions on protected freedoms of political expression and association than do its limitations on financial contributions." The Court implied, however, that the expenditure limits placed on publicly funded candidates were constitutional because Presidential candidates were free to disregard the limits if they chose to reject public financing; later, the Court affirmed this ruling in *Republican National Committee v. FEC*, 445 U.S. 955 (1980).

⁸ Comptroller General of the United States, "Report of the Office of Federal Elections of the General Accounting Office in Administering the Federal Election Campaign Act of 1971" (February 1975), pp. 23 and 24.

⁹ "Political committee" is defined in 2 U.S.C. 431(4) and 11 CFR 100.5.

The Court also sustained other public funding provisions and upheld disclosure and recordkeeping requirements. However, the Court found that the method of appointing FEC Commissioners violated the constitutional principle of separation of powers, since Congress, not the President, appointed four of the Commissioners, who exercised executive powers.¹⁰ As a result, beginning on March 22, 1976, the Commission could no longer exercise its executive powers.¹¹ The agency resumed full activity in May, when, under the 1976 amendments to the FECA, the Commission was reconstituted and the President appointed six Commission members, who were confirmed by the Senate.

1976 Amendments

In response to the Supreme Court's decision, Congress again revised the campaign finance legislation. The new amendments, enacted on May 11, 1976, repealed the expenditure limits (except for candidates who accepted public funding) and revised the provision governing the appointment of Commissioners. The 1976 amendments also added specific contribution limits on giving to national party committees and to any other federal political committee.

Among the 1976 amendments were provisions to limit the scope of PAC fundraising by corporations and labor organizations. Preceding this curtailment of PAC solicitations, the FEC had issued an advisory opinion, AO 1975-23 (the SunPAC opinion), confirming that the 1971 law

permitted a corporation to use treasury money to establish, operate and solicit contributions to a PAC. The opinion also permitted corporations and their PACs to solicit the corporation's employees as well as its stockholders. The 1976 amendments, however, put significant restrictions on PAC solicitations, specifying who could be solicited and how solicitations would be conducted. In addition, a single contribution limit was adopted for all PACs established by the same union or corporation.

1979 Amendments

Building upon the experience of the 1976 and 1978 elections, Congress made further changes in the law. The 1979 amendments to the FECA (P.L. 96-187), enacted on January 8, 1980, included provisions that simplified reporting requirements, encouraged party activity at state and local levels and increased the public funding grants for Presidential nominating conventions.

Other Amendments

Throughout the 1980s and 90s and continuing to 2001, Congress adopted several amendments of limited scope, including provisions to:

- Ban honoraria for federal officeholders;
- Repeal the "grandfather clause" that had permitted some Members of Congress to convert excess campaign funds to personal use; and
- Increase funding for national nominating conventions.

In addition, Congress enacted legislation that:

- Instituted a program for electronic filing of campaign finance reports;
- Created a program for administrative fines dealing with reporting violations;
- Permitted candidates to access credit from their brokerage accounts or similar lines of credit;

¹⁰ Similarly, in its 1993 decision in *NRA Political Victory Fund v. FEC*, the U.S. Court of Appeals for the District of Columbia ruled that the presence of two Congressionally appointed ex officio members on the Commission "violate[d] the Constitution's separation of powers." 6 F.3d 821, 822 (D.C. Cir. 1993). In compliance with the court's decision, the Commission reconstituted itself as a six-member body, comprising only the Presidentially appointed Commissioners. As a precaution, the reconstituted Commission ratified all of its previous decisions to ensure uninterrupted enforcement of the FECA. The Commission petitioned the Supreme Court for a writ of certiorari in the case, but in December 1994, the Court dismissed the Commission's petition, concluding that the agency lacked statutory authority to seek Supreme Court review on its own in cases arising under the FECA. The Court's decision left standing the appeals court ruling. (*FEC v. NRA Political Victory Fund*, 513 U.S. 88 (1994)).

¹¹ The Supreme Court stayed its judgment concerning Commission powers for 30 days; the stay was extended once.

-
- Assigned significant new administrative duties to the Commission under the National Voter Registration Act;¹² and
 - Increased the tax checkoff for the Presidential Election Campaign Fund from \$1 to \$3.

Soft Money

In the 1996 election cycle, the major national party committees experienced significant increases in financial activity, a large portion of which was due to the dramatic increase in funds raised outside the limits and prohibitions of federal law, otherwise known as nonfederal or “soft” money. Compared to the 1992 Presidential cycle, the Republican national committees’ soft money receipts more than doubled and the Democratic national committees’ soft money receipts tripled, exceeding their total federal receipts for the cycle.

While these funds could not legally be spent to support or oppose federal candidates, the parties nonetheless used soft money to fund “issue ads” that portrayed their candidates more favorably than their opponents. Often, corporations and unions would themselves finance “issue ads” ostensibly to influence legislation, but with a fairly clear election-influencing slant.

The way soft money was raised caused at least as much concern among reformers as the way it was spent. The parties frequently asked federal candidates and officeholders to help raise large soft money donations, offering donors access to current and future federal legislators and raising concerns about potential corruption or the appearance of corruption.

The Bipartisan Campaign Reform Act

In an effort to address concerns about the effects of soft money and issue ads on the federal election process, Congress passed a comprehensive

reform bill called the Bipartisan Campaign Reform Act of 2002 (BCRA). President George W. Bush signed the BCRA into law on March 23, 2002. Among other things, the new law prohibits national party committees from raising or spending soft money. It also places certain limitations on the ability of federal candidates and officeholders to raise or spend soft money.

In addition to banning soft money fundraising by and for national parties, the BCRA also restricts state and local party committees’ use of nonfederal funds to pay for certain federal election activities, such as voter registration and get-out-the-vote efforts in connection with a federal election.

With respect to issue advertising, the BCRA prohibits corporations and unions from funding broadcast ads that refer to a federal candidate in close proximity to that candidate’s election (i.e., within 30 days prior to the primary and 60 days prior to the general). The law requires other groups not registered with the FEC to disclose their payments for these types of ads (referred to as electioneering communications), and the source of the funds used. The ads must also include a disclaimer identifying the sponsor.

The BCRA’s comprehensive reach extended to numerous aspects of the FECA in areas such as contribution limitations, party committee activity, independent spending, compliance matters, permissible use of campaign funds and contributions by minors and foreign nationals.

McConnell v. FEC

The BCRA was challenged in court within days of its passage into law. On March 27, 2002, Senator Mitch McConnell and the National Rifle Association each filed a complaint with the U.S. District Court for the District of Columbia, challenging the constitutionality of several provisions of the BCRA. The Commission, through the Litigation Division of the Office of General Counsel, and the Office of the Solicitor General of the Department of Justice, defended BCRA. The Supreme Court handed down its ruling

¹² These responsibilities were transferred to the newly created Election Assistance Commission under the Help America Vote Act of 2002.

on December 10, 2003, upholding most of the challenged provisions of the BCRA, including its two principal features: the control of soft money and the regulation of electioneering communications. The Court found unconstitutional other BCRA provisions banning contributions from minors and requiring party committees to choose whether to make coordinated or independent expenditures on behalf of their nominees.¹³

Soft Money Ban

In upholding the soft money ban, the Court noted that the “record is replete with examples of national party committees’ peddling access to federal candidates and officeholders in exchange for large soft-money donations.”¹⁴

The Court also upheld the BCRA’s limits on state and local party committees’ use of soft money for activities affecting federal elections, finding that this provision was closely drawn to match the governmental interest of preventing corruption and the appearance of corruption.

Electioneering Communications and Express Advocacy

The electioneering communications provisions were also upheld by the Court. The plaintiffs had claimed that *Buckley v. Valeo* drew a constitutionally mandated line between express advocacy, which contains “magic words” such as “vote for” or “vote against,” and the more ambiguous language of issue advocacy. The Court disagreed, finding that the express advocacy restriction was not a constitutional command: “both the concept of express advocacy and the class of magic words were born of an effort to avoid constitutional problems of vagueness and overbreadth in the statute before the *Buckley* Court.”

The Court rejected the plaintiff’s claims that arguments in support of the longstanding ban on express advocacy communications financed by corporations and unions cannot be applied to the larger quantity of speech captured in the definition

of electioneering communication. The Court went on to say that “issue ads broadcast during the 30- and 60-day periods preceding federal primary and general elections are the functional equivalent of express advocacy,” adding that the “justifications for regulating express advocacy apply equally to those ads if they have an electioneering purpose, which the vast majority do.”

¹³ *McConnell v. FEC*, 540 U.S. at 93.

¹⁴ *McConnell v. FEC*, 540 U.S. at 95–96

Chapter 2

Administering, Interpreting, Enforcing and Defending the FECA

The Federal Election Campaign Act (FECA) governs the financing of elections for federal office. It limits the sources and amounts of funds used to support candidates for federal office, requires disclosure of campaign finance information and—in tandem with the Primary Matching Payment Act and the Presidential Election Campaign Fund Act—provides for the public funding of Presidential elections.

As the agency charged with administering and enforcing the FECA, the Federal Election Commission has four major responsibilities:

- Providing disclosure of campaign finance information;
- Ensuring that candidates, committees and others comply with the limitations, prohibitions and disclosure requirements of the FECA;
- Administering the public funding of Presidential elections; and
- Interpreting and defending the FECA.

This chapter highlights the Commission's stewardship of the FECA, focusing on recent improvements the agency has made in carrying out its responsibilities.

Outreach and Disclosure

Since its beginning, 30 years ago, the FEC has prided itself in providing outstanding service to the public, the press and the regulated community. Transcending the Commission's prescribed duties, the commitment to serving the public is most evident in the Commission's efforts to encourage voluntary compliance with the FECA and to facilitate public access to campaign finance data. This section demonstrates how the agency's outreach and disclosure programs serve the public.

Outreach

For political committees, outreach begins early. A committee's first contact with the FEC usually takes place through two different channels: the agency's web site and its toll-free information hotline. When committees contact the Information Division through the hotline, they receive guidance on how to comply with the law and regulations. Information Division staff explain the requirements of the FECA and send the committee a registration packet that contains forms and publications geared toward its needs. Staff may also direct callers to the FEC web site which contains an extensive store of information on the law, regulations, filing requirements and compliance, as well as campaign finance information filed by political committees.

When a committee submits its registration documents, the Commission's Information Technology (IT) staff assigns it an identification number and enters the registration information into the FEC database. Microfilm, electronic and paper copies of the registration are made available in the Commission's Public Records Office and on the Commission's web site. The committee is also automatically added to the mailing list for all official notices and correspondence from the Commission, including the agency's award-winning monthly newsletter, the *Record*.

As questions about the FECA arise, committee staff can choose from a variety of FEC services designed to help them understand the law and voluntarily comply with its provisions. (These services are available to anyone interested in learning about the law.) Public affairs specialists answer their questions about the law, and campaign finance analysts, who review the actual reports filed by committees, respond to reporting questions and offer guidance on the law. The analysts also offer guidance on how to file electronically using the "FECfile" software, which is made available to committees at no charge. Every committee that files with the FEC has its own campaign finance analyst in the agency's Reports Analysis Division. (Staff in the Commission's Audit Division and the Office of General Counsel's General Law and Advice Division help Presidential committees comply with the special rules that govern publicly funded campaigns.) Committee staff can also attend instructional workshops and conferences and/or request free FEC publications that explain particular aspects of the law. Should committee staff need a publication or other document quickly, they can access it on the web site or call the agency's automated "faxline" system and receive the document immediately by fax, 24 hours a day, seven days a week.

To further assist committees, the Commission sends reminder notices along with the necessary reporting forms shortly before reports are due. Committees also receive notice when they have failed to file.

Interpreting the FECA

Rulemaking

The Commission implements the various provisions of the FECA and its amendments through its rulemaking procedures. As part of these procedures, the Commission, with the assistance of the Office of General Counsel's Policy Division, issues notices of proposed rulemaking (NPRMs), collects, reviews and analyzes comments on the NPRMs, conducts hearings and promulgates final rules with explanations and justifications.

In recent years, the Commission has undertaken several notable rulemakings, including the proceedings implementing the Bipartisan Campaign Reform Act (BCRA). The Commission completed the rulemaking on the soft money ban in the BCRA in 90 days and the rulemakings on the other provisions of the BCRA in 270 days. The Commission also received over 150,000 comments in connection with its political committee status rulemaking, which the Office of General Counsel reviewed and processed.

Advisory Opinions

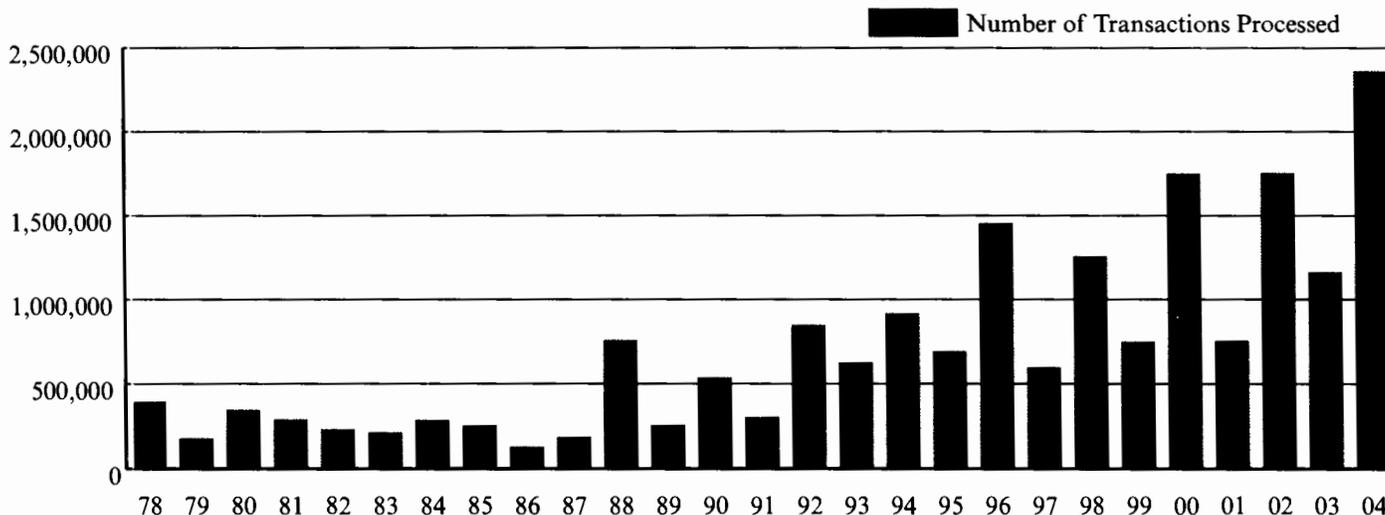
If an individual, political committee or other entity wants official, legally binding guidance from the Commission, it may request an advisory opinion (AO). The Commission responds to these requests within 60 days, or within 20 days if a candidate's committee submits the request just before an election. An AO answers the requesting committee's question and also serves as a precedent for other committees in the same situation. The Commission has issued more than 1,200 AOs since 1975.

Disclosure

Disclosing the sources and amounts of funds used to finance federal elections is perhaps the most important of the FEC's duties. In fact, it would be virtually impossible for the Commission to effectively fulfill any of its other responsibilities without disclosure. Public disclosure of a committee's receipts and disbursements provides essential aid to the Commission's efforts to ensure

CHART 2-1

Number of Detailed Contribution and Expenditure Transactions Processed*



* The Commission lowered its data entry threshold from \$500 to \$200 in 1989 and began entering soft money transactions in 1991.

that committees are complying with the FECA's contribution prohibitions and limitations. Disclosure also helps the public evaluate political committees and the candidates running for federal office and it enables them, along with the agency, to monitor committee compliance with the election laws. Given these facts, the Commission has devoted substantial resources to providing effective access to campaign finance data.

When a committee files its FEC report on paper, the Commission's Public Records Office ensures that a copy is available for public inspection within 48 hours. Simultaneously, the agency's IT staff begins to enter the information disclosed in the report into the FEC computer database. Reports filed electronically¹ are made available to the public almost immediately. The amount of information disclosed has grown dramatically over the years. By December 2004, more than 28 million pages of information dating back to 1972 were available for public review.

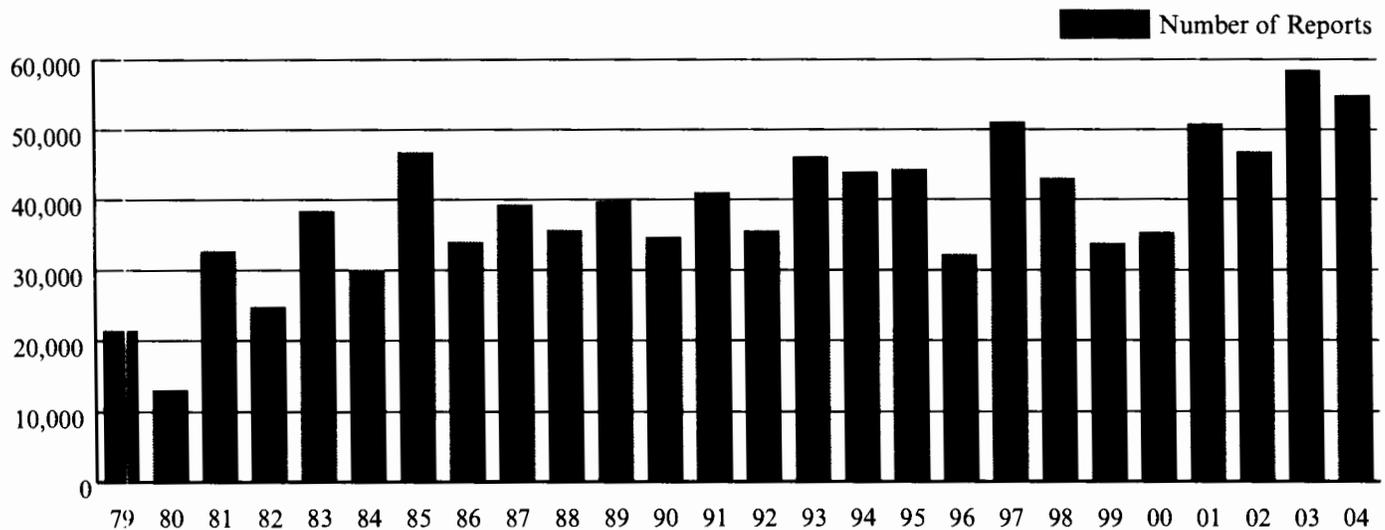
¹ Under the Commission's mandatory electronic filing program, almost all committees with more than \$50,000 in either contributions or expenditures must file reports electronically.

On the FEC web site, the public can access all reports filed with the agency regardless of whether they were filed electronically or on paper. Scanned copies of paper reports can be searched and viewed through the FEC's digital imaging system online. The imaging system permits a user to view a committee's report on a high resolution computer screen (or a paper copy), just as the document appeared in its original form. Campaign finance data can also be searched in a host of different ways: one can search the database by individual contributor, committee, candidate, occupation, date, dollar amount or other search criteria.

In the Public Records Office, visitors can inspect microfilm and paper copies of committee reports, as well as the FEC's computer database and more than 25 different computer indexes that make the data more accessible. (The G Index, for example, lists individuals who have given more than \$200 to a committee during an election cycle. The K and L Indexes offer broader "bank statement" views of receipts and disbursements for PACs, parties and candidates.) The Public Records staff assist thousands of callers and visitors every year.

CHART 2-2

Number of Reports Reviewed by the Reports Analysis Division



Members of the news media may review committee reports using any of the methods described above and may receive assistance from the Commission's Press Office. The staff answer reporters' questions, issue press releases summarizing campaign finance data and significant FEC actions and respond to requests under the Freedom of Information Act (FOIA). The press office logs thousands of calls each year.

The Commission also makes available, both in its Public Records Office and on the web, a variety of agency documents, including advisory opinions and closed enforcement and audit reports, as well as litigation documents. In December of 2003, the Commission introduced a searchable database of enforcement matters, the Enforcement Query System (EQS). EQS is a web-based search tool that allows users to find and examine public documents regarding closed Commission enforcement matters. Previously, this information was available only at the Commission's offices in Washington, and only on paper or microfilm.

Compliance

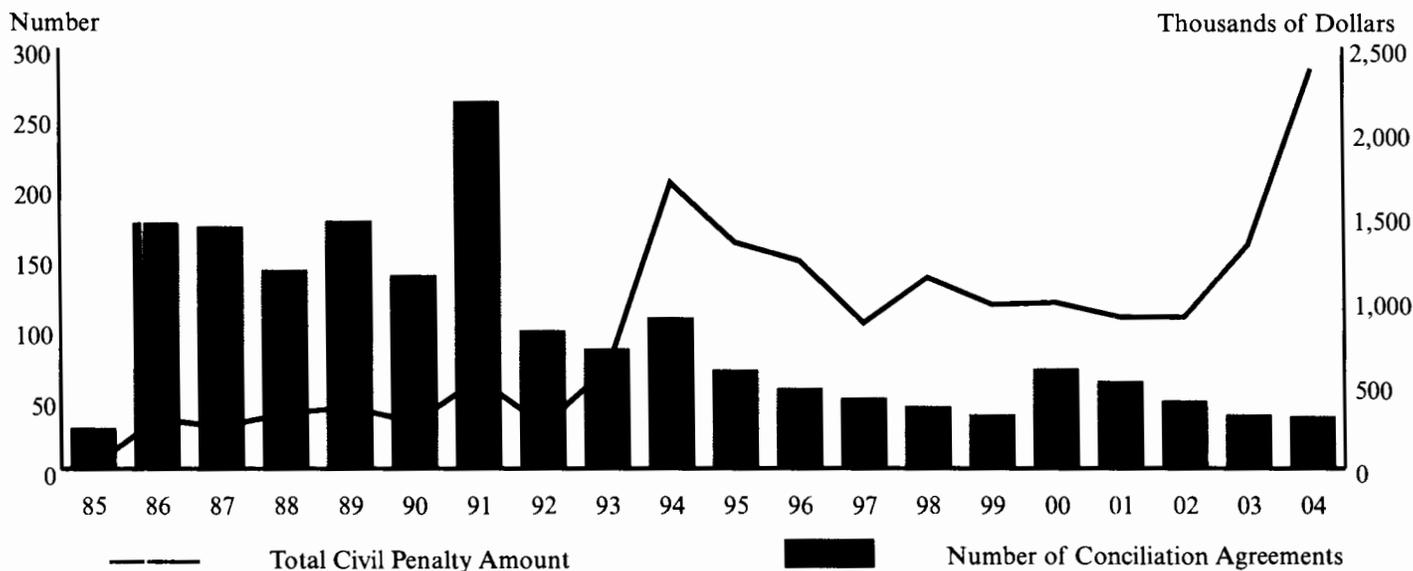
As effective as the Commission's efforts to encourage voluntary compliance with the FECA

have been, none would have succeeded without the deterrent provided by the agency's enforcement program. As noted in Chapter 1, earlier campaign finance laws were largely ineffectual because no single, independent agency handled enforcement. By contrast, under the current law, the Commission has exclusive jurisdiction over civil enforcement.

Enforcement cases are generated through complaints filed by the public, referrals from other federal and state agencies and the FEC's own monitoring procedures. The Commission's Reports Analysis Division reviews each report a committee files in order to ensure the accuracy of the information on the public record and to monitor the committee's compliance with the law. If the information disclosed in a report appears to be incomplete or inaccurate, the reviewing analyst sends the committee a request for additional information (RAFI). The committee may avoid a potential enforcement action and/or audit by responding promptly to such a request. (Most responses take the form of an amended report.) Although the Commission does not have authority to conduct random audits of committees, it can audit a committee "for cause" when the committee's reports indicate violations of the law. (Chart 2-2 tracks report review activity.)

CHART 2-3(a)

Conciliation Agreements and Civil Penalties by Calendar Year



Whether initiated by outside complaint or internal referral, the most complex and legally significant enforcement matters are handled by the Enforcement Division of the Office of General Counsel (OGC). The Enforcement Division:

- Recommends to the Commission whether to find “reason to believe” the FECA has been violated, a finding that formally initiates an investigation;
- Investigates potential violations of the FECA by requesting, subpoenaing, and reviewing documents and interviewing and deposing witnesses; and
- Conducts settlement negotiations on behalf of the Commission, culminating in “conciliation agreements” with respondents.

Based on the results of its investigations, the Office of General Counsel recommends to the Commission whether to find “probable cause to believe” the FECA has been violated.

The agency must attempt to resolve enforcement matters through conciliation. If conciliation fails, however, the Commission may sue a respondent in federal district court. Likewise,

when Commission actions are challenged in court, the Commission conducts its own defensive litigation.² The Commission has been involved in more than 530 court cases since 1980, and the Commission prevailed in 90 percent of those cases (excluding cases that were dismissed).

Enforcement Initiatives

Prior to 1993, the Commission handled every enforcement matter, regardless of its significance. As the number and complexity of cases increased, a backlog developed, jeopardizing the Commission’s ability to enforce the law effectively. In order to deal with the increasing caseload, the Commission developed the Enforcement Priority System (EPS). Under this system, the Commission ranks enforcement cases based on specific criteria, and immediately assigns the significant cases to staff.

² With regard to cases that are appealed to the Supreme Court, however, the high Court ruled, in December 1994, that the FEC could not unilaterally bring cases before it, except those involving the Presidential public funding program. Instead, the Commission must ask the Justice Department either to represent the agency or to grant approval for the Commission to represent itself before the Court. (*FEC v. NRA Political Victory Fund*, *supra*.)

Implementation of the EPS was a major accomplishment, which continues to yield benefits today. But it also reflected that the Commission's enforcement program had neither the resources nor the systems in place to handle every case. Between fiscal year 1995 and fiscal year 2000, 54 percent of enforcement matters were summarily dismissed under the EPS as either low rated – meaning the matter was of a lesser priority compared to other matters before the Commission – or as “stale,” meaning the matter rated as being a higher priority, but staff resources did not become available to work the case within 12 to 18 months following intake. In recent years, the number of cases summarily dismissed has dramatically decreased. And, in fiscal year 2004, for the first time since implementation of the EPS more than a decade before, the Commission did not dismiss a single case as “stale.”

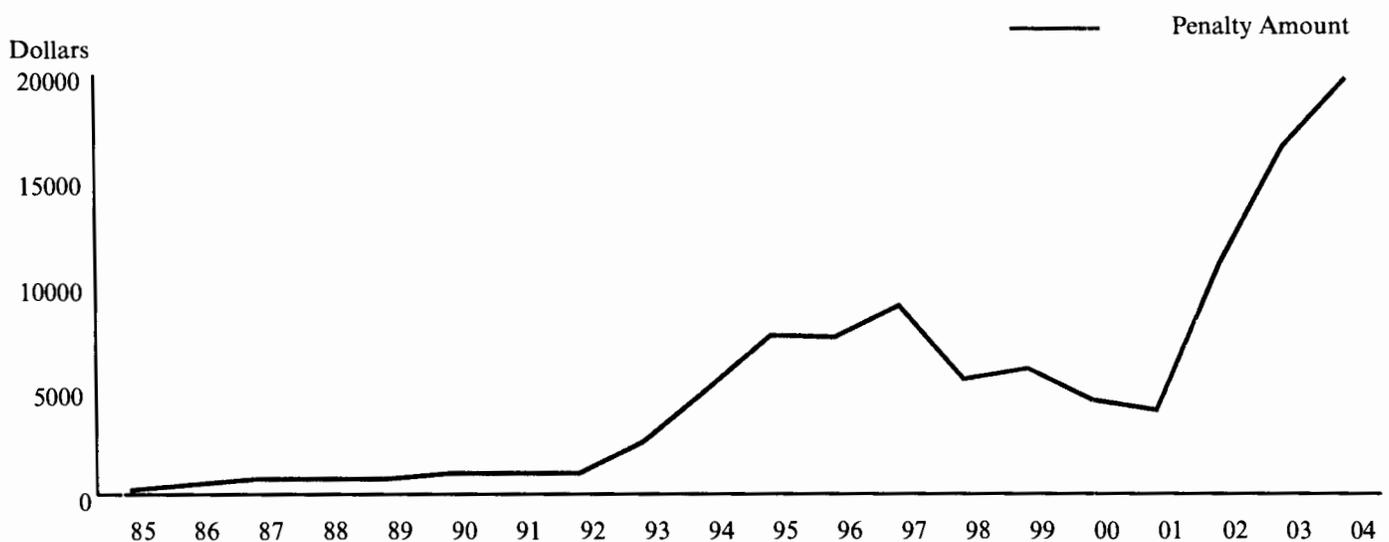
The recent history of the Commission's enforcement program reflects efforts to become more effective and efficient, to do far more with few additional resources. These efforts have included a number of management initiatives implemented within OGC, including:

- Emphasizing that the investigative process conducted within OGC is not an adversarial

proceeding, and that the General Counsel's recommendations to the Commission in enforcement matters are objective and based on a fair reading of the record and careful, thorough consideration of the issues;

- Bringing all enforcement matters under the Enforcement Division, and creating two new enforcement teams. (Immediately prior to this most recent reorganization, enforcement matters were handled by two different divisions of OGC, depending on certain characteristics of the particular matter.);
- Initiating numerous staff training programs;
- Renewing the emphasis on timeliness of case processing;
- Balancing resources to account for the seriousness, magnitude and complexity of cases;
- Increasing efficiency through centralized and strategic case assignments;
- Implementing a computerized Case Management System to track and store data related to cases and respondents in a searchable database; and
- Requiring respondents to cease and

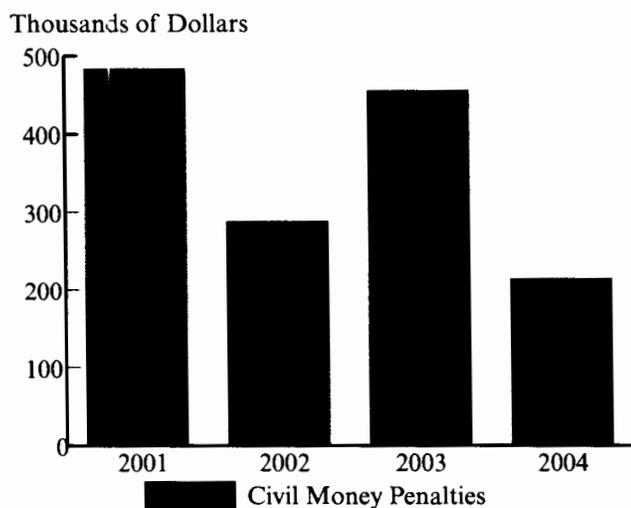
CHART 2-3(b)
Median Civil Penalty by Calendar Year



desist from violating the same provision or provisions of the law in the future.

The Commission has also introduced new programs to expedite resolution of less serious violations of the law. In July 2000, the Commission was authorized by Congress to create an Administrative Fine Program to process cases involving late or non-filed reports. This program promotes timely filing by assessing civil money penalties for committees that file reports and notices late or fail to report at all. The program has significantly increased the timeliness of committee filings and has succeeded in allowing the Commission to use its enforcement resources more efficiently (See chart). Since the Administrative Fine Program's establishment, the program has processed over 1,000 cases and assessed \$1,370,827 in fines.

CHART 2-4
Administrative Fines Collected by Calendar Year



Another program that has helped to reduce the burden on the traditional enforcement process is the FEC's Alternative Dispute Resolution (ADR) Program. The ADR Program is designed to resolve cases without using the more formal enforcement process. The program allows appropriate cases to be dealt with through negotiation and mediation between the FEC and the respondent. The program has proved successful in expediting the resolution of

numerous complaints filed with the Commission as well as internal referrals from the Audit and Reports Analysis divisions. Begun in 2000 as a pilot program and then made permanent in 2002, the ADR program has reached more than 150 negotiated settlements.

As a result of these initiatives, civil penalties collected by the Commission have increased, especially since 2003. In calendar year 1995, the Commission collected \$1,339,000 in civil penalties, and the median civil penalty was at an all-time high of \$7,500. (The median civil penalty did not exceed \$1,000 until 1993.) As recently as 2001, civil penalty collections for the year were less than a million dollars. In 2003, the standard enforcement process alone collected a record \$2,184,375, counting all penalties collected in that year. In 2004, that record was surpassed, with total penalties negotiated in the traditional enforcement process amounting to \$2,370,395, with a median penalty of \$21,000.

In addition, the initiatives of recent years have speeded case processing times. In just one year, from Fiscal Year 2003 to Fiscal Year 2004, the Office of General Counsel reduced by 25% the median number of days from the date a complaint was received to the date a substantive analysis was completed and further action taken, if appropriate, to resolve the matter; the average time for processing such matters was reduced 16% over the same time period.

In short, the FEC has been able to close significant numbers of routine reporting violations and address other straightforward violations more expeditiously. At the same time, OGC has focused resources on more significant cases, resolving them more quickly with substantially higher civil penalties and all but eliminating the number of matters summarily dismissed due to lack of resources.

Bipartisan Structure and Enforcement

By law, no more than three Commissioners may be from the same political party. Historically, this has left the Commission composed of three

Democratic and three Republican Commissioners. The structure of the Commission leaves open the possibility of a tied vote on enforcement matters. Because enforcement matters can only proceed with a majority vote, effective enforcement is in part dependent upon the Commission's ability to reach a consensus. In the five-year period from 1999-2003, the Commission voted 5,602 times and reached a tie vote on enforcement matters 60 times (or just less than 1.1% of overall votes for that period). The vast majority of tie votes do not result in the closure of the enforcement matter; instead, the matter is usually continued with the terms of the case revised and with a consensus achieved.

Presidential Public Funding

Every presidential election since 1976 has been financed with public funds. While the concept of public funding dates back to the turn of the century, a statutory public funding program was not implemented until the early 1970s.

Congress designed the program to correct the problems perceived in the presidential electoral process. Those problems were believed to include:

- The disproportionate influence (or the appearance of influence) of the wealthiest contributors;
- The demands of fundraising that prevented some candidates from adequately presenting their views to the public; and
- The increasing cost of presidential campaigns, which effectively disqualified candidates who did not have access to large sums of money.³

To address these problems, Congress devised a program that combines public funding with limitations on contributions and expenditures. The program has three parts:

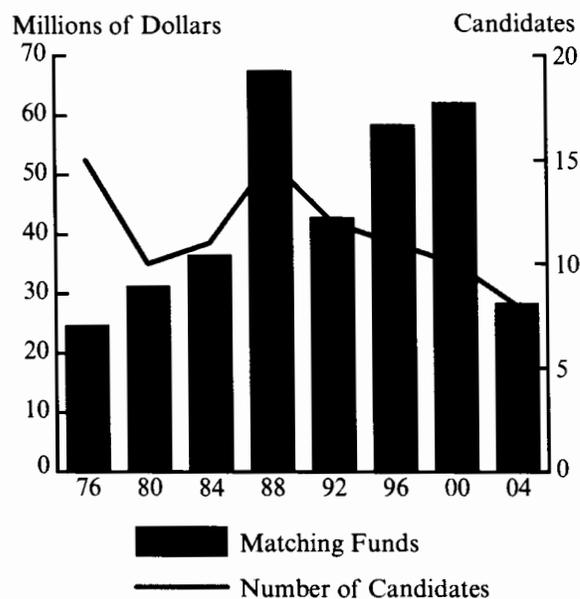
- Matching funds for primary candidates;
- Grants to sponsor political parties' Presidential nominating conventions; and
- Grants for the general election campaigns of

major party nominees and partial funding for qualified minor and new party candidates.

Based on statutory criteria, the Commission determines which candidates and committees are eligible for public funds, and in what amounts. The U.S. Treasury then makes the necessary payments. Later, the Commission audits all of the committees that received public funds to ensure that they used the funds properly. Based on the Commission's findings, committees may have to make repayments to the U.S. Treasury.

CHART 4-4

Total Presidential Matching Fund Payouts and Number of Candidates Participating in Matching Fund Program, 1976-2004 Elections



Audits

Ensuring the proper use of public funds requires Commission auditors to review thousands of transactions involving millions of dollars for each Presidential candidate who receives public funds. In the past, the time required for these audits, and the campaigns' response to the Commission's conclusions, often extended several years after the election.

³ See S. Rep. No. 93-689, pp. 1-10 (1974).

During the 1990s, the agency revised its regulations, amended its audit procedures, expanded its use of technology and increased staffing to hasten the completion and disclosure of Presidential audits. One significant change allows Audit staff to issue the preliminary results of audits that do not raise significant legal questions or issues to the Commission without formal review by the Office of General Counsel. This change eliminated one complete level of processing while preserving the opportunities for campaigns to answer and comment on the conclusions reached in the audit reports. The Office of General Counsel's General Law and Advice Division continues to assist on audits that raise significant or complex legal issues, and to facilitate the audit process by advising the auditors on a wide range of legal and audit protocol issues. As a result of these changes, the vast majority of the audits for the 2000 election were completed in 2002, marking a significant improvement over previous Presidential cycles.

Tax Checkoff

The public funding program is exclusively funded by the dollars that taxpayers designate for the Presidential Election Campaign Fund on their 1040 tax forms. Beginning in 1980, fewer and fewer taxpayers designated a dollar to the Presidential Fund, even as Fund payments to candidates increased with inflation.

After being warned by the Commission that the program faced an impending shortfall, Congress acted to preserve the fund in the short run by raising the checkoff amount from \$1 to \$3 in 1993. But Congress did not index the checkoff amount for inflation, so the long-term problem of shortfall remains. The Commission has suggested a number of legislative changes to remedy this problem, including indexing the checkoff amount for inflation and allowing the Treasury to rely on "expected proceeds" from the checkoff instead of the actual balance as of the dates of the matching fund payments. The checkoff is discussed in further detail in Chapter 4.

Chapter 3

Key Issues Before the Commission

Since its inception, the FEC has negotiated the tension between the rights of citizens to enter into public political debate and discussion and the need to simultaneously safeguard the integrity of the electoral process. Throughout its 30 years as an agency, the Commission has dealt with a myriad of issues that have required it to balance a keen sensitivity for the First Amendment right to free speech with the need to safeguard the process central to our representative form of government.

This chapter examines the Commission's balancing act, focusing particularly on a few of the difficult issues that the agency is currently addressing or has recently resolved.

Electioneering Communications

The extent to which the FECA may limit election-related communications by corporations and unions has long been a contentious and constitutionally significant issue debated both in the courts and at the Federal Election Commission. While the history of this issue has its provenance as far back as the 1907 Tillman Act, the constantly shifting terrain of campaign finance activity and subsequent regulation have culminated in what is arguably among the most significant regulatory measures to date: the electioneering communications provisions of the Bipartisan Campaign Reform Act. These provisions not only expand application of the long-standing corporate/labor prohibition but

also provide greater disclosure of election-related communications.

For some, the express advocacy standard established by the Supreme Court's decision in *Buckley v. Valeo* marked the boundary delineating how far the FEC could regulate election-related speech. Applying that standard, any communication that expressly advocated a vote for or against a federal candidate could be paid for only with funds subject to the limits and prohibitions of federal law (also called "hard money"). Over the years, an increasing number of corporations, unions, political parties and independent groups produced communications contoured specifically to avoid express advocacy language, thereby avoiding regulation. Reformers cited these communications as evidence that express advocacy was an insufficient standard for distinguishing between election-influencing ads and those that genuinely addressed other issues. In a study cited by Congressional proponents of the electioneering communications provisions, only 10% of election ads in the 2000 election used express advocacy language.¹ Spending on "issue" ads increased almost sevenfold from \$30 million in 1998 to over \$200 million in the 2000 election.² In light of these developments, reformers argued that the express advocacy standard was an

1 Craig B. Holman and Luke P. McLoughlin, *Buying Time 2000*. Brennan Center For Justice. www.brennancenter.org.

2 *Ibid.* p. 15.

easily circumvented and ineffective standard for preventing prohibited sources of funds from being used to affect federal elections.

The electioneering communications provisions introduce a new standard for determining whether or not an ad is campaign related. Since most ads are indirect in their appeal and rarely state a direct call to action, such as “vote for” or “vote against,” Congressional sponsors of the provisions sought to craft legislation that focused on when, how and to whom a communication is made. Accordingly, the electioneering communications provisions require that any broadcast, cable or satellite ad that satisfies the following criteria must be disclosed and paid for with funds permissible under federal law:

- The ad mentions a clearly identified federal candidate;
- The ad is run within 30 days of a primary or 60 days of a general election; and
- The ad is targeted to the relevant electorate.

Some have referred to the 30- and 60-day pre-election windows as “blackout periods,” suggesting that ads cannot be run during those periods. Actually, electioneering communications are permitted during those periods, but they must be paid for with donations from individuals and not from any prohibited sources, such as corporations, unions and foreign nationals. In the 2004 election cycle, individuals and groups disclosed to the FEC over \$97 million in electioneering

communications. As Chart 3-1 shows, a handful of groups were responsible for the vast majority of spending on electioneering communications. The sources and amounts of these communications would likely have gone undisclosed prior to the electioneering communications provisions.

The constitutionality of the electioneering communications provisions was challenged in *McConnell v. FEC*. The plaintiffs argued that the electioneering communications provisions overstepped the constitutionally-mandated line between election advocacy and issue advocacy drawn by the Court in *Buckley*. The Court, however, found that the components of the definition of an electioneering communication are sufficiently tailored to distinguish election-related ads from those that are not.

Several issues remain outstanding following the district and appeals court decisions in *Shays and Meehan v. FEC*. The decisions rejected several aspects of the Commission’s regulations on electioneering communications. As a result, the Commission has embarked on a rulemaking re-examining the regulation that exempts communications that are conducted by public charities (entities that are organized under section 501(c)(3) of the Internal Revenue Code). The Commission is also revisiting whether communications that broadcasters air for free should be covered by the electioneering communication rules.

Political Committee Status

Determining which groups should be required to disclose their activity to the FEC as political committees has proven to be a challenge for Congress, the courts and the Commission. A vast number of organizations engage in some sort of political activity, ranging from education to lobbying to direct electoral activity. Many organizations never engage in the sort of election-influencing activity that the FEC regulates. According to the interpretation of the FECA in the *Buckley v. Valeo* decision (see Chapter 1), a group or organization that is under the control of a candidate or has as

CHART 3-1
Largest Electioneering Communications Filers

Filers	Total
Media Fund	\$26,869,676
Progress for American Voters Fund	\$26,472,972
Swift Boat Veterans for Truth	\$13,568,351
Moveon.org Voter Fund	\$5,717,031
Citizens for a Strong Senate	\$4,580,471
League of Conservation Voters	\$3,711,570
Club for Growth.net	\$3,633,577

its major purpose influencing the nomination or election of a candidate must register with the FEC as a political committee and regularly disclose all of its receipts and disbursements once it has made or received contributions or expenditures aggregating in excess of \$1,000 in a calendar year.

"527" Organizations

All political committees registered with the FEC are classified as political organizations under section 527 of the Internal Revenue Code, but not all 527 organizations are required to register or report with the Commission. Those that are not required to register or report to the FEC are also not bound by many of the limits and prohibitions of the FECA. During the 2004 elections, campaign spending by 527 organizations not registered with the FEC became an issue of concern among campaign finance reformers (See Chart 4-3 in Chapter 4). Key sponsors of the BCRA encouraged the Commission to bring these groups within the agency's control and the Commission has stated that it will address those concerns on a case-by-case basis.

New Rules Affecting Political Committees

In an effort to address some of these concerns, the Commission promulgated new regulations in November 2004 to clarify when funds received are considered contributions and could thus trigger political committee status. The new rules included in the definition of "contribution" any funds received in response to a solicitation that indicates that some portion of the funds will be used to support or oppose the election of a clearly identified federal candidate. Hence, 527 organizations that raise such funds may be required to register and report to the FEC as political committees. On September 14, 2004, before the Commission promulgated the new rules on political committee status, U.S. Representatives Christopher Shays and Martin Meehan filed a complaint in the U.S. District Court for the District of Columbia challenging the Commission's alleged "failure... to promulgate legally sufficient regulations to define the term 'political committee,' particularly as that term is

applied to 527 organizations.³ In January, 2005, EMILY's List filed suit against the Commission in the same court alleging that the new rules violated the Administrative Procedure Act and the First Amendment. They argued that the FEC overstepped its authority by restricting activities that are not for the purpose of influencing a federal election. Their request for a preliminary injunction in this case was denied on February 25, 2005.

Both the Shays-Meehan and EMILY's List cases were pending at the date of this publication.

Personal Use of Campaign Funds

Congress banned personal use of excess campaign funds as part of the 1979 amendments to the FECA. That ban, however, did not apply to candidates who were Members of Congress on January 8, 1980 (due to the so-called "grandfather clause"), nor did it define the parameters of "personal use."

Since most of the candidates initially seeking guidance under this section were incumbents, who were exempt under the "grandfather clause," the Commission was rarely called upon to address the personal use issue. When questions did arise, the Commission tried to find answers that took into account both Congress's desire to prohibit the undefined "personal use" of campaign contributions and the need to give candidates and campaigns the discretion to conduct their campaigns as they saw fit. Once again, the Commission was called upon to find a balance between legislative interests and constitutional freedoms, mindful of practical considerations.

As years passed, public interest groups and the press began to focus public attention on the way certain Members of Congress and other candidates spent their campaign funds. Common Cause, for example, alleged that "Members are using campaign funds to buy cars, to pay for clothes and meals, to pay for pleasure and vacation trips, to pay for club dues and tickets to theater and sporting events..."

³ 337 F.Supp. 2d 28, (D.D.C., 2004).

claiming these activities are related to campaign or official duties.” Others complained that “some campaign coffers are regarded as slush funds to be used by incumbents for whatever purposes meet their fancy.”⁴

In response to the criticism, Congress repealed the “grandfather clause” by passing the Ethics Reform Act of 1989. That statute extended the personal use ban to all candidates, including Members of the House and Senate who served in the 103rd Congress or a subsequent Congress, but it did not define “personal use.”

Personal Use Regulations (1995)

With the repeal of the “grandfather clause,” the Commission expected additional questions regarding the scope of the personal use ban. As a result, the Commission initiated a rulemaking to define the term. Conflicting comments and testimony at public hearings demonstrated the controversial nature of the issue: One person’s “personal use” is another’s legitimate campaign expenditure.

After carefully considering the issues, the Commission adopted detailed regulations that defined personal use, and offered specific examples of expenses that the Commission considered personal. Generally, expenses that would exist regardless of an individual’s campaign for federal office or duties as a federal officeholder were deemed personal. Examples include:

- Household expenses;
- Funeral expenses;
- Tuition payments;
- Entertainment expenses; and
- Membership dues at clubs.

Statutory Developments

When Congress enacted the BCRA, it amended the statutory basis for the personal use regulations. With some slight differences, these changes served

to codify the existing FEC regulations relating to personal use of campaign funds. The concept that personal use covers expenses that would exist irrespective of the candidate’s candidacy or federal office holding duties was placed into the statute. The BCRA also included a non-exhaustive list of prohibited personal uses of campaign funds which largely corresponded to the list contained in the 1995 regulations. One exception was the treatment of funeral expenses which was removed from the list of prohibited personal uses. The new personal use regulations now permit campaign funds to be used for the funeral expenses of a candidate or campaign volunteer who dies in the course of campaign activity.

The BCRA also removed from the list of permissible purposes for the use of campaign funds “any other lawful purpose.” In its 2004 legislative recommendations to Congress, the Commission suggested restoring this language. In December 2004 Congress reinserted this language into the statute.

Candidate Salary

After the FECA was enacted, the Commission was unable to resolve the question of whether campaigns may pay a salary to a candidate during the campaign. Some Commissioners maintained that salary payments represented an illegal conversion of campaign funds to personal use. Others argued that banning campaign salaries unfairly disadvantaged challengers. In its 1995 rulemaking, the Commission considered two proposals to address the salary question: one would have banned candidate salaries; the other would have allowed candidates to receive a salary equal to the one they were forced to give up in order to campaign. Neither proposal, however, garnered support from a majority of the Commissioners.

In 2002, the Commission again considered the salary question, and issued new regulations that allow campaigns to pay a salary to the candidate, so long as that salary is not greater than the salary for the federal office sought or in excess of the candidate’s income for the previous year. The Commission noted that the earlier prohibition on candidate salaries unfairly hindered challengers and candidates who lacked the personal means to forego employment for the length of their campaigns.

⁴ Sara Fritz and Dwight Morris, *Handbook of Campaign Spending: Money in the 1990 Congressional Races*. Congressional Quarterly, Washington D.C. 1992; p. 9.

Coordination Issues

Under the FECA, expenditures that are coordinated with a candidate or campaign are considered in-kind contributions. The Commission, courts and the regulated community have long debated what standard should be used to determine what expenditures are coordinated and what expenditures are independent.

Following a lower court ruling that narrowed the activities that could result in coordination, and the Commission's promulgation of coordination rules based on that ruling, Congress in the BCRA changed the statutory definitions of "independent expenditure" and "coordination." Under the BCRA, an expenditure "made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of" a candidate, party or any agent of a candidate or party is considered "coordinated" and is thus subject to the limitations, prohibitions and reporting requirements of the Act. Congress also directed the Commission to revise its regulations.

As part of its BCRA rulemaking in 2002, the Commission developed regulations that adopted a three-prong test for determining when a communication is coordinated. This test considers the identity of the person paying for the communication, the content of the communication and the conduct of the parties producing the communication. This test was challenged in *Shays and Meehan v. FEC*. The district court decision in *Shays*, issued in 2004, held that by taking into account the content of communications, the Commission's coordinated communication test undermined the BCRA's statutory purposes of regulating campaign finance and preventing circumvention of the FECA's contribution limits. The court stated that where the parties have coordinated the production of a communication that constitutes an "expenditure," the communication should be considered a contribution regardless of its content. In July 2005, the U.S. Court of Appeals for the District of Columbia upheld the district court's conclusion on narrower grounds. The Commission is currently engaged in a new rulemaking revisiting its coordination regulations.

Regulation of the Internet

The development of the Internet has had important implications for the development of federal election laws. As the Commission has noted, the Internet "allows almost limitless, inexpensive communications across the broadest possible cross-section of the American population." The Commission has examined a number of Internet-related issues through advisory opinions which considered the impact of the Internet on various areas of campaign finance law, such as:

- Fundraising by candidates and political committees through web sites;⁵
- The use of the Internet in volunteer activities;⁶
- The services provided by vendors for fundraising;⁷
- Non partisan get-out-the-vote activities;⁸ and
- News media activity.⁹

As part of its rulemaking implementing the BCRA, the Commission concluded that Congress did not intend Internet communications to be treated as "public communications" and accordingly excluded Internet activity from Commission rules on soft money and coordinated communications. The district court's decision in *Shays and Meehan v. FEC* rejected the wholesale exclusion of the Internet from Commission regulations and charged the Commission with determining which forms of "general public political advertising on the Internet should be subject to some regulation." As a result, the Commission is in the process of developing new regulations which will deal with concerns expressed by the *Shays* court while continuing to respect the use of the Internet by individuals as a means of political expression and information gathering.

5 Advisory Opinion 1995-09 (NewtWatch PAC) and 1999-09 (Bradley for President).

6 Advisory Opinion 1999-17 (Bush for President).

7 Advisory Opinions 1999-22 (Aristotle Publishing Company), 2002-07 (Careau) and 2004-19 (Dollar Vote.org).

8 Advisory Opinion 1999-25 (Democracy Network).

9 Advisory Opinions 2000-13 (iNEXTV) and 2004-07 (MTV).

Chapter 4

Continuing Debate Over Reform

Since the Bipartisan Campaign Reform Act was signed into law in March 2002, the terrain of campaign finance law has shifted significantly and again placed the FEC at the center of public debate over the direction of campaign finance reform. This chapter examines some of the fundamental issues at the top of the reform agenda, supplemented by FEC statistical data.

The Role of Political Parties

Background

For many years conventional wisdom has held that political parties are gradually becoming less relevant in the American political arena. Up until the 1950s and '60s, the parties dominated the electoral process.¹ Then, a number of factors – including social, political, technological and governmental changes – coalesced to reduce party influence:

- Direct primaries limited the role parties played in selecting nominees.
- Changes in civil service laws limited patronage, which parties had used to reward loyalists.
- Higher education levels spawned issue-oriented campaigns, where voters and candidates were less reliant on party guidance.

- Television replaced the party as the primary link between candidates and voters.²

There were features of the FECA that also seemed to lessen the influence of the parties. It was argued, for example, that the Presidential public funding program, which provides public money directly to qualified candidates, reduced the parties' role in selecting Presidential nominees by encouraging the trend toward candidate-centered politics.³

Many, however, found the critics' evidence of party decline inconclusive. They noted the amounts raised and spent by parties generally indicated growth, rather than decline. Further, it was argued, the true importance of parties cannot be measured by contributions and expenditures alone. Parties produce generic materials and engage in other activities that also benefit federal candidates. For example, as a result of the 1979 amendments to the FECA, state and local party committees may produce and distribute slate cards and sample ballots, as well as yard signs, bumper stickers and other campaign materials that aid federal candidates, but these items are not considered contributions or coordinated party expenditures. As another example, parties may engage in generic voter identification and get-out-the-vote drives which have a significant

1 Sorauf, *Inside Campaign Finance*, p. 3.

2 Sabato, *Paying for Elections: The Campaign Finance Thicket*, p. 47 and Crotty, *American Parties in Decline*, p. 75.

3 Price, *Bringing Back the Parties*, p. 243.

CHART 4-1

Overall Financial Activity of National Party Committees (in Millions)

	1999–2000			2001–2002			2003–2004
	<i>Federal</i>	<i>Nonfederal</i>	<i>Total</i>	<i>Federal</i>	<i>Nonfederal</i>	<i>Total</i>	<i>Federal Only</i>
DNC	\$124.00	\$136.56	\$260.56	\$67.50	\$94.56	\$162.06	\$394.41
DSCC	\$40.49	\$63.72	\$104.21	\$48.39	\$95.05	\$143.44	\$88.66
DCCC	\$48.39	\$56.70	\$105.09	\$46.44	\$56.45	\$102.89	\$93.17
RNC	\$212.80	\$166.21	\$379.01	\$170.10	\$113.93	\$284.03	\$392.41
NRSC	\$51.47	\$44.65	\$96.12	\$59.16	\$66.43	\$125.59	\$78.98
NRCC	\$97.31	\$47.3	\$144.61	\$123.62	\$69.68	\$193.3	\$185.72

impact on elections. Yet these activities are not considered contributions or expenditures on behalf of particular candidates.

Parties After the BCRA

As noted in Chapters One and Three, the BCRA bans national party committees from raising or spending soft money. Directly following the passage of the BCRA, it was widely believed that this ban would drastically diminish the role of the national parties as soft money would move from the national parties into the hands of independent organizations and PACs. The BCRA ban on soft money effectively eliminated a source of funding that amounted to approximately \$500,000,000 in 2001-2002 for the six major national party committees (i.e., the Democratic National Committee (DNC), the Republican National Committee (RNC), the Democratic Senatorial Campaign Committee (DSCC), the National Republican Senatorial Committee (NRSC), the Democratic Congressional Campaign Committee (DCCC) and the National Republican Congressional Committee (NRCC), accounting for more than 40% of the total receipts for national party committees.⁴ Many were skeptical that the parties would ever be able to make up for the loss of soft money with an increase in

hard money contributions. Yet, in the 2003-2004 election cycle, the national parties managed to do just that. The DNC, DSCC, DCCC and state and local Democratic party committees raised over \$683,600,000 in hard money. Also, the RNC, NRSC, NRCC and state and local Republican committees raised \$755,300,000 in hard money. These fundraising figures represent an increase of 150% for Democratic committees and 69% for Republican committees. The national party committees managed to raise more in hard money than the combined hard and soft money totals of any previous year.

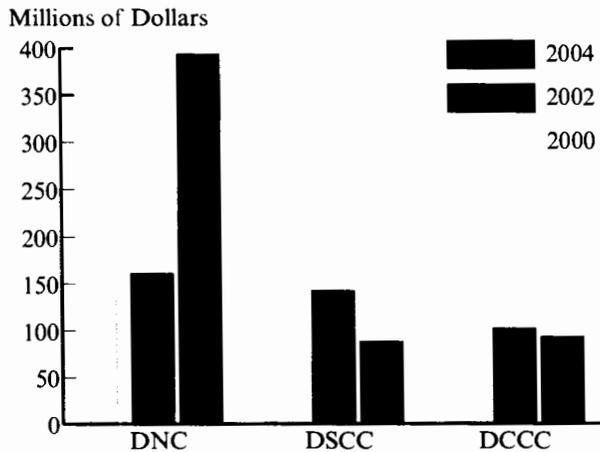
In addition to the fundraising success of the national parties under the BCRA soft-money prohibition, the parties have also dramatically increased their independent activity. In 2004, Democratic party committees reported a total of \$175,900,000 in independent expenditures – communications that expressly advocate the election or defeat of a candidate but are not coordinated with the candidate. The Republican party committees reported \$88,000,000 in independent expenditures. Furthermore, over 71% of independent expenditures made in support of Presidential candidates were made by party committees.

The parties' success in hard money fundraising still leaves open the question of what has happened to the soft money that they used to raise. Some have raised concerns that the soft money prohibited to national party committees has been

⁴ Malbin, Michael. "Political Parties Under the Post-*McConnell* Bipartisan Campaign Reform Act," *Election Law Journal*, vol. 3, no. 2, 2004: p. 177.

CHART 4-2(a)

Total Fundraising by Democratic National Party Committees, 2000-2004 Election Cycles



redirected to independent “527” organizations. This subject is addressed below in “The Role of Independent Committees.”

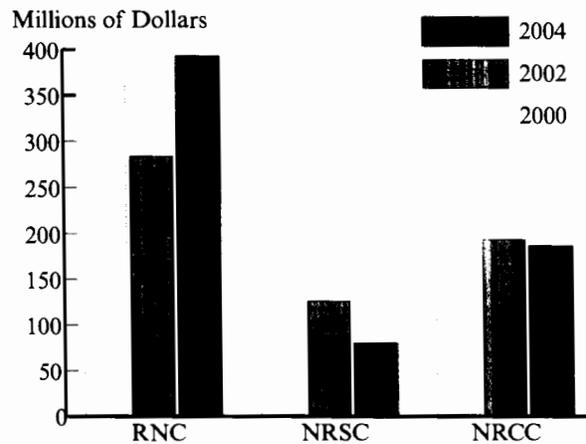
The Role of Independent Organizations

During the debate surrounding the passage of the BCRA, some of the critics of the new legislation claimed that the ban on national party committees raising soft money would shift the flow of political money and influence away from the parties and into independent organizations. Since only some independent organizations fall under the sway of FEC disclosure regulations, it was argued, the BCRA would drive campaign finance activity further underground.

This debate continues, and will, until there are more election cycles under the BCRA to provide harder evidence. One possible indicator of the increased flow of political money into independent organizations is the volume of electioneering communications reported to the Commission. In the 2004 election cycle, \$97,000,000 in electioneering communications were reported to the FEC. It is important to note that this activity went undisclosed

CHART 4-2(b)

Total Fundraising by Republican National Party Committees, 2000-2004 Election Cycles



prior to the BCRA, so it is difficult to determine how much electioneering communication activity shifted from national party committees to other political organizations.

Another possible indicator that political money may have shifted away from the parties is the increase in independent expenditures, a figure which reached \$192,000,000 in the 2004 election for Presidential candidates alone. While this represents a substantial increase, the national party committees themselves were responsible for \$138,000,000 in independent expenditures (for Presidential candidates) in 2004. Since the preponderance of independent expenditures were made by the national party committees, this increase hardly amounts to an indication that political money has moved away from the party committees.

In the 2004 election cycle, “527” organizations spent over half a billion dollars, raising \$434 million in calendar year 2004 alone, according to a report by the Center for Public Integrity. (See also Chart 4-3).⁵

The increase in non-party financial activity, while significant, has occurred alongside a dramatic

⁵ Center for Public Integrity, “527s in 2004 Shatter Previous Records for Political Fundraising” (www.publicintegrity.org/527/report.aspx?aid=435)

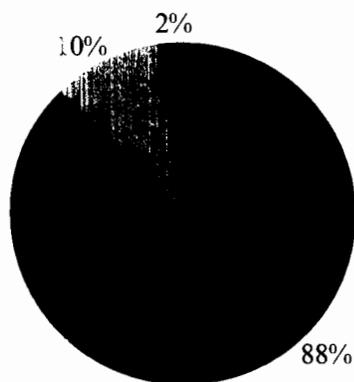
increase in fundraising by the national party committees. Receipts for national party committees increased by 150% for Democratic committees and 69% for Republican committees. (See the section above on “The Role of Political Parties.”)

While there has been a surge in activity from independent organizations, this growth seems to parallel dramatic growth in party activity. Furthermore, with the FEC’s new regulations on solicitations, mentioned earlier, more independent organizations may be required to file with the FEC as “political committees” and disclose their activity to the public. As political committees, such organizations would no longer be able to avail themselves of sources of funds prohibited under federal law (such as corporations and unions), and they would not be able to serve as repositories for soft money.

CHART 4-3

Spending by Registered Political Committees and Other 527 Organizations

-  Registered Political Committees
-  Other Spending by Unregistered 527 Organizations
-  Unregistered 527s Filing Electioneering Communication Reports



2004
\$4.45 billion in total spending

Presidential Public Funding

In the 2000 primary election, George W. Bush opted out of the federal matching funds program and, upon his later election to office, became the first President elected without matching funds since the creation of the program. In the 2004 Presidential primary, three major party candidates, George W. Bush, Howard Dean and John Kerry, opted out of the matching funds program.

In our discussion of Presidential Public Funding, in Chapter Two, we noted that candidates who accept matching funds must also accept limits on their expenditures, not only overall, but also for each state’s primary. The overall spending limit for a candidate in the 2004 primaries was about \$45 million. (This fell well below the amounts actually raised and spent by the primary campaigns of George W. Bush and John Kerry.) The expenditure limit for each state is determined by the voting-age population of the state in question. Because there is a relatively small voting-age population in states holding early primaries (i.e., Iowa and New Hampshire), the expenditure limits for these states are relatively low. The low expenditure limits, together with increased contribution limits, the rising cost of campaigning and the increased efficiency of fundraising, led some candidates to forego matching funds. The number of candidates opting out of the matching funds program worries its supporters, since the primary purpose of the program was to diminish reliance on those who can raise large batches of contributions.

In past Presidential election cycles, the Presidential Election Campaign Fund (the Fund) experienced temporary shortfalls in matching funds, requiring pro-rata payments to candidates until sufficient deposits were received. For several years, the Commission has urged Congress to help alleviate the shortfall problem. Possible solutions have included increasing the checkoff amount and revising the “set aside” provision under which funds must be earmarked for general election and convention financing before any monies can be used for primary matching payments.

Early projections by the Commission indicated that January 2004 payments to eligible candidates in the 2004 primaries could be less than 20% of the amount certified, even if one major party candidate did not take federal matching funds. However, as noted above, three major party candidates— Howard Dean, John Kerry and President Bush—chose not to participate in the matching payment program. As a result, the U.S. Treasury successfully made the January payments of \$15,417,353.84 to six eligible Presidential candidates. The only shortfall during the 2004 cycle took place in February, when candidates received approximately 46 cents per dollar certified. This shortfall was remedied by the time the March/ April payments were made.

A total of eight candidates were certified for primary matching funds during the 2004 primaries: Wesley K. Clark, John R. Edwards, Richard A. Gephardt, Dennis J. Kucinich, Lyndon H. LaRouche, Jr., Joseph Lieberman, Ralph Nader and Alfred C. Sharpton.

The three major party candidates' decision not to participate in the program lessened the shortfall somewhat for 2004, but the shortfall problem remains. To remedy this problem, the Commission has recommended several specific legislative changes. In 2005, the Commission repeated its recommendation that the law be revised to allow the Treasury to rely on expected proceeds from the checkoff, rather than relying solely on the actual fund balance as of the dates of the matching fund payments. Including estimated proceeds in the figure for matching fund payouts would virtually eliminate the shortfall in the near future.

In order to further the long-term stability of the program, the Commission proposed that the voluntary tax checkoff amount be adjusted for inflation. While the checkoff amount was raised from \$1 to \$3 in 1993, no indexing was built in at that time to account for further inflation. This measure would be crucial to replenishing the funds in the program.

CONCLUSION

The Federal Election Commission has administered and enforced the Federal Election Campaign Act for three decades. In carrying out its duties, the Commission has negotiated the tension between the governmental interest in ensuring the integrity of our electoral process and the protection of the constitutional right to free speech and association.

The endeavor to balance these two values that lie at the very foundations of our democracy has led the Commission to address some of the most complex and controversial legal issues of the past several decades. Its position as the central regulatory agency in the middle of this controversy tends to evoke more criticism than praise from groups on either side of the public debate, in which one rarely finds focus on the long record of FEC accomplishments.

As this report has related, in the last few years alone the Commission has succeeded in the challenging task of promulgating regulations and procedures pursuant to the Bipartisan Campaign Reform Act (BCRA), the most significant and sweeping campaign finance legislation since the 1976 amendments to the FECA. The FEC also played a key role in defending the BCRA in the courts and continues to face many other legal, regulatory and administrative challenges associated with the new law.

Even as it worked to implement the new law, the Commission continued to improve its operations. The agency enhanced its outreach and disclosure programs, expedited the processing and review of campaign finance transactions and improved compliance through numerous enforcement initiatives, including the creation of the Administrative Fines and Alternative Dispute Resolution programs.

Though admittedly limited in scope, this report offers at least a glimpse of some of the FEC's challenges and accomplishments over the last 30 years and offers a clear vision of the agency's place within the broad history of preserving the integrity of federal elections and of sustaining public trust in the electoral process.

Appendix 1

FEC Commissioners and Officers 1975-2005¹

Commissioners

Joan D. Aikens	April 1975 – September 1998 (reappointed May 1976, December 1981, August 1983 and October 1989).
Thomas B. Curtis	April 1975 – May 1976.
Thomas E. Harris	April 1975 – October 1986 (reappointed May 1976 and June 1979).
Neil O. Staebler	April 1975 – October 1978 (reappointed May 1976).
Vernon W. Thomson	April 1975 – June 1979; January 1981 – December 1981 (reappointed May 1976).
Robert O. Tiernan	April 1975 – December 1981 (reappointed May 1976).
William L. Springer	May 1976 – February 1979.
John Warren McGarry	October 1978 – August 1998 (reappointed July 1983 and October 1989).
Max L. Friedersdorf	March 1979 – December 1980.
Frank P. Reiche	July 1979 – August 1985.
Lee Ann Elliott	December 1981 – June 2000 (reappointed July 1987 and July 1994).
Danny L. McDonald	December 1981 – Present (reappointed in July 1987, July 1994 and July 2000).
Thomas J. Josefiak	August 1985 – December 1991.
Scott E. Thomas	October 1986 – Present (reappointed in November 1991 and July 1998).
Trevor Potter	November 1991 – October 1995.
Darryl R. Wold	July 1998 – April 2002.
Karl J. Sandstrom	July 1998 – December 2003.
David M. Mason	July 1998 – Present.
Bradley A. Smith	May 2000 – Present.
Michael E. Toner	March 2002 – Present.
Ellen L. Weintraub	December 2002 – Present.

¹ Beginning and reappointment dates listed here do not necessarily reflect when Commissioners took the oath of office. Overlapping terms in office reflect delays between Senate confirmation and arrival at the Commission.

Ex Officio Commissioners

Clerk of the House

W. Pat Jennings April 1975 – November 1975.
Edmund L. Henshaw, Jr. December 1975 – January 1983.
Benjamin U. Guthrie January 1983 – January 1987.
Donald K. Anderson January 1987 – October 1993.

Secretary of the Senate

Francis R. Valeo April 1975 – March 1977.
Joseph Stanley Kimmitt April 1977 – January 1981.
William F. Hildenbrand January 1981 – January 1985.
Jo-Anne L. Coe January 1985 – January 1987.
Walter J. Stewart January 1987 – October 1993.

Statutory Officers

Staff Director

Orlando B. Potter May 1975 – July 1980.
B. Allen Clutter, III September 1980 – May 1983.
John C. Surina July 1983 – July 1998.
James A. Pehrkon April 1999 – Present.

General Counsel

John G. Murphy, Jr. May 1975 – December 1976.
William C. Oldaker February 1977 – October 1979.
Charles N. Steele December 1979 – March 1987.
Lawrence M. Noble October 1987 – January 2001.
Lawrence H. Norton September 2001 – Present.

Inspector General

Lynne A. McFarland 1990 – Present.



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