



FEDERAL ELECTION COMMISSION
Washington, DC 20463

July 6, 2007

Hon. Dianne Feinstein, Chairman
Hon. Robert Bennett, Ranking Member
U.S. Senate Committee on Rules and Administration
Russell Senate Office Building
Washington, DC 20510

Re: Hearing on Nominations to the Federal Election Commission and Responses to Post-Hearing Questions

Madam Chairman, Ranking Member Bennett, and Distinguished Members of the Senate Committee on Rules and Administration:

At the conclusion of the hearing before your Committee on June 13, 2007, the Committee determined that the public record would remain open until close of business on Wednesday, June 20, 2007, to allow the record to be augmented and also to allow further questions to be presented to each nominee by members of the Committee. Below are my responses to the questions that have been forwarded to me. I hope that the following responses will be found sufficiently informative. I welcome the opportunity to provide clarification to any of my answers or further information on any topic if desired by any member of the Committee.

Questions from Chairman Feinstein

1. Most Commissioners have impressive campaign finance credentials; they have also had many dealings with parties that operate under the campaign finance laws. Because of those dealings, Commissioners occasionally have to recuse themselves from matters dealing with certain organizations. From your understanding, what is the FEC's policy with respect to recusals? What would be your approach on determining that a matter before you would require a recusal? What, if any, role does the FEC's Ethics Officer serve in this process?

Prior to taking the oath of office as a Commissioner, each prospective Commissioner is required to sign an Ethics Agreement in order to avoid any real or apparent conflicts of interest under applicable laws and regulations. As required by 18 U.S.C. 208(a), each prospective Commissioner must provide written assurance in the Ethics Agreement that the Commissioner will not participate personally and substantially

in any particular matter that has a direct and predictable effect on the financial interests of the Commissioner, or those of any other person whose interests are imputed to the Commissioner, unless the Commissioner obtains a written waiver, pursuant to section 208(b)(1), or qualifies for a regulatory exemption pursuant to section 208(b)(2). Persons whose interests are imputed to a Commissioner include spouses, minor children, general partners, any organization in which the Commissioner serves as an officer, director, trustee, general partner or employee, or any person with whom the Commissioner may be negotiating concerning prospective employment.

To implement the Ethics Agreement, a screening arrangement is agreed upon with the Commission's Designated Agency Ethics Official, which currently is the General Counsel of the Commission, pursuant to 5 C.F.R. 2634.802(a). The screening arrangement establishes a procedure to assure that any matter that comes before the Commission that might pose a conflict, or a reasonable appearance of a conflict, is immediately identified and so that appropriate steps can be taken to trigger a timely recusal. In my case, my screening arrangement identified four entities (including my former law firm) which would trigger my automatic recusal should any of them become a party to any matter before the Commission. Of those four entities, three required automatic recusal for a period of one year from the date I became a Commissioner, and that year expired on January 10, 2007. The automatic recusal commitment applicable to the fourth entity (the American Bar Association) remains, and potentially could continue in effect throughout my tenure on the Commission, depending on my ongoing relationship with, and activity involving, the ABA.

When a Commissioner recuses himself or herself, it is the policy of the Commission to take steps such that (a) no further information comes before, or is made available to, the Commissioner relating to that matter until such time as it may become public, and then only the public information is to be available to the Commissioner, and (b) the recused Commissioner may not be present at any hearing during which any such matter is being discussed or is otherwise under consideration by the Commission in closed session.

In my own case, I took personal steps in my office to be alerted to any matter that involves additional former clients of mine, so that, if any of such clients comes before the Commission as a party, I may, if then deemed appropriate after discussing it with the Ethics Official, recuse myself.

In addition to issues involving conflicts or appearance of conflicts based upon *financial matters*, a Commissioner should recuse himself or herself whenever there is a *relationship* with a party before the Commission that would present a conflict or reasonable appearance of one, or otherwise call into question whether a Commissioner could act objectively with respect to that party on the matter. *See* 5 C.F.R. 2635.501-2635.502. In that regard, should any such circumstance exist, or appear to exist, the Commissioner should disclose the matter fully to the Commission's Ethics Official and follow any guidance given by the Ethics Official with respect to recusal. I am sensitive to

the fact that I have lived in Nevada all my life, and consequently I often will personally know or have knowledge of an existing or future federal candidate or federal officeholder from Nevada. Accordingly, I have a procedure in place whereby I am notified immediately of any matter before the Commission involving a person from Nevada so I may consider at the outset whether a recusal is appropriate.

Since I arrived at the Commission, I have automatically recused myself, and will continue to automatically recuse myself, from any matter before the Commission in which Majority Leader Harry Reid, any member of his staff, any officer or staff member of his campaign committee, or any member of his family, is a party, or from any matter before the Commission in which there is any involvement, or claim of involvement, or the reasonable appearance of any involvement, on the part of any of them in any such matter.

To date, I have recused myself from two matters, one matter involving Majority Leader Harry Reid (MUR 5848; documents related to this matter can be found at <http://eqs.sdrdc.com/eqs/searcheqs> by searching Case # 5848), and another matter concerning another person from Nevada which still remains confidential within the Commission. In the latter instance, I discussed my recusal and the reasons for my recusal, in advance, with the Commission's Ethics Official.

In all instances where the recusal is not automatic, and requires the exercise of discretion, I will communicate with the Commission's Ethics Official, and follow any recommendation or opinion provided to me.

2. Since the 1970's, the Department of Justice and the Federal Election Commission have operated under a Memorandum of Understanding to effectuate referrals for potential criminal violations of the campaign finance laws. While such criminal violations should be investigated and prosecuted, it is in the FEC's interest to have a well understood referral process. This relationship has been settled for some time. From your perspective, what is the FEC's public policy on referrals to the Attorney General of the Department of Justice for prosecution consideration?

Under 2 U.S.C. 437g(a)(5)(C), if the Commission "determines that there is probable cause to believe that a knowing and willful violation . . . has occurred . . . [the Commission] may refer such apparent violation to the Attorney General of the United States . . ." Pursuant to that statute, in 1977, the Commission and the Department of Justice (DOJ) entered into a Memorandum of Understanding (MOU). The MOU was published in the Federal Register on February 8, 1978, 43 Fed. Reg. 5441 (full text below). The MOU remains the operative document reflecting the mutual referral policies between the Commission and the DOJ.

There are instances in which alleged violations of the FECA are brought to the attention of the DOJ independently (for instance, through a complaint filed directly with the DOJ or through a press report). In those instances, the Commission staff members and

their DOJ counterparts might communicate informally on such a matter. Such communications may, for example, relate to (a) the possibility or advisability of sharing investigative information, (b) the timing of certain investigative steps (e.g., taking of depositions), (c) consideration of the granting of immunity, and (d) consideration of a global settlement. There is no formal memorandum in place to address all those issues, but the two entities are mindful of the need to be mutually cooperative when appropriate.

Regarding the formal referral process, it had been the Commission's long-standing practice to refer someone or some entity to the DOJ in cases where (a) core provisions of the Act appear to have been violated, (b) there is strong evidence that the violations contained the requisite criminal intent (i.e., "knowing and willful"), and (c) the case is significant in terms of its overall gravity or size.

A matter is not referred from the Commission to the DOJ unless and until the full commission has met and there are at least four votes to support the referral. The above procedure is consistent with my experience during my tenure as a Commissioner.

3. Some critics would charge that the FEC is viewed as an ineffective agency. Watchdog groups are vigilant to ensure that FEC Commissioners will enforce the laws on the books, as well as highlight any attempts to undermine implementation of the Bipartisan Campaign Reform Act of 2002. We are interested in Commissioners' perspectives on how they view compliance with the campaign finance laws. How would you describe your record at the FEC in terms of effective enforcement of campaign finance laws?

I would like to begin by emphasizing the comments contained in my written Opening Statement before the Senate Committee on Rules and Administration wherein I specifically stated my strong support for the Federal Election Campaign Act (FECA), as amended by the Bipartisan Campaign Reform Act, as well as for the mission of the Commission. I stated:

"Fourth, I wish to state my strong support for the Federal Election Campaign Act, as amended by the Bipartisan Campaign Reform Act. I support the principles which gave rise to the legislation, and I am happily and firmly committed to its goals. I believe in the transparency that results from disclosure that is a cornerstone of the statute. Transparency is the most fundamental component of a successful democracy, and, I believe, affords citizens their strongest means to assure their will is achieved. Without transparency, no other Constitutional or legislative provision designed to ensure democracy can have a realistic chance of fulfillment. Additionally, in my view, the structure of limited contributions does act to reduce corruption, and certainly the appearance of corruption; additionally, in certain instances, it also serves to level the playing field for those wishing to participate in our great democracy by seeking to represent us in Congress and in the Office of the Presidency.

Last, and perhaps most important, I wish to state my strong belief in the mission of the Commission. I consider the obligations and responsibilities of the Commission to be among the most important of any governmental agency in our country, and I make sure that they are fulfilled to the best of my ability. I strongly believe in the rule of law, and I will look first to the language and intent of our laws we have sworn to uphold as my lodestone for all decisions that come before me as a Commissioner.”

During my tenure on the Commission, I have attempted to follow that personal commitment to the best of my ability, and will continue to do so during the balance of my term. Consistent with my views on the rule of law, I should state that any judicial interpretations of these laws must be followed and enforced with the same force and vigor as if contained in the legislation itself.

The Commission has accomplishments during the last eighteen months in a number of areas that I believe demonstrate strong and vigorous enforcement of the FECA. These include, in order of discussion below, (a) record-breaking enforcement results through settlements, (b) adoption of several regulations providing significant guidance to the regulated community, (c) issuance of numerous advisory opinions, (d) development of internal procedures which have been made available to the public to provide a better understanding of how issues will be handled by the Commission, and (e) establishment of administrative and operational policies designed to improve the performance of the Commission.

First, in the enforcement category, in 2006 the Commission closed 315 enforcement cases (including Administrative Fines and Alternative Dispute Resolution cases), which is more than any other calendar year since 2001. Moreover, the average time to close a case in 2006 declined significantly from previous years; additionally over 85% of the Commission’s cases are now closed within a two-year election cycle, which is the most efficient processing of complaints in the Commission’s history. At the same time, in 2006 the Commission collected a record \$6.2 million in penalties, which is more than double the amount that the Commission has ever collected in a single year since its formation in 1975.

These accomplishments have continued into 2007. In the first quarter alone, the Commission has collected over \$1.1 million in penalties, which is the largest collected amount for a first quarter in Commission history.

Second, in connection with its rulemaking activity, in the last eighteen months, the Commission has been very active. Our rulemaking responsibility and authority is one of the most important aspects of Commission work, since the success of the Commission’s enforcement program depends upon the Commission having issued clear regulations that properly implement both the letter and the spirit of the campaign finance laws. Since my arrival, the Commission has completed eight important rulemaking proceedings covering core activities, namely (1) Internet Communications, (2)

Coordinated Communications, (3) Political Committee Status, (4) the definitions of “Solicit” and “Direct,” (5) the definition of “Federal Election Activity” and an interim exception for municipal election activity, (6) the definition of “Agent,” (7) Best Efforts in administrative fines matters, and (8) an inflation adjustment for contribution limits. In addition, the Commission has initiated another three rulemaking proceedings that are now actively moving forward toward completion this year. These three pending proceedings cover (1) a final rule for an exception to the definition of “Federal Election Activity” for municipal election activity, (2) Standards of Conduct for Commission employees, and (3) Hybrid Advertisements, which are discussed in more detail in response to Chairman Feinstein’s Question 4, below.

Third, regarding its advisory opinion authority and responsibility, the Commission also provided guidance by the issuance of 31 advisory opinions in the last eighteen months responding to specific legal questions from the regulated community. To its credit, the Commission determined to act on a long-recognized need to respond, in certain cases, before the statutory deadline, if it is truly to serve the regulated community effectively. To achieve this goal of providing timely advice, the Commission initiated a process to provide advisory opinions in an even more expedited time frame than the 60-day period provided in the FECA in instances in which there is a genuine time-sensitive issue of a serious nature, especially if the opinion will have an impact on the regulated community generally. We have activated that process, which I believe to have been sorely needed, and I think we are all proud of the results and the favorable response from those who have obtained guidance from the Commission on an expedited basis.

Fourth, respecting policy statements, the Commission has issued seven policy Statements (compared to only four policy statements being issued between 2001 and 2005) providing specific guidance to our regulated community on the Commission’s policies on important topics. One policy provides specific incentives to persons who report violations voluntarily. Another important policy establishes a new pilot program providing respondents with an opportunity to request a formal public hearing before the full Commission prior to a probable cause determination being made by the Commissioners. These are among others that have injected additional fairness and transparency into the Commission’s enforcement process.

Finally, as I mentioned in my prepared Opening Statement, there are several internal operational improvements that have been adopted by the Commission. I have had the good fortune to serve on the Finance Committee, the Personnel Committee and the Litigation Committee, each of which is comprised of two Commissioners. Each Committee is examining old precepts and considering ways to improve internal processes and management of the Commission. The Litigation Committee, for example, a committee which is new to the Commission, is designed to improve communication between the Commissioners and the Office of General Counsel (OGC), and to work in a collaborative manner to improve the Commission’s performance and efficiency in litigation. I believe my experience as a practitioner for 39 years, much of which was involved with civil litigation, has been an asset to the Commission in this area. Working

with OGC, there is now improved communication with OGC staff. As a result, the Commissioners we have also acquired a better understanding of the immediate and long term needs of OGC's Litigation Division in terms of technology, personnel, structure, and ongoing professional training. This process has provided greater assurance that the Litigation Division will have the support it needs to carry out its functions in the future.

Based upon the forgoing, I believe the current Commissioners can comfortably claim that they have been active and effective in enforcing the FECA in a firm but fair way on a par with, and in some instances to a greater degree than, previous Commissions.

4 One of the split votes that the Federal Election Commission has made during your tenure on the Commission is in respect to the Audit of Bush-Cheney '04, Inc., on March 22, 2007. That audit involved "hybrid advertisements," where the national candidates as well as references to members of Congress were mentioned. Please explain your vote on this matter and your general perspective on handling disputes related to such advertisements.

The issue of proper allocation of expenditures for hybrid ads (*i.e.*, television and radio ads that refer both to a clearly identified federal candidate and generically to candidates of a political party), which came up in a glaring way in the context of the most recent Presidential elections, has significant implications not only for that election but going forward.

The FECA contains coordinated party expenditure limits, which apply to the parties and their coordinated spending on behalf of all federal candidates. *See* 2 U.S.C. 441a(d). If party committees and their candidates are permitted to split the cost of so-called hybrid ads, the parties potentially are able to circumvent and exceed these coordinated party expenditure limits. In the context of a publicly funded Presidential campaign, not only is there a potential for a national party to exceed the FECA limit on coordinated party spending on behalf of a Presidential candidate (which in 2004 was \$16,249,699 million) but there is also the potential for the Presidential candidate to exceed the candidate's own spending limit which the candidate pledges to adhere to when accepting public funds.

Since the date your question was received relating to the Bush-Cheney '04, Inc. Audit Report, the Kerry-Edwards 2004, Inc. Audit Report became public. Accordingly, I will discuss both audit reports, since the issue of hybrid ads arose in both audits, and in both instances the Commission deadlocked on the issue, based upon the same rationale, of whether the Presidential campaigns and their respective national parties could, under existing law and regulations, equally split the cost of hybrid ads.

For convenience, the relevant documents are available on the Commission website. The Bush-Cheney '04, Inc. Audit Report is available at www.fec.gov/audits/2004/20070322bush_cheney_compliance_04.pdf and the Kerry-

Edwards 2004, Inc. Audit Report is available at
www.fec.gov/audits/2004/20070531kerry_edwards_genl_acct_fnd.pdf.

I stated my view in a Statement of Reasons (joined by Chairman Lenhard and Commissioner Weintraub) that I could not support an equal allocation between the candidate and the party for expenditures for hybrid ads in the last Presidential elections and that, in the absence of regulations or an advisory opinion, any allocation at all would not be unauthorized. Further, under the circumstances of these audits, nearly all, if not all, of the questioned expenditures (the Bush campaign and the Republican National Committee equally split the cost of \$81 million in hybrid ads; the Kerry campaign and the Democratic National Committee equally split the cost of \$22 million in ads), were made in the Presidential battleground states; accordingly there was little basis, in my view, to support an allocation of those expenditures to anything other than entirely to the Presidential campaign committees. Our Statement of Reasons may be found at the following website address:
www.fec.gov/audits/2004/20070322bush_cheney_stmt_03.pdf. The text of our Statement of Reasons is also set forth below.

Despite the deadlock on the issue, a positive outcome was reached by consensus. Although we deadlocked on the specific issue of whether to proceed to find a violation for how the parties and the candidates in the 2004 Presidential race paid for hybrid ads, we reached consensus to finalize and approve the overall audits for both campaign committees and, in addition, determined (a) to publicly identify the hybrid ad issue, and the fact of a deadlock, by specifically referring to it in the publicly released Audit Reports, (b) to explain in separate Statements of Reasons the rationale for our respective votes on the hybrid ads issue, and (c) to initiate a rulemaking to provide future guidance to the regulated community regarding this important issue, but only after considering comment from the public through our normal rulemaking process.

Additionally, consistent with the latter commitment mentioned above, on May 3, 2007, the Commission initiated a Notice of Proposed Rulemaking (NPRM) to specifically address the issue. The Commission has already received considerable public comment and the Commission will have the further benefit of hearing from witnesses on this issue at our public hearing which is scheduled for July 11, 2007. I look forward to the presentations from the witnesses at the up-coming hearing and I remain open to reconsidering my views in the context of a new regulation that will have general applicability in addition to Presidential elections. The text of the NPRM can be found at www.fec.gov/pdf/nprm/hybrid/notice_2007-10.pdf.

Questions from Senator Inouye

1. As members of the Federal Election Commission, you have all testified to the wonderful working environment that exists. Given the record number of fines through settlement, improved management of increased filings, increased efficiency in the

enforcement process, to name a few, I would like to learn of your thoughts on the current campaign finance laws and procedures that are in place. Where do you believe the problems are in current law that may be addressed by Congress, by clarifying the law or closing loopholes, in order to increase transparency and make accountability easier to monitor?

As is well known, on June 25, 2007, after your question was received, the United States Supreme Court handed down a landmark decision in the case of Federal Election Commission v. Wisconsin Right to Life, Inc., Nos. 06-969 & 06-970, ___ U.S. ___, 2007 WL 1804336 (FEC v. WRTL). In that case the Supreme Court upheld a three-judge panel lower court decision finding section 203 of the Bipartisan Campaign Reform Act (BCRA), Public Law 107-55, 116 Stat. 81 (2002), unconstitutional as applied to the facts of the case before it. This decision has generated much speculation about its impact and long-term ramification for the future of some aspects of campaign finance law. The decision not only fashioned an exemption for issue ads during the so-called electioneering communications “black-out” period leading up to an election, but it also called into question the scope of communications that are encompassed within the definition of “express advocacy” and those that are the “functional equivalent” of express advocacy.

This Supreme Court decision will continue to capture the attention of, and generate vigorous debate among, the regulated community, the reform community, academics and others for some time. It may also foster further litigation seeking clarity regarding the scope of the decision. Congress could provide helpful guidance at this point by amending its statute to reflect its intent in view of the recent decision. The Commission is already giving great attention to the decision in an effort to determine what steps the Commission should take on how best to enforce aspects of the FECA as currently interpreted by the U.S. Supreme Court.

Moving beyond the question of potential legislation related to the FEC v. WRTL decision, I would note that the Commission historically makes annual legislative recommendations to your Committee. This year there were five recommendations made to Congress, as follows:

(1) Electronic Filing of Senate Reports.

This issue is well-known to your Committee, which has acted favorably on it. *See* Senate Campaign Disclosure Parity Act, S. 223, 110th Cong. (2007). It is my hope that the Senate will approve your Committee’s recommendation in the near future.

(2) Extension of Commission Jurisdiction on the Prohibition on Fraudulent Misrepresentation of Campaign Authority to Include All Persons (rather than just agents of candidates).

Occasionally, the Commission becomes aware of persons who have fraudulently represented that they are authorized agents of a political committee or are otherwise

authorized to solicit or collect campaign funds on behalf of a candidate. There are instances in which such individuals have no connection whatsoever with any federal committee or candidate. We have asked for legislation making clear that the Commission may enforce the FECA against such persons.

(3) Inclusion of the Commission in the List of Agencies Authorized to Issue Immunity Orders.

There are instances in which the investigative and enforcement abilities of the Commission would be significantly strengthened with the authority to grant civil immunity to persons who might otherwise be targets in a Commission enforcement action. The Commission seeks to be included with the other federal agencies that already have authority to use this tool to enhance enforcement of the laws under their respective jurisdictions.

(4) Inclusion of FEC Identification Numbers on Contribution Checks and in Reports of Itemized Receipts and Disbursements.

This requirement would significantly reduce the chance of error in designating or identifying political committees that make contributions to other committees, and would likely, in time, foster improved practices and procedures on the part of the committees to assure better identification at the outset.

(5) Increase of Certain Pre-BCRA Registration and Reporting Thresholds.

The Commission recommended Congress consider whether to raise certain thresholds that were not modified when BCRA was enacted but which have effectively been reduced as a result of inflation. This not designed to close loopholes, as asked in the above question, but is mentioned to provide clarity regarding the overall recommendations made this year.

Additionally, there are some other issues where guidance or expanded jurisdiction would act to close loopholes or provide more certainty on enforcement issues. Some of these are as follows:

(1) 527s.

For the past several years the Commission has had before it the question of whether to promulgate a regulation that specifically addresses under what circumstances a so-called "527 organization" (*i.e.*, an organization exempt from federal taxation under section 527 of the Internal Revenue Code) is required to register with the Commission as a federal political committee.

Before my arrival in January 2006, the Commission declined to promulgate a regulation specific to 527 organizations based, *inter alia*, on the Commission's view that

the test for whether any organization must register as a federal political committee (*i.e.*, (1) whether the organization received contributions or made expenditures in excess of \$1,000 during a calendar year and (2) whether the “major purpose” of the organization is the nomination or election of a federal candidate) applies to all organizations irrespective of whether the organization is exempt from Federal taxation under section 527 of the Internal Revenue Code. Further, the Commission concluded that determining the “major purpose” of an organization often requires a fact-intensive comparison of the organization’s campaign and non-campaign activities and, in those instances, the need for such a fact-based case-by-case analysis may be incompatible with a bright-line regulation for 527 organizations.

The Commission continues to be involved in litigation over this issue. The litigation seeks to test whether the decision to enforce on a case-by-case basis was a lawful exercise of its discretion or whether the law requires the Commission to adopt regulations on the subject. *See Shays v. FEC*, 424 F.Supp.2d 100 (D.D.C. 2006) and Political Committee Status, Revised Explanation and Justification, 72 Fed. Reg. 5595 (Feb. 7, 2007). If Congress determines that the Commission’s decision not to promulgate a regulation specific to 527 organizations is inconsistent with the goals of Congress, it would be helpful if Congress were to provide guidance through clarifying legislation.

Additionally, please see my response to Senator Inouye’s Question 3, below, for further thoughts on 527 organizations, and other possible actions Congress could take in connection with 527s.

(2) Foreign Contributions.

The law currently prohibits foreign nationals from contributing funds in connection with federal, state, or local elections. *See* 2 U.S.C. 441e. However, there could be improvement, in my opinion, in the legislation by providing guidance with more specificity regarding instances in which where the money is contributed, or contribution decisions are made, through domestic subsidiaries of companies whose majority interest in voting shares is owned by foreign nationals.

(3) Clarifying the Status of American Indian Tribes.

The FECA prohibits corporations and labor unions from making contributions to federal candidates and committees. *See* 2 U.S.C. 441b. However, because Indian tribes typically do not incorporate, they are not subject to this prohibition and therefore are permitted to contribute directly to federal campaigns using tribal funds, including funds raised through gaming activities.

With the growing economic impact of businesses under the control of Indian tribes, it is increasingly appropriate for Congress to clarify the status of Indian tribes for campaign finance law purposes and to address the issue of whether or not Indian tribes should be treated similarly to corporations. If Indian tribes were treated like corporations,

the tribes would be free to create separate segregated funds (or PACs) which could make contributions to federal campaigns from funds that were solicited from tribal members.

(4) Expanded Educational Outreach.

Many of the violations the Commissioners see are due to lack of education on, or understanding of, the FECA and the Commission's regulations and advisory opinions. Most persons and entities subject to these laws and policies want to fully comply, but mistakes are made along the way. Increased funding for education, not only of the regulated community, but also the press and the public, would not only provide a greater understanding of the impact of the FECA and the role of the Commission, but also how to better comply with the campaign finance laws.

(5) Research Expansion.

The Commission is a repository of an immense amount of factual information, but it is often difficult to extract, synthesize and analyze. I believe the Commission could provide a valuable public service by having additional resources to conduct objective empirical research based on the factual information that is already available through compliance with the reporting requirements of the FECA. Empirical research would help legislators make even more educated choices on campaign finance legislation, and on the extent to which existing laws fulfill, or laws under consideration will fulfill, the goals of the FECA. Such research would also likely provide Congress with valuable insights into the merits of a public funding system and, if it so chooses, how to make public funding a more successful program in the future.

2. The 2008 Presidential election season started off early. In addition, the fundraising that is necessary for candidates in federal elections is at an all-time high. It seems as though the "down time" for candidates in between election cycles has shortened dramatically. Do you believe this is straining the ability of the FEC to keep track of campaign finances due to an increased volume?

At this point in the campaign, Presidential candidates are required to file quarterly reports with the Commission. Those reports for the first quarter of 2007 reflect a significant increase in both amount of and number of contributions over previous Presidential campaigns. The Presidential candidates reported receiving \$157.2 million in *amount of contributions* in the first quarter of this year, which represents an increase of more than 400% over the same period in the previous two Presidential election cycles (\$34.6 million in 2003 and \$31.3 million in 1999). Likewise, the *number of itemized contributions* (i.e., contributions over \$200 from any person) disclosed in those reports has also increased significantly, from approximately 33,000 in 1999 and 22,000 in 2003, to over 89,000 in 2007. The dip in the number of itemized contributions in 2003 was the result of President Bush's re-election campaign not receiving any contributions in the first quarter of 2003, which is typical early in the cycle for an incumbent Presidential candidate seeking re-election.

Because all Presidential candidates are required to file electronically, the disclosure of these contributions is almost instantaneous and the increased burden on the Commission's computer resources is negligible. However, Commission staff must review each of these quarterly reports to ensure that biographical contributor information has been properly reported for each itemized contribution, and additional staff resources are necessary this year to review the increased number of reported itemized contributions. Although the Commission was able to anticipate the current increased workload and has directed additional staff resources to review these reports, if this increased number of itemized contributions continues beyond the current election cycle, as is expected, the Commission will, in my opinion, need to augment its staff and other resources in order to meet the Commission's responsibilities in a timely manner.

3. Finally, I would like to hear your thoughts regarding the issue of "527s", and the impact on the FEC's ability accurately track campaign finances. What, if anything, do you believe might assist your agency in its efforts to keep the American electorate informed about candidates' campaign finances?

The level of expenditures by 527 organizations that was not in compliance with the campaign finance laws for communications that contained express advocacy, or its functional equivalent, during the 2004 election cycle is unacceptable and must not be repeated. It is estimated over \$400 million was spent by the 527s in the 2004 election cycle. Much of this spending was done using funds that did not comply with the FECA's contribution limits or source prohibitions.

Since that election, the Commission has processed to conclusion several complaints filed against 527 organizations on the basis that those organizations were in fact political committees that should have registered with the FEC and consequently should have also reported all their contributions and expenditures. These successful enforcement actions should serve as a healthy deterrent to any entities seeking to embark on the same conduct for the 2008 election cycle.

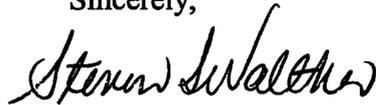
As stated above, prior to my arrival in January 2006, the Commission determined not to promulgate specific regulations regarding 527s, and decided the best approach was to continue to treat 527s equally with all other entities in determining whether they were a political committee. As a result, the Commission decided to continue to enforce violations on a case-by-case basis. Although the extent and vigor of case-by-case enforcement was not knowable by the public due to confidentiality provisions in the law regarding then pending enforcement cases, the recent disclosure of concluded settlements makes clear that the Commission's approach to enforcement is working and should provide confidence that the Commission will continue to pursue violations of the Act against 527s with the same efficiency that it does against other entities.

If that approach is deemed unacceptable by Congress it could take either of two possible courses of action. One would be to enact a provision spelling out factors that

would support a finding of political committee status by clarifying when the “major purpose” test is satisfied. Another would be to simply provide that any 527 organization (other than an organization that does not engage in any activity whatsoever regarding the nomination or election of a federal candidate) that solicits contribution over \$1,000 or makes expenditures of over \$1,000 for express advocacy, or its functional equivalent, of federal candidates automatically becomes a political committee. Although the latter approach might be challenged based on the claim that, under the Supreme Court case of *Buckley v. Valeo*, 424 U.S. 1 (1976), more would be needed to satisfy the judicially created “major purpose” test, nevertheless, such a law, if held valid, would provide immediate and unambiguous guidance to a 527 organization regarding whether the organization is required to register with the Commission as a federal political committee.

I appreciate this opportunity to provide further information to the Committee, and remain available to respond, either formally or informally, to any additional questions.

Sincerely,

A handwritten signature in cursive script that reads "Steven T. Walther". The signature is written in dark ink and is positioned below the word "Sincerely,".

Steven T. Walther

**DEPARTMENT OF JUSTICE
FEDERAL ELECTION COMMISSION
MEMORANDUM OF UNDERSTANDING
43 Fed. Reg. 5441 (1978)**

The following is intended to serve as a guide for the DEPARTMENT OF JUSTICE (hereinafter referred to as the "Department") and the Federal Election Commission (hereinafter referred to as the "Commission") in the discharge of their respective statutory responsibilities under the Federal Election Campaign Act and Chapters 95 and 96 of the Internal Revenue Code:

(1) The Department recognizes the Federal Election Commission's exclusive jurisdiction in civil matters brought to the Commission's attention involving violations of the Federal Election Campaign Act and Chapters 95 and 96 of the Internal Revenue Code. It is agreed that Congress intended to centralize *civil* enforcement of the Federal Election Campaign Act in the Federal Election Commission by conferring on the Commission a broad range of powers and dispositional alternatives for handling nonwillful or unaggravated violations of these provisions.

(2) The Commission and the Department mutually recognize that all violations of the Federal Election Campaign Act and the antifraud provisions of Chapters 95 and 96 of the Internal Revenue Code, even those committed knowingly and willfully, may not be proper subjects for prosecution as crimes under 2 U.S.C. 441j, 26 U.S.C. 9012 or 26 U.S.C. 9042. For the most beneficial and effective enforcement of the Federal Election Campaign Act and the antifraud provisions of Chapters 95 and 96 of the Internal Revenue Code, those knowing and willful violations which are significant and substantial and which may be described as aggravated in the intent in which they were committed, or in the monetary amount involved should be referred by the Commission to the Department for criminal prosecution review. With this framework, numerous factors will frequently affect the determination of referrals, including the repetitive nature of the acts, the existence of a practice or pattern, prior notice, and the extent of the conduct in terms of geographic area, persons, and monetary amounts among many other proper considerations.

(3) Where the Commission discovers or learns of a probable significant and substantial violation, it will endeavor to expeditiously investigate and find whether clear and compelling evidence exists to determine probable cause to believe the violation was knowing and willful. If the determination of probable cause is made, the Commission shall refer the case to the Department promptly.

(4) Where information comes to the attention of the Department indicating a probable violation of Title 2, the Department will apprise the Commission of such information at the earliest opportunity.

Where the Department determines that evidence of a probable violation of Title 2 amounts to a significant and substantial knowing and willful violation, the Department will continue its investigation to prosecution when appropriate and necessary to its prosecutorial duties and functions, and will endeavor to make available to the Commission evidence developed during the course of its investigation subject to restricting law. Where the alleged violation warrants the impaneling of a grand jury,

information obtained during the course of the grand jury proceedings will not be disclosed to the Commission, pursuant to rule 6 of the Federal rules of criminal procedure.

Where the Department determines that evidence of a probable violation of Title 2 does not amount to a significant and substantial knowing and willful violation (as described in paragraph 2 hereof), the Department will refer the matter to the Commission as promptly *as* possible for its consideration of the wide range of appropriate remedies available to the Commission.

(5) This memorandum of understanding controls only the relationship between the Commission and the Department. It is not intended to confer any procedural or substantive rights on any person in any matter before the Department, the Commission or any court or agency of Government.

Dated: December 5, 1977.

For the United States Department of Justice.
BENJAMIN R. CIVILETTI,
Assistant Attorney General,
Criminal Division.

Dated: December 8, 1977.

For the Federal Election Commission.
WILLIAM C. OLDAKER,
General Counsel.

**STATEMENT OF CHAIRMAN ROBERT D. LENHARD AND
COMMISSIONERS STEVEN T. WALTHER AND ELLEN L. WEINTRAUB**

AUDIT OF BUSH-CHENEY '04, INC.

The Bush-Cheney '04 campaign voluntarily agreed to participate in the public financing system for the 2004 general election. As a result, it received \$74,620,000 in taxpayer funds to pay all of the costs of its campaign activities. As a condition of receiving these funds, the Bush-Cheney campaign agreed to limit its spending to the \$74,620,000 it received.¹ See 26 U.S.C. § 9003(b)(2); 2 U.S.C. § 441a(b)(1)(B). If the campaign accepted or used funds in addition to those provided by the taxpayers, the law requires the campaign to repay the excess funds to the U.S. Treasury. 26 U.S.C. §§ 9007(b)(2), 9007(b)(3).

As a further condition of receiving public funds, a presidential campaign must agree to be audited by the FEC to ensure that it has complied with the restrictions on how public funds may be spent. In the audit, the campaign has the burden of proving to this agency that public funds were used properly and that it adhered to the spending limit. See 11 CFR §§ 9003.1(b)(1), 9003.5(a).

The audit of Bush-Cheney showed that the Republican National Committee and Bush-Cheney equally split the cost of \$81,418,812 in television advertisements that featured President Bush and/or John Kerry.² Although the advertisements focused on supporting Bush or attacking Kerry, they also made vague references to other political figures in Congress (e.g., "President Bush and our leaders in Congress," "John Kerry and liberals in Congress," "John Kerry and his liberal allies").³ The audit raised the question of whether the RNC's payment for half of these so-called "hybrid advertisements" was a violation of the Bush-Cheney campaign's obligation not to spend more than the \$74,620,000 on its general election campaign.

Bush-Cheney argued that it was permitted to split the cost of the hybrid ads by analogizing to an FEC regulation covering telephone banks. Under that regulation, a

¹ Some limited exceptions to this rule exist, such as for legal and accounting services provided to ensure compliance with federal campaign finance law, 11 CFR § 9002.11(b)(5). None of those exceptions apply to the type of spending at issue here.

² In addition to paying for half the cost of the advertisements, the RNC also paid approximately \$1.7 million in commissions for these ads.

³ The following is a typical example of the advertisements at issue:

President Bush and our leaders in Congress have a plan: Strengthen our economy, lifelong learning, investment in education, new skills for better jobs, simplify the tax code, reduce dependence on foreign energy, freer, fairer trade, create jobs, comp and flex time for working families, strengthen social security, legal reform, tax relief, an agenda for America

party may split the cost of a phone bank with a federal candidate, with the party paying up to one-half the cost, if the phone calls refer to a clearly identified candidate and also make a generic reference to other candidates of the same party (e.g., “Vote for Smith and the rest of the Democratic team”). See 11 CFR § 106.8. Bush-Cheney argued that because the FEC’s regulations provide that a party that pays for a portion of a phone bank with the appropriate message has not made a contribution to that candidate, similarly, the RNC did not make a contribution to Bush-Cheney (and Bush-Cheney did not accept a contribution) when the RNC paid one-half the cost of the hybrid ads.

Another argument raised during the audit process reasons that an advisory opinion the FEC issued in 2006 applies equally to Bush-Cheney’s decision to split the cost of these ads with the RNC during the 2004 election. In Advisory Opinion 2006-11 (Washington Democratic State Central Committee), the Commission decided that a state party committee did not make a contribution to a federal candidate if it paid for part of the cost of a mass mailing that advocated the election of one clearly identified federal candidate as well as the election of other party candidates who are referred to only generically. See AO 2006-11, at n.1 (providing as an example “Vote for John Doe and our great Democratic team”). The Commission concluded that a state party could pay for a portion of the mailing costs that were equal to the percentage of the mailer space devoted to the generically referenced party candidates, but under no circumstances could the party pay for more than 50% of the overall costs of the mailing.

The Commission considered the arguments of Bush-Cheney and split 3-3 on whether the RNC’s payment for half of these advertisements was a violation of the requirement that the Bush Cheney campaign spend no more than the \$74,620,000 on its general election campaign.⁴ We voted to find that this was not a permissible way to pay for these ads.⁵ Our reasons for doing so follow.

First, Bush-Cheney’s argument that the hybrid ads were permissible in light of the phone bank regulation is unpersuasive. In part this is because at the time the Commission adopted the phone bank regulation, it considered and rejected a proposal to expand this exemption to include advertisements. See *Party and Committee Telephone Banks*, 68 Fed. Reg. 64,517-18 (Nov. 14, 2003) (explaining that the Commission “decided to limit the scope of the new section 106.8 to phone banks at this time because each type of communication presents different issues that need to be considered in further detail before establishing new rules”).

⁴ Commissioners Lenhard, Walther and Weintraub believed there was a violation, while Commissioners Mason, Toner and von Spakovsky did not

⁵ Press reports at the time reflect that the Kerry-Edwards campaign and the Democratic National Committee made similar expenditures for hybrid ads, though the Kerry-Edwards effort began later, spent substantially less and the ads did make generic reference to other party candidates. See Michael J. Malbin (ed.), *The Election After Reform: Money, Politics, and the Bipartisan Campaign Reform Act* 32-33 (2006); Liz Sidoti, *Kerry Campaign, DNC to Run Joint Ads*, Associated Press State and Local Wire (Sep 24, 2004).

Second, even if the phone bank regulation were to be broadly interpreted to apply to broadcast advertisements, the regulation requires that the communication “generically refer[] to other candidates of the Federal candidate’s party without clearly identifying them.”⁶ 11 CFR § 106.8(a)(3). The Commission’s Explanation and Justification for the rule is clear that a political party must be mentioned to satisfy the generic reference requirement. *See* 68 Fed. Reg. 64,518 (giving as examples of generic references “our great Republican team” and “our great Democratic ticket”). Otherwise, the phone bank is influencing only the clearly identified candidate’s election. Here, only one of the 27 hybrid advertisements used the party names “Democrats” or “Republican,” with the rest making vague references to “our leaders in Congress,” “liberals in Congress” or “liberal allies.” As recognized by the phone bank regulation requirements, a reference to “liberals” and “leaders” in Congress is not the same as advocating for specific candidates or a specific party.

Bush-Cheney’s attempt to seek protection under the Commission’s Advisory Opinion 2006-11 is also unpersuasive. First, the opinion requires a generic party reference. *See* AO 2006-11, at n.1 (providing as an example “Vote for John Doe and our great Democratic team”). As discussed above, only one of the twenty-seven Bush-Cheney ads contained a reference to either the Republican or Democratic Party. Second, the advisory opinion does not sanction a blanket 50% split, but rather states that the costs must be allocated based on the “space or time” devoted to the generic party candidates, with a limit that under no circumstances may more than 50% of the cost be allocated to the generic party candidates. Bush-Cheney presented no evidence at all that 50% of the space or time of the advertisements was devoted to the generic party candidates and a review of those ads indicates that this standard would not have been met.

Because Bush-Cheney’s activity falls under no exemption to the general prohibition on publicly funded committees taking contributions, we believe the campaign impermissibly accepted \$42,409,406 in in-kind contributions from the RNC. Consequently, the committee should be required to repay this amount to the U.S. Treasury. However, without the requisite four affirmative votes, this is not the conclusion reached in the Commission’s Final Audit Report.

Despite our inability to reach agreement in the audit, the Commission is committed to addressing whatever ambiguity there is in the law concerning hybrid advertisements through rulemaking this year. This will ensure that future campaigns properly allocate the costs of communications that specifically reference a candidate while generically referencing other party candidates.

⁶ If the advertisement clearly identifies other candidates, the expenditure is covered under a different section of the agency’s regulations. 11 CFR § 106.1. When there are multiple candidates specifically mentioned, the cost can be apportioned based upon the benefit reasonably expected to be derived by each candidate. That is determined by examining the proportion of space and time devoted to each candidate as compared to the total time and space devoted to all candidates.