

A Toothless Anaconda: Innovation, Impotence and Overenforcement at the Federal Election Commission

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IN A RECENT PRESS RELEASE, two campaign finance regulation advocacy groups chided members of the Federal Election Commission (FEC) for refusing to investigate the campaigns of three Senate candidates and several party committees, claiming the decision was “just one more example of the FEC Commissioners overriding their professional staff to protect powerful political figures and the corrupt soft money system at the expense of enforcing the nation’s campaign finance laws.”¹ Criticism of the Commission’s allegedly lax approach to enforcement is longstanding among advocates of campaign finance regulation.² The press, certain members of Congress, various interest groups, and even some Commissioners have argued that changes must be made in the Commission’s powers and structure to ensure that the Commission carries out its enforcement duties. To criticize the Commission for its enforcement record, however, is to make many assumptions, not just about the Commission’s work product, but about the actual state of the law and the optimal level of enforcement.

In this paper, we consider whether the powers or structure of the Commission are obstacles to the Commission’s efforts to carry out its statutory duties, especially to the extent that those duties are equated with “aggressive enforcement of the law.”³ We conclude that they

are not. Indeed, we conclude that a greater problem than underenforcement by the Commission may be overenforcement, and that the allegedly lax enforcement by the Commission merely represents the reality that the First Amendment and public opinion are powerful barriers to more aggressive regulation.

We begin with a review of recent developments in the Commission’s enforcement procedures and efforts. While we believe that more reforms are needed, particularly in the realm of providing due process to respondents, we also believe that reforms implemented in the last decade, and particularly since the spring of

¹ Press release of Common Cause and Democracy 21, *FEC Counsel Finds Reason to Believe Clinton, Ashcroft and Stabenow Senate Campaigns, and DSCC and NRSC, Broke the Law. But FEC Commissioners Reject Findings, Ignore the Law*, October 24, 2001.

² See Scott E. Thomas & Jeffrey H. Bowman, *Obstacles to Effective Enforcement of the Federal Election Campaign Act*, 52 Admin. L. Rev. 575, 577–78 (2000), notes 14–24 and accompanying text.

³ In this paper, we will periodically describe enforcement policy as “robust,” “aggressive,” “vigorous,” etc., placing the adjectives in quotes. This is not to refer at any given point to specific comments made by individuals, but as a convenient shortcut for referencing a desired approach to enforcement. Because these and similar terms are used by many reform advocates, we feel this is a fair and accurate shorthand to generally describe their preferred enforcement philosophy. See e.g. Editorial, *Rethinking the FEC*, Washington Post, March 5, 1999, p. A32 (calling for “robust” enforcement); Russ Buetner, *Hil Off Soft Money Hook: Federal Election Panel Tosses Findings on Violations*, New York Post, Oct. 25, 2001, p. 37 (quoting Common Cause and Democracy 21 calling for “effective enforcement”); Rafael Lorente, *Underdogs Put Finance Reform in Spotlight*, Sun Sentinel, March 9, 2000 at 1A (arguing that FEC lacks the necessary power for “vigorous enforcement”); Stuart Taylor, *The President’s Least Favorite Nominee*, 32 National Journal 598 (2000) (noting that the FEC is not known for “aggressive enforcement”).

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2000, demonstrate an agency that is capable of reforming its procedures and of developing innovative, flexible, and effective programs for enforcing the law.

With that background, we then discuss a variety of proposals to increase the powers and structure of the Commission, and we conclude that most such proposals are unnecessary for the Commission to carry out its duties. Rather, we find that complaints about the Commission's structure or lack of power and resources in large part reflect underlying assumptions about what the law ought to be which do not necessarily reflect what the law is. In particular, these complaints reflect a preference for policies of "robust" enforcement which have largely been precluded by the courts or failed to gain support in the public, Congress, or the Commission. The problem is not that the Commission cannot or will not "enforce the law," but rather that the law is not as some wish it to be. We build on this thesis later to suggest that overenforcement, by which we mean the discouragement of lawful activity, rather than underenforcement, may be the greater problem at the Commission.

INNOVATION AT THE FEC

The Federal Election Commission is an independent federal agency established by Congress to "administer, seek to obtain compliance with, and formulate policy for" the Federal Campaign Act (FECA, or Act).⁴ The Commission has exclusive jurisdiction for civil enforcement of the Act, and has the "'sole discretionary power' to determine in the first instance whether or not a civil violation of the Act has occurred."⁵ The scope of the FECA is limited not only by statute but also by the Constitution and a rather extensive overlay of constitutional and statutory case law.⁶ The most important of these decisions is, of course, *Buckley v. Valeo*,⁷ in which the United States Supreme Court modified or rejected roughly half the FECA as amended in 1974. The Court held that limits on contributions are constitutionally permissible, but that limitations on expenditures are constitutionally infirm. The court upheld disclosure requirements but re-

stricted the types of activity that would be subject to the disclosure and reporting provisions of the Act. The *Buckley* Court was concerned with vagueness and overbreadth in all parts of the FECA, and consistently interpreted the Act's language narrowly in order to preserve it from being found unconstitutional in its entirety.

While the courts have greatly influenced the substance of the law,⁸ the enforcement process at the Commission is largely determined by statute. Most cases—called "MURs," shorthand for "Matter Under Review"—begin with a complaint, although the Commission may also investigate matters uncovered in carrying out its normal responsibilities.⁹ Any person who believes that a violation of the Act has occurred may file a complaint with the Commission.¹⁰ After a complaint is filed and the respondent has had an opportunity to respond, the Commission's Office of General Counsel (OGC) may make a recommendation that the Commission find Reason to Believe (RTB) that a violation of the Act has occurred.¹¹

⁴ 2 U.S.C. §437c(b)(1).

⁵ *FEC v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 37 (1981) (quoting *Buckley v. Valeo*, 424 U.S. 1, 112 (1976)).

⁶ The Act has sometimes been amended to incorporate judicial holdings. See e.g. Pub. L. No. 94-283, 90 Stat. 497, May 11, 1976 (amending 2 U.S.C. § 441d after *Buckley v. Valeo* by adding an express advocacy prerequisite before disclaimers are required).

⁷ 424 U.S. 1 (1976).

⁸ The FEC has summarized over 200 important court cases affecting the reach and application of the FECA in Federal Election Commission, Selected Court Case Abstracts 1976–September 1999 (1999).

⁹ See 2 U.S.C. §§ 437g(a)(1) & (2). The Commission lacks the authority to launch investigations merely on the basis of rumor or newspaper reports. As a practical matter, this matters little, as suspicious activity reported by the press usually results in a formal complaint being filed—frequently by the respondent's political opposition. Respondents have a statutory right to reply to the allegations in a complaint. 2 U.S.C. § 437g(a)(1). However, respondents discovered in the normal course of carrying out the Commission's obligations are not guaranteed this right. *Id.*

¹⁰ 2 U.S.C. § 437g(a)(2). Complaints may not be anonymous. 2 U.S.C. § 437g(a)(1).

¹¹ See 2 U.S.C. § 437g. An excellent summary of the Commission's enforcement procedures, but with more detail than provided here, can be found in Kenneth A. Gross, *The Enforcement of Campaign Finance Rules: A System in Search of Reform*, 1991 Yale L. & Pol'y Rev. 279, 284–86 (1991).

The statute provides no legal guidance as to what standard the Commission should apply in making an RTB determination, but the present posture of a majority of the Commission, including the co-author of this paper, is that the standard is roughly akin to that of a judgment on the pleadings in civil litigation. This means that the Commission will find RTB unless the allegations fail to state a violation or the facts are incontestably refuted by information included in the response.¹² An RTB finding triggers a full Commission investigation, which may include compulsory depositions and document discovery, at the close of which the General Counsel may recommend that the Commission find “Probable Cause” that a violation of the Act has occurred.¹³ In this case, the General Counsel is required to provide the respondent with a brief stating his position on the legal and factual issues of the case, to which the respondent may file a reply. If the Commission accepts the General Counsel’s recommendation and finds probable cause, it is required to attempt to conciliate with the respondents. If the Commission is unable to reach a conciliation agreement, it may instigate a civil suit in federal court to enforce the Act, and the case is tried *de novo*.¹⁴

In recent years, the Commission has sought to streamline the use of resources, modernize the enforcement process, and increase the number of complaints investigated and decided on substantive grounds.¹⁵ Some of these changes have come about simply through effective management and use of technology. For example, between the 1988 and 1996 election cycles, the Commission was able to increase the number of itemized transactions coded per staff person from 73,699 to 119,386.¹⁶ But in addition, since mid-2000 the Commission has implemented several new programs, reshaping the nature of the enforcement and disclosure processes.

The program with the greatest impact to date may be the Administrative Fines program for late or nonfiled disclosure reports. The program was adopted by Congress in response to a legislative recommendation made by the Commission,¹⁷ and aims to free critical Commission resources for more important and complex enforcement matters, while reducing the

number of financial reports filed late or not all. In the past, the Commission handled all reporting violations, including late or nonfiled reports, under the same enforcement procedures it employs for other alleged campaign finance violations, with an investigation eventually culminating in agreement on a civil penalty, or court action. The time and effort required to pursue cases in this fashion was such that many reporting violations were not pursued due to a lack of resources. The Administrative Fines Program, which became effective in July 2000, attempts to resolve this problem by handling the most routine reporting violations—late or nonfiled reports—in much the same fashion as parking tickets are issued. While uncovering and proving reporting inaccuracies usually requires investigation, whether or not a report is filed late, or not filed at all, is typically a straightforward, uncomplicated question. Because the necessary determination can be made easily and with a low rate of error, constitutional due process concerns are minimized, allowing an abbreviated adjudicatory procedure.¹⁸

Under the Administrative Fines Program, when a report is not timely received, the Commission notifies the committee and informs it

¹² See Fed. R. Civ. P. 12(c). Under Rule 12(c) the motion is converted to one for summary judgment under Rule 56 if matters outside the pleadings are considered. The Commission’s process is often somewhat similar—for example, respondents may contest a claimed violation of § 441d (failure to include a proper disclaimer) by attaching the communication allegedly in violation and demonstrating that it does not include express advocacy, and therefore is not subject to the provisions of 2 U.S.C. § 441d.

¹³ Although there is no specific statutory authority to do so, by longstanding policy the Commission frequently enters into conciliation agreements with respondents prior to a finding of probable cause. See 11 C.F.R. § 111.18(d).

¹⁴ 2 U.S.C. § 437g(a)

¹⁵ Although the lead author voted for and has supported most of the programs discussed here, these programs were well along before the author joined the Commission, and credit for their success must go to other Commissioners and the Commission’s staff.

¹⁶ Thomas & Bowman, *supra* n. 2 at 581.

¹⁷ See FEC, 1999 Supplemental Legislative Recommendations, p. 11. Congress authorized the program as part of Pub. Law 106-58, 106th Cong., Sec. 640, 113 Stat. 430, 476-77 (1999).

¹⁸ See *e.g.* Shaumyan v. O’Neill, 987 F. 2d 122 (2d Cir. 1993).

of the penalty, which is established by regulation.¹⁹ The committee then has 40 days to either pay the penalties or submit a written response challenging the alleged violations. Any challenge is analyzed by a reviewing officer, and a report is then forwarded to the Commission, with an additional response by the committee, if it so chooses. If the Commission makes a final determination that a committee has failed to file on a timely basis, civil penalties will be assessed, and the committee has thirty days to pay the penalties or seek judicial review in U.S. District Court.²⁰

Civil penalties under the Administrative Fines Program are intended to be high enough to discourage committees from considering them an acceptable cost of doing business, but not so high as to be exorbitant for the nature of the violation. They currently range from as low as \$125 to a high of \$16,000, and are determined by the number of days late, the amount of financial activity involved, and any prior penalties for reporting violations. Penalties for non-filing are higher than for late filing.²¹ Certain reports due close to the election date are deemed "election sensitive" reports and are subject to higher penalties.²² Additionally, the Commission reports the names of late and nonfilers, which is sometimes a source of adverse publicity for the committee involved. Regular reports are considered "late" if filed no more than 30 days after the due date, while reports filed after 30 days are considered not filed for purposes of calculating penalties.²³ Election sensitive reports filed more than four days before the election are considered late—any closer to the election and they are considered nonfiled, resulting in higher penalties.

Announcement of the program prior to its July 2000 implementation, and the dissemination of articles outlining the program's purpose and scope, appear to have had an impact, as the number of late filers and nonfilers dropped significantly upon implementation. Thirty percent of filers were late in filing their April 2000 Quarterly reports, the last pre-Administrative Fines filing, compared to only 18% for the July 2000 Quarterly Report, the first post-Administrative Fines filing. Decreases in the number of late and nonfilers as compared to past election years occurred for all reports. In 1996 and 1998,

the July Quarterly Report was filed late by 25% of respondents, but in 2000 by only 18%. Late or nonfiled October Quarterly Reports were 25% in 1996 and 24% in 1998, but 22% in 2000. Late and nonfiled 12-Day Pre-General Election Reports dropped from 18% in 1996 and 17% in 1998 to just 13% in 2000. Late and nonfiled 30-Day Post-General Election Reports declined from 22% in both 1996 and 1998 to 17% in 2000. These results have continued in the nonelection year, with a 47% drop in nonfilers for midyear 2001 reports versus midyear 1999 reports.²⁴

The boon and bane of the Administrative Fines Program is that it functions mechanically, allowing little or no room for latitude or discretion. As a result, the size of civil penalties has been a concern in some cases. For example, one respondent rather logically but erroneously believed that, because there was no primary, no Pre-Primary Report was due, resulting in a \$5000 fine.²⁵ Some members of the Commission have also expressed concern that the fine levels are disproportionately high for losing primary candidates who are attempting to terminate their campaign committees.²⁶ For these reasons, the Commission may seek to adjust penalty levels and the types of defenses available.

¹⁹ Regulations governing the program are set forth at 11 C.F.R. § 111.30 et seq.

²⁰ 11 C.F.R. §§111.35–111.38.

²¹ 11 C.F.R. §§111.43–111.44.

²² 11 C.F.R. § 111.43(d).

²³ 11 C.F.R. § 111.43(e).

²⁴ Most of these internal FEC statistics are available through press releases on the FEC's web site, www.fec.gov.

²⁵ AF #84, Friends of John LaFalce.

²⁶ See e.g. AF# 12, Miles for Senate (candidate raised approximately \$63,000 before dropping out of Senate race before primary. The candidate's treasurer personally mailed the Quarterly Report by first class mail on the due date. Under the regulations, reports must be received by the due date unless sent by certified mail. See 11 C.F.R. § 104.5. Campaign was fined \$2700). Even well-financed primary losers are often left without money to pay fines for late filed reports due after the primary, with the result that the burden of fines often falls heavily on the candidate or treasurer, as in AF #119, Hochberg for Congress, in which the campaign was fined \$9500. Given that these primary losers often have no future plans to run for office, and these post-primary reports are not relevant to the public in determining how to vote before the election, such fine levels are probably high.

Despite these drawbacks, there is general agreement that the program has been highly successful in increasing compliance, fostering rapid disclosure, and utilizing Commission resources more effectively. As of September 30, 2001, the Commission made 429 reason to believe findings assessing \$878,474 in civil penalties. In November 2001, Congress, again following the Commission's recommendation, authorized extension of the program through 2003.²⁷

A second program which has so far had less effect than Administrative Fines, but which may ultimately have more far reaching implications, is the Alternative Dispute Resolution Program (ADR). This pilot program was approved by the Commission in August, 2000. The program was created in an effort to move certain cases, mainly those involving relatively minor and inadvertent violations, away from the full prosecutorial process within the General Counsel's office, where resources are scarce, precedents are set, and the adversarial process is at its most contentious. The ADR program's formally stated goals are to expedite resolution of some enforcement matters, reduce the cost of processing complaints, and enhance overall FEC enforcement.²⁸ Additionally, the program allows the FEC greater flexibility in promoting future compliance with the Act through innovative and cooperative settlements.

The ADR office seeks to process its cases, on average, within 90 days after the Commission has sent the matter to ADR for resolution,²⁹ versus the 1 year or more that it often takes to conduct a full investigation under the Commission's traditional enforcement system. The ADR office attempts to move matters through the bilateral negotiations process in 5 weeks and then, if the parties are unable to reach a settlement, through the Mediation process in another 7 weeks, for a total of 84 days.

As a pilot project, the program exempts certain cases from consideration under ADR, most notably matters also subject to criminal investigations; allegations or prima facie evidence of knowing and willful violations; violations of the Presidential Fund Acts; matters covered under a concurrent MUR within the General Counsel's Office; repeat offenders; respondents

who fail to respond to Commission inquiries, and certain types of complex legal cases.³⁰

Additionally, for a case to be considered for ADR treatment, a respondent must express willingness to engage in the ADR process, and agree to waive the statute of limitations while the case is pending in the ADR Office.³¹ These negotiations occur prior to any Commission consideration of whether there is a reason to believe a violation has occurred. If a resolution is reached through the ADR program, it is submitted to the Commissioners for approval, and if approved the resulting settlement concludes the matter. Matters resolved through ADR have no precedential value.³²

The Director of the ADR program reports directly to the Commission's Staff Director, rather than the General Counsel. This reporting structure draws certain cases away from the General Counsel, creating a potential source of friction between these two statutorily created offices within the Commission, but was deemed important to ensure respondent confidence in the program, since failure to reach an agreement may result in the matter being returned to OGC for investigation. The program was to receive direct referrals from the office of General Counsel, but perhaps because the Counsel's office perceived the ADR program as diminishing its scope within the agency, most ADR matters during the first year of the program were referred by direct action of the Commission itself. In the first six months of the program, from November 2000 through April 2001, the Office of General Counsel did not consider a single one of the 70 complaints received by the Commission as appropriate for ADR, including those in which the respondents specifically requested ADR in their responses to the complaints. However, during this period the Commission specifically directed fourteen MURs to the ADR program. Ninety-two per-

²⁷ Pub. Law 107-67, 107th Cong., Sec. 642 (2001).

²⁸ Memorandum to the Commissioners from Allan D. Silberman, "FEC ADR Pilot Program Plan," July 25, 2000, (not public).

²⁹ *Id.* at 2.

³⁰ *Id.* at Attachment 2.

³¹ *Id.* at 2.

³² *Id.*

cent of the respondents referred by the Commission opted to proceed under the ADR program, and the first six ADR matters were conciliated and approved by February 2001. Respondents included, among others, a state party committee; two authorized committees; an ideological organization; and a private individual. Importantly, these early agreements set an important precedent in that two respondents agreed to undergo staff training or to enact policy changes to help prevent future violations.³³

In addition to the apparent reluctance of the OGC to refer MURs to ADR, from November 2000 to April 2001, only two respondents initiated a request to participate in the ADR program.³⁴ In response to the lack of both OGC referrals and respondent requests for ADR, on April 11th 2001, the Commission approved revisions to the ADR Program, including revisions in the letter to respondents to better inform them of the benefits of ADR. Additionally, on July 11, 2001, the Commission released ADR-032, in which the Commission approved a settlement finding no violation of the Act.³⁵ This made clear that a respondent does not have to admit guilt in order to participate in the ADR program. These changes seem to have had the desired effect, with 45 new cases being referred to ADR between mid-April and the end of August, 2001, bringing to 59 the total number of referrals. Another 41 cases were referred to ADR in the next 2 months, bringing the total to 100 cases by October 31, 2001. The average time from the date respondents are invited to participate in the program until the ADR office sends an agreement to the Commission for rejection or approval has been under 100 days.³⁶

Penalties in reported ADR settlements, when assessed, have averaged approximately \$1,800. Though this level may sound small, it must be remembered that, by definition, the pilot ADR program is primarily only involved with lower rated matters where fines would be well below the Commission average. Perhaps more importantly, however, settlements in which respondents agree to participate in training or to take other proactive steps to prevent future violations, whether in place of or in addition to

penalties, have become common.³⁷ This is an important step in attempting to improve future compliance with the Act. We believe that the pilot ADR program will be expanded and will become a model for other federal enforcement agencies.

The Commission has also moved recently to improve the availability of public information on campaign finances. On June 15, 2000, the Commission approved the final rules on mandatory electronic filing.³⁸ Under this program, since January 1, 2001, all persons that are required to file their reports with the Commission who receive contributions or make expenditures in excess of \$50,000 in a calendar year, or who expect to do so, have been required to submit their campaign finance reports electronically.³⁹ The system has provided faster disclosure of filed reports. The Commission now estimates that 96–98% of all financial activity reported is now available almost immediately on the Commission's website.⁴⁰

³³ See Federal Election Commission Press Release, *ADR Program Resolves Cases*, February 16, 2001.

³⁴ Respondents are required to request ADR on a form enclosed with the complaint, within 15 days of receipt of the complaint. The Commission determined that the lack of response from respondents was because the respondents' attention was focused on responding to the complaint, to the exclusion of considering alternative methods for resolving the matter.

³⁵ ADR-032, Friends of Roger Kahn. See Federal Election Commission, *ADR Program Resolves Cases*, July 11, 2001.

³⁶ Internal FEC statistics as of Nov. 2, 2001. Through November 2000, final Commission action has taken 3–34 days.

³⁷ See e.g. ADR-016, Casey for Auditor (penalty combined with preventive measures); ADR-036, Van Horne for Congress (preventive measures alone).

³⁸ The electronic filing program was created pursuant to an amendment of 2 U.S.C. § 434(11)(A) (requiring the Commission to promulgate regulations requiring electronic filing for all persons engaging in activity over a monetary threshold). The amendment to 2 U.S.C. § 434(11) is contained in section 639 of the Treasury and General Government Appropriations Act, 2000, Pub. Law No. 106-58, signed into law on September 29, 1999.

³⁹ Committees subject to the rules will be deemed nonfilers if they file on paper, and may be subject to enforcement action.

⁴⁰ Federal Election Commission, Annual Report 2000 at 90.

Yet another innovation in the area of disclosure is the Commission's program for state filing waivers, for which rules were promulgated on March 16, 2000. The FECA requires candidates and committees to file copies of their campaign finance reports with the appropriate state officer in each state where the contributions are received or expenditures are made.⁴¹ In 1995 Congress amended 2 U.S.C. § 439(c) to provide a waiver of these requirements in any state that the Commission determines has in place a system that permits electronic access to and duplication of reports and statements that are filed with the Commission. However, virtually no states acted on the new law through 1998. In response, in 1999, the Commission launched the "State Filing Waiver Program," working to help states develop a system of electronic access to FEC reports by providing computer equipment, training, and internet capability. By May of 2001, 48 states were certified, simplifying the political process for hundreds of committees as well as for state governments. In 2001, the program was a semi-finalist in Harvard's John F. Kennedy School of Government's "Innovations in American Government" Award.⁴²

IMPOTENCE

As this record of recent innovation demonstrates, the FEC is certainly capable of effective and efficient enforcement of the law. Nevertheless, the Agency continues to be the target of vituperation from self-styled "reform" advocates.⁴³ The reason is not hard to understand: these critics feel that with or without such innovation, the FEC has done little to stem the flow of money in politics. In many important substantive areas, most notably the regulation of party soft money, nonparty issue ads, and coordinated expenditures, the Commission has fallen far short of hopes of many regulatory advocates.⁴⁴ As one proregulatory member of the Commission has put it, until the Commission is able to stop the flow of party soft money and nonparty issue ads, judging its performance by programs such as Administrative Fines and ADR "is a bit like judging the performance of

the crew of the Titanic by how well the band played as the ship sank."⁴⁵

Of course, even the Commission's strongest critics recognize that judicial decisions, and the statute itself, may limit the ability of the Commission to be as aggressive an enforcement agency as some would like to see. However, another strain of thought argues that the Commission is structurally incapable of meaningful enforcement of the law.⁴⁶ According to these critics, the FEC is impotent: aggressive enforcement of the law requires major changes in the structure of the FEC or perhaps even the abolition of the FEC and the creation of a new agency in its place.⁴⁷ In this section, we analyze these claims and conclude that they are wrong. These complaints serve merely to mask the fact that the FEC's critics have failed to convince the public, the courts, the Congress, and the Commissioners that their interpretation of what the law is, and their vision of what the law should be, is correct.

Before looking at proposals to reform the Commission, we should consider what critics of the FEC mean when they argue that the Commission has not been "effective" in enforcing the law. By "effective" enforcement, these critics seem to mean that the FEC should be far more aggressive in regulating and pursuing alleged violations of the FECA, especially in the aforementioned areas of "soft money,"

⁴¹ 2 U.S.C. § 439.

⁴² Federal Election Commission Press Release, *FEC Semi-finalist in "Innovations" Competition*, May 2, 2001.

⁴³ See Thomas & Bowman, *supra* note 2, at 577-78, notes 14-24 and accompanying text.

⁴⁴ See *id.* at 593-606.

⁴⁵ Comments of Commissioner Karl Sandstrom at a forum of American University Center for Presidential and Congressional Studies, Dec. 8, 2000. It should be noted that Commissioner Sandstrom has supported the programs discussed here.

⁴⁶ See e.g. Pete Leffler, *FEC Called Toothless Tiger: Critics Say Watchdog of Elections Toothless—FEC Investigations Take Too Long and Violators Face Little Punishment*, Allentown Morning Call, April 20, 1998 at A1 (including quotes from Ellen Miller, Kent Cooper, and others).

⁴⁷ See Democracy 21, Press Release, *Project FEC Task Force Releases Statement of Principles*, Feb. 20, 2001 (Announcing creation of task force to "develop[] a new system for effective enforcement of the nation's campaign finance laws.")

“issue advocacy,” and “coordinated expenditures.”⁴⁸ Assuming, *arguendo*, that this is a correct definition of “effective enforcement,” we believe that any FEC failure at such “effective enforcement” is not due to structural problems or lack of power in the FEC itself, but rather reflects deep divisions in ideology and constitutional law apparent on the Commission, in Congress, in the courts, and among the public at large.

It is important to differentiate complaints about the FEC’s structure with complaints about the Agency’s powers, or lack thereof. By structural issues, we mean changes in the make up of the Commission, as opposed to increases in its powers. Proposals to change the number of commissioners, or the way commissioners are selected, are structural, whereas suggestions that the Commission be granted greater budgets or the authority to conduct random audits of campaigns are power critiques.

Insufficient powers

The power critiques argue that the FEC lacks the necessary enforcement tools to aggressively enforce the law.⁴⁹ We believe that these recommendations miss the fundamental conflict that exists over what the law is and what direction it should take.

Perhaps the most obvious suggestion to increase the level of Commission enforcement is simply to call for greater Agency funding.⁵⁰ Of course any agency, given more resources, can presumably accomplish more, and certainly added funding could be put to use by the FEC. At the same time, it is not clear that current enforcement efforts are truly suffering from lack of resources. Under its internal enforcement priority system, the Commission rates MURs to determine their importance, and dismisses MURs that are deemed either low rated or “stale” without investigation. Low-rated MURs are those in which the alleged violations are so insubstantial as not to be worth the resource allocation of pursuing them. Stale MURs are those of greater importance, but which cannot be pursued due to lack of resources and have grown “stale” over time.⁵¹ In recent years, the FEC has been able to cut substantially into its case backlog and reduce the number of

MURs being dismissed without substantive investigations. The number of MURs dismissed by the Commission as stale has decreased from 86 in Fiscal Year 1998 to just 13 in Fiscal Year 2000, and a mere five through the first nine months of Fiscal Year 2001.⁵² Low-rated cases have, in recent years, made up barely three to ten percent of the Commission’s case closings (between 10 and 40 cases), depending on the year.⁵³ Whether it would really make sense to

⁴⁸ See *e.g.* Thomas and Bowman, *supra* n. 2 at 593–606 (describing judicial rulings on issue advocacy and coordinated expenditures as “obstacles to effective enforcement” of the Act); Editorial, *supra* n. 3 (equating “get[ting] soft money under control” with “robust enforcement”); Brooks Jackson, Broken Promise: Why the Federal Election Commission Failed 39-57 (1990) (complaining that a combination of congressional policy, Commission policy, and court decisions has allowed the growth of “soft money,” and comparing the Commission’s interpretations of the law to those of “southern school boards” complying with desegregation orders); Charles R. Babcock, *Real Campaign Reform Will Give the Watchdog Agency New Teeth*, Wash. Post, Dec. 6, 1992, at C5 (“The Commission has done nothing over the years to stop candidates and their fund-raisers from soliciting [soft money]”). Secondary areas which these critics believe that the FEC has failed to regulate aggressively enough include “bundling,” see *e.g.* Lisa Rosenberg, *A Bag of Tricks: Loopholes in the Campaign Finance System*, (no page numbers)(1996) (available at www.opensecrets.org/pubs/law_bagtricks); Jackson, *supra* at 73; building funds, see *e.g.* Rosenberg, *supra*; Jackson, *supra* at 46-47; Convention funding, cf. Samuel Issacharoff *et al.*, *The Law of Democracy: Legal Structure of the Political Process* 660-61 (1998); and “Leadership PACs,” see Rosenberg, *supra*.

⁴⁹ See *e.g.* Carol Mallory & Elizabeth Hedlund, *Enforcing the Campaign Finance Laws: An Agency Model*, Part 3, p. 11 (report of the Center for Responsive Politics, available at http://www.opensecrets.org/pub/law_enforce/enforce03.html) (quoting Roger Witten, “Fundamentally, we have a law enforcement agency here who lack, one the power to find that a violation of the law has occurred; and two, lacks the power to stop the violation as it is occurring. That’s ludicrous . . . A commission that doesn’t have the power to find that a violation occurred, or to stop one, is a commission that will always be a toothless tiger.”)

⁵⁰ See *e.g.* Thomas & Bowman, *supra* n. 2 at 579–81.

⁵¹ See Pre-MUR 395, Statement of Reasons of Commissioner Scott E. Thomas, Nov. 13, 2001, at 5, n. 13.

⁵² Internal FEC statistics (non-public) as of Nov. 6, 2001. Arguably, 1998 is a misleading year, as the Commission made a conscious decision that year to dismiss several cases as “stale” in an effort to relieve its internal backlog. However, there were 32 “stale” cases dismissed in Fiscal Year 1997, and 63 in Fiscal Year 1996, thus suggesting that under any criteria the Commission has succeeded in substantially reducing the number of cases dismissed for lack of resources to pursue them.

⁵³ *Id.*

add resources to deal with these relatively trivial allegations is doubtful.⁵⁴ Further, as each FEC enforcement attorney manages a docket of approximately four to five active cases at any one time, while closing approximately four cases a year,⁵⁵ it appears that at the present time the addition of a single line attorney could allow the Commission to avoid closing any cases as stale. Thus, while added resources might be beneficial, lack of resources does not seem to be a major obstacle to the Commission's ability to pursue serious allegations of violations of the law.

Added resources to pursue top tier cases might also improve enforcement by allowing cases to be taken up sooner and pursued with added vigor. Generally, the key elements to deterrence are the certainty of punishment and the relative cost of sanctions, versus the potential gains from the illegal activity involved.⁵⁶ In the context of campaign finance laws, speedy punishment would seem to be especially important to deterrence. Because the value of winning an election is high, and election outcomes will not normally be reversed short of powerful evidence that legal violations changed the results,⁵⁷ political actors have a strong incentive to ignore the law and deal with post-election penalties as a cost of doing business.⁵⁸ Rapid enforcement before an election might change this dynamic. In fact, however, it is a virtual impossibility that the Commission, no matter how structured or how well funded, would ever be in a position to resolve many cases prior to an election. How, for example, could any Commission, consistent with due process, uncover, investigate and resolve most alleged violations that occur within a few days, or even weeks or months, of election day?⁵⁹ Thus the incentives of the system are such that violators may be happy to engage in illegal, preelection conduct that may win the election, and pay a fine later.⁶⁰

This problem could theoretically be resolved by greater use of injunctive relief, which has also been proposed.⁶¹ Given the First Amendment issues involved, this is simply not a realistic solution.⁶² The most basic problem is that under any system it is doubtful that most cases could be investigated and adjudicated on a

timely enough basis for a preelection final injunction to issue on the merits. Use of preliminary injunctions, on the other hand, would be fraught with peril not only because of the First Amendment problems of prior restraint,⁶³ but because they would not serve their traditional purpose of preserving the status quo.⁶⁴ With or without a preliminary injunction, the election will go forward. The candidate or group that is denied the ability to campaign in some particular way will be damaged and the result of the election may be determined by the court's

⁵⁴ See Todd Lochner & Bruce E. Cain, *Equity and Efficiency in the Enforcement of Campaign Finance Laws*, 77 Tex. L. Rev. 1891, 1897 (1999) (noting that the FEC already spends the bulk of its resources "pursuing relatively technical or trivial violations.").

⁵⁵ See Pre-MUR 395, Statement of Reasons of Commissioner Scott E. Thomas, Nov. 13, 2001, at 4 and n. 12.

⁵⁶ See e.g. Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. Pol. Econ. 169 (1968); George J. Stigler, *The Optimum Enforcement of the Law* in *Essays in the Economics of Crime and Punishment* 55, 56 (Gary S. Becker et al. eds. 1974).

⁵⁷ See e.g. *Marks v. Stinson*, 19 F.3d 873, 887 (3d Cir. 1994) (election results should not be overturned "until the . . . court is satisfied that [the plaintiff] would have won the election but for the wrongdoing.").

⁵⁸ See *Colloquia: Federal Election Commission Panel Discussion: Problems and Possibilities*, 8 Admin. L. J. Am. U. 223, 232 (1994) (comments of Larry Noble).

⁵⁹ See Lochner & Cain, *supra* n. 54 at 1932-33.

⁶⁰ Michael W. Carroll, *When Congress Just Says No: Deterrence Theory and the Inadequate Enforcement of the Federal Election Campaign Act*, 84 Geo. L. J. 551, 572-79 (1996).

⁶¹ See e.g. Elizabeth Hedlund, *Justice Delayed, Justice Denied: The Federal Election Commission's Enforcement Record* (no page numbers) (1992) (Report for the Center for Responsive Politics, available at www.opensecrets.org); *Colloquia*, *supra* n. 58 at 232 (comments of Thomas Sargentich). It should be noted that the FEC does have the power to pursue injunctive relief in court, 2 U.S.C. 437g(a)(6), and occasionally has done so, *see id.* at 232-33 (comments of Larry Noble).

⁶² See e.g. *Colloquia*, *supra* n. 58 at 225 (comments of Larry Noble); Lochner & Cain, *supra* n. 54 at 1932.

⁶³ Prior restraints on speech are particularly frowned upon by the courts. See e.g. *New York Times Co. v. Sullivan*, 403 U.S. 713, 723 ("any prior restraint on expression comes to this Court with a 'heavy presumption' against its constitutional validity.")

⁶⁴ Preliminary injunctions are intended to prevent parties to a dispute from altering the status quo before the court can render a decision. See e.g. *Fleming James, Jr., Geoffrey Hazard, Jr., & John Leubsdorf, Civil Procedure* 338 (5th ed. 2001). In the context of an election, any "freeze" imposed by the court will alter the status quo as much as letting the ad go forward.

preelection injunction.⁶⁵ Along these lines, Lochner and Cain also point out that the tremendous value of a preelection injunction restraining an opposing campaign or group would quite likely lead to the Commission finding itself swamped with requests for injunctive relief and a greater number of nuisance suits filed by political partisans.⁶⁶ In short, increased reliance on preelection injunctive relief is simply not a realistic solution.

Other proposals to enhance Commission power create similar problems and dilemmas. For example, some have argued that the Act should be changed to authorize *qui tam* actions.⁶⁷ A similar effect would come from recommendations that the Commission's decisions shall be given no deference by the courts when complainants sue the Commission, as they may do pursuant to 2 U.S.C. 437g(a)(8), after the Commission has dismissed their complaints.⁶⁸ These procedures would probably result in a greater number of frivolous complaints being brought, since they would increase the incentives for groups to bring nuisance lawsuits against their political rivals.⁶⁹ Further, they may do little to make enforcement more efficient because legitimate third party complaints are most likely to catch only obvious violations.⁷⁰ Proposals to reinstate random audits are sound enough but would probably have only a marginal effect on deterrence, since the odds of being audited would still remain low, and the expected benefits of winning high.⁷¹ Changing the law to allow the Commission to conduct investigations on the basis of anonymous complaints, or to hide the identity of complainants, would be a mixed blessing: it might encourage more complaints,⁷² but by lowering the potential cost of filing complaints, it might foster more frivolous complaints and divert resources in that fashion.⁷³ Higher penalties, which of course are within the Commission's power now, would almost certainly add to deterrence, but a nine-fold increase in the size of penalties in the mid-1990s had little effect.⁷⁴

A more radical proposal that would involve both power and structure changes in the FEC is to grant the agency the power to directly fine violators.⁷⁵ Allowing the FEC to directly assess fines, rather than bringing a lawsuit in court in

the event conciliation efforts fail, would presumably increase the bargaining position of the Commission in conciliation discussions. This is because the burden of appealing the fine would fall on the respondent, as opposed to the current practice, in which failure to conciliate

⁶⁵ For one example of the problems of injunctive relief, see *Elections Board v. Wisconsin Manufacturers and Commerce*, 227 Wis. 2d 650, cert. denied 528 U.S. 969 (1999) (court issued injunction prior to the election blocking group from running ads; decision was reversed on the merits after the election).

⁶⁶ Lochner & Cain, *supra* n. 54 at 1932–33.

⁶⁷ Carroll, *supra* n. 60 at 585–86. A *qui tam* action is one which allows private citizens to bring suit for violations of the law, and retain part of any penalty assessed. See Black's Law Dictionary 1126 (5th ed. 1979).

⁶⁸ Amanda LaForge, *The Toothless Tiger: Structural, Political and Legal Barriers to Effective FEC Enforcement: An Overview and Recommendations*, 10 Admin. L. J. Am. U. 351, 381–82 (1996). This would have the same practical effect as authorizing *qui tam* actions, in that complainants would have their cases heard *de novo* in court.

⁶⁹ Lochner & Cain, *supra* n. 54 at 1904.

⁷⁰ *Id.* (citing Eugene Bardach & Robert Kagan, *Going by the Book: The Problem of Regulatory Unreasonableness* 167 (1982), and Ray La Raja & Renee Dall, *Enforcing California's Campaign Finance Laws: How Much Bark, How Much Bite for the Political Watchdog* 18 (Institute of Gov't Studies, Univ. Cal. at Berkeley, Working Paper 98–9, 1998)).

⁷¹ Lochner & Cain, *supra* n.54 at 1930. Congress banned random audits in 1979 amendments to the Act. See 2 U.S.C. § 438(b).

⁷² See Jackson, *supra* n. 48 at 68. Of course, witnesses would still have to be disclosed to respondents consistent with due process.

⁷³ *Cf.* Lochner & Cain, *supra* n. 54 at 1904 (noting that regulatees in this area have an incentive to file trivial complaints for the purposes of discrediting and harassing opposing campaigns), and Todd Lochner & Bruce E. Cain, *The Enforcement Blues: Formal and Informal Sanctions for Campaign Finance Violators*, 52 Admin. L. Rev. 629, 640–41 (2000) (noting that the FEC already receives "a large amount of nonmeritorious claims initiated by third parties;" the authors' study of FEC MURs between 1991 and 1993 found that while outside complaints triggered 60% of MUR investigations, they resulted in 88% of all "no reason to believe" findings.)

⁷⁴ See generally FEC 2000 Annual Report at 11, Chart 2-2. The median conciliation agreement penalty increased from \$1000 to \$9000 between 1992 and 1997, and the average penalty from \$2576 to \$25,111 between 1992 and 1998. Unpublished internal FEC statistics. Of course, it may well be that these fines are still an inadequate deterrent. Higher fines, however, also tend to increase resistance from respondents, draining the agency's resources and limiting the number of violations that may be pursued. See Lochner & Cain, *Equity and Efficacy*, *supra* n. 54 at 1932–33.

places the burden on the Commission to pursue the case in court.⁷⁶

Giving the FEC the power to directly fine respondents would, however, necessitate substantially added due process protections.⁷⁷ This would mean significant structural changes in the FEC, probably through the use of administrative law judges (ALJs).⁷⁸ If ALJs were utilized, the “Reason to Believe” stage of the enforcement process would presumably be eliminated, with cases instead brought before an ALJ. The ALJ would develop a factual record through an adversarial procedure in accordance with the Administrative Procedure Act, and make a final determination on guilt and a penalty.⁷⁹ The ALJs’ decisions would be appealable to the Commission, and eventually the courts. Because the courts would be presented with a full factual record, judicial appeals could be handled quickly without a full trial.⁸⁰

Ironically, the most obvious benefits of this plan accrue to respondents, not the Commission, in the form of the increased due process safeguards the Commission would have to provide in exchange for direct sanctioning authority. Respondents before the Commission have long complained about both the lack of due process in the Commission, and the *in terrorem* effect of certain Commission policies, and many of these policies and procedures would become subject to review if ALJs were utilized.

For example, when the Commission’s General Counsel recommends a finding of probable cause, its role is directly adversarial to that of the respondent.⁸¹ Yet while the General Counsel sits at the table and is able to answer questions and advocate the legal and factual positions outlined in the probable cause brief, there is no provision for the respondent to appear before the Commission.⁸² Additionally, the General Counsel provides the Commission with a report that summarizes and critiques the arguments presented in the respondent’s brief, and may even add new theories or information.⁸³ These reports are not available to the respondent. Nor are respondents allowed to view even their own deposition transcripts until after a probable cause brief has been filed. At that point, the General Counsel makes available the respondent’s own deposition and only such

other portions of deposition transcripts and documents that the General Counsel relied on in its brief or, in some cases, agrees might be helpful to the respondent.⁸⁴ Use of administrative law judges would provide respondents with the opportunity for oral hearings and

⁷⁵ Currently, if the Commission is unable to reach a conciliation agreement with a respondent, the Commission must then bring suit in federal court to enforce the Act. See 2 U.S.C. 437g(a). This has been criticized as requiring substantial duplication of effort, as the FEC must prove its case anew in federal court. See Gross, *supra* n. 11 at 288–89. Gross, one of the most persistent champions of having FEC cases heard by administrative law judges, does not specifically suggest that the FEC be given authority to assess fines directly, see *id.*; see also Kenneth A. Gross & Ki P. Hong, *The Criminal and Civil Enforcement of Campaign Finance Laws*, 10 Stan. L. & Pol’y Rev. 51, 52 (1998), but perhaps he considers that inherent in the proposal to add Administrative Law Judges and have the Commission serve “an appellate function.” Gross, *supra* n. 11 at 288. LaForge and Weidman, student commentators who appear to draw the argument from Gross, also do not specifically address the issue. See LaForge, *supra* n. 68 at 377–78 and accompanying notes, and David J. Weidman, *Comment: The Real Truth About Federal Campaign Finance: Rejecting the Hysterical Call for Publicly Financed Congressional Campaigns*, 63 Tenn. L. Rev. 775, 788–89, and accompanying notes (1996). Carroll, *supra* n. 60 at 585, and Mallory and Hedlund, *supra* n. 49, specifically recommend that the Agency be given the power to assess fines without going to court.

⁷⁶ See Carroll, *supra* n. 60 at 585 (“Allowing the FEC to impose sanctions would shift the bargaining power significantly. . . .”)

⁷⁷ Under the First Amendment, procedural safeguards are necessary before the government may burden free speech. See e.g. *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559–61 (1975); *Freedman v. Maryland*, 380 U.S. 51, 57–59 (1965).

⁷⁸ Generally legislative restraints on First Amendment rights require judicial review, see e.g. *Blount v. Rizzi*, 400 U.S. 410, 417–18 (1971), but an adversarial proceeding before an administrative law judge may be enough.

⁷⁹ 5 U.S.C. § 500 et seq.

⁸⁰ See Gross, *supra*, n. 11 at 288.

⁸¹ See e.g. Note, *The Federal Election Commission, The First Amendment, and Due Process*, 89 Yale L. J. 1199, 1204 (1980).

⁸² Committee on Election Law, Section of Administrative Law, American Bar Association, *Report on Reform of the FEC’s Enforcement Procedures* 7 (1982). Even Common Cause was at one time critical of this practice. See *Common Cause, Stalled From the Start* 55 (1981).

⁸³ Committee on Election Law *supra* n. 82 at 7. This procedure has not changed. Commissioners do sometimes express concerns when the General Counsel’s arguments in closed session seem to rely on facts or theories not included in the probable cause brief.

⁸⁴ See Gross, *supra* n. 11 at 286; Note, *supra* n. 81 at 1208. Again, procedures have not substantially changed since these earlier critiques were written.

greater access to depositions and documentary evidence.⁸⁵ Similarly, under the present enforcement system, the Commission authorizes discovery subpoenas on recommendation of the General Counsel. When a respondent contests such a subpoena, its motion is filed with the same Commission that has already authorized the subpoena, and is filtered through the office of General Counsel that first recommended that the subpoena be issued.⁸⁶ Naturally, motions to quash Commission subpoenas are rarely granted by the Commission.⁸⁷

Additionally, the longstanding policy of the Commission's Office of General Counsel has been to cast an extremely broad net when designating respondents to complaints. The Office traditionally goes far beyond the respondents named by the original complainant to include individuals and groups whose names appear in the complaint or its attachments, including sometimes those with only the most tenuous connection to events. For example, in MUR 4994, the complainant alleged that the Democratic Senatorial Campaign Committee (DSCC) and National Republican Senate Committee (NRSC) had established "joint fund raising committees" which, the allegations ran, would allow soft money contributions to parties to be illegally earmarked for particular senate races. The complaint named the campaigns of Hillary Rodham and Rudy Giuliani, two New York state joint fund raising committees, and the NRSC and DSCC as respondents. In describing the nature of the joint fund raising committees established by the NRSC and the DSCC, the complaint also noted that, "'joint fundraising' committees typically include the name of the Senate candidate in the name of the committee, such as . . . the 'Ashcroft Victory Committee' and the 'Santorum Victory Committee' or refer to the Senate race in the committee's name, such as 'Michigan Senate 2000'. . . ." Although none of these three committees were mentioned or discussed in any other way in the complaint, on the basis of this rather haphazard list of examples, the General Counsel's office named as respondents the campaigns of Michigan Senate candidate Debbie Stabenow, Missouri Senator John Ashcroft, and Pennsylvania Senator Rick Santorum.⁸⁸ Whether true or not, there is a widespread belief among the

practicing bar that the policy of naming as respondents minor players and persons only tangentially linked to the complaint is an intentional effort to intimidate committees to refrain from engaging in activities that are legal but disfavored by the Commission.

The Act also requires the Commission to keep confidential "any notification or investigation made under this section. . . ." ⁸⁹ Longstanding policy in the General Counsel's office has been to inform nonparty witnesses that they may not talk to *anyone* about the investigation under penalty of law, with the result that some respondents have reported that even friendly witnesses cite the General Counsel's warning as a basis for refusing to discuss the matter with respondents themselves. Further, the General Counsel's office has refused to clarify matters for these witnesses even when the respondents have complained.⁹⁰ Respondents cannot subpoena these witnesses and so are denied evidence during the probable cause stage.

⁸⁵ See Gross, *supra* n. 11 at 286.

⁸⁶ See Gross & Hong, *supra* n. 75 at 52.

⁸⁷ Although we have not attempted to gather precise data, none have been granted since June of 2000, when the lead author took his seat, and November of 2001, when this was written.

⁸⁸ See MUR 4994, New York Senate 2000 and Andrew Grossman, as Treasurer, et al., complaint and General Counsel's Report of Sep. 25, 2001. The Commission rejected the General Counsel's recommendation to find reason to believe in the case of the Stabenow and Ashcroft campaigns. The General Counsel did not recommend an RTB finding against the Santorum campaign. General Counsel's Report, *supra*.

⁸⁹ 2 U.S.C. 437g(a)(12).

⁹⁰ See e.g. MUR 4872, Republican Party of Louisiana, Respondent's Brief. The warning, which the General Counsel's office has required these non-party witnesses to sign, reads:

CONFIDENTIALITY AGREEMENT

Since this information is being sought as part of an investigation conducted by the Federal Election Commission, the confidentiality provisions of 2 U.S.C. Section 437g(a)(12)(A) apply. This section prohibits making public any investigation conducted by the Federal Election Commission without the express written consent of the person under investigation. You are advised that no such consent has been given in this case.

The General Counsel's office requires deponents to sign and date the document and list his social security number, date of birth, and home address.

Use of administrative law judges might trim these practices more effectively than Commission oversight.

For those who favor “robust” enforcement, then, there are few obvious benefits to having administrative law judges, while there may be many for respondents. The added due process that might adhere to respondents, and a potentially higher burden of proof that the General Counsel would need to show before pursuing conciliation,⁹¹ would improve the bargaining position of respondents prior to probable cause findings, quite possibly offsetting any bargaining advantage the Commission would gain from not having to bring its case *de novo* in District Court. The added resources necessary to pursue cases through the ALJ process may put pressure on the Commission to engage in more pre-probable cause settlements, with lower penalties. Furthermore, while actions might move through the courts more quickly, the added process involved with ALJ hearings may extend the period required to complete action on a complaint, to the benefit of respondents.⁹²

There is, however, an ace in the hole for those who favor ALJs as a means to gain more vigorous enforcement. Despite the added procedural protections that might accrue to respondents, there is a strong belief in some circles that administrative law judges tend to inherently favor the agency by which they are employed.⁹³ Some in fact celebrate this bias as a reason for using them at the FEC.⁹⁴ If true, it may be that authorizing the FEC to impose direct penalties through administrative law judges may be a step toward more “vigorous” enforcement. Yet it is hard for many to be attracted to the notion that the government ought to adopt an enforcement mechanism precisely because it is likely to have a substantive bias against respondents, especially in an area in which First Amendment rights are inherently at stake.

Changing the FEC to an adjudicatory agency with administrative law judges may be beneficial, primarily, it appears, in that it would address the longstanding due process concerns in the Agency’s operation. But unless one is willing to announce that he favors ALJs in the belief that ALJs have an inherent bias in favor of

the Agency, it is difficult to see that adding ALJ’s will provide for the more aggressive enforcement that many would be reformers claim to be seeking.

This discussion of the possible outcomes of granting various new powers to the Commission is useful in considering whether or not the Commission inherently lacks the powers it needs to enforce the law (we think that it does not) or would benefit from added powers (we are skeptical that it would). But the discussion also threatens to overshadow the core issue faced by those who favor “more robust” enforcement of the FECA. Even if all of these proposals for added Commission power were adopted, they would not necessarily result in the Commission taking any tougher stand on interpreting the law as it pertains to coordi-

⁹¹ As with “reason to believe” findings, the statute provides no specific guidance to the Commission in determining when “probable cause” has been shown. Traditionally, many viewed this as a relatively low standard, akin to that a civil grand jury might meet. See *Colloquia*, *supra* n. 58 at 242 (comments of former General Counsel Larry Noble); Note, *supra* n. 81 at 1203 (citing interview with former General Counsel William Oldaker). Our experience is that the current Commission tends to apply a tougher standard than at the time these comments were made, requiring something more akin to a preponderance of the evidence before finding probable cause. The theory of some commissioners appears to be that if conciliation fails, the Commission must be prepared to authorize an enforcement suit, and these commissioners are reluctant to devote resources to litigation when they would not themselves find guilt by the legal standard that will need to be met in court.

⁹² Lochner & Cain, *Equity and Efficacy*, *supra* n. 54 at 1898 (noting that delays between infraction and punishment undermine deterrent effects). Lochner and Cain explore the problem of delay in the context of campaign finance enforcement in a bit more detail in Lochner & Cain, *supra* n. 73 at 639 (noting that even a relatively rapid one to two year time period between infraction and punishment may be ineffective in the context of campaign finance, because “one to two years can be an eternity in politics. . . .”).

⁹³ See John C. Coffee, Jr., *Paradigms Lost: The Blurring of the Criminal and Civil Law Models, and What Can Be Done About It*, 101 Yale L. J. 1875, 1887 (“The [agency] always seems to win before its in-house judges”). Cf. *Colloquia*, *supra* n. 58 at 251-52 (comments of Larry Noble) (“There are a lot of complaints that ALJs can get very political. . . . ALJs can be controversial.” Noble also notes that the FEC’s structure is not unique among enforcement agencies, citing the Equal Employment Opportunity Commission as an agency with a similar enforcement structure *id.* at 241-42.).

⁹⁴ See Carroll, *supra* n. 60 at 585.

nated political activity, issue advocacy, soft money, bundling and the other areas of concern to reformers. In other words, granting added powers to the Commission might help the Commission catch more violations of the Act's routine provisions, but there is no reason to think it would lead to substantive policy changes as regards these controversial issues.⁹⁵ Perhaps in recognition of this fact, many regulatory proponents have also urged changes in the structure and selection of commissioners designed to make the Commission a "more effective" agency, and we consider some of the most common such proposals next.

Structural issues

Just as the failure of the Commission to take aggressive "enforcement" stands on controversial issues cannot be resolved merely by granting the Commission added powers, we do not believe that changing the Commission's structure would resolve the complaints of those who favor "vigorous" or "robust" enforcement.

The most common structural criticism of the FEC may be the Commission's makeup. The Commission has six commissioners, of whom no more than three may be from the same party.⁹⁶ As a practical matter, this means that the Commission has three Democratic and three Republican commissioners.⁹⁷ Four votes are needed for Commission action,⁹⁸ and so it is often suggested that three-three deadlocks are a substantial Commission problem.⁹⁹ The most common solution to this alleged problem is to change the composition of the Commission to an odd number of Commissioners,¹⁰⁰ although it has also been suggested that the agency be authorized to proceed with enforcement in the case of tie votes;¹⁰¹ that the Commission's General Counsel serve as a tie-breaker;¹⁰² or even that enforcement be placed under the control of a single individual given a status akin to the Director of the FBI.¹⁰³

Given the political nature of the FEC's jurisdiction, the notion that an investigation could go forward without majority support on the Commission is not likely to be taken seriously by Congress.¹⁰⁴ Allowing the commission to investigate without majority support would allow commissioners from just one party to

launch investigations of the opposition. Of course, the other party's commissioners might do the same, making the system wholly political; or the commissioners might reach an informal truce, effectively eviscerating all enforcement. Since most politically active "independents" generally lean left or right, and since appointments to the executive branch must be made by the President and confirmed by the Senate, we do not see the addition of "independents" solving this problem. Rather, we would simply predict fierce confirmation fights over the independents appointed.

Even worse, however, are recommendations to create an FBI type "Campaign Czar," or to provide the FEC's General Counsel with a tie-breaking vote. The comparison to the FBI Director overlooks the fact that the FBI's duties are generally perceived as nonpolitical, whereas those of the FEC are entirely political. The effect would be not unlike that of the now-discredited independent counsel statute.¹⁰⁵ It is all but inconceivable that the public or the courts, let alone Congress, would tolerate what would

⁹⁵ Nor, of course, would it be likely to have much impact on judicial decision-making or congressional policy.

⁹⁶ 2 U.S.C. §437c(a)(1).

⁹⁷ No independent or other party member has ever been appointed.

⁹⁸ 2 U.S.C. §437c(c).

⁹⁹ See e.g. Thomas & Bowman, *supra* n. 2, at 590; LaForge, *supra* n. 68 at 359; Jackson, *supra* n. 48, at 64; Weidman, *supra* n. 75 at 778-79; Babcock, *supra* n. 48; Colloquia: *supra* n. 58 at 252-53 (1994) (comments of Elizabeth Hedlund).

¹⁰⁰ See e.g. Weidman, *supra* n. 75 at 788; Mallory & Hedlund, *supra* n. 49; Jackson, *supra* n. 48 at 64-65.

¹⁰¹ See LaForge, *supra* n. 68 at 359, n. 34 (noting that the six member International Trade Commission is instructed by statute to carry out investigations after a deadlocked 3-3 vote); Weidman, *supra* n. 75 at 779 (arguing that the ITC's structure "favors action instead of inaction."). Both LaForge and Weidman stop short of actually recommending that process for the FEC.

¹⁰² Thomas & Bowman, *supra* n. 2 at 592. Thomas and Bowman propose this only for "reason to believe" findings, which are the predicate to the FEC's launching a full-scale investigation.

¹⁰³ Editorial, *supra* n. 3.

¹⁰⁴ See LaForge, *supra* n. 68 at 359, n. 34 (noting that the differences in subject matter between the federal government's other six member commission, the International Trade Commission, and the FEC make the idea less suitable for the FEC).

¹⁰⁵ Karl J. Sandstrom, *Letter to the Editor: In Support of Fair Elections*, Washington Post, Mar. 29, 1999, p. A18.

be, in essence, a “campaign czar,” with a roving brief to police elections. Investigations of the President’s party or campaign would likely make permanent the atmosphere that existed during the latter years of the Clinton administration, when the administration was unwilling, apparently for political reasons, to fire Independent Counsel Kenneth Starr, and so instead engaged in a constant war of vilification and personal vituperation against him. A hint of what such a system would lead to in practice may be found in the vigorous campaign Republican lawmakers waged against a rather obscure career civil servant, the FEC’s former General Counsel, Larry Noble, in 1998. Noble became a subject of much controversy when Republicans in Congress sought to limit the terms of the FEC’s general counsel.¹⁰⁶ Despite the fact that his recommendations to pursue alleged violations had to be approved by at least one Republican commissioner before the FEC could act on them, Republicans questioned Noble’s impartiality, and Democrats correspondingly sprung to his defense. The matter eventually became a major source of debate in that year’s budget bills, threatening briefly to leave the Department of Treasury unfunded.¹⁰⁷ In light of this, it is not only obvious that the “FBI” proposal is unlikely to work, but that the lesser proposal to have the General Counsel serve as tie-breaker would create the same types of problems.

In any case, these proposals may be a solution in search of a problem. Three-three deadlocks on the Commission are quite rare, and straight splits on party lines even more rare. A study of 4,725 Commission votes cast between 1993 and 1999 found only 121 votes, or 2.6%, resulting in a 3-3 or 3-2 deadlocked vote.¹⁰⁸ Not all of these deadlocked votes were along partisan lines. Nor does this appear to have been an unusually harmonious period in Commission history. An earlier study limited to advisory opinions found that between 1977 and 1988, the highest rate of “deadlocked” votes (including those not along partisan lines) was a bit under seven percent in 1987 and 1988.¹⁰⁹ Another independent review of 65 advisory opinions issued in 1979 found just one 3-3 Democratic/Republican split, and that resulted from disagreement on a procedural issue.¹¹⁰ Those

inside the agency have long recognized that 3-3 deadlocks rarely have a direct impact on the Commission’s work.¹¹¹

This is not to say that having an even number of commissioners does not affect the Commission’s work. From personal experience the authors can state that even though 3-3 deadlocks are rare, the threat of such deadlocks can often shape Commission action. The potential for deadlock sometimes leads to compromises on the scope of advisory opinions, or the amount of penalties sought in conciliation. Less often, but perhaps more importantly, it may lead to compromise positions on the scope of discovery subpoenas. These are not trivial matters, but they are rarely among the most important enforcement matters facing the Commission.

Nevertheless, advocates of “vigorous” enforcement sometimes argue that the decisions on which the Commission is most likely to deadlock tend to be particularly important ones, or that such deadlocks tend to leave the law unclear.¹¹² Whether this is true is, to a substantial extent, a matter of conjecture: after all,

¹⁰⁶ See Ruth Marcus, *FEC Spending Bill Provides Vote on Key Staffers’ Terms; Critics Call GOP Proposal Retaliation for Campaign Fund Probes*, Washington Post, July 14, 1998, p. A13.

¹⁰⁷ See Stephen Barr, *Funding Bill Is Stalled, Revealing Split in GOP; Disputes Highlight Risks For House Leadership In Appropriations Push*, Washington Post, Oct. 2, 1998, p. A1.

¹⁰⁸ Thomas & Bowman, *supra* n. 2 at 591, n. 88. The Commission had only five commissioners during a portion of the period studied.

¹⁰⁹ Jackson, *supra* n. 48 at 35, n. 51 (citing Alexei Cowett, *Walking on Eggshells: The Federal Election Commission and Political Regulation*, Unpublished Senior Thesis, Department of Government, Harvard University, Mar. 23, 1989).

¹¹⁰ Common Cause, *supra* n. 82 at 27.

¹¹¹ See Thomas & Bowman, *supra* n. 2 at 590 (Scott Thomas is a sitting Commissioner and Jeffrey Bowman his Executive Assistant); Colloquia, *supra* n. 58 at 226, 252 (comments of former FEC General Counsel Larry Noble); Frank P. Reiche, *Weakness of the FEC in Money, Elections, and Democracy: Reforming Congressional Campaign Finance 237, 241* (Margaret Nugent & John R. Johannes, eds. 1990) (Mr. Reiche served as an FEC Commissioner from 1979–85); Gross, *supra* n. 11 at 291 (Mr. Gross was formerly Associate General Counsel for Enforcement at the FEC).

¹¹² Thomas & Bowman, *supra* n. 2 at 591; Colloquia, *supra* n. 58 at 252–53 (comments of Elizabeth Hedlund) (“When they do deadlock, however, it is *always* on critical questions of law”)(emphasis added).

just which matters are “crucial”¹¹³ or “critical”¹¹⁴ is open to interpretation. Be that as it may, it is not clear just why avoiding such deadlocks through the most palatable solution offered, an odd number of commissioners, will necessarily mean more aggressive enforcement. These ties might be broken in favor of “aggressive enforcement,” but they might be broken against it. Which way most ties might fall would depend on the disposition, degree of partisanship, and regulatory philosophy of the decisive commissioner.¹¹⁵ Of course, since a deadlocked vote now means an enforcement action will not go forward, it can be argued that there is only an upside for proponents of aggressive enforcement. There is some truth to this argument, but it must also be recognized that a decisive vote against enforcement may have more effect on future Commission actions and development of the law than a 3-3 deadlock. Alternatively, if deadlocks are replaced by narrow majorities that appear to be partisan in nature, or by frequent reversals of Commission policy when the “tie-breaking” seat changes hands, the result could be less credibility and effectiveness.¹¹⁶ Such has arguably been the case at the National Labor Relations Board, where Board policy is known to change radically and frequently depending on the current partisan majority on the Board.¹¹⁷ Finally, even if we assume a perfectly “neutral” commissioner, we must recognize that the number of matters on which his vote would be decisive for the “pro-enforcement” position, given the small number of tie votes, would be so few as to have only the most marginal impact on enforcement. In sum, in explaining why FEC enforcement has not been more aggressive, the theory of “structural deadlock” is little more than a red herring.

A related and somewhat more worthwhile recommendation is to increase the authority of the Commission’s chairman, through some combination of greater power over daily operations and budgets or a longer, fixed term of office.¹¹⁸ As currently structured, the chairmanship of the Commission is a largely ceremonial post, with the chairman holding few powers beyond presiding at meetings, representing the Commission before Congress, and exerting limited control over the Commission’s

agenda. The chairman does not hire and fire staff or generally manage the daily affairs of the Agency, and has little more power than any other Commissioner. Furthermore, the position rotates through the Commission in a series of 1-year terms of office.¹¹⁹

As a question of good management, proposals to strengthen the chair’s powers may make sense. Arguably, the lack of a strong chair leaves the Commission adrift, and bogs commissioners down in mundane details.¹²⁰ But it is difficult to see how such changes would necessarily result in more “robust” enforcement.

¹¹³ Thomas & Bowman, *supra* n. 2 at 591.

¹¹⁴ Colloquia, *supra* n. 58 at 252–53 (comments of Elizabeth Hedlund).

¹¹⁵ As an administrative matter, this means that battles over the confirmation of the “tie-breaking” commissioner could be particularly fierce. Nor would this be solved by awarding the key seat or seats to an “independent,” as is sometimes suggested. See e.g. Jackson, *supra* n. 48 at 65; Hedlund, *supra* n. 61. Independents can be of widely differing philosophies. There are many state level agencies with an odd number of members, often including “independent” appointees. These independents do not necessarily vote the “pro-enforcement” line in the way in which some use the term. See e.g. Darrell Rowland and James Bradshaw, *State Elections Panel Reaffirms Legality of Anti-Resnick TV Ad*, Columbus Dispatch, Oct. 27, 2000, p. 1D (Independent member of Ohio Elections Commission “cast[] the deciding vote” against proceeding on complaint filed by Common Cause-Ohio, holding that the ads in question were constitutionally protected issue ads).

¹¹⁶ Lochner & Cain, *supra* n. 54 at 1929.

¹¹⁷ See Julius G. Getman & Stephen B. Goldberg, *The Myth of Labor Board Expertise*, 39 U. Chi. L. Rev. 681, 682–83 (1972) (noting that the judicial nature of the Board’s functions “has mandated the appointment of lawyers, which has typically meant politicians with little or no labor relations background, former Board employees, or those with only partisan experience.”); see also Robert Douglas Brownstone, *The National Labor Relations Board at 50: Politicization Creates Crisis*, 52 Brooklyn L. Rev. 229 (1985) (noting that the Board tends to follow the ideology of the President, and that politicization of the agency leads to a backlog of cases, ever-evolving policy and precedent, and overall instability in the agency and the law).

¹¹⁸ See e.g. Weidman, *supra* n. 75 at 788; Jackson, *supra* n. 48 at 63; Common Cause, *supra* n. 82 at 30–31.

¹¹⁹ 2 U.S.C. Sec. 437c(a)(5).

¹²⁰ LaForge, *supra* n. 68 at 362; Common Cause, *supra* n. 82 at 30. It is by no means obvious that the lack of a strong Chairman bogs the commissioners down in details—it seems at least as arguable that the presence of a permanent, statutorily created position of Staff Director in fact saves all commissioners, including the Chair, from these details, and ensures greater continuity in routine administration than having such details left to the politically appointed chair. See 2 U.S.C. § 437c (f)(1).

Whether it would or not may depend on the identity of the chairman, and to the extent that management policies affect the level of enforcement generally one might well expect that a stronger chair with a deregulatory philosophy would lead to “weaker,” rather than more “vigorous” enforcement. As we saw earlier, the Commission, despite its current structure and weak chair, is quite capable of enacting significant reforms of the enforcement process.¹²¹

We do not doubt the sincerity of regulatory advocates who propose the types of solutions discussed above, but we believe that such advocates misunderstand their own goals. A closer reading of the literature arguing for structural reform of the Commission shows that the real complaint of these regulatory advocates is simply that the Commission has often disagreed with them on the state of the law and the role of the Commission. As Elizabeth Hedlund, former head of the Center for Responsive Politics’ FEC Watch, argued a few years back, “[f]irst and most important, the President must appoint active, pro-enforcement Commissioners.”¹²² Similarly, Fred Wertheimer, President of the pro-regulatory interest group Democracy 21, expressed his disagreement with several recent FEC decisions and complained of, “the persistent failure of the Federal Election Commission to enforce the nation’s campaign finance laws.”¹²³ Common Cause complains of the FEC’s “repeated failure to act.”¹²⁴

But the issue is not that the Commissioners “fail to enforce” the nation’s campaign finance laws, or are not proenforcement. It is that the Commissioners often disagree with these regulatory advocates on interpretation of the law.¹²⁵ Moreover, the courts frequently disagree with these regulatory advocates on the status of the law.¹²⁶ Congress has not passed the type of reform these groups favor, and the public remains ambivalent.¹²⁷

These advocates seem to ignore the fact that their ideas on what the law is and how it should be enforced do not have universal acceptance. Thus, their recommendations sometimes border on the comical. Brooks Jackson urges that one seat on the Commission be set aside for a “public commissioner,” who would specifically be required to represent the view that

“moneyed interests hold sway in both parties.”¹²⁸ The Center for Responsive Politics proposes that the President should make appointments to the Commission from a list chosen by a “non-partisan advisory panel” who would be specifically “charged with recommending persons who have a demonstrated commitment to

¹²¹ Perhaps the Commission’s greatest management failure was the lack of an internal system for prioritizing cases from its inception all the way to 1993. This failure to take such an obvious step for so long was not based on any Commission obliviousness to the managerial benefits that might result, but rather because of a conscious policy decision to treat all cases as equally important. See *Colloquia*, *supra* n. 58 at 258–59 (comments of former FEC General Counsel Larry Noble).

¹²² *Id.* at 239.

¹²³ Fred Wertheimer, *The Federal Election Commission Strikes Again*, Capital Bits and Pieces, Vol. 1, No. 16, Nov. 1, 2001. Wertheimer is, as of this writing, working on a task force to propose a new agency to replace the FEC, something he claims is necessary “in order to make any new laws work in the long term.” See Megan Garvey, *Campaign Finance Reform’s Granddaddy*, L.A. Times, July 12, 2001, p. A17.

¹²⁴ Common Cause, *Improve Enforcement of Campaign Finance Laws*, 1999 Issues Agenda, available at <http://216.147.192.101/publications/issue99%5improve.htm>.

¹²⁵ See *e.g.* *Colloquia*, *supra* n. 58 at 242–43 (comments of Larry Noble, noting that the Commission’s decisions not to prosecute alleged violations are rarely reversed). Decisions by the Commission not to proceed on a complaint may be challenged in court by the complainant. 2 U.S.C. § 437g(a)(8). The burden in such actions is on the complainant to show that the decision of the Commission was arbitrary and capricious.

¹²⁶ See *e.g.* Robert F. Bauer, *The Demise of Reform: Buckley v. Valeo, the Courts, and the “Corruption Rationale,”* 10 Stan. L. & Pol’y Rev. 11, 18 (1998) (“The FEC’s failures have led the press to believe that the FEC’s setbacks result from the bipartisan composition of the Commission . . . the Commission’s failures may be traced to tactical error or insufficient resources, but the larger case lies with the almost insurmountable obstacle presented by the courts.”) See also Thomas & Bowman, *supra* n. 2 at 593–606 (discussing various court decisions that have “threaten[ed] to create large loopholes in the disclosure provisions, the contribution limitations, as well as other provisions of the Act.” The two go on to discuss specific court decisions in the area of coordination and issue advocacy that have bedeviled reformers.)

¹²⁷ See David M. Primo, Public Opinion and Campaign Finance 5–6 (Cato Institute Briefing Paper, Jan. 31, 2001); Bradley A. Smith, *A Most Uncommon Cause: Some Thoughts on Campaign Finance Reform and a Response to Professor Paul*, 30 U. Conn. L. Rev. 831, 833–36 (1998).

¹²⁸ Jackson, *supra* n. 48 at 65. Of course, no one will be required to represent the view that “political contributions are an important form of free speech.”

. . . rigorous enforcement of the law."¹²⁹ In short—"let us pick the Commissioners."¹³⁰

The problem, of course, is that not everybody agrees with the philosophies and legal interpretations of Brooks Jackson, the Center for Responsive Politics, or Common Cause. That is why the Commissioners come from a variety of backgrounds and have a variety of opinions.¹³¹ Complaints about the structure of the Commission are a self-deluding smokescreen masking the failure of regulatory advocates to win the political and legal battles necessary to make their vision of the law a reality.

OVERENFORCEMENT

Ironically, while proregulatory lobbying groups and newspaper editorial pages have focused attention on alleged underenforcement of the Act, associating underenforcement with disagreements over what the law does or should cover, we believe that the bigger problem at the FEC may be overenforcement. This overenforcement takes two forms. The first is overly aggressive interpretation of the law by the Commission, leading to wasted resources and infringements on First Amendment rights. The second is excessive enforcement against inexperienced individuals and small committees. We believe that the first type of overenforcement is demonstrated by the treatment that the FEC has received in the courts. The second proposition remains at this time little more than a working hypothesis, although supported by bits of anecdotal evidence.¹³²

Overly aggressive interpretation of the law

Regulation of campaign finance deeply implicates First Amendment principles of free speech and association. Although the courts have held that some degree of regulation is consistent with First Amendment principles, they have consistently limited the reach of such regulation, both as a matter of constitutional law and as a matter of statutory interpretation. As one court put it, "in this delicate first amendment area, there is no imperative to stretch the statutory language, or read into it oblique references of congressional intent."¹³³ Neverthe-

less, and contrary to those critics who assail the FEC for being timid, throughout its history the FEC has aggressively sought to expand the

¹²⁹ Hedlund, *supra* n. 61. That the President might prefer an appointee with "a demonstrated commitment to First Amendment rights" or "a balanced approach to the law" is not considered.

¹³⁰ See American Bar Association's Election Law Committee Panel Discussion: Revolutionizing Campaign Finance - An Appraisal of Proposed Reforms, 13 J. L. & Pol. 163, 187 (comments of Common Cause's then Acting President Don Simon) ("It's a matter of making sure that the Federal Election Commission . . . is staffed by people who approach the task with the intent of the law primarily in mind.")

¹³¹ A common complaint is that commissioners have been too "tainted by politics." LaForge, *supra* n. 68 at 374; see also Jackson, *supra* n. 48 at 65 (describing the "ideal" commissioner as a "former university president, a retired judge, a prominent member of the clergy, or a leader of a public interest group."). Interestingly, even assuming that the goal is desirable, experience doesn't seem to support the recommendations, and refutes the notion that these regulatory advocates want anything other than commissioners who agree with them, from whatever background. For example, Trevor Potter, a Republican commissioner from 1991-95 who was often credited by regulatory advocates with "revitalizing" the Commission, see e.g. LaForge, *supra* n. 68 at 374-75, was the ultimate "insider," having served as legal counsel to President Bush's election campaign. Potter's law firm at the time of his appointment listed as clients the Republican National Committee and the National Republican Senatorial Committee. See Hedlund, *supra* n. 61. Conversely, the lead author of this paper, though not Brooks Jackson's "university president," was an academic with only loose connections to the Republican Party, having never held office in the party nor run for public office, and whose law practice had included filing *amicus* briefs in support of the Harold Washington and Libertarian Parties, but never representing the Republican Party. Nevertheless, his appointment was sharply contested by Common Cause, Democracy 21, and the Brennan Center because of his views on campaign issues. See e.g. Donald J. Simon, Fred Wertheimer, & E. Joshua Rosenkranz, Letter to President Clinton, June 3, 1999 (available at http://www.brennancenter.org/programs/programs_b_smith_letter.html); Brennan Center for Justice, *Bradley A. Smith: An FEC Nominee Who Would Gut the Election Laws And Eviscerate The Agency He Aspires To Lead* (2000)(describing author as "the last person" who should be appointed to the FEC).

¹³² The authors have recently begun an effort to study MURs to determine if Commission fines and enforcement resources are unduly directed toward relatively unimportant matters. Identifying and quantifying underenforcement faces many of the same difficulties as trying to identify and quantify "corruption" caused by unregulated or undetected contributions and spending, in that the definitions are elusive and it is very difficult to measure political activity which may be chilled, abandoned or altered by regulation or the threat of regulation.

¹³³ Federal Election Commission v. Machinists Non-Partisan Political League, 655 F. 2d 380, 394 (D.C. Cir. 1981) (quoting *Richmond v. United States*, 275 U.S. 331 (1928)).

reach of the FECA—so much so that the Commission appears to have lost much of its credibility in the courts. We will not attempt to explore every area of the law in which the FEC has stretched its authority, but limit ourselves to three areas as examples: issue advocacy; political committee status; and coordination.

Issue advocacy. In *Buckley v. Valeo*, the Supreme Court limited the reach of the FECA's regulation of independent expenditures, including disclosure, to ads that used "express terms" advocating "election or defeat" of particular candidates.¹³⁴ The Court argued that this bright line test was necessary in order to assure that regulation would not have a chilling effect on otherwise legal political activity.¹³⁵ Since that time, the "express advocacy" test has been a source of tremendous consternation to those favoring increased campaign finance regulation, especially since the early 1990s when candidate-targeted issue advocacy became a primary campaign tactic for many groups and parties.¹³⁶ Yet almost since its founding, the FEC has aggressively pushed to erode or overturn the express advocacy doctrine, despite repeated defeats in court, up to and beyond the humiliating decision of the U.S. Court of Appeals for the Fourth Circuit in *Federal Election Commission v. Christian Action Network*.¹³⁷

In 1978, the FEC sued the American Federation of State, County and Municipal Employees for failing to report \$984 it had spent at the time of the 1976 election to publish and circulate a poster of Republican presidential candidate Gerald Ford hugging former president Richard Nixon over the words, "Pardon Me," and a quote from Ford, "I can say from the bottom of my heart that the President is innocent and he is right." The case was dismissed because, "although the poster includes a clearly identified candidate and may have tended to influence voting," it did not include "express advocacy."¹³⁸

Less than 1 year after the decision in *FEC v. AFSCME*, on February 2, 1980, the Commission lost another express advocacy case. In this case, a small group of conservative Long Island activists called the Central Long Island Tax Reform Immediately (CLITRIM) had spent about

\$135 to publish a bulletin critical of their congressman's voting record. The Commission argued that the bulletin was not merely informational or educational, but contained express advocacy because it outlined the positions favored by CLITRIM and urged the reader to vote with CLITRIM. The U.S. Court of Appeals for the Second Circuit, sitting *en banc*, found no express advocacy.¹³⁹

In 1986 and 1987 the FEC won two cases involving express advocacy, and from them seemed to draw all the wrong lessons. In *FEC v. Massachusetts Citizens for Life*,¹⁴⁰ ("MCFL") the Supreme Court held that a mailer which stated "vote pro-life" and included photos of candidates identified as "pro-life" constituted express advocacy.¹⁴¹ This part of MCFL is unremarkable, and serves mainly to refute the notion that the examples of express advocacy that the Supreme Court discussed in *Buckley v. Valeo* were some type of "magic words" that constituted the only possible forms of express advocacy. Soon after, in *FEC v. Furgatch*,¹⁴² the U.S. Court of Appeals for the Ninth Circuit found express advocacy in a newspaper ad that noted the upcoming presidential election and claimed that President

¹³⁴ *Buckley v. Valeo*, 424 U.S. 1 at 44, 79–80.

¹³⁵ *Id.*

¹³⁶ A vast literature has since grown up around the topic. For a small sampling of the debate, see e.g. Richard L. Hasen, *The Surprisingly Complex Case for Disclosure of Contributions and Expenditures Funding Sham Issue Advocacy* 48 UCLA L. Rev. 265 (2000); Scott Thomas and Jeff Bowman, *Is Soft Money Here to Stay Under the 'Magic Words' Doctrine*, 10 Stan. L. & Pol'y Rev. 33 (1998); Glenn J. Moramarco, *Beyond 'Magic Words': Using Self-Disclosure to Regulate Electioneering*, 49 Cath. U. L. Rev. 107 (1999); Kirk L. Jowers, *Issue Advocacy: If It Cannot be Regulated When It Is Least Valuable, It Cannot be Regulated When It Is Most Valuable*, 50 Cath. U. L. Rev. 65 (2000); Allison R. Hayward, *When Does an Advertisement About Issues Become an 'Issues Ad'?* 49 Cath. U. L. Rev. 63 (1999); Allison R. Hayward, *Stalking the Elusive Express Advocacy Standard*, 10 J.L. & Pol. 51, (1993).

¹³⁷ 110 F.3d 1049 (4th Cir. 1997). See discussion *infra*, text at notes 157–58.

¹³⁸ *FEC v. American Federation of State, County, and Municipal Employees*, 471 F. Supp. 315 (1979).

¹³⁹ *FEC v. Central Long Island Tax Reform Immediately Committee*, 616 F.2d 45 (2d Cir. 1980)(*en banc*).

¹⁴⁰ *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986). The FEC lost the case, but on other grounds.

¹⁴¹ *Id.* at 249–50.

¹⁴² *FEC v. Furgatch*, 807 F.2d 857, 858 (9th Cir.), *cert. denied* 484 U.S. 850 (1987).

Jimmy Carter's campaign was "an attempt to hide his own record." It continued, "If he succeeds, the country will be burdened with four more years of incoherencies, ineptness, and illusion as he leaves a legacy of low-level campaigning. Don't let him do it."¹⁴³ The court concluded that while it was "a very close call," the words "don't let him do it" following a plea not to let Carter "burden [the country] with four more years of incoherencies, ineptness, and illusion," could only be interpreted as an express call to vote against Carter.

The Court held that express advocacy could be found where the speech met three requirements:

First, even if it is not presented in the clearest, most explicit language, speech is "express" for present purposes if its message is unmistakable and unambiguous, suggestive of only one plausible meaning. Second, speech may only be termed "advocacy" if it presents a clear plea for action, and thus speech that is merely informative is not covered by the Act. Finally, it must be clear what action is advocated. Speech cannot be "express advocacy of election or defeat of a clearly identified candidate" when reasonable minds could differ as to whether it encourages a vote for or against a candidate, or encourages a reader to take some other kind of action.¹⁴⁴

Rather than heed the narrow language of *Furgatch* and the Court's warning against pushing further—"a very close call"—the FEC viewed *Furgatch* as a green light to regulate a great deal of otherwise unregulated speech, and headed off on an era of vigorous—and spectacularly unsuccessful—efforts to regulate advocacy.¹⁴⁵

Claiming to follow *Furgatch*, but in reality attempting to expand the definition of express advocacy beyond explicit words of advocacy of election or defeat, the Commission lost express advocacy cases in 1989,¹⁴⁶ 1991,¹⁴⁷ 1993,¹⁴⁸ and 1994.¹⁴⁹ On June 28, 1995, yet another federal court ruled against the FEC's expansive definition of express advocacy. In that case, *FEC v. Christian Action Network*,¹⁵⁰ the Commission sought to find express advocacy in a television ad that ran in the weeks leading up to the presidential election. Although

the ad did not contain words expressly advocating the election or defeat of a candidate, the Commission argued that when the ad was considered in context, including the timing of the ad, together with its imagery, music, editing, coloration, and the like, it clearly conveyed a message advocating the defeat of Bill Clinton.¹⁵¹ Despite losing that case, just 8 days later the Commission enacted a new regulation expanding the definition of "express advocacy" beyond *Buckley's* requirement that an ad use "explicit words of advocacy of election or defeat." The Commission's definition provided the words themselves need not include explicit advocacy of election or defeat if, "taken as a whole and with limited reference to external events," they "could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidates."¹⁵² Al-

¹⁴³ *Id.* at 858.

¹⁴⁴ *Id.* at 864.

¹⁴⁵ For more complete discussions demonstrating that *Furgatch* breaks no new ground in defining express advocacy, see *FEC v. Christian Action Network*, 110 F. 3d 1049, 1052–55 (1997); Bradley A. Smith, *Soft Money, Hard Realities: The Constitutional Prohibition on a Soft Money Ban*, 24 J. Legis. 179, 188–89 (1998).

¹⁴⁶ *FEC v. National Organization for Women*, 713 F. Supp. 428 (D.D.C. 1989).

¹⁴⁷ *Faucher v. FEC*, 928 F.2d 468 (1st Cir.), *cert. denied* 502 U.S. 820 (1991).

¹⁴⁸ *FEC v. Colorado Republican Federal Campaign Committee*, 839 F.Supp. 1448 (D. Colo. 1993), *rev'd on other grounds* 59 F.3d 1015 (10th Cir. 1995) and *vacated on other grounds*, 518 U.S. 604 (1996).

¹⁴⁹ *FEC v. Survival Education Fund*, 1994 U.S. Dist. Lexis 210 (S.D.N.Y. Jan. 12, 1994), *aff'd in part and rev'd in part on other grounds*, 65 F.3d 285 (2d Cir. 1995).

¹⁵⁰ *FEC v. Christian Action Network*, 894 F.Supp. 946 (W.D. Va. 1995).

¹⁵¹ *Id.* at 955.

¹⁵² 11 C.F.R. 100.22(b), adopted July 6, 1995. The complete regulation reads:

Expressly advocating means any communication that . . .

(b) When taken as a whole and with limited reference to external events, such as the proximity to the election, could only be interpreted by a reasonable person as containing the advocacy of the election or defeat of one or more clearly identified candidate(s) because—
(1) The electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning; and

(2) Reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action.

though the Commission claimed to be basing its definition on *Furgatch*,¹⁵³ in fact the definition left out a crucial part of the *Furgatch* test that required that the communication include “a clear plea for action,” that the specific action advocated be clear, and that no other action be recommended.¹⁵⁴

Putting the definition in the regulations did not help the Commission. In February 1996, the U.S. District Court for the District of Maine held that the above regulation, 11 C.F.R. §100.22(b), was unconstitutional.¹⁵⁵ That decision was affirmed by the First Circuit later in the year.¹⁵⁶ In August of 1996, the Fourth Circuit Court of Appeals summarily affirmed the District Court’s decision in *Christian Action Network*.¹⁵⁷ The *coup de grace* seemed to come a few months later, when the Fourth Circuit, in a scathing opinion, took the unusual step of awarding attorneys’ fees to the Christian Action Network. The Court accused the FEC of attempting “sleight of hand,” ridiculed the FEC for legal submissions that contained “notably little discussion of the legal analysis,” and concluded “an argument such as that made by the FEC in this case, that ‘no words of advocacy are necessary to expressly advocate the election of a candidate,’ simply cannot be advanced in good faith . . . much less with ‘substantial justification.’”¹⁵⁸

But this harsh language and an award of attorney fees still did not cause the Commission to back off. The FEC continued to cling to its regulation at §100.22(b) even after that regulation was found to be unconstitutional by the Federal Court for the Southern District of New York in *Right to Life of Dutchess County, Inc. v. FEC*,¹⁵⁹ and when an identical state regulation was found to be unconstitutional by the Eighth Circuit Court of Appeals in 1999.¹⁶⁰ In January 2000, the U.S. District Court for the Eastern District of Virginia also found the Commission’s definition of express advocacy to be unconstitutional. Moreover, in a sign of the Commission’s lack of credibility, the Court took the extremely unusual step of issuing a nationwide injunction against the Commission.¹⁶¹ Nevertheless, in the wake of that decision, the Commission refused, by a 2-3 vote, to open a rule making proceeding to repeal the regulation.¹⁶² In October 2001, the Fourth Circuit held that the lower court

lacked the authority to make its injunction nationwide, but affirmed the finding that the regulation is unconstitutional.¹⁶³ Numerous other state and federal court decisions not involving the FEC as a party have also ruled that express advocacy requires explicit words of advocacy of election or defeat.¹⁶⁴

Not only has the FEC refused to back down against overwhelming judicial authority, but until recently it has actively propagated the notion that its position merely reflects a “split in the circuits,” and continued to argue, erroneously, that its express advocacy regulation

¹⁵³ See Federal Election Commission 2000 Annual Report at 21.

¹⁵⁴ See *FEC v. Christian Action Network*, 110 F.3d 1049, 1054, n. 5 (4th Cir. 1997) (“It is plain that the FEC has simply selected certain words and phrases from *Furgatch* that give the FEC the broadest possible authority to regulate political speech [i.e., ‘unmistakable,’ ‘unambiguous,’ ‘suggestive of only one meaning,’ ‘encouragement’], and ignored those portions of *Furgatch*, quoted above, which focus on the words and text of the message”)(citation omitted).

¹⁵⁵ *Maine Right to Life Committee v. FEC*, 914 F.Supp. 8 (D. Me. 1996).

¹⁵⁶ 98 F.3d 1 (1st Cir. 1996), cert. denied 522 U.S. 810 (1997).

¹⁵⁷ 92 F.3d 1178 (4th Cir. 1996).

¹⁵⁸ *FEC v. Christian Action Network*, 110 F.3d 1049, 1063 n. 13, 1064 (4th Cir. 1997).

¹⁵⁹ 6 F.Supp. 2d (S.D.N.Y. 1998).

¹⁶⁰ *Iowa Right to Life v. Williams*, 187 F.3d 963 (8th Cir. 1999) (striking down an Iowa law). Additionally, the FEC lost yet another express advocacy case, not pertaining directly to the regulation, in 1999. See *FEC v. Freedom’s Heritage Forum*, No. 3:98CV-549-S (W.D. Ky. Sept. 29, 1999).

¹⁶¹ *Virginia Society for Human Life, Inc. v. FEC*, 83 F.Supp. 2d 668 (E.D. Va. 2000)(calling the regulation “blatantly” unconstitutional and holding that, “the Court is unwilling to perpetuate the state of uncertainty faced across the land by potential participants in the public arena”).

¹⁶² Agenda Document 00-11, Feb. 9, 2000. Commissioners Thomas, McDonald, and Sandstrom voted to retain the definition at 11 C.F.R. 100.22(b). Commissioners Wold and Mason voted to start the repeal process.

¹⁶³ *Virginia Society for Human Life, Inc. v. FEC*, 263 F.3d 379 (4th Cir. 2001).

¹⁶⁴ See e.g. *Vermont Right to Life Committee v. Sorrell*, 216 F.3d 264 (1st Cir. 2000); *Kansans for Life, Inc. v. Gaede*, 38 F.Supp. 2d 928 (D. Kan. 1999); *Right to Life of Michigan v. Miller*, 23 F.Supp. 2d 766 (W.D. Mich. 1998); *West Virginians for Life v. Smith*, 919 F.Supp. 954 (S.D. W. Va. 1996); *Washington State Republican Party v. Washington State Public Disclosure Commission*, 141 Wash. 2d 245 (Wash. 2000); *League of Women Voters v. Davidson*, 23 P.3d 1266 (Colo. App. 2001); *State ex rel. Crumpton v. Keisling*, 982 P. 2d 3 (Ore. App. 1999).

follows *Furgatch*.¹⁶⁵ Far from being a timid enforcement agency in the field of express advocacy, it is clear that the FEC has devoted substantial resources over a lengthy period of time to promoting an aggressive interpretation of the law that has been uniformly rejected by the courts, even if one includes the decision in *Furgatch*.

Political committees. Blocked in the courts, the FEC has not given up its efforts to regulate issue advocacy. For while issue advocacy is unregulated under *Buckley* and its progeny, the Act regulates “political committees,” which are defined as “any committee, club, association, or other group of persons which receives contributions aggregating in excess of \$1000 during a calendar year or which makes expenditures aggregating in excess of a \$1000 during a calendar year.”¹⁶⁶ Some Commission members have attempted to include expenditures for issue advocacy—which *Buckley* and its progeny have held does not meet the definition of expenditure under the Act—as being sufficient to qualify a group as a “political committee.”¹⁶⁷ Then, the reasoning goes, the issue advocacy of these groups can be regulated, and this would be constitutional because the Commission would not be regulating the issue advocacy *per se*, but regulating the group as a political committee.

This approach turns *Buckley* on its head by converting issue advocacy from protected activity to the very activity that would trigger regulation. So far, however, lower courts have not been fooled.¹⁶⁸ Most specifically, the argument that a group’s issue ads and nonfederal political activity are enough to make the group a “political committee” or to convert disbursements into “expenditures” as defined by the Act was specifically rejected in *Federal Election Commission v. GOPAC*.¹⁶⁹ The district court held that GOPAC’s issue advocacy and state activity did not make it a political committee for purposes of federal regulation.¹⁷⁰

One Commissioner, Scott Thomas, has since dismissed the district court’s decision in *GOPAC* as “goofy.” Though recognizing that *GOPAC*’s holding “requires that a group’s major purpose be issuing ‘express advocacy’ communications regarding one or more federal candidates” for the group to become a political

¹⁶⁵ See e.g. Federal Election Commission, Campaign Guide for Corporations and Labor Organizations 22-23 and n. 3 (1997). The Commission has also described the express advocacy test applied by the courts using the favored language of critics of that test, “magic words,” see *id.* For examples of use of the “magic words” label by critics of the test, see Moramarco, *supra* n. 136; Thomas & Bowman, *supra* n. 136. The courts themselves do not use the phrase, and several courts have specifically rejected the idea that the test can be accurately described by the phrase. See e.g. *FEC v. Christian Action Network*, 894 F. Supp. 945 (W.D. Va. 1995); *League of Women Voters v. Davidson*, 23 P.3d 1266, 1277 (Colo. App. 2001); *Brownsburg Area Patrons Affecting Change v. Baldwin*, 714 NE 2d 135 (IN 1999). In the most obvious sense, there is no split in the circuits because *Furgatch* did not rule on the constitutionality of 11 C.F.R. 100.22(b). Beyond that, 100.22(b) does not follow *Furgatch* but selectively incorporates from it. See *Christian Action Network*, 110 F. 3d at 1054; *Virginia Society for Human Life*, 83 F. Supp. 2d at 677. The best interpretation of *Furgatch* is that it is in harmony with other decisions, merely establishing the outer limits of the express advocacy test. See e.g. *Christian Action Network*, 110 F.3d at 1054; Smith, *supra* n. 145 at 188–89.

¹⁶⁶ 2 U.S.C. § 431(4)(A). Current Commission regulations mirror this provision. 11 C.F.R. § 100.5(a).

¹⁶⁷ See Statement for the Record of Commissioner Scott E. Thomas and Chairman Danny Lee McDonald in MUR 4624 (The Coalition, National Republican Congressional Committee, et al.) September 7, 2001 (arguing that respondents which did not engage in express advocacy nevertheless ought to be required to register as a political committee because their “communications were undertaken for the purpose of influencing federal elections” as they “aired ads in the weeks before the election;” “dropped direct mail ten days before the election;” and “took credit” for the reelection of many members of Congress, *id.* at 12, n. 6, (internal citations omitted); because, “[t]here is no indication that the Coalition was formed for any purpose other than building . . . public support for certain candidates [and] nothing suggesting that the Coalition engaged in . . . issue discussion outside the context of elections,” *id.* at 15; and because the Coalition had stated, “Our ultimate objective is to return a pro-business, fiscally responsible majority for the 105th Congress,” *id.* at 16 (emphasis omitted); see also Statement for the Record of Commissioner Karl J. Sandstrom in MUR 4624 (The Coalition, National Republican Congressional Committee, et al.) September 6, 2001 (arguing that respondents should be required to register as a political committee for “testing” the effect of issue ads on voters).

¹⁶⁸ See e.g., *Citizens for Responsible Gov’t. State Political Action Committee v. Davidson*, 236 F.3d 1174, 1193–94 (10th Cir. 2000) (striking as unconstitutional an extension of Colorado’s election law to reach “advocacy with respect to public issues”); *Vermont Right to Life Committee, Inc., v. Sorrell*, 221 F.3d 376, 387 (2d Cir. 2000)); *North Carolina Right to Life v. Bartlett*, 168 F.3d 705 (4th Cir. 1999); *Florida Right to Life v. Mortham*, 1999 WL 33204523 at *4 (M.D. Fla. 1999) (finding that Florida election law was overbroad for sweeping in groups that engage only in issue discussion); *FEC v. GOPAC*, 917 F. Supp. 851 (D.D.C 1996).

¹⁶⁹ 917 F. Supp. 851, 861–62 (D.D.C. 1996).

¹⁷⁰ *Id.* at 861–67. See also *FEC v. Machinists*, 655 F.2d 380, 390-92 (D.C. Cir. 1981).

committee under the Act,¹⁷¹ Commissioner Thomas nevertheless argues that political committee status attaches to groups that engage in no federal “campaign activity” at all, if their activities might in some way influence federal elections, even years down the road.¹⁷² However, encompassing disbursements for non-federal elections to define a group as a “political committee” under the Act exceeds the Commission’s jurisdiction. The court in *GOPAC* made this plain as well, holding that a group that “focused on recruiting, training and funding strong local and state candidates” is not a political committee under federal election law.¹⁷³

Even though several other courts have found it unconstitutional for definitions of “political committee” to sweep in issue advocacy,¹⁷⁴ Commissioner Thomas is not alone in his quest to expand the definition to reach issue advocates. At the request of Commissioner Karl Sandstrom, the Commission has issued an advance notice of proposed rulemaking regarding amendments to the definition of “political committee.”¹⁷⁵ Much of the proposal is an attempt to redefine the definitions of contribution and expenditure enacted by Congress and construed by the courts. For example, the definition of contribution would be altered to include receipts of “money, services or anything of value received from a political committee.”¹⁷⁶ Thus if a national political committee funded a group that did no electoral activity, the group would still be defined as a “political committee” and so be regulated by the Commission. The intention is to get at issue advocacy: if a group engages in express advocacy and spends over \$1,000 to do so, it will qualify as a political committee in its own right and no change in the definition is needed. But if the group uses the funds solely for issue advocacy, then under *Buckley* it is exempt from the FECA. The proposal is therefore a blatantly unconstitutional effort to regulate that which the Supreme Court has said may not be regulated. “If the federal government cannot regulate issue advocacy directly as expenditures . . . then it cannot regulate organizations that primarily engage in issue advocacy on the basis of the organizations’ issue advocacy. If it did so, the Commission would be doing indirectly what it could not do directly.”¹⁷⁷

Again, having largely lost in the courts over the definition of issue advocacy, there is a substantial effort at the Commission to accomplish the same result by expanding the definition of political committee, so as to allow regulation of what courts have held is protected activity. This is hardly indicative of an agency that is not interested in “aggressive” enforcement.

Coordination. Another contentious issue of law which the Commission has been accused of not pursuing aggressively is coordination. Under the Act, if a group or individual coordinates its activities with a candidate, those activities are treated as contributions, subject to the limits of the Act, rather than expenditures, which are unlimited.¹⁷⁸ The question is what level of contact between a campaign and a person making expenditures is necessary to prove that the expenditures were coordinated with the campaign.

¹⁷¹ See Pre-MUR 395, College Republican National Committee, Statement of Reasons of Commissioner Scott E. Thomas, p.3, November 9, 2001.

¹⁷² *Id* at 3.

¹⁷³ *GOPAC*, 917 F. Supp. at 862.

¹⁷⁴ See e.g., *Citizens for Responsible Gov’t. State Political Action Committee v. Davidson*, 236 F.3d 1174, 1193–94 (10th Cir. 2000) (striking as unconstitutional an extension of Colorado’s election law to reach “advocacy with respect to public issues”); *North Carolina Right to Life v. Bartlett*, 168 F.3d 705 (4th Cir. 1999) (striking state law requiring “an intrusive set of reporting requirements” from “groups engaged in only issue advocacy”); *Florida Right to Life v. Mortham*, 1999 WL 33204523 at *4 (M.D. Fla. 1999) (finding overbroad a Florida law that covered groups engaged only in issue discussion).

¹⁷⁵ See Advanced Notice of Proposed Rule Making, 66 Fed. Reg. 13681 (2001). The proposal was first raised by Commissioner Sandstrom in Agenda Document No. 00-51, May 4, 2000.

¹⁷⁶ Advanced Notice of Proposed Rule Making, 66 Fed. Reg. (proposing additions to the definitions of contribution and expenditure found at 11 C.F.R. §§ 100.7(a) and 100.8) The Act defines “contribution” as “anything of value . . . given by any person for the purpose of influencing an election for federal office.” 2 U.S.C. § 431(8)(a)(i). Similarly, an “expenditure” is “any purchase . . . or anything of value made by a person for the purpose of influencing an election for federal office.” 2 U.S.C. § 431(9)(a)(i).

¹⁷⁷ Comments of the Chamber of Commerce of the United States at 6, May 7, 2001, on Advanced Notice of Proposed Rulemaking, Definition of Political Committee, 66 Fed. Reg. 13681 (Mar. 7, 2001)

¹⁷⁸ 2 U.S.C. 441a(a)(7).

Historically, the Commission took an aggressive line on coordination. For example, the Commission long operated on the theory that expenditures by political parties were coordinated as a matter of law. This position was rejected by the U.S. Supreme Court in *FEC v. Colorado Republican Federal Campaign Committee*, the Court writing that “an agency’s simply calling an independent expenditure a ‘coordinated expenditure’ cannot (for constitutional purposes) make it one.”¹⁷⁹ The Commission also long operated under what was sometimes dubbed an “insider trading” standard.¹⁸⁰ Under this standard, the Commission held that expenditures would be presumed to be coordinated under an extremely broad standard that would find coordination on the basis of even the slightest contacts between candidate and spender. As one court described it, the rule “sweeps in all attempts by corporations and unions to discuss policy matters with the candidate while these groups are contemporaneously funding communications directed at the same policy matters.”¹⁸¹ In 1997, the U.S. Court of Appeals for the First Circuit held that a similar standard used by the FEC, which prohibited a group preparing voter guides from contacting candidates except in writing, was unconstitutional.¹⁸² After the insider trading standard itself was held to be unconstitutional by the Federal District Court for the District of Columbia,¹⁸³ the Commission opened a rule making proceeding on a new coordination standard. That standard, establishing a tougher test for proving coordination, was approved in 2001,¹⁸⁴ but only over vigorous protests from the Office of General Counsel and Commissioners who sought to keep the old, unconstitutional standard.¹⁸⁵

Even in enacting this new, stricter standard for proving coordination, however, the Commission stopped short of adopting a clear, bright line content standard that was favored by the overwhelming number of commentators during the rule making process,¹⁸⁶ and that would unquestionably address the vagueness and overbreadth problems that caused the previous regulation to be found unconstitutional.¹⁸⁷ Most groups that make independent disbursements are also concerned with legislative matters, and so have contacts with a wide

variety of candidates and office holders. Because the Commission’s new coordination standard still does not require that a group engage in express advocacy, or meet some other content standard, before its communications can be considered coordinated expenditures, groups have no jurisdictional defenses to protect them from FEC investigations. The result is that mere allegations of coordination, which are easy to make, and which usually trigger a Reason to Believe finding under the Commission’s loose standard for making that finding, are sufficient to ensnare such groups in major investigations.¹⁸⁸ Recent MURs have shown that these investigations, even when they ultimately result in no finding of a violation, can

¹⁷⁹ 518 U.S. 604 (1996).

¹⁸⁰ *FEC v. Christian Coalition*, 52 F. Supp. 2d 45, 90 (1999).

¹⁸¹ *Id.*

¹⁸² *Clifton v. FEC*, 114 F.3d 1309 (1st Cir. 1997), cert. denied 522 U.S. 1108 (1998).

¹⁸³ *FEC v. Christian Coalition*, 52 F. Supp. 2d 45 (D.D.C. 1999).

¹⁸⁴ 11 C.F.R. § 100.23.

¹⁸⁵ See MUR 4624, The Coalition, Statement of Reasons of Commissioners Scott E. Thomas and Danny Lee McDonald; MUR 4624, General Counsel’s Report, April 20, 2001 (arguing that new coordination standard unduly hampered ability to find probable cause).

¹⁸⁶ See Federal Election Commission, Hearing on General Political Communications Coordinated With Candidates, Feb. 16, 2000 (Comments of Jan W. Baran for the Coalition; of Laurence E. Gold for the AFL-CIO; of James Bopp, Jr. for the James Madison Center for Free Speech; of Robert F. Bauer for the Democratic Senatorial Campaign Committee and Democratic Congressional Campaign Committee; Thomas J. Josefiak for the Republican National Committee; Joseph E. Sandler for the Democratic National Committee; Cleta Mitchell for the First Amendment Project of the Americans Back in Charge Foundation; Nan Aron and Elliot Mineberg for the Alliance for Justice and People for the American Way; Bobby Burchfield for the National Republican Senatorial Committee; and Richard B. Wilkof for the National Education Association).

¹⁸⁷ See MUR 4624, The Coalition, Statement of Reasons of Commissioner Bradley A. Smith.

¹⁸⁸ Experienced players know this and sometimes use it threateningly against others. See e.g. Plaintiff’s Exhibit 34, *National Right to Life PAC v. Friends for Bryan*, No. CV-S-88-865-PMP-(RJJ) (D. Nev. 1988) (In which counsel for sitting Governor, running for U.S. Senate, urged local broadcast station not to run ads filed by a group because the ads may have been illegally coordinated, and, “a Federal Election Commission investigation is required in order to determine the independence of these expenditures.”)

impose tremendous costs on respondents and intrude deeply into the internal affairs of such groups.¹⁸⁹ Both the threat and reality of such investigations almost certainly have a chilling effect on the legal political involvement of some groups.¹⁹⁰ The lower courts that have directly considered the question have split on the issue,¹⁹¹ while comments filed with the Commission from across the political spectrum argued that precedent and policy required the inclusion of a content standard, such as express advocacy, in the Commission's regulations.¹⁹² The Commission, quite typically, ignored the comments and chose the more aggressive enforcement position.

The Commission's behavior in these three areas is not atypical. In virtually every contentious area of the law, the FEC has fought hard for a sweeping interpretation of the law.¹⁹³ That the Commission has had to be repeatedly checked by the courts suggests that the problem is not that the Commission has

been too hesitant in its enforcement efforts, but that it has been too aggressive.

Overenforcement against grassroots activities

It is sometimes said that the FEC is a toothless animal. But not all predators kill with their teeth. That the FEC has not been able to successfully regulate in certain areas, notably issue advocacy, is due less to any lack of muscle or will in the FEC than due to the determination of the courts to protect the rights of Americans to participate in political activity.¹⁹⁴ But if the FEC has lacked teeth in some areas, in others it appears to be slowly squeezing the life out of American politics.

Under FECA, and fighting what the Supreme Court apparently believes is "corruption" or the "appearance of corruption," the FEC fines husbands for contributing to the campaigns of their wives,¹⁹⁵ sons for contributing to fathers,¹⁹⁶ and fathers for contributing to sons.¹⁹⁷

¹⁸⁹ See MUR 4624, The Coalition, Statement of Reasons of Commissioner Bradley A. Smith; AFL-CIO et al. v. FEC, Civ. Action No. 01-1522 (GK), Dist Ct., District of Columbia. For examples of other recent expensive, intrusive investigations, see also MUR 4872, Louisiana Republican Party; MUR 4503, South Dakota Democratic Party; and MUR 4538, Alabama Republican Party.

¹⁹⁰ MUR 4624, The Coalition, Statement of Reasons of Commissioner Bradley A. Smith; See also Federal Election Commission, Comments on Notice of Proposed Rulemaking on Independent Expenditure Reporting, June 12, 2001, (comments of James Madison Center for Free Speech at 7-8)(noting efforts to urge broadcasters not to run ads when FEC complaints have been filed concerning those ads).

¹⁹¹ See *Christian Coalition*, 52 F. Supp. 2d 45 (holding that express advocacy is not required for coordinated corporate expenditures to be subject to the Act, but without considering 2 U.S.C. §431(8)(B)(vi), which provides that "The term 'contribution' does not include . . . (vi) any payment made or obligation incurred by a corporation or labor organization which, under Section 441b(b) of this title, would not constitute an expenditure by such corporation or labor organization," in light of the holding in *MCFL* that, "an expenditure must constitute 'express advocacy' in order to be subject to the prohibition of § 441b." See 479 U.S. at 249.); and *FEC v. Colorado Republican Federal Campaign Committee*, 839 F.Supp. 1448 (D. Colo. 1993), *rev'd on other grounds* 59 F.3d 1015 (10th Cir. 1995) and *vacated on other grounds*, 518 U.S. 604 (1996) (express advocacy is required as a prerequisite before communicative expenditures can be considered prohibited contributions).

¹⁹² See *supra* note 186.

¹⁹³ To briefly cite just a few others areas of law in which the FEC's efforts at "robust" enforcement have been blocked by courts, see e.g. *United States Chamber of Commerce v. Federal Election Commission*, 69 F.3d 600 (D.C. Cir. 1995)(striking down an FEC regulation narrowly defining the definition of "member," thus limiting the ability of groups to make expenditures to communicate with dues paying supporters); *Republican National Committee v. FEC*, 76 F.3d 400 (D.C. Cir. 1996), *cert. denied* 519 U.S. 1055 (1997) (striking down an FEC regulation requiring political committees to take added steps to obtain information on donors, and limiting contents of communications taken in conjunction with such efforts, including solicitations and expressions of thanks); and *FEC v. National Rifle Association*, 254 F.3d 173 (D.C. Cir. 2001); *Minnesota Concerned Citizens for Life v. FEC*, 113 F.3d 129 (8th Cir. 1997), and *FEC v. Survival Education Fund*, 65 F.3d 285, 292-93 (2d Cir. 1995)(rejecting FEC attempts to narrow the scope of the "MCFL exemption," by which certain non-profit organizations are exempt from reporting as political committees pursuant to *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 254-55, 259-63 (1986), to those organizations with categorical bans on corporate contributions and all "business" activity). This list is by no means exhaustive of the subject areas in which the FEC has pushed the limits of the law, only to lose in court.

¹⁹⁴ See *Bauer*, *supra* n. 126 at 18.

¹⁹⁵ See *Audit Referral 99-22*, Eva Clayton Committee for Congress.

¹⁹⁶ See MUR 4568 (not public by date of publication).

¹⁹⁷ *Id.*

The Commission has acted to discourage citizens from engaging in voluntary political activity on the internet.¹⁹⁸

The burdens of FEC enforcement are often felt by those who best exemplify American civic involvement. MUR 4978 is a typical example. The Commission fined the respondent, a retired army officer, for failing to place the disclaimers required by 2 U.S.C. § 441d on literature that in every other way identified the campaign. The respondent, a first time candidate, had finished fourth in a primary race for congress, after having spent approximately \$20,000 of his own money in the effort.¹⁹⁹ While large committees with abundant resources are usually able to cope with the FECA as a cost of doing business, campaigns reliant on volunteers often find compliance with the Act to be especially difficult. As one respondent, a CPA serving as a volunteer treasurer, wrote the Commission, "I will never be acting as treasurer again. It is clear from the complexity of the rules, and the quantity of literature sent and expected to be read and understood in its entirety, and the size of the penalties, it could never be intended that anyone other than a specialist act as treasurer in a campaign."²⁰⁰

Congress has not adjusted FECA thresholds for disclosure and contributions since the Act was amended in 1974, with the result that most small contributions, which would not have had to be itemized in reporting in 1974, now must be itemized and reported. Indeed, Congress has continued to squeeze disclosure thresholds and time frames downward, so that, for example, expenditures as low as \$1,000 must in some cases be reported within 24 hours.²⁰¹ It is hard to believe that anybody sincerely thinks that a \$1,000 expenditure in a race for the U.S. House or Senate poses such a risk of corruption that it must be disclosed on such an instantaneous basis. Similarly, the Act retains a \$250 threshold for groups engaging in independent expenditures to begin filing reports with the FEC.²⁰² This threshold was low when enacted, and after a quarter century without being adjusted for inflation, now borders on ridiculous. It is almost certainly a barrier to some grassroots activity that poses no danger of corruption.²⁰³ In other words, it is a form of statutory overenforcement that has little to do with the

stated rationale for the Act, preventing corruption or its appearance.²⁰⁴ Even much of the alleged soft money "problem" is caused by the failure merely to adjust hard money limits for inflation—had the limits been so adjusted, individuals could contribute up to \$70,000 per year in hard money to political parties.

Oddly enough, a reintroduction of random audits, favored by those who hope for more "robust" enforcement, would probably have little deterrent effect on violators of the law, but might slightly ease the burden on small players. It would have little deterrent effect because the odds of an audit would remain low. It might have a mildly ameliorative effect on small players, however, because in the absence of random audit authority the FEC is required to select audit targets by the error rate on reports filed with the Commission.²⁰⁵ A large committee intentionally violating the Act might doctor its reports so that no illegal activity, and few or no errors, appear on the face of the reports. A small committee, on the other hand, with lesser resources and expertise, might be more likely to make innocent reporting errors, thus triggering an audit. Congress has shown no interest in the idea.

FECA's complex regulatory scheme now takes up over 300 pages in the Code of Federal

¹⁹⁸ See Advisory Opinion 1998-22 (finding that a citizen who created a web site on his home computer expressly advocating the defeat of his congressional representative might need to file with the Commission). *But see* Notice 2001-14, Notice of Proposed Rulemaking on the Internet and Federal Elections, 66 Fed. Reg. 50358, Oct. 3, 2001 (would provide safe harbors for the type of activities at issue in AO 1998-22. The comment period for this proposed rule making ended on Dec. 3, 2001).

¹⁹⁹ MUR 4978, Mac Warren. The case is discussed at greater length in Bradley A. Smith, *Regulation and the Decline of Grassroots Politics*, 50 Cath. L. Rev. 1, 7-8 (2000). See Bradley A. Smith, *McCain-Feingold Will Hurt the Little Guy*, Wall St. J., March 20, 2001, p. A15 for other examples.

²⁰⁰ AF 12, Miles for Congress, Letter of Barbara Steinberg.

²⁰¹ See 2 U.S.C. § 434(c)(2).

²⁰² 2 U.S.C. § 434(c)(1).

²⁰³ See Smith, *McCain-Feingold Will Hurt the Little Guy*, *supra* n. 199 (noting that current law requires a college Republican group pooling their funds to run a few radio ads to file reports with the Commission).

²⁰⁴ See Buckley, 424 U.S. at 26.

²⁰⁵ See 2 U.S.C. § 438(b).

Regulations.²⁰⁶ Amateur politicians and small citizen advocacy groups are faced with separate filing deadlines for pre and postelection reports and quarterly reports. Different thresholds exist for accepting and/or reporting anonymous cash contributions. Certain corporate expenses must be paid in advance; others reimbursed. Citizens now engage in grassroots political activity at their peril.

Meanwhile, the FEC's statutory scheme, with its reliance on third party complaints, fosters trivial complaints filed to harass the opposition.²⁰⁷ While the implementation of the Commission's Enforcement Priority System in 1993 has helped the Agency to focus its resources on more important cases, even supporters of more aggressive enforcement have long recognized that the enforcement system tends to fall disproportionately on smaller political players.²⁰⁸ Overenforcement of this sort diverts FEC resources away from more important cases, and penalizes low level, grassroots political involvement. FEC procedures fail to provide adequate due process safeguards, which also penalizes poorly financed activists and candidates who lack the resources to hire top legal assistance.²⁰⁹ The result is a system that places a significant regulatory burden on volunteer and small time political activity. As a result, average citizens become increasingly distant from a small, well-trained political class that understands the system and uses it to its advantage.

CONCLUSION

Recent innovations at the FEC demonstrate that the Commission is not a "dysfunctional" agency.²¹⁰ Complaints about the FEC's failure "to enforce the law" assume not only that more "robust" or "vigorous" enforcement would be desirable, but that the law provides for such enforcement and is stifled only by the structure

and lack of power and will at the FEC. In fact, it is not obvious that such "vigorous" enforcement is a good thing, and it may not even be lawful. Public opinion has not demanded, the Congress has not passed, and the courts have not accepted the constitutionality of many of the types of measures these advocates desire.

The greater problem at the FEC has been overenforcement. The FEC's enforcement efforts place a substantial burden on small committees and campaigns, and are having a chilling effect on some political speech. Unfortunately, regulatory advocates in Congress have promoted changes only in those areas where they believe that the Commission has been guilty of underenforcement, and have shown no interest in amending the law to alleviate overenforcement, in particular the burdens that the Act places on small political actors. Thus the FEC has become something of a toothless anaconda, gradually squeezing the life out of low level, volunteer political activity, even as regulatory advocates criticize it for having no teeth.

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²⁰⁶ See 11 C.F.R. 100 et seq.

²⁰⁷ *Lochner & Cain*, *supra* n. 73 at 637-39; *Lochner & Cain*, *supra* n. 54 at 1904-05.

²⁰⁸ See e.g. *Colloquia*, *supra* n. 58 at 225-26 (comments of Larry Noble, citing *Central Long Island Tax Reform Immediately*, 616 F.2d at 653, and *Massachusetts Citizens for Life*, 479 U.S. at 259, as examples); *Common Cause*, *supra* n. 82 at 46-48.

²⁰⁹ See *supra* text at notes 81-87.

²¹⁰ *Leffler*, *supra* n. 46 (quoting former Congressman Bob Livingston).

