



FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

**Statement of Chair Cynthia L. Bauerly and Commissioner Ellen L. Weintraub  
on the adoption of the Commission's new Procedure for  
Disclosure of Documents in the Enforcement Process**

We support formalizing the Commission's procedure regarding the production of exculpatory evidence in our enforcement process, relying on the principles of *Brady v. Maryland*, 373 U.S. 83 (1963) and its judicial progeny. We proposed a narrowly tailored procedure to achieve the laudatory goals of fairness identified in *Brady*, even though courts have found that opinion does not apply to civil administrative proceedings. Our proposal is similar to those adopted by several other Federal agencies, some of whom have far broader enforcement authority than the Commission.

The procedure adopted today is unnecessarily broad in scope, will weaken the enforcement process, and ultimately undermine the credibility of the FEC. By allowing for the disclosure of all non-privileged documents in the Commission's investigative files prior to the probable cause stage of the enforcement process, the procedure adopted provides an incentive for respondents to request conciliation solely in an effort to game the system and evaluate the Commission's evidence against them or against co-respondents that the Commission may still be investigating.

In weighing whether to adopt an exculpatory evidence policy, other investigative agencies have considered such concerns as the agency's ability to conduct investigations effectively and efficiently, the opportunity for collusion or intimidation among witnesses or parties, the possibility that complainants and informants will be deterred, and the prospect of harm to a parallel investigation or proceeding by another agency. The new procedure gives short shrift to these concerns.

In addition, the new procedure will bog down the Commission's enforcement process with convoluted and time consuming procedures, motions, and appeals. Finally, and very importantly, this new procedure presents the real potential to violate the statutory requirement of confidentiality that is not ours to waive.

We are disappointed that the long discussions that reflected consensus about providing respondents with exculpatory information at the probable cause stage did not result in unanimous adoption of a straightforward procedure. We could not support adopting a procedure far more expansive than that of any similar enforcement agency, a procedure that will further erode confidence in the Commission's ability and desire to enforce the law.