

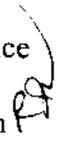


FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

June 3, 2003

SUPPLEMENTAL MEMORANDUM

TO: The Commission
General Counsel
Staff Director
Public Information
Press Office
Public Records Office

FROM: Rhonda J. Vosdigh 
Associate General Counsel for Enforcement

SUBJECT: Additional Response to the Notice of Public Hearing on Enforcement
Procedures

Attached please find a copy of Dr. Julian Salisbury's Ph.D. thesis, which concerns the Commission's enforcement process. As stated in my Memorandum dated June 2, 2003, in response to the Commission's news release concerning the upcoming enforcement hearing, Dr. Salisbury requested that the Commission consider his Ph.D. thesis.

Attachment

cc: Deputy General Counsel
Acting Associate General Counsel for Public Financing, Ethics
and Special Projects ("PFESP")
Deputy Associate General Counsel for Enforcement
Assistant General Counsels for Enforcement
Assistant General Counsel and Acting Assistant General Counsel
for PFESP
Acting Associate General Counsel for Policy
Acting Assistant General Counsels for Policy
Congressional Affairs Officer
Executive Assistants
Data Systems Development Division, Systems Analysis and Design Branch





Julian SALISBURY <j-salisbury@s-cheshire.ac.uk> on 05/12/2003 07:33:11 AM

To: enfpro@fec.gov
cc:

Subject: FEC enforcement

To: Susan L. Lebeaux

Dear Susan,

I am writing to you concerning a May 1 2003 News Release relating to the June 11 discussion on FEC enforcement.

I understand that the meeting is largely designed to consider comments by the regulated community, but I feel that my recently completed Ph.D thesis on FEC enforcement might be worthy of consideration on this occasion.

I sent Press an electronic copy a couple of months ago and Commissioner Thomas has a hard bound copy which he has read.

Although I live in the UK, I hope to be able to make a small contribution to debate through my written work on FEC enforcement.

Many thanks,

Dr. Julian Salisbury



.C.htm



Introduction

This dissertation investigates the enforcement of political finance regulation by the U.S. Federal Election Commission (FEC). One might justify this topic by saying that political finance is an important area of inquiry, as it forms an integral part of democratic politics, governs the ability of candidates to communicate with the electorate and affects their chances of success at the polls. Political finance laws have attempted to regulate the activities of politicians, powerful financial interests and ordinary citizens in a number of ways. For example, the law has often contained prohibitions on sources of funding, placed limits on contributions and mandated public disclosures. If the law is to be successful in achieving its objectives, be that promoting equality, deterring *quid pro quo* relationships, or maintaining public faith in electoral politics, it has to be enforced effectively and fairly.

Much has been written about campaign finance laws, political action committees and soft money, but comparatively little has been written about enforcement. This work attempts to fill this gap in the literature. Additionally, what has been written tends to be informed by strong ideological sentiment. For example, Cain and Lochner view political finance regulation as undesirable and unworkable, which leads them to advocate a *laissez-faire* approach.¹ Yet public interest advocates are equally ideological and tend to possess a conspiratorial psyche, seeing corruption everywhere. For them, more regulation and stricter expansive enforcement by an independent, blue ribbon panel, is the only way forward. Therefore, most of the academic and journalistic comment on enforcement has been normative. Whilst prescriptive suggestions for change are important, this work is

¹ Cain B & Lochner T (1999) 'Equity and Efficacy in the Enforcement of Campaign Finance Laws': *Texas Law Review* 77 1935-36.

essentially explanatory, helping to set out what is, not what should be. Although the actions and motivations of individuals have been discussed at length, this has been done in order to aid understanding, not for any idealistic or moralistic purpose.

The first chapter explains how the law was enforced in the past and, by doing so, sets later chapters in historical context. This endeavour also establishes that the United States has never enforced campaign finance law in a particularly vigorous way. Therefore, public interest advocates call for a form of enforcement that has no historical precedent. The discussion also focuses on how the executive ensured that few cases were brought before the courts and how the judiciary and Congress have undermined enforcement.

The second chapter examines the performance of the FEC through the administration of its three principal programmes: (1) public financing, (2) disclosure, education and outreach, and (3) compliance. This examination establishes what the FEC has done well and what it has done badly and why. Broadly, the FEC has been successful in administering the first two programmes but has been found wanting in the third. In particular, enforcement timeliness was poor. Timely enforcement enables the electorate to make informed choices at the ballot box. When the electorate are denied knowledge in a timely fashion, the utility of the law is degraded. However, although the bureaucracy has been partly responsible for that poor timeliness, many other factors have also contributed to it. The chapter also discusses the implementation of two relatively new pilot programmes, an administrative fines programme for dealing with late and non-filers, and an alternative dispute resolution programme (ADR) which sought to improve enforcement timeliness, prevent future violations through education and promote a less adversarial resolution of low level

infractions. Whilst both programmes were pilot projects, the study concludes that the fines programme possessed more utility than ADR. Finally, the way the FEC exercised prosecutorial discretion is examined. In the Commission's infancy, evidence suggested that the Commission unfairly targeted insignificant, inexperienced and poorly funded actors, yet this did not prove an enduring characteristic. In fact, under the enforcement priority system (EPS) implemented in 1993, the FEC is more likely to take enforcement action against high-profile repeat players than those who raised little money and attracted few votes. Larry Noble, former FEC General Counsel, commented that taking action against the powerful professionals gets you a 'bigger bang for the buck.'² However, it was found that political novices tended to attract the attention of the FEC because they made the most legal errors. Whether high profile or inexperienced actors deserve to be the focus of enforcement is a matter of opinion. Therefore, the issue of enforcement fairness becomes a normative one.

The third chapter focuses on FEC Commissioners. These six political appointees, evenly divided between Republican and Democratic Party affiliates, control all major decisions carried out in the agency's name and four votes are required in order to enforce the law. As the even number of Commissioners and partisan divide might suggest, an examination of the Commission's leadership found that the diffused structure inhibited strategic planning. Although weak leadership has been an enduring weakness at the Commission, far more criticism has been directed at the Commissioner appointment process and the agency's lack of independence. The chapter explains how individuals are appointed and who has influence over that selection process. By doing this, one can gain a greater understanding of

² Interview with the author, Washington D.C. 17.10.01.

the Commission's outlook, its strengths and its weaknesses. For example, whilst the reform community advocate the creation of a strong, independent, non-partisan, blue ribbon panel insulated from political reality, research shows that the Commission was created in such a way that it reflects that political reality. Again, a normative issue arises concerning whether this reality is a good or bad thing. Politicians generally view it as a good thing, whilst public interest advocates generally view it as a bad thing. The discussion then addresses the issue of Commission decision-making and rejects the traditional orthodoxy that suggests that the Commission is impotent because of partisan deadlock. Although partisanship has prevented enforcement in the past, often occurring in high-profile controversial cases, the partisan paralysis thesis misrepresents the decision making process and the agency's proclivity to deadlock. The chapter explains how consensus, legal interpretation, evidentiary and regulatory philosophy all feed into Commissioner decision-making. Finally, the Commission's court record is assessed. The thesis opines that whilst the Commission has operated without a strategic litigation policy, this may change in the future. However, in addition to that change, litigation is likely to become more conservative, or timid, seeking only to litigate where the Commission thinks it is on firm ground. This more cautionary approach should help to improve the FEC's court record and also ensures that the agency avoids antagonising powerful Congressional leaders and their allies.

The fourth chapter explains how enforcement has been micro-managed by Congress and undermined by a lack of support from the Office of Management and Budget (OMB). The thesis asserts that whilst FEC/Congressional relations have often been difficult because the Commission regulates those who oversee the agency and appropriate its budget,

enforcement policy has been pivotal in determining the nature of that relationship. Although the FEC budget has grown quite significantly, it remains one of the smallest agencies in the Federal government. Workload has outpaced this budgetary growth and Congress has kept a tight rein on staffing levels, especially in the Office of the General Counsel, which is responsible for enforcement. Two periods of FEC/Congressional conflict are identified. The first took place in the late 1970s and early 1980s and the second, which was more defining, started in 1994 and continued for approximately five years. As the Commission became more effective and vigorous in its enforcement efforts, levying significant fines, litigating against conservative groups and issuing new rules governing how candidates might spend their campaign contributions, so Congress struck back against the Commission. Auditors were despatched to investigate the agency in 1995 and 1998, budgetary policy was used as a tool to hobble enforcement and senior staffs were targeted for removal. However, more recently, Congress and the FEC have been enjoying a much more amicable relationship as enforcement policy has evolved into a more Congressionally acceptable model and new Commissioners more closely aligned with Congressional thinking have been appointed to the agency. Consequently, the thesis argues that the Commission has been gutted from within. Cautionary litigation and low impact programmes like administrative fines and ADR appear to be the future as far as enforcement is concerned. However, the OMB has also undermined the Commission's ability to enforce the law by habitually refusing to support the agency's budget requests. On some occasions, the amount the OMB has been willing to support has been so far below that requested, Congress has appropriated funds in excess of the Administration's figure. Therefore, the chapter discusses the Commission's budgetary history through the interplay of budget requests made, OMB response and the final Congressional appropriation. The

chapter concludes by making some observations about how enforcement has changed and how it may change in the future.

Research Methods

Each chapter presents its own set of particular methodological challenges. For example, attempting to establish a historical record of enforcement is problematic for two reasons. Firstly, whilst authors have discussed the early origins of campaign finance reform, often alluding to its genesis in the mid-nineteenth century, little has been written on the enforcement of these laws. Secondly, despite numerous laws on the statute book, enforcement was largely a token affair. In the early part of the 20th century the enforcement of disclosure was minimal and reports were rarely kept for any length of time before being destroyed. The law contained numerous loopholes and neither the courts nor the executive appeared willing to support enforcement. Therefore, the widest possible varieties of sources needed to be accessed in order to build a valid historical record. For example, in addition to the more conventional secondary sources like books, legal journals, newspapers and internet-sites, Congressional hearings and court cases also prove invaluable primary sources.

The performance assessment also raised a number of difficulties. Firstly, few agreed on what the FEC should be doing. Some argue that the agency should be a disclosure organisation, focusing on placing data on the public record in a timely manner, and that it

should do that task better. Others argue that it should be more active in enforcing the prohibitions on sources of funding, should focus on enforcing contribution limits and should search out and investigate more allegations of wrongdoing. Therefore, in order to avoid making arbitrary judgements in the performance assessment it was important to focus on what the FEC attempted to do, rather than what others thought it ought to do. Whilst it had its limitations, the Government Performance and Results Act 1993 provided a useful methodological framework for this endeavour as it required agencies to set clear objectives and goals for their core programmes. Whilst the collegiate nature of the Commission has tended to obviate the strategic management of performance objectives and their achievement, the GPRA helped to minimise value judgements in the assessment and aided the clarity of its organisation.

Congressional hearings, particularly the Treasury, Postal Service and General Government Appropriations committee, proved useful primary sources for chapters 2, 3 and 4. Although this subcommittee determines the size of Commission's budget and how that money is to be spent, it also performs a *de facto* oversight role as the agency is praised or chastised during the budget process. In addition, Congressional hearings, a PricewaterhouseCoopers (1999) report, FEC internal publications and government correspondence unavailable to the public provided a significant contribution to the primary sources used in these chapters.

The political finance community in Washington D.C. is both small and specialist, probably numbering no more than twenty significant actors. In order to aid understanding and generate the most valid study possible it was essential to interview members of this cabal. Elite interviews as a qualitative approach provided the best means of generating

explanation by understanding, 'by seeing through the eyes of others.' Thirteen interviews were conducted in Washington D.C. between 14 and 28 October 2001. FEC Commissioners affiliated to both political Parties were interviewed along with a number of senior staffers. Interviewees representing the public interest community included: Fred Wertheimer, President of Democracy 21 and former President of Common cause; Larry Noble, Executive Director of the Center for Responsive Politics and former FEC General Counsel; and, finally, Bill Allison, Senior Editor at the Center for Public Integrity. Both Parties' leading campaign finance lawyers were also interviewed, Bob Bauer, who represents most Democrats, and Jan Baran, his Republican counterpart. Other lawyers interviewed included Alex Vogel, General Counsel at the National Republican Senatorial Committee, and Donald McGahn II, General Counsel at the National Republican Congressional Committee. Although the interviews carried out reflected a plurality of political opinion, all Republicans responded favourably to interview requests whilst few Democrats responded at all. The transcripts used in the thesis are *verbatim* accounts and have not been edited to aid their intelligibility or to conform to the prescriptive rules of English.

Whilst the FEC has contributed to weak enforcement, especially in high-profile cases or controversial areas of law, the agency is only one of a number of factors that have led to that weakness. The courts, the executive and Congress have all undermined the effectiveness of enforcement. Although Democracy 21 have called for the abolition of the FEC in their 2002 report, doing so would not necessarily solve the 'problem' of weak enforcement. A change in the administrative apparatus would not alter the way all three branches of government hobble the enforcement process.

CHAPTER 1

U.S. Campaign Finance Regulation

An Historical Introduction

On March 27, President George W. Bush signed the Bipartisan Campaign Finance Act 2002 (BCRA). Although the new law will undoubtedly shape the nature of this policy area for the foreseeable future, it is not discussed here because enforcement is the central focus of this thesis. As the BCRA did not govern the conduct of the November 2002 elections and the Federal Election Commission has yet to fully complete the rule-making process, judgements about the effectiveness of the reform measure would be supposition. However, some introductory comments and a summary of the BCRA are set out in appendix F.

The twentieth century saw an impressive array of campaign finance laws added to the statute book. Six of these laws provided a central framework for the regulation of campaign finance at the Federal level. The 1907 Tillman Act made contributions from national banks and corporations illegal. The 1910 Federal Corrupt Practices Act mandated that those campaigning in U.S. House elections had to make certain financial disclosures. This Act was amended and expanded in 1911 to include disclosure mandates for the U.S. Senate and introduced expenditure limits for both Chambers. The 1925 Federal Corrupt Practices Act made disclosure requirements stricter and revised expenditure limits. All candidates were mandated to file disclosure reports with their respective Congressional officers, either the Clerk of the House or Secretary of the Senate. The Federal Election Campaign Act 1971 contained the familiar disclosure and expenditure limits yet also contained provisions to reduce the advantage wealthy candidates had over their competitors. Large contributions from a candidate's family were proscribed and greater electoral equality was fostered by placing expenditure ceilings on communications media.

The Federal Election Campaign Act 1974, technically an amendment to the 1971 Act, subsequently amended in 1976 and 1979, was the most comprehensive bill passed during the twentieth century. It contained spending limits on presidential and Congressional elections, mandated a rigorous if burdensome disclosure system, set up a limited public funding system and established the FEC, a multifunctional agency responsible for administering the Act.

Political scandal and tainted elections have generally motivated this legislative development.¹ Many view the reform process as a genuine attempt to maintain the integrity of the electoral process, restoring health to the nation's political culture. Moralistic, egalitarian and ethical motivations can drive reformers to re-establish a common standard of financial behaviour, injecting greater probity and transparency into democratic politics.²

A number of powerful Congressional critics have resisted these reforming urges. Whilst First Amendment Republicans have generally been the most vocal opponents of campaign finance law, some have been Democrats. For example, the best known of these was Wayne Hays (D-OH). Wayne Hays chaired the House Administration Committee 1971-1976, the Democratic National Campaign Committee and was also chief fund-raiser and leading campaign finance policy maker. Reform opponents often occupy positions with party-political or financial responsibility. Legislation affects the Parties differently, as they tend

¹ La Forge A (1996) 'The Toothless Tiger, Structural, Political and Legal Barriers to Effective FEC Enforcement': An overview and recommendations: *The Administrative Law Journal*, 10 354. Alexander Heard has stated that scandal is often a necessary catalyst to provoke Congressional reform proposals. Heard A (1960) *The Cost of Democracy*: Chapter Hill, U.S. University of North Carolina Press, 465.

² Many advocates of reform argue that regulation is needed to protect the electoral system from the appearance, or reality of, "quid pro quo" arrangements between candidates and contributors. Other justifications involve promoting political equality amongst the citizenry, and ensuring that private interest does not displace the democratic practices of deliberation and reason giving. Sunstein C (1994) 'Political Equality and Unintended Consequences': *Columbia Law Review*, 94 (4) 1391-1392.

to raise their campaign finance in different ways, and from different sources. Therefore, opposition to a law, or a particular provision of it, takes on an instrumental, partisan character. However, once the tide of reform looks inevitable, many play the reform game, trying to shape the legislation to their advantage or at least make it as electorally benign as possible.³ One might argue that even this process of reform serves more of a symbolic function rather than a utilitarian one, as an enforcement malaise often continues unhindered by any new statutory vision.⁴ Before the creation of the Federal Election Commission,⁵ Congress was largely responsible for supervision and administration of the law. This self-regulation generated public cynicism, as the law was rarely enforced and often contained vague provisions and other loopholes, which rendered it meaningless.⁶ Later attempts by Congress to emasculate the intent of the law have often relied on its confirmation, oversight, budgetary, and political powers. These formal and informal methods have enabled Congress to exert macro and micro pressures on the enforcement process. Additionally, the executive has also contributed to a *laissez-faire* enforcement scenario,

³ Wayne Levere Hays (D-OH) was a famously ardent critic of campaign finance reform, never missed an opportunity to exert his will on Congress, and the Federal Election Commission, the bipartisan agency responsible for enforcement, authorized by the Federal Election Campaign Act of 1974. Jackson B (1990) *Broken Promise. Why the Federal Election Commission Failed*: United States, Priority Press 23-24. For an on-line biography of the late Wayne L Hays see [bioguide.Congress.gov](http://bioguide.congress.gov).

⁴ Most violations were thought to occur at State and local level, and the law was essentially couched in negative terms. Limitations were placed on sources of political money, sometimes in conjunction with contribution and expenditure limits. Alexander H (1976) *Financing the 1972 Election*: United States, Lexington Books, 4. As election costs rose as the century progressed and Congress failed to provide alternative sources of funding, so the money followed the path of least resistance. As electoral competition stiffens, so the opportunity cost of adhering to the law rises, and the temptation to violate the law becomes the rational alternative. As compliance has generally relied for the most part on a voluntary ethos, and deterrence is poor, the motivation towards non-compliance is increased further by the social distance that candidates can maintain from their finance committees, and the ability of their election lawyers to argue that the impermissible is in fact permissible. Gross K (1991) 'The Enforcement of Campaign Finance Rules: A System in Search of Reform' *Yale Law & Policy Review*, 9 286-287.

⁵ The Federal Election Commission is the bipartisan administrative agency charged with enforcing the Federal Election Campaign Act 1974.

⁶ Alexander H (1972) *Political Financing*: Minnesota, United States: Burgess Publishing, 40. Frank Sorauf commented, 'All this regulation scarcely impeded the flow of campaign money. Much of the reform legislation, both of Congress and the states, seems to have been passed with the loopholes tailored in.' Goider R, Gross D & Shields T (1999) *Money Matters: Consequences of Campaign Finance Reform in U.S. House Elections*: Maryland, United States, Rowman & Littlefield Inc. 23.

either institutionally, through prosecutorial inertia at the Department of Justice,⁷ through appointment power,⁸ through the Office of Management and Budget (OMB), or through its own non-compliance and avoidance of the law during election campaigns.⁹ Both democratically elected branches of government have been able to use their constitutional authority of direction and control over the bureaucracy as a cloak to legitimise their hobbling of the enforcement process. Furthermore, although Congress has been most active in ensuring a permissive regulatory environment, the courts have also emasculated campaign finance statutes through judicial review.¹⁰

Three models of democracy have generally underpinned attitudes towards enforcement. The first is the idealist or moralist model, whose most ardent supporter has been the public interest advocates who are often based in Washington D.C. and the K Street corridor in particular.¹¹ They usually equate special interest money with political corruption. These

⁷ Historically, the Department of Justice has been unwilling to prosecute campaign finance offences, and when they have, alternative statutes have often been employed.

⁸ The executive has often received criticism, especially from good government groups and others from an idealist tradition, for not making either independent or pro-enforcement appointments to the Federal Election Commission.

⁹ Two examples of political finance abuse by chief executives might include President Nixon, and the activities of the finance Committee to Re-elect the President in 1972 and the ethically questionable practices involving President Clinton's re-election campaign in 1996. The Senate Governmental Affairs Committee conducted investigations during 1997 that found the Clinton/Gore '96' Re-election Campaign Committee, the Democratic National Committee, the AFL-CIO, and other groups, to have 'explicitly violated the FECA, or violated the spirit of the FECA.' Practices involved soliciting and accepting illegal foreign donations, illegally soliciting contributions within the confines of Federal property, so-called 'sleep-overs' at the White House, and finally, abuse of soft money provisions in the law. Soft money, first created by the Federal Election Commission in a ruling made in 1978, and then consolidated by the FECA 1979, allowed certain 'party building' activities to be carried out which did not come within the remit of the FECA. Instead of soft money being spent on voter registration drives and grass roots activity like recruiting volunteers, millions of dollars were spent, and illegally co-ordinated with Clinton's re-election efforts. Special Investigation into Illegal and Improper Activities Arising from the 1996 Federal Elections, Senate Resolution 39, U.S. Senate Governmental Affairs Committee, 1997, 1-10.

¹⁰ The judiciary has often ruled that Congress either does not have the power to legislate on a particular matter, as it lacks the constitutional authority, or it has ruled that the law infringes First Amendment rights.

¹¹ Examples of these groups might include, Common Cause, Center for Responsive Politics, Center for Public Integrity, and Democracy 21. They often advocate motive-based regulation. This attempts to distinguish appropriate from inappropriate motives in political representation, and to weed out the latter through prohibition, and limitation.' Cain B (1995) 'Moralism and Realism in Campaign Finance Reform': *The University of Chicago Legal Forum*, 111-113.

watchdog groups have campaigned for rigorous enforcement,¹² independent regulators, and their attitude towards electoral politics has favoured equality of outcome. The second view or democratic model advocates a far more permissive regulatory environment. It relies on disclosure to deter *quid pro quo* relationships and ethically questionable behaviour. The proactive citizen, exercising their political judgement at the ballot box and responding at least in part to the disclosures made, largely takes the place of the regulator by using their political judgement. Finally, the proceduralist model tends to reject both of the more ideological approaches and reflects the belief that America is an unequal society and whilst it is desirable that it remain so, politically, all should 'play by the same rules of the game.' Therefore, the regulators' legitimate role is one of impartial umpire, applying universal rules to unequal regulatees. Historically, all three models have had an influence on political finance regulation and its enforcement.

Violations of campaign finance law tend to fall into two generic types. The first are substantive violations, either wilful, or non-wilful, and might include breaking contribution and expenditure limits or receiving and spending prohibited funds from corporations, banks, or labor unions. These offences have a '*malum in se*' character, having the potential to corrupt democratic politics. The second type of violation involves breaking disclosure mandates, and may involve failure to report, late filing, or inaccurate disclosures. Cain and Lochner describe these violations as less serious, in that they possess a '*malum prohibitum*' character, something unlikely to breed corruption.¹³ However, any discussion of

¹² A particularly strong advocate of the use of coercion to achieve compliance is Professor Kenneth Culp Davis. His views might be described as a sub-division of idealism, what Thomas Curtis described as a 'neo-Machiavellian tradition.' Davis argued that nine tenths of agencies' desired results were attained through exertion of the supervisory power, coercion. Curtis T (1979) 'Reflections on Voluntary Compliance Under the Federal Election Campaign Act': *Case Western Reserve Law Review*, 29 847.

¹³ Cain B & Lochner T (1999) 'Equity and Efficiency in the Enforcement of Campaign Finance Laws': *Texas Law Review*, 77 19:3.

enforcement must include '*malum prohibitum*' offences, as they deprive the electorate of the necessary tools to make informed democratic choices and make '*malum in se*' violations much more difficult to detect.

Early Attempts At Reform: The Tillman Act 1907

The 1904 Presidential election was to serve as a catalyst for the introduction of campaign finance reform. The losing candidate, Democrat Judge Alton Parker, had relied on many small donations to fund his campaign. Yet Theodore Roosevelt, the Republican candidate and incumbent President since the assassination of McKinley,¹⁴ solicited a small number of large donations from corporate interests.¹⁵ Parker accused Roosevelt of profiting from big Corporations and Trusts who were interested in obtaining government favours. More specifically, an article that appeared in the *New York World* that October provided fuel for Parker's attack.¹⁶ The newspaper made allegations concerning the Bureau of Corporations, a new regulatory body designed to regulate Trusts. Its remit was to investigate practices and initiate prosecutions where necessary. However, Roosevelt moved George Cortelyou, its Bureau Chief, to the post of Chairman of the Republican National Committee. Once

¹⁴ On September 6 1901, President McKinley was attending the Pan-American exposition at Buffalo, New York when he was shot twice by Leon Gzolgosz, an anarchist. Pringle H (1931) *Theodore Roosevelt*: London, Johnathan Cape, 231.

¹⁵ Years later, an accurate picture of the 1904 campaign found that Roosevelt had accepted 72.5% of the \$2.2 million received in donations from corporate interests. Three particularly high-profile contributors were the banker, J.P. Morgan, E. H. Harriman, a railroad magnate, and H. C. Frick, from the United States steel corporation. Morgan had donated \$150,000, Harriman, \$50,000, and raised a further \$200,000, and Frick had given \$50,000. Pringle H (1931) 357. The fund-raising activities of Mark Hanna, on behalf of McKinley, in 1896, and Roosevelt, in 1904, had provoked the attention of reformers. Alexander H (1976) 459. Hanna used a systematic method of fund-raising, aimed at corporations and wealthy entrepreneurs, which Lance Bennett aptly described as a wealth tax. Herbert Croly commented in his biography of Hanna 'he converted the practice of soliciting contributions from a matter of political begging into a matter of systematic assessment according to the means of the individual institution.' Sikes E (1928) *State and Federal Corrupt Practices Legislation*: North Carolina, Duke University Press, 189. Thus, it was not only the large contributions from corporations and wealthy individuals that caused concern, but the methods involved in obtaining them.

¹⁶ *New York World* October 1 1904.

appointed, Cortelyou became responsible for raising finance for Roosevelt's re-election campaign. Joseph Pulitzer, who penned the article, alleged that the huge corporate donations that were coming into the Republican coffers were attempts to buy protection from future prosecutions. After reports of a meeting involving Harriman, Frick, and a small number of others, who had allegedly agreed to underwrite Roosevelt's electioneering costs, Parker unwisely accused Roosevelt of corporate blackmail. Roosevelt easily defended himself against Parker's accusations, and denied any *quid pro quo* arrangements with business. However, Roosevelt failed to deny that corporate donations had been received, many of which were either solicited by Roosevelt directly or indirectly through Cortelyou.¹⁷ A number of related investigations conducted by business regulators and grand juries kept disparaging rumours about Roosevelt's campaign finances in the public arena.¹⁸ Although 'muckrakers'¹⁹ sometimes fuelled this criticism, Roosevelt was astute enough to keep the majority of stories out of the public eye by cultivating a good relationship with the press.²⁰ Roosevelt was also able to read public feeling and respond effectively and successfully to it

¹⁷ Pringle H (1931) 451 & 453.

¹⁸ New York insurance investigations, which uncovered Hanna's wealth tax, the Harriman letters, which proved the close financial and political relationship between Roosevelt and Harriman, and the grand jury investigations into the Metropolitan Railways of New York City, all reinforced doubts about the integrity of Roosevelt's campaign and the state of political finance regulation generally. Sikes E (1928) 183, Overacker L (1932) *Money in Elections*: New York, The Macmillan Company, 235.

¹⁹ It was Roosevelt who coined the phrase *muckraker*, and journalists wore the label as a badge of honour. However, Roosevelt used the term as an insult, adulterating the original meaning from Bunyan's Pilgrim's Progress. Bunyan's muckraker was content to rake to himself 'the straws, the small sticks, and dust of the floor, blind to the celestial crown that was offered him.' Brogan H (1985) *Penguin History of the United States of America*: England, Longman, 463.

²⁰ Brogan H (1985) 464.

²¹ Unlike his predecessor, William McKinley, Roosevelt was determined to address the problem of corporate greed. Poverty, urban slums, corruption, and the damaging effects unregulated capitalism had on the environment, society, and the democratic system, all needed to be tackled. He had a genuine concern about the natural environment, being an active 'outdoors man,' and a famous, if bloodthirsty hunter. His reformist urges towards economics were not motivated by any desire to promote equality, but were motivated by the fear of socialism. Muckrakers like Upton Sinclair, Ida Tarbell, and Lincoln Steffens, had deliberately engineered growing public disquiet against the excesses of the big Trusts. Pringle H (1931) 367. Therefore, although many in corporate America felt betrayed by Roosevelt, having funded his re-election in 1904, he was determined to initiate further regulation of the Trusts. Frick commented, 'Roosevelt got down on his knees to us. We bought the son of a bitch, and he did not stay bought.' www.cleanelections.org 4.3.01. Shannon J (1959) *Money in Politics*: New York, Random House, 35. Roosevelt not only had a high Tory

through promoting reform.²¹ Whilst his reforming urges were popular, they were born of compromise and usually led to an accommodation with powerful financial interests. In light of the concerns about the 1904 election, he supported the passage of the Tillman Act.²² This prohibited corporations and national banks from contributing to Federal election campaigns. It read:

It shall be unlawful for any national bank, or any corporation organised by authority of any laws of Congress, to make a money contribution in connection with any election to any political office.²³

Penalties under the Act's provisions were essentially aimed at corporations and corporate officers, not Parties, committees, or candidates. Corporations could be fined up to \$5000, and corporate officers or directors could be fined up to \$1000 and imprisoned for up to one year for knowingly consenting to an illegal contribution.²⁴ However, the battle to pass a more ambitious law that contained disclosure mandates was defeated in the Senate despite support from the National Publicity Bill Organisation.²⁵ The Tillman Act failed to contain any disclosure provisions²⁶ and was routinely ignored by corporate business interests. As no

concern for the good of society, but a strong desire to protect capitalist accumulation. Perhaps the resurrection of the Sherman Act by Roosevelt in 1902, an antitrust law, and the passage of the Tillman Act, were symptomatic of these concerns. Harbaugh W (1975) *Life and Times of Theodore Roosevelt*: New York, Oxford University Press, 150.

²² Tillman Act was enacted January 26, 1907.

²³ Stephenson-Horne M (1990) 'The Road To Hell? The Unintended Consequences of Unwise Federal Campaign Finance Reforms': *Northern Kentucky Law Review*, 17 548.

²⁴ Stephenson-Horne M (1990) 548.

²⁵ Samuel McCall (R-MA) introduced a bill containing disclosure mandates. The McCall bill was largely a result of pressure from Perry Belmont, a New Yorker, who had experience in raising and spending funds on behalf of the Democrats. He was committed to a disclosure model of regulation, and founded the National Publicity Law Organisation and the later National Publicity Bill Organisation. Senate Democrats who saw it as too closely associated with the Crumpacker amendments killed the bill. This would have re-established complete national supervision of elections, something that had been repealed in 1894. Overacker L (1932) 236.

²⁶ The lack of publicity contained in the bill, though supported by Roosevelt after he won the presidential election of 1904, was a reflection of the distaste for such provisions in Congress. For example, Mr. Bliss, treasurer of the National Republican Committee during the 1904 campaign, argued that the relationship

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enforcement mechanism had been established to enforce the law, its deterrent effect was minimal.²⁷ In order to evade the nominal scrutiny that might be attracted by corporate contributions, company executives were awarded salary raises, on the understanding that the net increase was to be donated to the institutions' preferred party, candidate, or committee. Additionally, as the law did not proscribe wealthy individuals who might own corporations from making large donations, a strategy of disguising corporate gifts soon developed.²⁸ All legislation designed to regulate powerful interests was essentially modest and often contained loopholes. Yet politicians like Roosevelt followed a strategy to maximise the political capital generated by passing such legislation. Firstly, he would tap into or provoke concern about an issue or problem. Secondly, this was invariably followed by fierce campaigning on behalf of a legislative measure, despite a conspicuous lack of opposition to it. Finally, when legislation was passed, as Hugh Brogan commented, 'the ballyhoo which surrounded it, convinced everyone that something wonderful had occurred.'²⁹ Despite the Tillman Act's many loopholes and the lack of an enforcement mechanism, there was also another reason why it was not taken seriously: its constitutionality was in doubt.

Constitutional Uncertainty: *U.S. v United States Brewers' Association* (1916)

In *U.S. v United States Brewers' Association*,³⁰ the plaintiff claimed that the Tillman Act not only infringed free speech, but that Congress lacked the authority to regulate elections

between the committee and its contributors was a confidential one. He said that he had persistently refused to make accounts public, likening making contributions to the secret ballot at an election. Sikes E (1928) 196-197.

²⁷ La Forge (1996) 354. www.cleanelectionscalifornia.org/private/evolution 4.3.01 & www.campaignfinance.org/history 4.3.01.

²⁸ Sikes E (1928) 192.

²⁹ Brogan H (1985) 466-467.

³⁰ *U.S. v United States Brewers' Association*, 239 Fed Rep.163 (1916).

that included the selection of presidential electors. Constitutionally, they argued that this was a matter for the individual states, as electors were state officers.³¹ Article 2, section 2, of the U.S. Constitution sets out that 'Each state shall appoint, in such a manner as the legislature thereof may direct, a number of electors, equal to the whole number of senators, and representatives, to which the state may be entitled in the Congress.' Similarly, prior to the seventeenth amendment, there was doubt as to whether the statute was able to proscribe corporate contributions to U.S Senate campaigns. It was not until 1913 that Senators became directly elected. Prior to this, Senators were selected by state legislatures.³² Article 1, section 3, states that 'The Senate of the United States shall be composed of two senators from each state, chosen by the state legislature thereof.' Thus, these three issues, free speech, Presidential electors, and Senate elections all undermined the willingness of those responsible for enforcement to bring violations before the courts.³³

Although the U.S. Court for the Western District of Pennsylvania upheld the constitutionality of the statute in *U.S. v United States Brewers' Association*, it failed to rule on or resolve the other constitutional issues at stake. The opportunity to obtain a definitive ruling clarifying Congressional authority to regulate elections that involved presidential electors was lost. The court ruled that if Congress were later found to have exceeded its power in this regard, it would not invalidate the whole Act, just that provision.³⁴ Therefore, the lack of an enforcement mechanism and the fact that only one case was brought before

³¹ Sikes E (1928) 192-193.

³² In the early part of this century, before the passage of the seventeenth amendment, the office of U.S. Senator could be bought. The cost of purchasing the vote of a state legislator was known to reach \$20,000 in order to ensure that he supported the preferred candidate. Goider, Gross & Shields (1999) 21.

³³ Authorities like Earl Sikes and Louise Overacker, the former writing in 1928 and the latter in 1932, both seemed reliant on the *United States v United States Brewers' Association*, 239 Fed 163 (1916) case. This would be indicative of the Tillman Act's nominal enforcement, where academics of the day had to rely on one case in their discussions on enforcement. Alternative sources of data relating to enforcement of these early Acts have been notoriously difficult to obtain. There was for many years a pervasive Congressional culture that favoured keeping records inaccessible, or destroying them as soon as legally possible.

³⁴ Sikes E (1928) 193.

the courts not only reflected the *laissez-faire* attitude of many legislators towards enforcement, but also its constitutional uncertainty.³⁵

Federal Corrupt Practices Act (1910) & (1911)

Attempts to strengthen the law were made through the enactment of the Federal Corrupt Practices Act 1910 and its 1911 amendments.³⁶ These were the first modern attempts at fostering a disclosure model of enforcement,³⁷ a strategy that was combined with candidate spending ceilings.³⁸ The 1910 Act also mandated that committees operating in two or more states, i.e., committees for Presidential candidates, had to comply with certain pre-primary and nomination expenditure limits. Candidates and committees were required to file disclosure reports with the Secretary of the Senate and the Clerk of the House. Further reform was attempted in 1911, through the Rucker bill and its amendments. It mandated

³⁵ Ewing interprets the case more favourably, stressing the importance of the court findings that corporate contributions did not infringe free speech or freedom of the press. Ewing K (1988) 'The Legal Regulation of Campaign Financing in American Federal Elections': *Cambridge Law Journal*, 47 (3) 376.

³⁶ Better known as the Publicity Act, the 1910 Act was passed June 25 and mandated disclosure requirements for the House. The Act not only encompassed committees, but also sought to include those making independent expenditures. All groups who spent more than \$50 on trying to influence the outcome of a Federal election had to file disclosures. Ewing K (1988) 372. The 1911 Act was enacted August 19 and extended the disclosure mandate to the upper House, and established expenditure limits to House and Senate. Contributions over \$100 and expenditures over \$10 were to be reported. www.campaignfinancesite.org/history/4.3.01, Gross K (1991) 280. Adamany D & Agree G (1975) 'Election Campaign Financing: The 1974 Reforms': *Political Science Quarterly*, 90 (2) 202. The 1911 Act, mandated pre-election and post-election disclosures, and broadened the statute to include disclosure requirements and spending limits in primaries. Ewing K (1988) 372.

³⁷ This is often referred to as a 'sunshine' model of regulation. Public disclosure and openness are likened to 'sunshine' disinfecting and preventing tendencies towards political corruption. Motivations associated with notions of a 'quid pro quo' relationship are said to be discouraged, as the electorate is not only aware of the actions of the Congressman, but also the sources of his/her funding. The disclosure model has been an enduring method of achieving compliance, and one usually favoured by those like Bruce Cain, who argue that all other prohibitions are doomed to failure, and circumvention. Campaign finance law that relies on disclosure has sometimes been described as the democratic model, as it casts the electorate in the role of regulator. It is their informed judgement that impinges on the regulated to modify their inclination towards reciprocity, in the expectation that obvious 'quid pro quo' behaviour will be punished at the ballot box. Motivation-based regulation has a close association with disclosure models, yet it tends to stipulate specific prohibitions in terms of banned sources of finance and sets contribution limits.

³⁸ House candidates could spend \$5,000 & Senate candidates \$10,000 on their election campaigns. www.cleanelections/california.org/private/evolution/4.3.01.

that candidates make financial disclosures when competing in primary elections. This was something especially important in states where one party monopolised electoral success. Securing the party's nomination became tantamount to securing victory in the general election.³⁹ However, debate was characterised by aggressive partisan squabbles in the 62nd Congress (1911-1913), a time when the Democrats had just regained their majority in the House. Republicans, who hoped that tougher regulations might be unacceptable to southern Democrats, who favoured individual state rights, countered Democratic Party proposals with cynical ploys of 'one-upmanship'. Although the Senate eventually passed the bill, the issue of Congressional authority over primaries provoked fierce controversy. Senator Bailey (D-TX) argued:

"The Constitution of the United States expressly authorises Congress to regulate the times, places, and manner of electing Senators and Representatives in Congress, but there is no suggestion in any clause of the Constitution that Congress has the power to regulate the party process by which its candidates are nominated."⁴⁰

Although partisan disagreement led to the passage of reform that appeared to be tougher than either party had expected, or perhaps wanted, Senator Bailey's words were to become prophetic a decade later.

³⁹ During the 1950s, approximately one third of electoral districts were safely in the hands of one party. Senate subcommittee on Privileges and Elections: 84th Congress, 1st session. Testimony given by Warren Olney III, Assistant Attorney General, Department of Justice, regarding the Federal Elections Act of 1955, 200.

⁴⁰ Sikes E (1928) 201.

Anthony Corrado, Professor of Government at Colby College Maine, a leading campaign finance expert and member of the American Bar Association, sets out and explains the improvements contained in the 1910 and 1911 Acts. In work published by the Washington D.C. based Brookings Institution, he dedicates his comments to discussing the more rigorous disclosure and contribution limits passed.⁴¹ Yet as he does so, he fails to discuss their enforcement. The 1910 and 1911 Acts were not enforced in any meaningful way, and consequently compliance was negligible. The Clerk of the House and Secretary of the Senate failed to ensure that either candidates or committees made regular disclosures. The disclosures that were made were incomplete and inaccurate.⁴² No central repository existed for the disclosures to be stored or accessed and when researchers, usually newspaper journalists, did apply for access, they faced unhelpful legislative staffers. The lack of accessible campaign finance data and the deliberate obstructionism on the part of some Congressional employees were anathema to the intent of the Act. Those of a cynical disposition might argue that having Congressional officers control access to the disclosures made was a deliberate strategy based on parochial self-interest. Congressional officers acted as information gatekeepers, deciding what was to be disclosed, and to whom. Even an investigative subcommittee of Congress, the Clapp committee, named after its Chair, Senator Moses Clapp (R-MN), failed to gain either complete or reliable data through the existing disclosure mechanism. Their task was made more difficult by the lack any verification system. The committee concluded that 'abuses of the law plagued the system of financing elections.'⁴³ Contribution limits were ignored, and the spending limits that were enforced were done so long after the election had been held. More specifically, only one case was brought against a successful candidate under the 1910 and 1911 Acts. A

⁴¹ www.brook.edu 7.3.01.

⁴² www.cleanelectionsocalifornia.org/private 4.3.01.

⁴³ www.cleanelectionsocalifornia.org/private 4.3.01.

representative from Pennsylvania, Orrin Bleakley (R-PEN), was charged with exceeding the \$5,000 limit on expenditures. He admitted the offence, resigned, and the charges were discontinued.⁴⁴

One might argue that there was no political will to enforce the 1910 and 1911 Acts. The first reason was that although the U.S. Congress was, and still is, potentially very responsive to public pressure and could have ensured tougher enforcement from the Clerk, and Secretary, the electorate seemed unconcerned about the issue. For example, when stories did appear in the newspapers, something that was quite rare during this period, the public remained undecided on what reform measures were appropriate. Though the public remained cynical about politicians and their relationship with special interests, they were certainly not outraged by the practices reported.⁴⁵ Secondly, this democratic silence suited politicians, as data showed that all two major Parties were heavily reliant, if not totally dependent on, large special interest contributions. The citizenry were just not contributing in sufficient numbers to allow politicians to break free from their symbiotic relationship with the wealthy. An added incentive for politicians not to enforce the law was that the huge donations by the super rich, like J.P Morgan, Thomas Lawson, John Archbold, the Taft family, Dan Hanna, Cleveland Dodge, Bernard Baruch, James Hill, Henry Mongenthou and Jacob Schiff, all flowed to incumbents.⁴⁶ Therefore, to enforce the existing law would cut off essential funds, without the realistic prospect of obtaining alternative legal contributions elsewhere. This scenario suggests that the Secretary of the Senate and the Clerk of the House were simply paying lip service to the Act, aware of the political realities in which they were operating. Additionally, one needs to appreciate that

⁴⁴ Overacker L (1932) 241.

⁴⁵ www.cleanelectorscalifornia.org/private 4.3.01.

⁴⁶ www.cleanelectorscalifornia.org/private 4.3.01.

the positions of Secretary of the Senate and Clerk of the House were patronage positions, in the gift of the majority party. Only if supported by the powerful majority party leaders would any candidate hope to win the intra-Congressional election process.⁴⁷ This contributed to a situation where the supervisory officers charged with administering the Act did not wish to antagonise the majority party, for fear of losing their job or appearing disloyal. Additionally, they did not wish to enforce the law against the minority party, for fear of provoking retaliation, should electoral circumstances change. This essentially parochial method of enforcement was to persist, in one form or another, until Congress passed the Federal Election Campaign Act 1974.

Supreme Court Rules on Primaries

The 1918 Michigan Republican Senatorial primary saw Henry Ford, who also entered and won the Democratic primary, lose to Truman Newberry. During the election, Newberry accused Ford of being an anti-Semite and a pacifist who had helped his son avoid military service. Although both men had unlimited means, Newberry then went on to win a narrow victory at the general election.⁴⁸ However, questions, and accusations were levelled at Newberry for breaking campaign finance law. A Congressional investigation was convened, and after investigatory help from Ford's agents, Newberry was indicted by a Federal grand jury on violations of Federal Corrupt Practices Acts 1910 and 1911. He was

⁴⁷ [www.senate.gov/learning/stat 7.3.01](http://www.senate.gov/learning/stat_7.3.01). This Internet web-site provides a description of the way in which the Secretary of the Senate was elected and contains a historical database that includes biographical information on the most notable holders of the Office.

⁴⁸ [www.senate.gov/learning/min 7.3.01](http://www.senate.gov/learning/min_7.3.01).

⁴⁹ [www.cleanelectionscalifornia.org/private/evolution 4.3.01](http://www.cleanelectionscalifornia.org/private/evolution_4.3.01). Newberry had spent approximately \$100,000 between December 1 1917, and November 5 1918, most of which was spent in the primary, pre-nomination period. Alexander H (1972) *Money in Politics: The History of Reform*: Washington D.C. Public Affairs Press, 200. Others, like Pamela Ford, assert that the figure reached \$195,000, just for the primary election, though Michigan law only allowed primary spending of \$1,875. Ford P (1955) *Regulation of Campaign Finance*:

found guilty in March 1920, having spent close to one hundred times the permitted limit.⁴⁹ However, what was significant about this case was that Newberry appealed to the Supreme Court and on May 21 1921, three years after the election, the Supreme Court overturned his conviction.⁵⁰ The Supreme Court held that 'Congress did not have the authority to regulate the primary, and nomination process.'⁵¹ This had a long-lasting, cautionary effect on Congress' willingness to regulate these activities. Congress did not attempt to regulate primary elections again, until the passage of the Federal Election Campaign Act of 1971. This was despite the changing balance of opinion in the court, which gave Congress the authority to do so in 1941, through its *U.S. v Classic* decision.⁵² A lack of political consensus about political finance law in Congress, a complacent electorate, the reliance of politicians on big special interest contributions, the Supreme Court decision in *Newberry*, and the largely incestuous enforcement arrangements, meant that the law could be ignored with impunity.

Scandal and Response

The next event to provoke campaign finance reform, was the Teapot Dome scandal of

Pamphlets, Legislative Problems No 6: Bureau of Public Administration, Berkeley, University of California, 20.

⁴⁹ *Newberry v United States*, 256 U.S. 232 (1921). On the important constitutional issue of Congressional jurisdiction over primary elections, the court split three ways. Justices McReynolds, Day, Holmes and Van Devanter held that Congress had no power to regulate senatorial primaries before the seventeenth Amendment, and acquired none by its adoption. Justice McKenna held that Congress had no power before the Amendment, but might possibly have acquired it through the adoption of the Amendment. Justices Brandeis, Clark, Pitney and White, argued that Congress always had the authority to regulate primaries. However, the Supreme Court gave a unanimous opinion, after finding that the jury had been misdirected in the original trial, and Newberry won his appeal. Ford P (1955) 20.

⁵¹ Gross K (1991) 28.

⁵² This case centred on determining the balance of power between federal and state government. It rejected the narrow constitutional interpretation made in *U.S. v Newberry*, 256 U.S. 232 (1921). Justice Stone wrote the majority opinion, 'Unless the constitutional protection of the integrity of 'elections' extends to primary elections, Congress is left powerless to effect the constitutional purpose.' *U.S. v Classic*, 313 U.S. 299 (1941). Alexander H (1960) 12.

⁵³ Teapot Dome was the name given to the lands owned by the government in Wyoming and Elk Hills that contained large oil reserves. The area was characterised by domes of rock, and one was said to resemble a

1922.⁵³ Albert Fall, Secretary of the Interior during the Harding administration, was involved in exclusively leasing oil fields to Harry Sinclair, of Sinclair Oil, on a non-competitive basis. In return, he received bribes and donations to the Republican National Committee.⁵⁴ The scandal was well publicised at the time, through a Congressional committee, chaired by a relatively unknown junior Senator, Thomas Walsh (D-MT). Although the donation was thought to have been influential in helping Harding win the Presidency,⁵⁵ it was not reported to Congress, as the law failed to regulate donations made in a non-election year.⁵⁶ Teapot Dome provoked a strong reaction in the American people, who now called for reform. This, coupled with the *Newberry* decision, which emasculated the intent of previous legislation, provoked Congress into passing the Federal Corrupt Practices Act (FCPA) of 1925.⁵⁷

The FCPA 1925 either repealed or codified the legislation that had been passed in the preceding years.⁵⁸ Although the Act was subjected to amendment, it provided the main statutory foundation upon which more functionally specific legislation was built.⁵⁹ Detailed records were to be kept by committee treasurers of all contributions over \$100 received, and expenditures made in excess of \$10.⁶⁰ The FCPA also mandated that committees were to file regular reports with the Clerk of the House of Representatives.⁶¹ Every candidate for

large teapot.

⁵⁴ www.polisci.ccsu.edu/trieb/early 8.3.01.

⁵⁵ The donations were said to be in the region of \$400,000, and were used to help pay off the debts of the 1920 election. www.jackburden.com/timelines 8.3.01.

⁵⁶ Gross K (1991) 281. www.cleanelectionscalifornia.org/private 4.3.01.

www.pbs.org/followthemoney/history&humour/timeline 8.3.01.

⁵⁷ Federal Corrupt Practices Act, 1925, 43 Stat. 1070, passed February 28, 1925. Hereinafter referred to as FCPA 1925. www.trook.edu/gs/cf/sourcebk/ch2 8.3.01. www.polisci.ccsu.edu/trieb/early 8.3.01.

⁵⁸ FCPA 1925, Section 318, sets out the laws repealed by the Act.

⁵⁹ Stephenson-Horne (1990) 549.

⁶⁰ Federal Corrupt Practices Act 1925, Section 303 (a) (b) & (c). Thus, regulations relating to disbursement disclosures were stricter than for contributions, where donations under \$100 only had to be disclosed as an aggregate. Ford P (1955) 21.

⁶¹ FCPA 1925, Section 305, (a)

House and Senate was required to file reports with their respective Congressional officers, Clerk of the House, and Secretary of the Senate.⁶² These reports were to include both pre and post-election disclosures. Additionally, provided that the state limits were not lower, a candidate for the Senate could spend up to \$10,000, and those competing for House seats could spend \$2,500 on their election campaigns.⁶³ However, candidates had the authority to use an alternative method of keeping within the expenditure limits, by using a statutory rubric. Federal candidates could spend an equal amount, calculated by multiplying three cents by the total number of votes cast in the previous general election. This could not exceed \$25,000 for Senate candidates, or \$5,000 for those competing in House races.⁶⁴ Section 310 was drafted to combat and proscribe any attempts by candidates to promise appointments in return for financial or in-kind support. Section 311 outlawed activities involving buying or withholding votes for money, something similar to section 310, in that crude *quid pro quo* agreements were to be forbidden by law. Section 313 was largely a reiteration of the Tillman Act, as it proscribed campaign contributions from any corporation or national bank. Institutional penalties could result in a \$5,000 fine, with individuals being fined up to \$1,000, or one year's imprisonment, or both. Finally, wilful violations of the Act could result in a fine of \$10,000, and two years' imprisonment.⁶⁵ Despite the lengthy disclosure requirements, contribution limits, spending caps and stiff penalties for those violating the law, enforcement of these provisions was negligible.⁶⁶ For example, provisions 303 through 309, which contain the bulk of the statute's provisions,

⁶²FCPA 1925, Section 307, (a).

⁶³FCPA 1925, Section 309, (b) 1.

⁶⁴ FCPA 1925, Section 309, (b) 2.

⁶⁵ FCPA 1925, Section 314, (b).

⁶⁶ Goider, Gross & Shields, support the introductory comment to this chapter, when assessing the utility of campaign finance law in the 1930's. "Reform efforts followed a familiar pattern: concern over specific activities; the passage of legislation despite reluctant support of politicians; efforts to circumvent the intent of the legislation; and finally, little or no enthusiasm for enforcement." Goider R, Gross D & Shields T (1999) 24.

had only been the subject of one prosecution by the year 1955, thirty years after the statute was enacted.⁶⁷ Olney also testified before Congress in 1956, when he set out the number of enforcement cases relating to illegal contributions from corporations, labor unions, and national banks. From 1950-1956, 54 complaints were received, 49 warranted investigation, 14 cases were presented to grand juries, two indictments were obtained, and one case went to trial.⁶⁸ Although the Department of Justice tended not to aggregate election offences, figures that indicated the level of enforcement for the 1950's were telling.⁶⁹

Table 1: Enforcement statistics

YEAR	COMPLAINTS	INVESTIGATED	PROSECUTED
1952	245	139	2
1953	92	54	1
1954	118	UNKNOWN	56

Source: U.S. Senate, subcommittee on Privileges and Elections: 84th Congress, 1st session. Federal Elections Act 1955, 202.

⁶⁷ *Burroughs and Cannon* 290 U.S. 534 (1934). This lone case involved a member of the clergy, Bishop Cannon, of the Methodist Church, and his treasurer, Ada L. Burroughs. The case related to a number of reporting violations Cannon had made in the 1928 presidential election campaign. Bishop Cannon was a staunch prohibitionist who campaigned against a 'wet,' Al Smith. Although well funded, Bishop Cannon failed to disclose accurate reports, and fought a number of Congressional attempts to bring him into compliance with the 1925 Act. He argued that the legislation was unconstitutional, that he had not knowingly violated the law, and that the resolution under which the Nye committee was authorised to investigate campaign practices, was also unconstitutional. Additionally, many of these temperance groups saw their campaigning as moral, not political, and therefore, outside the provisions of the Act. Although two out of eleven counts moved to trial, the result was an acquittal, despite the court upholding the constitutionality of the law, and more specifically, its disclosure provisions. It was likely that the authorities did not wish to bring the prosecution, but that Cannon forced their hand through his direct challenge of the law and his confrontational attitude towards investigative committees. The Department of Justice had never favoured criminal prosecution for disclosure violations, and one might argue that an acquittal based on technicality, was the best-case scenario for many. Overacker L (1932) 261-263. www.jackburden.com/timelines 8.3.01. U.S. Senate subcommittee on Privileges, and Elections: 84th Congress, 1st session. Testimony given by Warren Olney III, Assistant Attorney General, Department of Justice, regarding the Federal Elections Act 1955, 202. Comment (1972) 'Campaign Spending Controls Under the Federal Election Campaign Act of 1971': *Columbia Journal of Law & Social Problems*, 8 298.

⁶⁸ Alexander II (1963) 60.

⁶⁹ The Department of Justice failed to collate election offences together. Assistant Attorney General Olney testified that violations were filed as individual cases, not generically. Olney (1955) 206. Consequently, information to aid campaign finance policy making was limited and the historical record difficult to establish.

Although these figures might suggest that some attempt was being made to enforce the law, they were misleading. Few if any of these cases, involved campaign finance abuse. In 1955, Olney stated before Congress that the majority of cases in their files were of a particular character.⁷⁰ These violations involved vote buying and ballot box stuffing. The Department of Justice received very few allegations against candidates.⁷¹

One reason why so few complaints were made against candidates and committees was the result of the way enforcement officers managed the disclosure mechanism. Firstly, the disclosure mandates contained in sections 305-309 were only sporadically complied with, something the Clerk and Secretary of the Senate seemed reluctant or unable to change.⁷² Secondly, the management of and access to the disclosures made seemed designed to discourage both inquisitive reporters and the civic-minded layman. For example, in 1960, although staff at the House File Clerks' office, were described as personally co-operative, the reports could only be accessed between 10am and 3pm, when Congress was not sitting, and no weekend facilities were available throughout the year. This was in contrast with state depositories, which had traditionally provided longer business hours. Table space was limited to two individuals, and copying of reports had to be done by hand. As the custodians of these reports were political employees, they tended to be mindful of the

⁷⁰ Olney testifies that the most blatant criminal violations relating to Federal elections are not prosecuted under the Federal Corrupt Practices Act, but alternative, much older, civil rights legislation. The Civil Rights Section at the Department of Justice found it easier to prosecute election offences under laws that protected against a conspiracy 'to deprive the people of the community of their right to an honest election for Federal officials. Olney (1955) 205.

⁷¹ Olney (1955) 206.

⁷² www.cleanelectionscalifornia.org/private/evolution 4.3.0.1. One case arising out of the 1970 House elections showed that disclosure mandates were treated with contempt by some. Dennis J. Morrisseau, running as a Liberty Union candidate for the state of Vermont's only seat in the House, publicly refused to comply with any disclosure laws. He saw them as unenforceable, unenforced, and providing no control over campaign spending. He described his action as a protest against the 'empty procedure for reporting.' Aware of the penalties for not reporting, he continued to withhold disclosures, despite the Clerk trying to persuade him otherwise. Deputy Attorney General Kleindienst chose not to prosecute Morrisseau, fearing that it would set a precedent, obligating Justice to prosecute many others. Alexander H (1972) 226.

sensitivities of the Clerk, Speaker, and Minority leader. Heard has described how conditions of access to reports, and even hand-copying of data, could be arbitrarily restricted at times.⁷³ For example, a log existed in the File Clerks office, something that functioned as an essential index, required for accessing individual committee disclosures. Without knowing the name of the committee reporting, it was impossible to gain the information required without the log. This log was sometimes kept under lock and key, public access being denied. On other occasions, it was shown on the precondition that its contents would not be published in a newspaper. In the spring of 1955, when the Democrats regained control of the House, all reports over two years old were either burned or sold for scrap.⁷⁴

However, one cannot attribute failure to enforce the disclosure mandates contained in the 1925 Act solely to Clerk of the House and Secretary of the Senate. Herbert Alexander commented that 'no system existed for ferreting out violations.'⁷⁵ The responsibilities incumbent on the Clerk and Secretary were nominal.⁷⁶ For example, under the 1925 Act, they merely compiled a list of candidates and elections. This was then compared to the disclosures made. If mandated disclosures were not forthcoming, a reminder was issued, highlighting compliance responsibilities. However, by law, the respective Congressional Officers were not required to issue reminders or contact the Department of Justice.⁷⁷ When the Department of Justice was criticised for their prosecutorial neglect, they deflected

⁷³ Heard A (1960) 365.

⁷⁴ The Department of Justice wanted access to Democratic National Party disclosures for the years 1949-52 as part of an IRS investigation. Justice also required Republican National Committee reports. Heard A (1960) 365-366.

⁷⁵ Alexander H (1953) 68.

⁷⁶ Olney testified 'some of the reports filed may not be accurate. The absence of adequate procedures to examine or expose delinquencies has undoubtedly contributed to inadequate reports.' U.S. Senate, Subcommittee on Privileges and Elections, 84th Congress, 1st session, 202.

⁷⁷ U.S. Senate, Subcommittee on Privileges and Elections, 84th Congress, 1st session, 208.

criticism by placing the onus on the Clerk and Secretary. Thus, up until the late 1960s, the absence of an independent enforcement mechanism, parochial disclosure and publicity arrangements, and immobilism at Justice, might explain why so few cases were brought before the courts.

As the decade came to a close, this *laissez-faire* enforcement ethos appeared to be changing. In 1969, the Nixon administration successfully pressed charges against corporations who had illegally made contributions during the 1968 campaign.⁷⁸ However, the motivation for these charges was unclear, as Nixon generally opposed political finance regulation, vetoing the 1970 Political Broadcast Act.⁷⁹ In 1969, the new Clerk of the House and former Representative, W. Pat Jennings (D-VA), referred 65 House candidates to the Justice department for failing to file reports. He also referred 42 others for late filing. The Department of Justice was characteristically unwilling to act on Jennings' referrals. Justice ruled that there was no precedent during the Act's 45-year history for prosecuting those breaking disclosure mandates.⁸⁰ The Clerk of the House and Secretary of the Senate disclosed that twenty-five candidates had failed to file any reports after participating in the 1970 Congressional elections. A Department of Justice spokesman said that he was aware of the apparent violations but had no comment to make on whether prosecutions were planned. Although attempts to enforce the law were frustrated by Justice,⁸¹ what is more

⁷⁸ Congressional Ethics, *Congressional Quarterly* (1980) Second Edition: Campaign Laws & Regulations, Washington, D.C. 195.

⁷⁹ The Political Broadcast Act limited radio and television spending by candidates for Federal offices, and for governor and lieutenant governor in both primaries and general elections. Adamany D & Agree G (1975) 204.

⁸⁰ Alexander H (1972) 226.

⁸¹ By 1969, only three Companies had been prosecuted for breaking the ban on political gifts. However, although Justice has been traditionally reluctant to prosecute candidates, they did attempt to prosecute fourteen corporations for FCPA violations from May 1969 to January 1970. Comment (1971) 'Campaign Finances: Lobby Efforts to Curb Costs': *Congressional Quarterly Weekly Report*, May 7 1046.

surprising is that any violations occurred at all given the loopholes in the law.

President Lyndon Johnson said of the 1925 Act, 'campaign finance law during this forty-six year period was more loophole than law...inviting evasion and circumvention.'⁴² These loopholes were created by legal definitions of terms like 'election' and 'political committee.' Others arose from the large number of products and services excluded from the expenditure limits. Firstly, in response to the 1921 *Newberry v United States* decision, the Act failed to regulate primary elections. The Act defined an election as follows:

The term 'election' includes a general election or special election, and in the case of a Resident Commissioner from the Philippine Islands, an election by the Philippine Legislature, but does not include a primary election, or convention of a political party.'⁴³

Earl Sikes, writing in 1928, described the Act's definition of election 'as a glaring weakness.'⁴⁴ In 1953, the Senate subcommittee on Privileges and Elections concluded that:

The failure of the Federal Corrupt Practices Act to include Primaries makes a mockery of the entire law. Legislation must be realistic to be effective. In many states where one Party is dominant, winning the party nomination is tantamount to election. It is, under the present law, possible for large sums of money to be spent in a primary by a candidate or his committees which will accrue to his benefit in the general election, but which are not reportable under the Federal Corrupt Practices Act.'⁴⁵

⁴² www.campaignfinancesite.org/history/reform4.3.01.

⁴³ Federal Corrupt Practices Act, 1925, Section 302, (a).

⁴⁴ Sikes E (1928) 224.

⁴⁵ Ford P (1955) 22.

When the Act was initially drafted, taking Primaries out of the regulatory framework seemed pragmatic.⁶⁶ However, in *U.S. v Classic* (1941), the Supreme Court ruled that Congress did have the authority to regulate primaries. The court ruled that:

'Unless the constitutional protection of the integrity of elections extends to primary elections, Congress is left powerless to effect the constitutional purpose, and the popular choice is stripped of constitutional protection ...Congress' power thus has to be utilised.'⁶⁷

Despite this ruling, Congress remained cautious about regulating primaries, preferring to maintain the *status quo*.⁶⁸ Secondly, Congress chose to define what constituted a 'political committee' in a way that facilitated attempts to evade the intent of the law.

'The term 'political committee' includes any committee, association, or organisation which accepts contributions or makes expenditures for the purpose of influencing or attempting to influence the election of candidates or presidential or vice-presidential electors (1) in two or more states, or (2) whether or not in more than one state if such committee, association, or organisation (other than a duly organised state or local committee of a political party) is a branch or subsidiary of a national committee, association, or organisation.'⁶⁹

This definition quickly led to the practice where candidates, and other groups, established multiple intra-state campaign committees, which took them out of the regulatory

⁶⁶ Overacker commented that by expressly excluding primaries and conventions, issues related to the Act's constitutionality could be avoided. Overacker L (1932) 247.

⁶⁷ Ford P (1955) 25-26.

⁶⁸ www.cleanelectionscalifornia.org/private/evolution 4.3.01.

⁶⁹ Federal Corrupt Practices Act, Section 302, (c). One explanation for this narrow definition of committee was that Congress sought to derive its authority from the inter-state commerce clause of the Constitution.

framework. Intra-state committees could therefore campaign on behalf of a candidate, spending unlimited, undisclosed sums, whilst the beneficiary denied knowledge and responsibility.⁹⁰ Alexander commented that it was not unusual for contributions from one individual to reach \$100,000, which would be dispersed amongst multiple unregulated committees.⁹¹

Thirdly, the definition of political committee and the consequent proliferation of multiple intra-state committees also facilitated evasion of contribution and disclosure mandates. For example, Section 305 (1) required treasurers to make detailed disclosures to the Clerk of the House on contributions of \$100 or more. This resulted in large sums being contributed in multiples of \$99, all of which remained undisclosed.⁹²

Finally, Section 309 (c) allowed candidates to make expenditures on certain items which did not count against their disbursement limits. These unregulated campaign expenditures included the costs of travelling, subsistence, postage, stationery, writing, printing (other than for billboards or in newspapers), distributing letters and circulars, posters, telegraph and telephone services.⁹³ Therefore, a nominally experienced candidate could attribute all campaign expenditures to one or other of these provisions. Candidates, when sent reminders concerning their disclosure reports by Congressional Officers, could legally

⁹⁰ www.cleanelectionscalifornia.org/private/evolution 4.3.01. The Act referred to 'knowledge and consent' regarding gifts and expenditures. By having independent committees manage candidates' finances, he, or she, could legally report that they had neither received, nor spent, any funds. Comment (1980) 'Congressional Ethics': *Congressional Quarterly Weekly Report*, 195. Maintaining social distance from those who spend money on one's behalf has been an enduring feature of campaign finance practices throughout the twentieth century. For example, committee treasurers are responsible for compliance with the Federal Election Campaign Act, not candidates. One off the record comment by an FEC staffer opined that 'being a committee treasurer is a hazardous business.' Interview with the author, Washington D.C. 14.10.01.

⁹¹ Alexander H (1984) (3rd Ed) *Financing Politics, Money, Elections, & Political Reform*: Washington D.C. Congressional Quarterly Press, 33. This definition of what constituted a political committee reflected the general lack of constitutional certainty over political finance regulation at the time. Congress may have been drawing on its authority to make regulations under the interstate commerce clause, when it defined what constituted a political committee under the Act. Sikes E (1928) 227.

⁹² Comment (1980) 'Congressional Ethics': *Congressional Quarterly Weekly Report*, 195.

⁹³ Ford P (1955) 21.

reply that they had no intention of complying with the reporting mandates, as they had not spent one cent on their campaigns. ⁶⁴

The 1925 Act was an enforcement failure. The lack of an independent enforcement structure, a disinterested Department of Justice and loopholes in the law all contributed to its lack of practical utility. Although the Act was largely ignored or circumvented, Congress did make its own limited attempts to maintain the integrity of the electoral process. Article 1, section 5, of the U.S. Constitution sets out that Congress shall be the judge of elections, returns and qualifications of its own members. This authority was used by Congress to conduct investigations into particular House and Senate races. In light of the lack of traditional legal enforcement, this method of less formal, intra-Congressional investigation seemed to have been the preferred strategy for dealing with alleged violations.⁶⁵ For example, investigations might have been initiated by complaints or after the notification of a contested election result. One early high-profile investigation concerned the Senate election of Mr. Frank L. Smith, Republican candidate for Illinois, and Mr. William S. Vare, Republican candidate for the state of Pennsylvania. From December 1926 until March 1927, much time was spent discussing the findings of the Reed Committee.⁶⁶ This investigation centred on breaking expenditure limits and, in the case of Smith, receiving prohibited contributions.⁶⁷ After fierce debate on the interpretation of

⁶⁴ Although spending on the 1968 Congressional campaigns had risen to approximately \$50 million, something that could at least in part be attributed to rising costs, the amounts reported as spent were \$689,032 less than 1964 campaigns. Additionally, 182 Congressional candidates filed reports asserting that they had no personal campaign income and no committee expenditures that had to be reported. Comment (1971) 'Campaign Spending: How To Cut Costs': *Congressional Quarterly Weekly Report*, March 26, 713.

⁶⁵ Sikes noted that this strategy was employed to bolster the inherent weaknesses in the 1925 Act. However, Sikes discusses the many reservations he has about informal regulation. Issues of concern to him were that no definite norm is established to which a candidate must conform, the regulatory power may be abused for partisan reasons, and affected by a tyranny of the majority. Finally, he argued, voters from the particular state in question were likely to feel that the Senate arbitrarily set aside their democratic voice. Sikes D (1928) 241.

⁶⁶ Senate special committee investigating expenditures in Senatorial Primary and General elections (69th and 70th Congress' 1926-1928).

⁶⁷ Mr. Smith received large contributions (\$200,000) from public utility companies, whilst sitting as Chair of

Article 1, section 5, of the Constitution (loose versus strict constructionism), both men were denied their seats, despite their successful elections.⁹⁸ The Norris resolution described Smith and Vare's expenditures as:

'Contrary to sound public policy, dangerous to the perpetuity of free government, harmful to the dignity and honour of the Senate, and tainted with fraud and corruption their credentials, so that they are not entitled to membership of the Senate.'⁹⁹

Some of the other investigatory committees included: the Steiwer Committee,¹⁰⁰ which examined the financing of the 1928 campaign; the Caraway Committee,¹⁰¹ which investigated non-party committees; and the Nye Committee,¹⁰² which investigated senatorial candidates in 1930.¹⁰³ Other, more ad-hoc, investigations included the 1941 case of William Langer¹⁰⁴, and the 1947 case of Herbert O'Conor.¹⁰⁵ This informal method of regulation has been heavily criticised, especially among academics. For example, Hugh

the Illinois Commerce Commission. This body regulated the rates public utility companies could charge, along with determining the services they were to provide. Eighty percent of Smith's campaign funds came from three individuals, something that was seen as a conflict of interest, if not an obvious *quid pro quo* arrangement. Sikes E (1928) 233.

⁹⁸ Sikes E (1928) 241.

⁹⁹ Sikes E (1928) 236.

¹⁰⁰ U.S. Senate, Special Committee Investigating Presidential Campaign Expenditures, 70th Congress, 1st & 2nd session, 1928.

¹⁰¹ U.S. Senate, Subcommittee of the on the Judiciary, 71st Congress, 2nd session, 1929-1930.

¹⁰² U.S. Senate, Select Committee on Senatorial Campaign Expenditures, 71st Congress, 2nd session, 1930-1931.

¹⁰³ Overacker L (1932) 285-286.

¹⁰⁴ William Langer, a Senator from North Dakota, was investigated after the results of his election were contested. Senate Committee on Privileges and Elections investigated accusations involving breaches of political ethics (77th Congress, 1st session).

¹⁰⁵ The Senate Subcommittee on Privileges and Elections investigated Herbert O'Conor, from the state of Maryland, after his 1946-election success was contested. Senator O'Conor was eventually seated in May 1948 after defending himself against accusations that he violated the Federal Corrupt Practices Act and the Hatch Act.

Bone of the University of Washington commented 'sporadically created special committees on campaign expenditures, or subcommittee attention, is inefficient, and unsatisfactory.'¹⁰⁶ Cortez Ewing of the University of Oklahoma commented 'committees are not usually effective law-enforcement agencies. As Lloyd George once exclaimed, 'You cannot fight a war with a Sanhedrin at the head.'¹⁰⁷ These hearings rarely led to individuals being censured¹⁰⁸ or denied their seats.¹⁰⁹ Therefore, this would suggest that, despite attempts by Congress at a system of informal regulation, its effectiveness was marginal. Thus formal and informal approaches to enforcement of the 1925 Act were found seriously wanting.

Legislative Politics Leading To The Passage Of The FECA 1971.

Senate Reform Attempts at Creating an Independent Enforcement Authority:

Federal Elections Commission

The Federal Election Campaign Act 1971 was very much a product of policy, process and personality. The Senate debate began on their reform Bill, S382, on July 21 1971. An amendment to its reform bill proposed the establishment of an independent Federal Elections Commission. The amendment was passed by 89 votes to 2. The Senate called for a six-member bipartisan commission, evenly divided between Democrats and Republicans.¹¹⁰ This would end the practice of Congress controlling the supervision of campaign finance law, a practice described by William Frenzel (R-MIN) as 'tantamount to

¹⁰⁶ Senate Subcommittee on Privileges, and Elections 84th Congress, 1st session, 288-300.

¹⁰⁷ Senate Subcommittee on Privileges, and Elections 84th Congress, 1st session, 288-300.

¹⁰⁸ The Senate has resorted to censure only five times in its history. Alexander H (1972) 224.

¹⁰⁹ Denying a Congressman elect his/her seat has been used sparingly for a number of reasons. Firstly, it causes partisan and constitutional disagreement (many believing that Congress does not have the power to do so). Secondly, elections have to be repeated, as American culture tends to abhor awarding the seat to a defeated candidate. Thirdly, substantive action generates accusations of being a bad loser, and may provoke retaliation. Alexander H (1963) 69.

¹¹⁰ Jackson B (1990) 25.

putting the fox in charge of the chicken coup."¹¹¹ Proposals for an independent enforcement authority had been made before, but failed to come to fruition. For example, a bill had been introduced in 1928, proposals were made in 1962, through J. F. Kennedy's Commission on Campaign Costs,¹¹² and again, in 1970, by the Republicans.¹¹³ Some Senators might have been motivated to pass this reform in order to enhance their reputations, yet some may have been genuinely dissatisfied with the poor record of enforcement under the existing arrangements. Others might argue that the Senate tended to be more willing to make radical campaign finance reforms, as they had less difficulty in raising finance than House candidates, and therefore, more rigorous enforcement of disclosure and other prohibitions might have affected them less. Others, of a more cynical disposition, might have surmised that Senators knew that proposals for an independent Federal Elections Commission would have been opposed in the House, making their amendment an irrelevance. Despite the difficulty in ascribing reliable motivations for the amendment, bipartisan support for it held in the Senate. Senate Republicans tended to oppose spending limits, and Democrats usually opposed the idea of an electoral commission, and were often unenthusiastic about strict disclosure mandates.¹¹⁴ Notwithstanding, at the time, Senate Democrats were not as opposed to the Commission as they might have been, as their candidate committees were

¹¹¹ Berry J & Goldman J (1973) 'Congress and Public Policy: A Study of the Federal Election Campaign Act 1971': *Harvard Journal on Legislation*, 10 343.

¹¹² President Kennedy's Commission on Campaign Costs recommended the setting up of a Registry of Election Finance. This was to be a bipartisan body, charged to receive, examine, tabulate, summarise, publicise, and preserve reported data. Although the enforcement powers of this body were not set out, simply recommending, 'that it help to police and enforce political financing regulations,' Kennedy's assassination meant that the political will to fulfil the recommendations disappeared. Presidential Report (1962) 'Text of the President's Recommendations on Campaign Financing': *Congressional Quarterly Weekly Report*, June 1, 949. Comment (1962) 'Campaign Finance Report': *Congressional Quarterly Weekly Report*, June 20, 650.

¹¹³ Jackson B (1990) 24.

¹¹⁴ Berry J & Goldman J (1973) 340-341.

¹¹⁵ In 1970, Republican Party committees outspent Democratic ones by 3 to 1. Seventeen Republican committees spent \$12.7 million, whilst eighteen Democratic committees spent \$4.3 million. Democratic candidate committees spent \$6.6 million, compared to \$5.9 million by Republican candidates. Comment (1971) 'Campaign Spending: Record \$42.4 million in 1970': *Congressional Quarterly Weekly Report*, July 37

able to raise and spend more than their Republican rivals.¹¹⁵

House Reform

After the failure of one bill, sponsored by Wayne Hays (D-OH), powerful Chairman of the House Administration Committee, the Brown-Frenzel Bill was adopted.¹¹⁶ Clarence J. Brown (R-OH) and Bill Frenzel (R-MIN) sponsored HR 11060. It was a hybrid, combining the reporting and disclosure mandates sponsored by Brown and Frenzel with the media spending limitations introduced by Torbert McDonald (D-MASS), Chairman of the Subcommittee on Communications and Power. On November 30, when the bill was considered on the floor of the House, Wayne Hays, a long-time opponent of reform, offered an amendment.¹¹⁷ Hays called for the Secretary of the Senate, Clerk of the House, and Comptroller General to be substituted for the independent Federal Elections Commission. He was influential, as the provision of determining who should supervise the legislation, which came under titles IV of the Act, fell under his jurisdiction, as Chair of House Administration. The Hays amendment was passed, 79 to 52, and the bill passed 373 to 23, despite opposition from moderate Republicans and liberal Democrats.¹¹⁸ The substance of the final bill was decided upon in Conference Committee, where strategic negotiation reconciled the differences between Senate and House versions.

23, 1570.

¹¹⁶ Berry J & Goldman J (1973) 345.

¹¹⁷ Wayne Hays (D-OH) had a fearsome reputation in Congress, and had, 'become known for his cantankerous and often unpredictable behaviour, making him a hard man to deal with.' Berry J & Goldman J (1973) 345 & 352.

¹¹⁸ Berry J & Goldman J (1973) 351. Jackson B (1990) 26.

Conference Committee

The Conference Committee was a complicated affair, especially where House conferees were concerned. The negotiations were held over two days, and provisions I to V of the House bill were allocated to different House Committee jurisdictions. Hays, as Chair of House Administration Committee, was perhaps the most influential House conferee, and he was joined by Harley Staggers (D-W-VA), Chair of Interstate and Foreign Commerce Committee. Staggers had House jurisdiction over titles I and II, which related to media spending limits, and Hays had jurisdiction over title IV, which related to enforcement. The first day of negotiations between House and Senate conferees aimed to resolve the issue of spending limits on mass telephone banks and mass mailings. The White House, Senate, and House Republicans were fiercely opposed to restrictions, and were determined to maintain their aggregate spending advantage. However, Hays and Staggers remained steadfast in their opposition to any liberalisation of the spending limits. Before a vote was taken, Hays called a private caucus meeting and made a proposal. He would agree to delete the mass mailings from the spending limits, if the Senate would delete their proposal for a Federal Elections Commission. The Senate attempted to negotiate further, but Hays remained adamant. Senator Scott, a keen advocate of independent enforcement, was said to have 'wilted like a flower' when he realised that Hays was likely to achieve his goal. After threatening to scuttle the whole bill, privately saying that 'he didn't give a dam about the bill and would get up and walk out,' the Senate conferees reluctantly agreed to his demand.¹¹⁹

¹¹⁹ Speaking some years later, Hays ironically commented, 'Pressure became fairly intense in the Congress to do something because the Corrupt Practices Act was honoured more in the breach than it was in any other fashion. I don't recall that there was ever a prosecution or that even anybody raised an eyebrow about anybody's campaign expenditures, and it seemed to a good many people that they were getting out of hand. A lot of things were going on that shouldn't go on.' Gross K (1991) 282.

By maintaining the tripartite system of supervisory officers, legislators with campaign finance raising and national committee responsibilities, like Hays, could continue to manipulate the enforcement process. Hays kept Jennings, the House Clerk, on an inadequate budget, and often resorted to name calling and other bullying tactics at committee hearings.¹²⁰ Hays commented, 'I have a fixation, you might call it, against unnecessary commissions, and I think that this is another unnecessary commission.'¹²¹ Yet again, Congress was unwilling to allow an external body to enforce the campaign finance laws that it had passed.¹²² Hays opposed setting up the Commission for a number of reasons, but he was particularly concerned not to allow President Nixon to appoint members of an agency that would regulate Democratic Party finances. Bertram Podell (D-NY), a supporter of Hays, commented that 'the worst thing we can do is to relegate the activities of members of this House to an independent commission appointed by a political individual, the President of the United States.' Hays was also concerned to avoid increasing the number of campaigns subject to litigation. He commented 'I suspect that if this becomes law, we would have practically every election in the country tied up in the courts, before, during, and after the elections.'¹²³

Modern Reform: The Federal Election Campaign Act 1971

The Federal Election Campaign Act 1971¹²⁴ was signed by President Nixon on February 7 1972, and became law sixty days later, on April 7. The effective date fell in the middle of

¹²⁰ Berry J & Goldman J (1973) 361.

¹²¹ Jackson B (1990) 25.

¹²² Berry J & Goldman J (1973) 354.

¹²³ Jackson B (1990) 25.

¹²⁴ The Federal Election Campaign Act of 1971: Pub L. No. 92-225. Referred to as FECA 1971.

the 1972 presidential and Congressional races, which reduced its potential impact. Some candidates, who were determined to use the inadequacies of the 1925 Act as a cloak in order to hide their questionable fund-raising activities from scrutiny, engaged in frantic activity before the April 7 deadline.¹²⁵

The 1971 Act was unusual in that it was passed by Congress, and signed into law, prior to scandal.¹²⁶ The historic Watergate hearings into the many abuses of President Nixon's Campaign to Re-elect the President were not to take place until the summer of 1973.¹²⁷ Therefore, it might be helpful to explain some of the reasons why reform occurred. Firstly, advances in technology were increasingly being utilised in political campaigning,

¹²⁵ The Finance Committee to Re-elect the President (President Nixon's chief finance committee for the 1972 election) solicited large donations in the final weeks before the effective date of the FECA 1971. FCRP offered the inducement that contributions received before April 7 would remain confidential, and that post April 7 contributions would have to be disclosed. The 1925 Act did not provide for any disclosure requirements for contributions made to fund the nomination of a presidential candidate. During the Watergate hearings, Sloan testified that the Committee received an 'avalanche' of contributions during the last five days before April 7th, and that he handled \$6 million in contributions in the two days before the deadline. It was during this period that the Nixon campaign received two of its largest donations: \$2 million from W Clement Stone, and \$1 million, from Richard Mellon Scaife. www.jackburden.com/timelines. Additionally, to reduce the reported cash on hand, a requirement of the 1971 Act, FCRP prepaid for \$3,787,480 of media services that would be used after April 7th. Although the FCRP was used as a good generic example of this activity, many Democratic campaigns acted in a similar way. Schorr D (1974) (Ed) *The Senate Watergate Report*: 2 151-152.

¹²⁶ Although Michael Carroll disagrees, commenting that the 1971 FECA was passed in response to scandal, he offers no evidence to support his claim. Carroll M (1996) 'When Congress Just Says No: Deterrence Theory and the Inadequate Enforcement of the Federal Election Campaign Act': *Georgetown Law Journal*, 84 552. Although scandal has never really been absent from political finance regulation, what preceded the passing of the 1971 Act, could not be compared with the activities surrounding the 1907 election, the 1922 TeaPot Dome scandal, or Watergate. For evidence that might give some weight to Carroll's argument, see Alexander H (1976) 5, where he discusses the cases of Bobby Baker and Tom Dodd.

¹²⁷ The Senate Select Committee on Presidential Campaign Activities, almost universally known as the Watergate Committee, investigated a multiplicity of criminal and civil violations, related to the 1972 election. Perhaps the most well-known offence involved keeping large secret funds held in cash, which were used to pay for illegal activities such as the break-in at the Democratic Parties HQ in Washington D.C., something that was to provoke further scrutiny of the Nixon campaign. Other offences included loaning large sums to preferred candidates in order to make their fund-raising dinners appear more successful (Alexander Lankler received \$50,000 to make a fund-raiser honouring Vice-President Agnew look a popular success), illegal contributions were received, and records were either inaccurate, or destroyed. Ervin S (1980) *The Whole Truth. The Watergate Conspiracy*: Random House, New York, 139-144. Most of the hearings, which largely concerned the activities of President Nixon's Campaign to Re-elect the President (CREEP), and the Finance Committee to Re-elect the President, (FCRP), were held from May 17 to August 7. After a recess, the Committee reconvened from September 24 to November 15. This, and other Congressional hearings, led to President Nixon's impeachment, and subsequent resignation on August 8 1974, in view of the overwhelming likelihood of a guilty verdict in the U.S. Senate. School D (Ed) (1974) 8.

something that also increased the value of money, as these services could be purchased.¹²⁸ The frequent use of jet aeroplanes, television, computerised direct mail advertising, and polling all meant that campaigns became more sophisticated. Although technology could be a great benefit to well-financed candidates, it drove up spending very quickly. For example, in 1964, total campaign spending was estimated at \$200 million; by 1968, this figure had reached \$300 million.¹²⁹ Therefore, the 1971 Act attempted to control aggregate costs, by placing limits on certain media expenditures. Secondly, there was a growing perception that politics was becoming the exclusive preserve of the rich.¹³⁰ For example, Representative Richard Ottinger (D-NY) spent \$1.9 million on his 1970 Democratic Senatorial Primary, most of which came from his family.¹³¹ Generally, this was thought unhealthy in a modern democracy,¹³² more specifically, as it tended to drive up spending and costs for all candidates.¹³³ Therefore, Congress was minded to place limits on the campaign use of personal fortunes. Thirdly, the National Committee for an Effective Congress, a public interest advocacy group, made efforts to aid the passage of the 1970

¹²⁸ Comment (1972) 286.

¹²⁹ Berry J & Goldman J (1973) 334.

¹³⁰ Chairman of the New York Liberal party commented 'Quite literally, you must either be a very rich man, or have very rich relatives, or make yourself beholden to rich corporate executives or the underworld to get elected to almost any office in the United States.' Comment (1972) 286.

¹³¹ Berry J & Goldman J (1973) 334.

¹³² In 1968, testimony given before the Senate Subcommittee on Communications, Joseph Califano, general council to the Democratic National Committee, warned of the 'insidious danger that large contributors, by reason of their enormous wealth alone, can influence foreign or domestic policy to suit their personal prejudices.' Comment (1971) 712.

¹³³ Alexander H (1976) 5.

¹³⁴ Senate 3637, 91st Congress, 2nd session, 1970.

¹³⁵ Berry & Goldman offer a number of explanations why Nixon chose to veto the bill. Firstly, that if spending was restricted on radio and television, candidates might be forced to use more expensive techniques. Secondly, that restrictions on broadcast spending, not broadcast time, was discriminatory, as media prices vary widely between geographical regions. Thirdly, he said that the bill would benefit the better known incumbents, and finally that it was rate setting by legislation. However, self-interest was perhaps the most convincing reason. President Nixon was determined to win a second term, and any delay in passing regulations on spending would benefit his re-election campaign. Therefore, it was expedient to promise more comprehensive legislation in the future, as this would not affect him personally. The effect this might have had on future Republican candidates may not have concerned him, as he tended not to work at cultivating relationships with either party in Congress. D Truman supported this view: 'The White House displayed little positive interest in this significant legislation, and the Nixon Administration often failed to communicate its

Political Broadcast Act,¹³⁴ something that was vetoed by President Nixon. This veto¹³⁵ made Congress determined to pass more comprehensive legislation in the 92nd Congress.¹³⁶ Finally, those opposed to the 1971 Act, realised that making a public stand against reform might prove politically unwise.¹³⁷ Thus, rising election costs, criticism of wealthy candidates, Nixon's veto of previous legislation, and the relative silence of reform opponents all helped ensure that the 1971 measures were passed.

The FECA 1971 contained a mixture of prohibitive and liberal measures. It aimed to discourage large contributions from individuals by passing strict disclosure mandates.¹³⁸ It required the disclosure of contributions by political committees of more than \$1,000, required disclosure of contributions by individuals of more than \$100, limited expenditures on media communications, and limited contributions from a candidate to his own campaign, along with those from his/her family.¹³⁹ Yet it also codified and legitimised the activities of political action committees.¹⁴⁰ Additionally, it repealed the FCPA 1925, which had contained contribution limits.¹⁴¹

views clearly to the Republican Congressional leaders.' Berry J & Goldman J (1973) 363. In the light of Watergate, it was ironic that President Nixon's veto message included the comments 'I am opposed to big spending in campaigns as I am to big spending in government,' and he then praised the 'highly laudable, and widely supported goals of controlling political campaign expenditures.' Comment (1971) 712.

¹³⁴ Senate 3637, 91st Congress, 2nd session, 1970.

¹³⁶ After vetoing the 1970 Political Broadcast Act, President Nixon wrote a letter to Senate Minority leader Hugh Scott, reassuring him that the Administration would work closely with Congress in the near future to draft a more comprehensive Bill. Berry J & Goldman J (1973) 336. Scott was largely responsible for sustaining the veto after undertaking to press for reform early in the next Congress. Comment (1972) 292.

¹³⁷ Berry J & Goldman J (1973) 334.

¹³⁸ Stephenson-Horne M (1990) 550.

¹³⁹ Burke D (1995) 359.

¹⁴⁰ Ewing K (1988) 388. The Act provided for 'the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilised for political purposes by a corporation or labor organisation provided, that it be unlawful for such a fund to make a contribution or expenditure by utilising money or anything of value secured by physical force, job discrimination, financial reprisals; or the threat of force, job discrimination, or financial reprisal; or by dues, fees, or other monies required as a condition of membership in a labor organisation or as a condition of employment; or by monies obtained in any financial transaction.' Comment (1972) 297.

¹⁴¹ Burke D (1995) 359. See Appendix A, for a more detailed description of the FECA (1971) provisions.

Establishment of the Administrative Apparatus

Enforcement authority was to be vested in a tripartite system of three supervisory officers. In keeping with previous legislation, Congress was to retain broad control over enforcement. On March 24 1972, the Comptroller General, Elmer Staats, established the Office of Federal Elections within the General Accounting Office. Staats, supported by Office Director Phillip Hughes and Fred Thompson, who acted as Deputy Director, became the enforcement officer for Presidential and Vice Presidential races. Title III of the Act awarded the Comptroller General responsibility for monitoring compliance with disclosure, contribution, and expenditure mandates. Additionally, the Comptroller General was required by title I to issue regulations and monitor the use of media communications by all Federal candidates, in order to ensure compliance with expenditure limits. Finally, section 308 (c) of the Act required the Comptroller General to act as a national clearing-house on the administration of elections. This was designed to promote information and facilitate campaign finance research.¹⁴² The Clerk of the House, W Pat Jennings, and Secretary of the Senate, Francis Valeo, were designated as the other two supervisory officers for Congressional elections. Each supervisory officer had the authority to conduct investigations and audit committees. Section 308 of the Act instructed supervisory officers to report 'apparent' violations to the Criminal Division of the Department of Justice. They were also charged with assessing the validity of citizen complaints, and having to determine if there was 'substantial' reason to believe that a violation had occurred. The Attorney General retained discretionary authority over the initiation of all prosecutions.¹⁴³ Therefore, the historical pattern of enforcement being dependent on the willingness of

¹⁴² McCoy L (1974) 'Recent Reforms and the Consequences: GAO's Responsibilities in Federal Elections': *Policy Studies Journal*, 11 (4) (summer) 244.

¹⁴³ Comment (1972) 295.

Justice to prosecute continued. The Act also failed to set out common practices and standards of enforcement. These might have acted as a common guide or benchmark for statutory officers to follow.¹⁴⁴ Despite these weaknesses, it was the Comptroller General, supported by a well-staffed and well-funded bureaucracy, who would develop a reputation for able and rigorous administration of the Act.¹⁴⁵ Alexander argued that the GAO had a reputation for being the Federal Government's elite corps of accountants. This led the mass media to give more publicity to their actions and reports, something that enhanced their power and status. Finally, the Comptroller General and his staff were insulated from the political pressures sometimes exerted on Congressional officers.¹⁴⁶ This accorded them greater independence and latitude.

The GAO adopted a voluntary compliance ethos in 1972, becoming more rigorous in its enforcement in later years. As the regulated community had claimed ignorance of political finance regulation in the past, the GAO was determined to secure as much awareness, publicity and support for the Act as possible. In April 1972, 8,000 information packs were sent out, which contained copies of the Act, the Comptroller General's regulations,

¹⁴⁴ Berry J & Goldman J (1973) 357.

¹⁴⁵ The GAO tended to propose regulations that were stricter than either the Secretary of the Senate or Clerk of the House would allow. Alexander (1976) 13. For example, the GAO proposed that if a committee Treasurer could not obtain all the necessary information relating to the origin of a contribution over \$500, it was to be returned. After negotiation, the GAO proposals were watered down to read that treasurers were only to make 'best efforts' in obtaining contributor information. The GAO also proposed the use of social security numbers for identification purposes; again, Jennings and Valeo rejected this. Congressional officers also proposed that definition of 'filing' meant actually mailing the report. This interpretation would negate any usefulness of the pre-election report. However, after a meeting between the three officers in March 1972, the stricter definition of delivery before the declared date was adopted. A more pragmatic and valid regulation was proposed by Congressional officers regarding citizen complaints. The GAO had wanted to draft a form that any citizen could fill in, alleging a complaint. This was successfully resisted by Jennings and Valeo, who also insisted that any complaints be notarised, in order to discourage frivolous complaints. Finally, the GAO did make one important permissive regulation dealing with negative campaigning in the media. Congress failed to determine whether unauthorised advertisements criticising candidate A, urging his defeat, should count against B's spending limits. The GAO, perhaps wishing to avoid a constitutional challenge in the courts over free speech protections, chose not to count such expenditures against candidate A's limits. Berry J & Goldman J (1973) 358-360.

¹⁴⁶ Alexander H (1976) 10.

registration, and reporting forms. Identifying, educating, and bringing those involved in Presidential campaigns under the Act proved a particularly difficult task, as hundreds of packs were returned marked 'not known,' 'deceased,' or 'not forwardable.' Although the recipients had been identified by mailing lists from state and county chairman, many had not been involved in politics for years. Therefore, in terms of the disclosure mandates, substantial compliance was deemed to be acceptable, preferring not to seek prosecutions. Other reasons why the GAO did not apply the law as vigorously as they might have included the fact that some ambiguities still existed in both the law and regulations and many committees were still confused about their reporting obligations.¹⁴⁷ Additionally, although the law held committee treasurers legally responsible for disclosure accuracy, many were either subordinate employees, unfamiliar with the law, or were honorary figureheads, essentially amateurs.¹⁴⁸ However, this period of grace and flexibility changed in 1973.¹⁴⁹ The GAO developed guidelines on what they considered were the less serious violations that could be remedied through the submission of a revised report and violations that warranted referral to the Attorney General. Examples of minor violations included failing to report changes in organisational personnel, the name of a new treasurer, or certain errors in reporting expenditures, and receipts. Examples of more serious violations, justifying a criminal referral, included accepting corporate contributions from foreign nationals, or making contributions in the name of another.¹⁵⁰ The GAO ensured compliance with the Act by conducting a nation-wide programme of audits, which was supported by the investigation of citizen complaints.¹⁵¹ The Office of Federal Elections then published reports on audits and citizen complaints that resulted in a referral. Although the GAO sent

¹⁴⁷ Alexander H (1976) 16.

¹⁴⁸ McCoy L (1974) 247. Alexander H (1976) 16.

¹⁴⁹ McCoy L (1974) 245-246.

¹⁵⁰ Alexander H (1976) 15-16. For a more comprehensive list of GAO violation profiles, see appendix B.

¹⁵¹ McCoy L (1974) 247.

most referrals to the Department of Justice, they did, on occasion, make referrals to the Internal Revenue Service, state Attorney General's and the Federal Communications Commission.¹³²

From June 5 1972 to December 16 1974, the GAO audited 420 committees. Of these, 49 were not found in full compliance, 260 were found to have committed technical violations, and 111 had committed violations serious enough to warrant a criminal referral. The Parties were equally culpable in terms of the number of referrals they received: Democrats received 12, the Republicans 13. Yet Republican committees were found to have committed over 50% more technical violations than the Democrats. The Democrats had committed 40 disclosure violations, compared with 65 Republican. Presidential committees, campaigning on behalf of George McGovern, the Democratic candidate, were found to have committed 36 technical violations, and attracted 42 criminal referrals. In the light of Watergate, it was perhaps ironic that Nixon's committees committed 45 technical violations, yet only attracted 8 referrals.¹³³ Labor committees committed 15 technical violations, and received 8 referrals. Finally, business/professional committees, were found to have committed 19 technical violations, and attracted 4 criminal referrals.¹³⁴

Administration of the Act by Congressional Officers

The Clerk of the House and Secretary of the Senate had a more difficult task than the GAO in monitoring compliance with the law, due to the larger number of candidates and

¹³² Alexander H (1976) 17

¹³³ For a more detailed examination of the violations committed by Nixon and McGovern arising from the 1972 presidential election, see appendix C.

¹³⁴ Alexander H (1976) 620.

committees competing in elections. For example, 1,700 candidates and 2,200 committees registered with the Clerk in 1972. Additionally, the Congressional officers had to prepare for the 1974 election cycle, and also had to cope with interference from Congressional committees. The House Administration Committee held financial and oversight power, something that was exercised by its Chairman, Wayne Hays (D-OH), to undermine Jennings' capacity to enforce the law. For example, Hays kept Jennings on a tight budget. When Jennings asked Hays for the 1972 annual appropriation of \$399,030 for 38 additional staff, he was only granted \$156,984. Hays also ordered that the cost of photocopying disclosure reports be increased from ten cents per page to \$1. Hays then tried to transfer enforcement authority from the Clerk to his own Committee.¹⁵⁵ Additionally, the House established an annual Special Committee to Investigate Campaign Expenditures. This committee also interfered with the work of the Clerk by carrying out its own investigations of particular violations and preventing meritorious referrals from being sent to the Department of Justice.¹⁵⁶ Therefore, Congressional officers, especially the Clerk, worked within particularly difficult political constraints. This impinged on the methods adopted to implement the Act. For example, the GAO was very open about its audit results, publishing the names of candidates and committees along with the nature of violations. Although the Clerk and Secretary did refer large numbers of candidates and committees to the Justice Department, specific details were never published. The Clerk and Secretary, unlike the GAO, chose not to differentiate between generic violations, referring even minor technical violations to the Attorney General. This provided legitimacy for the non-disclosure of violations. The Clerk and Secretary claimed that violations likely to be the subject of

¹⁵⁵ After pressure from the public integrity group, Common Cause, Hays backed down on the issue of photocopying costs, reverting back to 10 cents. However, it was only after Jennings was sued in the Federal Court by Common Cause that the matter was successfully adjudicated. Alexander H (1976) 22.

¹⁵⁶ Alexander H (1976) 21.

litigation should not be disclosed prior to their conclusion. Additionally, they claimed that minor offences unlikely to warrant litigation should not be disclosed for fear of unjustly damaging a respondent's reputation. This strategy resulted in the protection from public scrutiny of the incumbents who elected the Clerk and Secretary every new Congress.¹⁵⁷ Therefore the electorate were unlikely to be made aware of technical or disclosure violations and would never learn of substantive violations if the Department of Justice failed to prosecute. Despite these weaknesses, the aggregate number of cases referred was as follows: the Clerk referred 4,900 cases to the Department of Justice in 1972, a figure that rose to 6,100 cases, by 1973. 418 cases referred to Justice concerned candidates and 779 cases involved political committees. By March 1973, Francis Valeo had referred 565 cases to Justice. This was a particularly high figure, as the Secretary of the Senate, in keeping with the early voluntary compliance policy of the GAO, chose not to initiate criminal referrals until the beginning of 1973. As a total, the Secretary referred 1,098 cases arising from 1972 violations, 564 of which related to late or non-filing of disclosure reports.¹⁵⁸ Perhaps one of the major difficulties in monitoring compliance with the Act, especially for Congressional officers, was the volume of data produced. For example, from April 7 to December 31 1972, the Clerk received 117,000 pages of reports, the Secretary 69,500, and the Comptroller General 83,000.¹⁵⁹ Attempting close scrutiny of these reports was very difficult, if not impossible.¹⁶⁰ Congressional officers carried out their responsibilities as effectively as they could, given the financial, political, and practical constraints at hand. Despite the efforts of the Comptroller General, Secretary of the Senate, and the Clerk of the House, the tripartite system was only part of the enforcement scenario

¹⁵⁷ Alexander H (1976) 11-12.

¹⁵⁸ Alexander H (1976) 23.

¹⁵⁹ Alexander H (1976) 12.

¹⁶⁰ Comment (1980) 'Campaign Laws & Regulations': *Congressional Quarterly Weekly Report*, 197.

and many other problems existed which seriously undermined enforcement of the Act.

Enforcement of Communications Media Spending Limitations

The FECA 1971 aimed to control the dramatically escalating costs and spending on mass media communications. As a central plank of the legislation, it aimed to limit spending on radio, terrestrial, and cable television, newspapers, magazines, outdoor advertising and automated telephone systems. Specifically, it restricted spending on these services to ten cents per eligible voter within the geographical area in which the election was taking place. Additionally, candidates were proscribed from spending more than 60% of this total on television and radio communications.¹⁶¹ The responsibility for adherence to this particular mandate rested with committee treasurers and the service provider. The supplier of the advertising service had the responsibility of obtaining a certification from the candidate or treasurer, guaranteeing that the purchase would not break spending limits. Burke described how the media spending limits helped to control certain expenditures, though she also noted that total spending was not reduced to any significant extent, as money tended to flow elsewhere.¹⁶² Alexander described how media expenditures were more difficult to hide, which made them more amenable to enforcement. Yet these supportive comments were usually aimed at radio and television spending, not all media communications. These expenditures on broadcast media were already regulated by disclosure mandates enforced by the Federal Communications Commission.¹⁶³ The FECA proved much more difficult to enforce against newspaper expenditures, some of which involved large sums.¹⁶⁴ For

¹⁶¹ Alexander H (1972) 42

¹⁶² Burke D (1995) 359.

¹⁶³ Alexander H (1972) 42.

¹⁶⁴ In 1971, a full page advertisement in the Sunday New York Times cost \$10,000. Comment (1972) 312.

example, Larry McCoy, Assistant to the Director, Office of Federal Elections, GAO commented:

'The geographic range of newspapers with their independent way of operating, made administration and enforcement of this requirement extremely difficult. There are over 8,000 daily and weekly newspapers in the United States, and, although we worked with the American Newspapers Publishers Association in an effort to inform their members of the legal requirements, we found many instances where they failed to require a candidate's certification before publishing campaign advertising.'¹⁶⁵

Enforcement of the print media spending limitations was a failure. Not only did the practical difficulties of trying to regulate a geographically dispersed and institutionally heterogeneous print media prove to be beyond the capacities of enforcement officers, the provision was declared unconstitutional on November 14 1973.¹⁶⁶ Although the Department of Justice took the case to appeal in the U.S. District Court, it was to become irrelevant in the light of Watergate, and the passage of more radical legislation in 1974.¹⁶⁷

Loopholes that Frustrated Enforcement of The FECA 1971

The 1971 Act contained a number of loopholes that undermined its utility and made enforcement difficult. Private clubs and other fraternal organisations were not brought under the Act's jurisdiction, the definition of 'candidate' was too restrictive, and the Act failed to adequately regulate loans and familial gifts.

¹⁶⁵ McCoy L (1974) 246.

¹⁶⁶ McCoy L (1974) 246.

¹⁶⁷ Alexander H (1976) 25.

Firstly, social clubs exploited a loophole in the law that allowed them to make sizeable contributions to campaigns, if they were funded from their membership fees (dues). Although, if the donation was over \$1,000, it would have to be reported, the law could not force the club to disclose any of the personal details of its membership. This loophole could be used to make large 'ghost' donations, where anonymity was guaranteed. Secondly, the definition of 'candidate' in Title I of the Act, relating to media spending limits, allowed individuals to campaign and actively advance their political careers without having to comply with spending limits contained in the Act. Candidates, therefore, delayed their formal announcement of candidacy until the last possible moment. Thirdly, the Act stipulated that all loans had to be reported until they were 'terminated.' However, loans could be forgiven at a later date, essentially written off for free, or terminated through the repayment of a token amount. Fourthly, the restriction of campaign contributions by a candidate's family only applied to the immediate members. Therefore relatively close family members might still legally provide large contributions to one another. Additionally, there was no prohibition on candidates' receiving loans from their immediate family. Therefore, the third and fourth loopholes in the law essentially emasculated the provisions designed to prevent politics from becoming the exclusive preserve of the rich.¹⁶⁸

Department of Justice Enforcement Stasis

One of the most serious problems with the enforcement process was that the Department of Justice failed to act on the referrals that it received. For example, of the 4,900 referrals received from the Clerk of the House relating to the 1972 elections, the Department of

¹⁶⁸ Comment (1980) 'Campaign Laws & Regulations': *Congressional Quarterly Weekly Report*, 197.
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Justice acted upon three. The 565 cases referred by the Secretary of the Senate also generated a similar response.¹⁶⁹ The Comptroller General, Elmer Staats, and Director Hughes, of the Office for Federal Elections, complained about inertia at the Department of Justice after GAO referrals were also ignored.¹⁷⁰ In keeping with the historical unwillingness of the Department of Justice to prosecute campaign finance violations, monitoring compliance with the 1971 Act was not given priority. For example, during the 1972 campaigns, the department of Justice only had one full-time attorney supervising enforcement of the Act.¹⁷¹ This lack of resources and trained staff reflected the inherent controversy that surrounded the enforcement process. The post of Attorney General had often become a reward for political service,¹⁷² and as such, prosecuting persons from his/her own party might seem disloyal and prosecuting the opposing party might seem politically motivated, inviting retribution in the future.¹⁷³ The Department of Justice followed the rational choice scenario, either deciding that most violations failed to warrant prosecution, or if they did, committees were prosecuted, not individuals.

Origins Of The U.S. Federal Election Commission

History Repeats Itself: Scandal and Reform, the 1970s Scenario

By 1973, a number of disparate factors contrived to forge a powerful new impetus for

¹⁶⁹ Burke D (1995) 360.

¹⁷⁰ After approximately one quarter of the total GAO referrals had been made to the Department of Justice, the Comptroller General urged the Attorney General to 'take the initiative with regard to reported violations of the Federal Election Campaign Act.' Director Hughes also doubted the deterrent value of the few cases that were prosecuted, after the Finance Committee to Re-elect the President was given a small fine for serious violations. The case involved failing to report a \$200,000 contribution, failure of the committee to keep a record of the contribution, and failure to report any personal details of the contributor. The Finance Committee to Re-elect the President was fined \$3,000 on 20th June 1973. Alexander H (1976) 31.

¹⁷¹ Comment (1980) 'Campaign Laws and Regulations': *Congressional Quarterly Weekly Report*, 197.

¹⁷² The post of Attorney General has been awarded to successful presidential campaign managers. John Michell was appointed by Richard Nixon, Robert Kennedy by John Kennedy, Herbert Brownell by Eisenhower, and J. Howard McGrath by Truman. Alexander H (1976) 28-29.

¹⁷³ Alexander H (1976) 29.

campaign finance reform. The FECA 1971 proved a double-edged sword. Its strict disclosure mandates, which had on occasions been enforced through private civil litigation, provided a wealth of political finance information.¹⁷⁴ However, the 1972 data proved that the 1971 Act failed in its original objective to rein in campaign expenditure. Overall, spending had risen from \$300 million in 1968 to \$425 million by 1972. This was an increase of more than 300% since 1952, when compared to the 56% rise in the consumer price index over the same period. Presidential spending had been estimated at \$27.2 million in 1960, \$38.1 million in 1964, \$56.4 million in 1968, and reached \$94.4 million in 1972.¹⁷⁵ This failure to control expenditure through the existing legislative framework was further compounded by the fact that the percentage of Americans willing or able to make contributions remained relatively low.¹⁷⁶ This resulted in many candidates depending on a small number of large private contributions. Concerns about the possible *quid pro quo* relationships brought about by this dependency¹⁷⁷ and a more general dissatisfaction with the poor record of regulatory enforcement¹⁷⁸ led to numerous groups and interests to call for reform. Common Cause was supported in its campaigning by the Center for the Public

¹⁷⁴ Common Cause initiated legal action against President Nixon's Campaign to Re-elect the President, forcing them to disclose that they had raised \$16.8 million from 124 individuals, just prior to the April 7 1972 deadline, the effective date that the 1971 Act came into force. Their 1972 Congressional campaign finance monitoring project-publicised amounts spent, the financial advantage of incumbents, and special interest donations. Adamany D & Agree G (1975) 205-207. Common Cause was founded in 1970 by John W. Gardner. Gardner, a Republican who had served in the Democratic administration of Lyndon Johnson, in 1965, as Secretary of Health, Education, and Welfare. Frustrated at seeing resources for social programmes being squandered on the Vietnam War, despite mass protest, he resigned his post in 1968. Gardner felt that money was able to buy political outcomes, something that the secrecy that surrounded political finance regulation made possible. The group, which by 1973 had 300,000 well educated-members, campaigned on a number of related issues which included campaign finance secrecy, advocating 'sunshine' laws, and public financing of election campaigns, and abolishing the seniority system in Congress where committee posts and promotion were determined by length of service. www.virginia.edu/history 19.1.01.

¹⁷⁵ Burke D (1995) 'Twenty Years after the Federal Election Campaign Act Amendments of 1974: Look Who's Running Now': *Dickinson Law Review*. 99 359. Ewing K (1988) 388.

¹⁷⁶ 12% of Americans had made political finance donations in 1972, the same percentage as 1960 and 1964, despite nominal tax incentives to do so. Adamany D & Agree G (1975) 206.

¹⁷⁷ Light L (1980) 'Resurrectional Agency Also Discovers'. *Congressional Quarterly Weekly Report*, April 19, 1019.

¹⁷⁸ David P (1976) 'The Federal Election Commission: Origins, and Early Activities': *National Civic Review*, 65, 278.

Financing of Elections, union labor, National Committee for an Effective Congress, the League of Women Voters, the Nation Women's Political Caucus, and many newspapers. Although reforms had already been passed at state level,¹⁷⁹ something that reflected their greater responsiveness to changes in public attitudes, Congress, more specifically, the House, remained unenthusiastic about reform during the first session of 1973.

Watergate Break-in, Discovery and Cover-up

The tide of reform became inevitable as the historic Watergate scandal unfolded. Watergate was a Washington D.C. apartment and hotel complex. It acted as the headquarters of the Democratic National Committee during 1972. After a number of damaging leaks concerning the activities of the administration, a number of individuals with electoral or executive responsibilities decided to develop a secret political intelligence capability. Gordon Liddy, council to the Finance Committee to Re-elect the President, proposed a number of ambitious, illegal, and essentially foolhardy plans during the spring of 1972.¹⁸⁰ His third proposal, costing \$250,000, was authorised by John Mitchell, the Attorney General, and former Nixon campaign manager, and Jeb Magruder, deputy director of the

¹⁷⁹ Forty state legislatures had passed campaign finance reform by 1973, with Iowa, Minnesota, Montana, Rhode Island, and Utah initiating a tax check off system to encourage voluntary donations and New Jersey being the most progressive by setting up a system of matching grants for private donations. Adamany D & Agree G (1975) 207.

¹⁸⁰ In order to avoid trouble at the Republican National Convention, Liddy has proposed a \$1 million plan to abduct Nixon opponents. Other 'employees' were to beat up demonstrators. Liddy suggested that political intelligence could be obtained from Democratic officials through the use of 'call girls,' and secret recording devices, placed on a yacht in Miami Beach. After Nixon officials determined that the plan was too expensive, Liddy concentrated on proposals that cost \$500,000, and involved wiretaps and photography. This was also deemed too expensive. Alexander H (1976) 39-40.

¹⁸¹ Although the original Watergate break-in was code named Gemstone, all political intelligence activities of the Nixon administration, unethical as well as illegal ones, were given the name of a precious stone. Gordon Liddy recently described how the number of intelligence operations led them to run out of precious stone names, having to use semi-precious stones, and then rocks. BBC documentary, Watergate, and the Cover-up, Discovery Productions, part 1.

Campaign to Re-elect the President. The plan was code-named Gemstone¹¹¹ and involved breaking into the Democratic National Committee's headquarters in order to place listening devices in telephones and photocopy private documents. The group of Cuban-Americans employed to carry out Liddy's plan were given the code name the 'plumbers' as their remit was to stop 'leaks.'¹¹² The first two attempts at gaining entry to the building failed.¹¹³ For example, security staff removed the adhesive tape placed on the door catches to facilitate entry and the plan was aborted. The first successful attempt at gaining entry occurred on May 28 1972, although results of the break-in were of no value. One listening device, placed on the telephone of Lawrence O'Brien,¹¹⁴ the Democratic National Chairman, proved faulty, and other devices picked up personal, not political conversations. Officials complained about the lack of useful information generated by their investment, and Liddy made another attempt on June 17 1972. This time, an alert security guard became suspicious about the 'scotch' tape on the door locks, and phoned the police. James

¹¹¹ Although the original Watergate break-in was code named Gemstone, all political intelligence activities of the Nixon administration, unethical as well as illegal ones, were given the name of a precious stone. Gordon Liddy recently described how the number of intelligence operations led them to run out of precious stone names, having to use semi-precious stones, and then rocks. BBC documentary, Watergate, and the Cover-up, Discovery Productions, part 1.

¹¹² This was not the first time that the Cubans had been used to carry out illegal political intelligence. Dr. Daniel Ellsberg, an U.S. government defence analyst, had released the 'Pentagon Papers,' 46 volumes of which detailed American involvement in Southeast Asia. This provoked damaging coverage in the press, and imbued a sense of paranoia in the Nixon administration concerning security leaks and privacy of correspondence. White House officials, John Ehrlichman, Presidential advisor, Charles Colson, White House lawyer, Gordon Liddy, and others, hired the Cuban refugees to break into the offices of Dr. Lewis J. Fielding, Ellsberg's psychiatrist. The rationale for the break-in, carried out in September 1971, was to gain damaging medical information about Ellsberg, and then use it to commit a character assassination. However, the plan was to gain entry, and leave undetected. Unsupervised, the Cubans broke windows and locks, broke into filing cabinets, and ransacked the office. Ellsberg was put on trial by the end of 1972, and was charged with espionage. However, as the activities of the administration came to light, Judge W. Matthew Byrne, Jr. called for a dismissal of the charges on 2nd May 1973. As the Watergate cover-up trials concluded, those involved in its planning and implementation were gaoled. Alexander H (1976) 581-582.

¹¹³ Jack Anderson, a newspaper journalist, had become a thorn in the side of the Nixon administration, and was therefore placed on 'the enemies' list.' The enemies' list was reserved for those individuals who were either seen as unpatriotic, or just critical of the administration. Once on the list, they became targets of either unethical or illegal political intelligence activities. BBC documentary, Watergate, and the Cover-up, Discovery Productions, part 1.

¹¹⁴ The rationale behind gaining secret intelligence about O'Brien, was that Nixon's officials thought that he had potentially damaging information about the Administration. Therefore fear and the need to procure leverage on O'Brien explained why he was targeted.

McCord, the security chief of Nixon's re-election committee, and four Cubans, all dressed in smart business suits, were caught by police. Initially, the police were confused by the appearance of the well-dressed burglars, though it was not long before the suspects' hotel rooms were searched, and an address book was found with names and private telephone numbers of senior White House officials. The burglars were also caught in possession of \$4,200 in \$100 bills, which had originated from funds managed by Nixon campaign officials. The administration attempted to frustrate the FBI investigation into the Watergate break-in, trying to convince law enforcement officials the whole affair was a secret foreign policy mission related to Cuba.¹⁵ The FBI were not fooled, and rejected the administration's diversionary tactics. The next attempt to obstruct justice involved a White House request, asking the CIA to pay the Watergate defendants to keep silent about who authorised the break-in. The CIA also refused to be drawn into the conspiracy, and refused to pay out funds that had been earmarked for 'legitimate' covert purposes. This situation led to the administration's using political donations as a ready source of hush money. Nixon's personal attorney, Herbert Kalmbach, raised \$230,000 over the summer of 1972. Additionally, funds controlled by Haldeman, head of the White House staff, totalling \$550,000, were later paid to the Watergate defendants. They were indicted on September 15 1972, and stood trial throughout January 1973, two months after Nixon won his landslide re-election victory, carrying 49 of the 50 states. However, McCord, and others, gave evidence for the prosecution in March 1973, testifying that the conspiracy involved senior administration officials. McCord's testimony implicated Presidential counsel John Dean and Jeb Magruder. Eventually, all but Liddy co-operated with investigators and

¹⁵ This was not the first time that Cuba had been used as a cover story for Watergate activities. The Cuban Americans (referred to by President Nixon as 'jackasses') hired to break into the Watergate building were duped by administration stories that Castro was financing McGovern. Senate Select Committee on Presidential Campaign Practices, volume 2, 12.

earned reductions in their otherwise lengthy prison sentences.¹⁸⁶

As the political damage caused by Watergate continued to build throughout 1973, the administration became the subject of fresh allegations concerning the Vice President, Spiro Agnew, a self-styled defender of morality. Agnew was forced to resign in October 1973, after compelling evidence was produced that he had been involved in bribery, extortion and tax fraud.¹⁸⁷ Most of the offences were committed during 1962-72, when Agnew held the offices of Baltimore County Executive, Governor of Maryland, and Vice President.¹⁸⁸ Nixon's attitude towards the Agnew revelations was perhaps indicative of his character. Colleagues described his mood as calm, detached and somewhat philosophical. One might suggest that Nixon viewed the Agnew revelations as a mercenary opportunity to deflect attention away from his own actions, and more generally a distraction from the broader Watergate troubles. After telling Agnew that he would have to go, Nixon remarked to an administration official at the time 'I'm not surprised, they're all crooks up there in Maryland.'¹⁸⁹ Gerald Ford, who had led Republicans in the House for many years, replaced Agnew. As Congressional investigations and the Special Prosecutor's Office uncovered more illegal practices,¹⁹⁰ pressure mounted for Nixon to resign or face impeachment. Nixon

¹⁸⁶ Alexander H (1976) 39-76.

¹⁸⁷ The evidence against Agnew, which was related to other court cases in Maryland, was so serious and so compelling that the Department of Justice was minded to proceed on all charges. However, they offered him a plea bargain, as Watergate had already been very damaging to American democracy. He would plead *nolo contendere* (Latin: 'I will not defend it') to one charge of felonious tax evasion, in return for discontinuing the more serious charges. Additionally, as part of the agreement, Justice published a forty-page report detailing his extortion of bribes by using the pretence of accepting campaign contributions. Alexander H (1976) 579, Brogan H (1985) 688, Mosher F (1974) (Ed) *Watergate, Implications for Responsible Government*: New York, Basic Books, 87-88.

¹⁸⁸ Alexander H (1976) 579.

¹⁸⁹ BBC documentary, *Watergate, and the Cover-up*, Discovery Productions, Part 4.

¹⁹⁰ The Special Prosecutor's office was comprised of the Watergate Task Force, Campaign Contributions Task Force, and the Dirty Tricks Task Force. After pressing for the disclosure of the White House tapes, Nixon offered a compromise where he would disclose written transcripts, prepared by Senator John Stennis. Many years later, some of Nixon's former officials described this proposal as laughable. Stennis was in his dotage and very hard of hearing. They found it particularly amusing that he would have signed for the authenticity of

finally resigned the office of President of the United States on August 9 1974. He did not resign willingly, but was forced from office after Archibald Cox successfully obtained a subpoena, forcing the disclosure of tapes proving the extent of Nixon's involvement in the Watergate cover-up.¹⁹¹ This evidence, and the fact that the House Judiciary Committee had proposed articles of impeachment on July 30 with conviction in the Senate likely, placed Nixon in an impossible situation. For Nixon, at least, the matter came to a close, when on the September 8 1974, Gerald Ford granted Richard Nixon a full and unconditional pardon, for all crimes he committed or was privy to while in office.

Watergate became synonymous with the break-in at the Democratic National Committee Headquarters, and the failed cover-up, yet Watergate should also be remembered as a chronicle of political campaign finance abuse. If the large amounts of cash on hand,¹⁹² and unaccounted for, had not been available to those intent on funding illegal activities,

transcripts that he would have been unable to hear. Cox remained adamant about the tapes, and initiated further investigations concerning Nixon's San Clemente home, which was allegedly funded using taxpayers money. This resulted in Cox's being sacked by Robert Bork, Acting Attorney General, after the previous incumbent of the office, William Ruckelshaus, had resigned rather than sack Cox. The Texan, Leon Jaworski, replaced Cox. Senate Select Committee on Presidential Campaign Activities, 2 14. Alexander H (1976) 68. BBC documentary, Watergate, and the Cover-up, Discovery Productions, Part 4.

¹⁹¹ Nixon had finally sealed his own fate, by taping all his Oval Office conversations for a book dedicated to his political memoirs. One particular conversation that was recorded disclosed how Nixon and Haldeman had attempted to mislead the FBI to delay their investigation. Alexander H (1976) 40-41. If Nixon had cooperated with investigators as soon as it became clear what had been carried out in his name, he may well have ensured his political survival. Though the tapes proved Nixon had authorised the payment of hush money, it was unlikely that he knew anything about the intention to break into the Watergate building. Nixon had not appointed all 'yes men' (they argued fiercely all the time) to his administration, but total loyalists, who would resort to actions unethical or illegal for what they saw as the greater good, or the wider picture. Brogan H (1985) 685. Nixon failed to comply with the subpoena. This was justified by citing executive privilege, which ensures that the President is able to consult advisors, without the necessity of public disclosure. Mosher F (Ed) (1974) 82. However, on July 24 1974, the Supreme Court ruled by 8 to 0 that the tapes must be disclosed to investigators. *The New York Times*, July 25 1974, 1. As other evidence suggested that the President had been involved in illegal activity and the tapes were essential in determining factual questions of alleged wrong doing, executive privilege did not apply. Article III of impeachment adopted by the House Judiciary Committee was largely comprised of charges relating to the withholding of evidence. *New York Times*, July 24 1974, 1.

¹⁹² The description 'cash on hand' is a technical term used to denote ready cash available. Cash as a campaign resource has traditionally been discouraged, as it is almost impossible to trace, and may encourage *malum in se* and *malum prohibitum* violations.

Watergate could not have occurred.¹⁹³ Therefore, on February 7 1973, the Senate passed resolution 60, which established a select committee to study the illegal, and improper campaign activities of the 1972 presidential election. The committee, was comprised of seven Senators, and was chaired by Sam Ervin Jr. (D-N.C). The Ervin committee was televised from May 17 to August 8 and the public hearings held throughout the summer of 1973, were instrumental in uncovering evidence of the Oval Office tapes.¹⁹⁴ The committee was also significant, in that it drafted a comprehensive set of campaign finance reforms, based on the results of its investigation¹⁹⁵

Further FCRP Activities Uncovered By The Ervin Committee

Some of the Ervin committee's most important discoveries included large illegal corporate contributions and the sale of ambassadorships. Corporate contributions were solicited and received by candidates of both Parties, though the Finance Committee to Re-elect the President (FCRP) was by far the most adept and fruitful beneficiary. In 1971-72, the FCRP resurrected the fund-raising practice famously used by Mark Hanna in the presidential elections of 1896 and 1904. Hanna operated a systematic wealth tax on big business. Maurice Stans, chair of FCRP, assessed corporations according to their national ranking, then 'asked' for a contribution.¹⁹⁶ Pressure was placed on corporations by the FCRP

¹⁹³ Ervin S (1980) 139.

¹⁹⁴ July 16 1973 was perhaps the most dramatic moment of the Ervin hearings, when Alexander Butterfield, a former White House aide, revealed the existence of a taping device in the Oval Office. Alexander H (1976) 67.

¹⁹⁵ Although the Ervin committee did not publish their report until the summer of 1974, after the Senate had already passed campaign finance measure S 3044, reform was still very much in its infancy. Therefore, not only did its preliminary findings have an impact on the drafting of S 3044, but also committee proposals still had an influence on the public debate, as reform was not achieved until January 1976.

¹⁹⁶ 'Assessed/assessment' is an acknowledged technical term that is used to describe attempted extortion of corporate funds by politicians and fundraisers. Colloquially, the term has been described as a 'shakedown.' See footnote 12, for its early history.

through repetitive solicitations by high-ranking White House officials and by implicit threats about the consequences of a refusal. These negative consequences were a realistic possibility, as the FCRP had pioneered the Incumbency-Responsiveness Programme. This was a strategy that used the governmental apparatus to reward friends and contributors¹⁹⁷ and punish¹⁹⁸ opponents.¹⁹⁹ These illegal contributions were sometimes made through reimbursement schemes, and further disguised by using foreign corporate subsidiaries and foreign bank accounts.²⁰⁰ Foreign accounts were often preferred, as foreigners were said by some donors to have a less inquisitive cultural attitude towards the withdrawal of large

¹⁹⁷ A \$200,000 office of economic opportunity contract that was awarded to a Washington consulting firm that was headed by an employee of the National Hispanics Finance Committee. The Committee was a branch of the FCRP and was deemed by anti-poverty groups to be a waste of money. Testimony before the Ervin committee set out that Federal funds for grants, contracts, loans and subsidies were to be used to reward supporters of Mr. Nixon's re-election. 'Ervin Panel Sees White House Plot in '72' to Divert the Executive in Nixon Drive': *The New York Times*, Monday, June 10, 1974, 1 & 24.

¹⁹⁸ On another occasion, a consulting firm that was deemed to be close to the Democratic National Committee and a union leader from the farming industry, were removed from a small business administration programme that previously enjoyed preferred status in competing for government contracts. *The New York Times*, June 10, 1974, 24.

¹⁹⁹ A Mr. Frederick V. Malek, former special assistant to the President, headed this programme, which started in the spring of 1971, and ended with the discovery of the Watergate break-in. Although the programme was largely designed to deliver votes and contributions from the black and the Spanish-speaking community 'through a selective funding approach,' the FCRP exploited the perception that executive departments were responsive to the political needs of the administration, and would act against opponents and the uncooperative. Though not all departments were willing to be used in this manner, some were. The General Services Administration, the Office of Minority Business Enterprise, the Department of Health, Education, and Welfare, and several other executive departments were willing to make government decisions based on the political advantage they might generate for Nixon's re-election campaign. *The New York Times*, June 10, 1974, 24. As many corporations were awaiting executive decisions affecting their businesses, awareness of the Incumbency Responsiveness Programme may well have minded them to comply with the contribution request. Ervin Committee, (1974) 2 8. This scenario was perhaps qualitatively different from the more traditional criticisms of a *quid pro quo* arrangement. Avoiding harm and gaining a fair hearing from the executive may well have been top of their agenda, though they would have been aware that their competitors would also have been approached for funds. Therefore, competition may well have driven corporations to make contributions. Ironically, often those who made large contributions to the FCRP, as American Airlines did, had important executive decisions made against them. Ervin (1974) 9. For a more comprehensive discussion of the Incumbency Responsiveness Programme, see Alexander H (1976) 472-475.

²⁰⁰ Reimbursement schemes can involve a corporation making conduit payments to a number of its executives, who in turn use the money to make political donations to their companies' preferred candidates. The contributions appear individual and personal, not corporate. However, journalists with only moderate experience can uncover this type of nefarious activity, as the contributions often have suspicious characteristics. Some executives were not realistically able to afford to give large donations from their salary. Making such donations could raise suspicion. Executives have contributed similar or identical amounts as their colleagues, the reason being that a large figure is sub-divided between individuals so as to appear within the contribution limits. However, this is quite crude, and appears contrived.

cash sums.²⁰¹ Additionally, on February 24 1974, Herbert Kalmbach was prosecuted for promising employment in return for political activity.²⁰² He had sold an ambassadorship, contrary to Title 18 U.S.C. section 600. Kalmbach admitted the offence and received a short prison sentence as part of a plea bargain. This type of offence was notoriously difficult to prove, as a prior *quid pro quo* arrangement had to be established. As this kind

²⁰¹ Some of the high-profile corporate contributions investigated by the Ervin committee included the following: American Airlines made a \$100,000 donation to the FCRP, after a solicitation by Kalmbach, the former personal attorney of the President. After the Common Cause suit against the FCRP, the money was returned to American Airlines, who were subsequently prosecuted and fined \$5,000. Ervin (1974) 6-11. American Ship-Building Company delivered a \$100,000 donation to the Committee to Re-elect the President (CRP), after a solicitation by Kalmbach. Though there was some question as to the origin of the funds, as \$75,000 was said to have been contributed by George Steinbrenner, Chairman and Chief Executive Officer of the Company, the remaining \$25,000 was deemed to be corporate funds. The contribution was disguised by attributing it to eight company executives. These employees were awarded fictitious bonuses of \$5,000, which were in turn handed over as personal cheques for \$3,000 to Robert Bartlome, Corporate Secretary. The excess was paid in tax or into a company political fund. The \$100,000 in total was passed onto Kalmbach. Again, prosecutions were brought against a number of company employees, including Steinbrenner. Ervin (1974) 11-21. Ashland Oil Company made a \$100,000 contribution to the FCRP after a solicitation by Maurice Stans to Orin Atkins, Chairman of the Board, and CEO. The payment was funded from an African subsidiary, with funds being funnelled through a Swiss bank account. Atkins testified before the committee that he felt under considerable pressure to make the contribution. Senator Ervin: 'Mr Atkins, it looks to me as if Mr. Stans had made an assessment.' Mr Atkins: 'I think that is a correct assessment.' Senator Ervin: 'In other words, he told you in effect that he would let you off with a contribution of \$100,000, plus a \$10,000 advertisement in the convention paper.' Mr. Atkins: 'I believe you are right.' Senator Ervin: 'He never left you much option in the matter, did he?' Mr Atkins: 'I don't believe so. It is true that I didn't have much of an option.' Ervin (1974) 24. The company was fined \$5,000 for making an illegal contribution, and Atkins was fined \$1,000. Ervin (1974) 27. Harding Lawrence, of Braniff Airways, made an initial \$10,000 contribution to FCRP on 1st March 1972. Although the recipient, Stans, thanked him, he asked for \$100,000 as Braniff, 'was doing much better than the rest of the industry.' Ervin (1974) 25. Braniff eventually contributed \$40,000 in corporate funds, which was made through a Panamanian conduit. Braniff was fined \$5,000, and Lawrence, \$1,000. Ervin (1974) 24-27. GoodYear Tire and Rubber Company made two \$20,000 corporate contributions to the FCRP, in cash, obtained through a Swiss account. The company used a number of company employees to falsely attribute the donations to, after Stans made it clear that the initial donation was inadequate. Ervin (1974) 28-32. Prior to April 7 1972, Gulf Oil Corporation made a \$50,000 donation to the FCRP, after Mr. Lee Nunn made a solicitation to Claude C. Wild Jr, VP of government relations Gulf Oil. They also made much smaller donations to Democratic candidates. Mr Nunn did not seem satisfied with the initial contribution, and arranged a later meeting between Stans and Wild. Stans was Secretary of Commerce at the time, just prior to his move to a more overtly political role in the FCRP. Wild testified that he felt compelled to make an additional payment of \$50,000, which he did. Ervin asked him to elaborate on the alleged pressure to contribute. Wild said, 'I considered it considerable pressure when two cabinet officers and an agent of one of the committees that was handling the election asking me on various occasions that I have enumerated, the times that I have enumerated, asking me for funds- that is just a little bit different than somebody collecting for the Boy Scouts.' Ervin (1974) 33-36. Associated Milk Producers Inc. were fined \$35,000 on August 1 1974, after making \$280,900 in illegal corporate contributions. In particular, \$100,500 was contributed to the 1968, 1970, and 1972 campaigns of Democrat Hubert Humphrey, with other large donations being made to FCRP. '\$35,000 Dairy Co-op Fine Levied for Election Outlays': *New York Times*, August 2, 1974, 1. Other corporations making illegal political donations to Nixon committees and Democratic candidates Wilber Mills and Hubert Humphrey, included; Lehigh Valley Co-operative Farmers Inc, Minnesota Mining and Manufacturing Co, Northrop Corp, and Phillips Petroleum Co. Ervin (1974) 49-60.

²⁰² *Watergate. Special Prosecution Force. Report: October 1975*, 78.

of activity relied on verbal assurances, negotiation and semantic gymnastics, individuals felt safe from prosecution, as nothing was committed to paper.²⁰³ However, figures presented to Ervin suggested that ambassadorships were being sold. The CRP received \$1.8 million in political contributions from serving ambassadors. Of the thirteen new non-career diplomats appointed, eight contributed a total of \$706,000 to the Nixon re-election campaign. Six other individuals who were lobbying for appointment gave a total of \$3 million. Robert Gray, who was employed by Maurice Stans, had a set piece speech, which he delivered to wealthy office seekers. It avoided crude *quid pro quo* language, but suggested that once a 'heavy donation' was made, he could ensure an applicant's consideration by the White House.²⁰⁴ Without promising the positions to applicants, he would, nevertheless, play one off against the other, relaying in turn the size of donation other applicants had made. Gray would inform those lobbying for appointment who was 'top man at the moment.' Also, different countries attracted differing levels of status. Therefore one could expect to pay much more for a European post than for the hotter, less-developed countries, like Trinidad, or Jamaica. Despite this arrangement, many lobbying for ambassadorial posts were to be disappointed, as they often failed to obtain their desired location, or failed to get any appointment at all.²⁰⁵

²⁰³ Ervin (1974) 64.

²⁰⁴ Those desirous of an appointment would be attributed to certain visibility or recognition classes. These classes would be differentiated by \$25,000 cut-off points. Serious contenders might join the '100 Club,' which was reserved for the \$100,000-plus contributor. Ervin (1974) 81.

²⁰⁵ Roy Carver, Chairman of Bandag, gave \$257,000 of corporate stock to Nixon's re-election campaign in the hope of gaining an ambassadorship. Despite a number of interviews in White House and State Department, he was unsuccessful. Some of the high-profile ambassadorial contributions were as follows;

Country	Name	Contribution
Great Britain	Walter Annenberg	\$250,000
Switzerland	Shelby Davis	\$100,000
Luxembourg	Ruth Farkas	\$300,000
Belgium	Leonard Firestone	\$112,600
Netherlands	Kingdon Gould	\$100,000
Austria	John Humes	\$100,000
France	John Irwin	\$50,500
France	Arthur Watson	\$300,000

Ervin Recommendations And Legislative Change

The Ervin committee's 2,217 page final report was published on July 13 1974. Although the report reflected its investigatory remit, it also made recommendations aimed at repairing the integrity of the electoral process. Most of the committee's thirty-five recommendations were adopted unanimously, but there was some pessimism about the report's timely implementation, as Sam Ervin had just announced his retirement.²⁰⁶ Many recommendations were generally designed to prevent the abuse of government power, though a significant number advocated campaign finance reform.²⁰⁷ Central to these was the committee's vision of a new enforcement authority. Ervin commented:

'Probably the most significant reform that could emerge from the Watergate scandal is the creation of an independent, non-partisan agency to supervise the enforcement of the laws relating to the conduct of elections. Such a body, given substantial investigatory

Ireland	John Moore	\$10,442
		Total:\$1,324,442 Ervin (1974) 64-69.

²⁰⁶ Comment (1974) 'Watergate Committee: Toward Tighter Regulations': *Congressional Quarterly Weekly Report*, 32 (30) July 27, 1974, 1943.

²⁰⁷ The reports first comments on campaign finance proposals stressed the essential importance of disclosure. The electorate should be made aware of contributions, expenditures, and government action that affects contributors. They were also mindful of the temptation to over-regulate in the wake of scandal. They were concerned not to stifle grass roots politics, and over-burden the amateur with participatory disincentives in the way of regulations and possible sanctions. Reform measures should also be enacted with an awareness of time, in order to avoid a repetition of the April 7 1972 scenario, where the Nixon campaign indulged in a 'frantic effort' to obtain contributions before the new legislation came into effect, forcing disclosure. *Congressional Quarterly Weekly Report*, July 27 1974, 1945. The report also proposed a prohibition on all cash contributions in excess of \$100 and that candidates should designate one committee as their campaign committee. Spending caps and contribution limits were also proposed for presidential candidates. A system of tax credits was recommended on contributions made to Federal candidates and funding raised out of direct taxation (taxation without representation, as Nixon described it) was opposed. Solicitation and receipt of monies from foreign nationals though already illegal, technical weaknesses in the law, according to Ervin, needed to be remedied. Other proposals advocated a ban on senior executive officials' soliciting or receiving campaign contributions. This ban aimed to prevent conflict of interest and the possible coercive effect solicitations by the powerful might have on potential contributors. Finally, the committee recommended that violations of the major provisions of campaign finance law be made felony offences. Ervin (1974) 151-169. Most of these proposals had been incorporated into the Senate bill passed on April 11 1974, S3044, sponsored by Senator Howard W. Cannon (D-NV). *Congressional Quarterly Weekly Report*, July 27 1974, 1945.

and enforcement powers, could not only help to ensure that misconduct would be prevented in the future, but that investigations of alleged wrong-doing would be vigorous and conducted with the confidence of the public.²⁰⁸

The Ervin report criticised the tripartite system of enforcement for lacking independence or sufficient authority. This could be rectified by a Commission, which would better investigate, deter violations, and win back the confidence of the public.²⁰⁹ However, there was a lack of consensus over the structural vision, and enumerated powers of the Federal Elections Commission (FEC). Having the appropriate structure was fundamental to the effectiveness of the Commission, as those who sat at its apex would control the institution. The significance of the powers vested in the agency was more obvious, as they would determine if the agency was taken seriously, or if, like so many of its enforcement predecessors, it could be ignored with impunity. The Ervin committee recommended an odd-numbered Commission, with seven seats. Each appointee would serve a seven-year term, with appointments staggered. No four members of the Commission could belong to the same political party, and the panel would elect its own chair and vice chair from different Parties. Although the Ervin committee explained the mechanics of appointment in a less than clear fashion, it suggested that Congress would have the greatest influence over Commissioner selection.

'Of the seven, two members would be appointed by the President from among individuals recommended by the President *pro tempore* of the Senate upon recommendations of the Majority Leader of the Senate and the Minority Leader of the Senate and two

²⁰⁸ Colloquay (1994) 'Federal Election Commission Panel Discussion: Problems & Possibilities': *The Administrative Law Journal*, 8 234.

²⁰⁹ Ervin argued that, as existing enforcement officers were not vested with subpoena power, their investigations were inadequate. Additionally, no central campaign finance data repository existed, and each officer had their own rules for making data available to the public. Finally, Ervin highlighted Elmer Staats' comments regarding the lack of independence imbued in the enforcement apparatus. Staats said 'confidence in impartiality is weakened in a situation where the administrator comes up for appointment every two years by the employers he is required to police.' Ervin (1974) 152-153.

members would be appointed by the President from among individuals recommended by the Speaker of the House of Representatives upon the recommendations of the Majority Leader of the House and the Minority Leader of the House.²¹⁰

Commissioners would have the power to make regulations, and could recommend legislation to Congress for its consideration. Finally, its report made certain recommendations awarding the commission a number of powers to facilitate its investigatory and enforcement remit.²¹¹

In April 1974, the National Academy of Public Administration published its own report, *Watergate, Implications for Responsible Government*. The report was requested by the Ervin committee and was given the remit 'to assess the implications of Watergate for the democratic system of government.' As part of its report, the Academy commented on reform proposals made by Mr. Hughes, Director of the Office of Federal Elections (GAO). Hughes offered two alternative reforms to improve the enforcement of campaign finance laws. The first scenario would strengthen the existing GAO mechanism, which would be supplemented by a seven-member supervisory board, representative of the major Parties, Congress, and President. The second proposal was more radical, and involved the establishment of an Electoral Commission. It would be composed of highly respected citizens, appointed by the President, and serving on a part-time basis. It would also have a full-time director, adequate staff, and would wield broad authority. The Academy rejected the first proposal and criticised the record of enforcement under tripartite arrangements. Although the Academy endorsed the second proposal, in their view, a Commission without

²¹⁰ Ervin (1974) 153.

²¹¹The Commission would have the power to administer oaths and to require by subpoena the attendance and testimony of witnesses and the production of documents relating to its duties. Ervin (1974) 152-156.

prosecutorial support would be in danger of becoming a 'toothless watchdog.' In response to the Department of Justice's historical timidity towards campaign finance violations, they suggested that a Permanent Special Prosecutor should support the Commission.²¹² When comparison between the Academy and Ervin proposals was made, the Ervin recommendations seemed modest. Their method of appointing Commissioners enshrined Congressional control and bipartisanship, not independence, and the issue of prosecutorial support was ignored.

Legislative Response To The Ervin And National Academy Of Public Administration Reports

The Senate attempted to pass relatively progressive measures, while the House gravitated towards more conservative bills.²¹³ The Senate wanted public financing for Congressional elections, higher spending limits, and supported proposals to establish a strong, independent enforcement agency. The House opposed public financing, and was divided over the composition and powers of an enforcement board. After the failure of S372, the Senate passed S3044 in April 1974.²¹⁴ This bill established a seven-member, independent, Federal Election Commission, appointed by the President and confirmed by the Senate.²¹⁵ Four members would be appointed upon the recommendation of Congress, and no more

²¹² Mosher F (Ed) (1974) 102-104.

²¹³ The lack of progress in the House in passing comprehensive reform was not always the result of obstructionism or a lack of political will. Institutional differences between the House and Senate in the way the legislative process works makes it more difficult to pass House bills in a timely fashion. For example, House rules dictate that a bill must only be referred to one committee, and the jurisdiction of that committee dictates the breadth of its review. If a bill is introduced that covers the jurisdiction of more than one committee, two or more bills must be drafted. Berry J & Goldman J (1973) 345.

²¹⁴ Edward Kennedy, referring to the passage of S3044, commented that 'this is one of the finest hours of the Senate in this or any other Congress.' www.virginia.edu 19.01.01.

²¹⁵ This was when 'Elections' became 'Election,' losing the plural, and according to Brooks Jackson, confusing journalists for many years afterwards. Jackson B (1990) 26.

than four members could be from the same political party. It would have responsibility for enforcement, and exercise wide-ranging administrative and policy-making powers. The Commission would make regular reports to Congress and act as a central clearinghouse, or repository, for election finance data.²¹⁶ The House bill, which was reported on 24th July, sponsored by Wayne Hays (D-OH), eleven Democrats, and three Republicans, was a much more conservative bill. Although HR16090 provided limited public funding for presidential elections and national nominating conventions, it failed to control the unethical practices uncovered by the Ervin committee, to regulate special interest contributions and, perhaps most importantly, failed to provide for a strong enforcement authority. Hays proposed a seven-member Board of Supervisory Officers. This Board would be comprised of the Secretary of the Senate, Clerk of the House, Comptroller General and four other Congressionally appointed public members, each serving staggered, four-year terms. The Board would have similar powers to the Senate bill, except that the Senate Rules Committee and Hays' House Administration Committee could veto regulations developed and proposed by the Board. This model, appointed and controlled by Congress, was criticised in the Republican minority report. Bill Frenzel (R-MN), one of the bill's original sponsors' commented 'if Congress' response to Watergate is to increase its control over federal elections, then it would be hard to blame the public for becoming even more cynical and alienated.'²¹⁷

The House bill was not popular with moderate Republicans or liberal Democrats, who favoured a stronger enforcement agency. The bill reported out of committee was very much a product of Wayne Hays, who had built up a considerable power base, through what one

²¹⁶ Comment (1974) 'House Campaign Finance Bill Reported': *Congressional Quarterly Weekly Report*, 32, (32) August 10, 2157.

²¹⁷ Comment (1974) *Congressional Quarterly Weekly Report*, 32 (32) 2158.

critic called 'nikel-and-diming-things.' Hays, as Chairman of the House Administration Committee, had control over awarding fringe benefits to House members. Office space, stationery, telephone, and postage allowances, could be awarded to supporters, or withheld from opponents. Also, as Chair of the House Democratic Campaign Committee, he could exercise patronage power through the dispersal of cash to House candidates.²¹⁸ His aggressive personality and autocratic behaviour made him loathed and feared by many in the House, despite having support from an eclectic group of liberals, conservatives, and black caucus members.²¹⁹ Before opponents to his Congressionally dominated supervisory board could adopt an entrenched position, Hays seized the initiative, and proposed concessions of his own. These moderate changes closed a minor disclosure loophole on expenditure items below \$500²²⁰ and gave the supervisory board a little more independence, something already proposed by fellow Democrat, John Brademas (D-IN). The board would be reduced to four public members, with the Comptroller General being removed, and the Clerk of the House, and Secretary of the Senate sitting as *ex officio* non-voting members. A final concession allowed that regulations proposed by the board would not be examined and possibly vetoed by particular Congressional committees, but by the whole House or Senate.²²¹ Changes to the bill pleased critics like Bill Frenzel (R-MN),²²² but angered many

²¹⁸ www.virginia.edu 19.01.01

²¹⁹ Evidence of the fear Hays could generate was displayed when the Democratic Steering and Policy Committee voted to oust him from his Chairmanship of the House Administration Committee. Although a replacement was voted in, 15-9, when an open vote was held by the Democratic Caucus, Hays was backed twice, 176-109, & 161-111. Comment (1976) 'Hays Committee: Frightening Base of Power': *Congressional Quarterly Weekly Report*, 34, (22) May 29, 1976, 1334.

²²⁰ Spending on food, beverages, invitations, personal property, and travel expenses would have to be disclosed, but it would not count against expenditure limits. Comment (1976) 'Congress Clears Campaign Financing Reform': *Congressional Quarterly Weekly Report*, 32 (41) 2869.

²²¹ The original bill would have allowed Wayne Hays to have *de facto* control over regulations as his committee would have had veto power.

²²² Frenzel commented 'I think the bill is in a good bill to provide reasonable independent supervision, and yet keep control of the regulations so that no supervisory agent can run roughshod over the Congress.' Comment (1974) 'Speedy Conference on Campaign Reform Seen': *Congressional Quarterly Weekly Report*, 32 (33) 2236.

others.²²³ The Hays amendments were accepted, and the House bill was passed on August 8 1974, by 355-48.

House/Senate Conference Committee

Wayne Hays was again determined to get his own way in negotiations with the upper chamber. He commented:

'When we go to conference, this will be the board or there 'ain't' going to be any bill, and I will not give in to the Senate on this one, and I know other conferees will not either.'²²⁴

The conference committee met between September 17, and October 3 1974. They would have met sooner, but Hays objected to the named Senate conferees. As Hays had used bullying tactics to defeat the Senate in conference before, a group of political 'heavyweights' were delegated to negotiate their position.²²⁵ Of the 138 differences to be reconciled between the two bills, public financing and enforcement were the main issues of contention. Although Hays had made it clear that he would not compromise over the

²²³ Dawson Mathis (D-GA) charged that the bill was being pushed through by Common Cause, and warned that the board could turn on Congress, as it failed to control it under the new amendment. He continued 'we are going to set up a bunch of head-hunters down here who are going to spend their full time trying to make a name for themselves persecuting and prosecuting members of Congress.' Bill D. Burlison (D-MO) said that by accepting the amendment, the House would be 'setting the stage for making it impossible for an incumbent to get a fair shake before this group.' Comment (1974) *Congressional Quarterly Weekly Report*, 32 (33) 2236.

²²⁴ Comment (1974) *Congressional Quarterly Weekly Report*, 32 (33) 2236.

²²⁵ Hays particularly disliked high-profile Senate conferees Edward Kennedy (D-MA), Russell Long (D-LA), and John Pastore (D-RI). All advocated a strong enforcement commission, higher spending limits, and comprehensive Congressional public financing. Comment (1974) 'Campaign Finance Reform': *Congressional Quarterly Weekly Report*, 32 (40) 2691.

enforcement apparatus, one might argue that it was public financing that he was most opposed to. The Senate wanted public financing, as their campaigns were particularly expensive. Obtaining public funds would relieve candidates from relying on special interest money, and the consequent *quid pro quo* pressures that this could generate. Although House races were cheaper, they often lacked competition, as challengers were rarely able to raise sufficient funds to oust incumbents. Public funding would reduce the advantages of incumbency and encourage competition. As Hays wanted to maintain the Democratic majority in the House, he had no intention of allowing the Senate to try to 'level the playing field,' under the guise of fighting special interest money. Additionally, incumbency advantage was particularly salient as Senators had poorer re-election success rates than House members.²²⁶ Therefore Hays wanted to maintain the status quo and avoid encouraging Democratic challengers to his safe, one-party district with the lure of guaranteed funds.²²⁷ He had more to lose over extending public funding to House elections than he did over concessions on an electoral Commission.

Hays was able to achieve his strategic objectives in conference by using a variety of tactics. The objections to named Senate conferees and the five-week delay before agreeing to the first meeting were probably designed to manipulate the atmosphere in his favour. For example, if Hays could make Senate conferees anxious about losing the bill altogether, or make them think he was an unwilling participant, they might have been more inclined to make concessions to him in conference. Also, Hays had made a number of tough sounding

²²⁶ Alexander H (1984) 37. Data that sets out House and Senate re-election success rates would support the argument that House candidates wished to maintain the *status quo*. For example, Senate re-election success rates for 1968 were 71.4%, rising to 77.4% in 1970, falling to 74.1% by 1972. The re-election success rate for House candidates in 1968 was 90.6%, 94.3% in 1970, and 93.0% in 1972. *Statistical C* (1974) 1401-1402.

²²⁷ Hays commented, 'If the government guaranteed every challenger ninety thousand dollars, five hundred candidates would run in every district.' 'It would be a travesty for every rip-off artist in the country.' www.virginia.edu 19.01.01.

public statements on his attitude towards certain key provisions, enforcement being one example. When Hays made small concessions in conference they would take on more significance, as he had rescinded on a well-known 'entrenched' position. Additionally, his success in conference involved inserting spoof or ghost provisions into a bill. One inserted into HR16090 limited the acceptance of honoraria, and was known to irk the Senate. This was deleted in conference, as a trade-off in return for Senate concessions.²²⁸ Hays took advantage of his reputation and used bluster to assert misleading positions that he was not committed to. This, and the insertion of spoof legislative proposals that could be traded out later, were part of a successful holistic negotiating strategy. The outcome was that public financing of Congressional elections was deleted from the bill. It would only be extended to cover presidential races and national nominating conventions, something already contained in the House bill. Hays agreed to the higher spending limits desired by the Senate and made some minor concessions on the structure and authority of the election Commission.²²⁹ Gerald Ford reluctantly signed the FECA 1974 into law on 15th October 1974.²³⁰ The law became effective on 1st January 1975, though the Commission failed to become operational until April 1975, due to a delay in making Commissioner appointments. Reform had been achieved, and for the first time campaign finance laws were to be administered, monitored and enforced not by Congress, but by a separate Commission.²³¹

Establishment Of The FEC (1) (FECA 1974)

²²⁸ Comment (1974) *Congressional Quarterly Weekly Report*, 32 (33) 2233.

²²⁹ Comment (1974) *Congressional Quarterly Weekly Report*, 32 (40) 2691. Hays agreed that the Commission should have the authority to issue subpoenas, and seek injunctions. www.virginia.edu 19.01.01.

²³⁰ Ford disagreed with public funding of elections but, responding to Watergate, he declared 'that the times demand this legislation.' 'The unpleasant truth is that big-money influence has come to play an unseemly role in our electoral process, and the 1974 law will help to right that wrong.' www.virginia.edu 19.01.01.

²³¹ For a summary of the main provisions of the FECA amendments of 1974, see appendix d.

The law established a six-member, full-time Federal Election Commission. It was responsible for administering the FECA 1971 and its 1974 amendments. Two members of the Commission would be appointed by the U.S. President, two by the President Pro-Term of the Senate, and two by the Speaker of the House. Each pair of appointees was mandated to be from different Parties. Although the Commission had often been referred to as an independent executive agency, it might be more accurately described as a bipartisan one, as three Democrats and three Republicans sit at its apex. All Commissioners were subject to Congressional confirmation, which included House and Senate. The Secretary of the Senate and the Clerk of the House were made non voting, *ex officio* members, and would receive disclosure reports relating to House and Senate candidates.²³² Although the Clerk of the House and Secretary of the Senate were non-voting members, they were entitled to sit in on closed Commissioner deliberations affecting enforcement matters. One Commissioner would act as Chairman, one as Vice Chairman, on a rotating basis and each would serve six-year, staggered terms. It would receive disclosure reports from Congress, and manage a cumulative index of campaign finance data. The Commission was also responsible for administering the public financing programme, and dispensing funds in accordance with the law. The Commission would also make regulations, subject to Congressional review within thirty days, and issue advisory opinions. Regulations made the law more understandable and had general applicability, whilst advisory opinions clarified the law in more particular cases. The Commission could subpoena witnesses and information, could seek civil injunctions, and had the power to select committees for random audit. Finally, serious knowing and wilful violations were to be referred to the

²³² The Commission had proposed that disclosure reports mandated under the Act should be filed directly with the Commission, rather than indirectly through the House Clerk and Secretary of the Senate. Hays and his colleagues were irked by this proposal and immediately voted it down. Jackson B (1990) 27-28.

Department of Justice for criminal prosecution.²³³

Despite the achievement of reform and optimism for the future, it was less than a year before the Judiciary and Congress seriously undermined the statute and the Commission. Important parts of the law were ruled unconstitutional and Congress reduced the potential efficacy of the Commission through its 1976 and 1979 amendments of the FECA.

Constitutional Challenge To The Commission

BUCKLEY v VALEO, 424 U.S. 1 (1976)

The Supreme Court decision in *Buckley v Valeo* had a profound affect on the breadth and efficacy of campaign finance regulation. As recently as 1997, a member of the American Bar Association described the case in a panel discussion as 'controlling like a huge oak tree in the middle of the playing field.'²³⁴ Senator James Buckley (Cons-R-NY), Rep. William Steiger (R-WI), former Senator, Eugene McCarthy (D-MN), and the New York Civil Liberties Union, filed 34 complaints challenging the FECA's constitutionality. In January 1976, the court ruled that expenditure limits were unconstitutional, as they infringed free speech protection guaranteed under the First Amendment.²³⁵ Therefore, the Court equated spending money with free speech. The exception to this rule was presidential candidates who had voluntarily accepted expenditure limits in return for public funds. However, the court upheld the Act's disclosure provisions and contribution limits. Disclosure mandates

²³³ Comment (1974) *Congressional Quarterly Weekly Report*, 32 (41) 2866 & 2868.

²³⁴ Comment (1997) 'Seeking a Fix for Election Law: Panelist says First Amendment protections may block reform efforts: *AMERICAN BAR ASSOCIATION JOURNAL*, 72.

²³⁵ The first amendment to the constitution reads: Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and petition the government for a redress of grievances.

and contribution limits were justified by the court, as they helped to protect the democratic process from corruption, whether real or perceived.²³⁶ Not surprisingly, given the parochial way Congress had mandated appointment to the Commission, the Court ruled that the FEC was unconstitutional. The Supreme Court concluded that the Commission broke the separation of powers and the appointment clause of the Constitution. As the Commission was partly appointed by Congress yet performed executive functions, it was unconstitutional and Commissioners were not, therefore, officers of the United States.²³⁷ The timing of this decision was especially problematic, as the 1976 presidential election had started, and the Commission could not authorize dispersal of Federal funds until the issue had been resolved. The options under consideration were to reconstitute the Commission with Presidential appointees, something President Ford advocated,²³⁸ allocate FEC functions elsewhere, something Hays had proposed²³⁹ or, finally, attempt more radical reform.

FECA 1976: Loosening The Law (1)

In May 1976, Congress passed, and the President signed, the FECA 1976, which contained considerable changes to the 1971 and 1974 Acts.²⁴⁰ In the Senate, the Rules Committee

²³⁶ Contributions were likened to acts of symbolic political support. Placing limits on the level of contributions permitted did not, in the Court's opinion, negate the symbolic act itself.

²³⁷ Burke D (1995) 365-366. Although two of the Commissioners might seem to have been appointed constitutionally by the President, the House of Representatives had participated in their confirmation, something that was unconstitutional.

²³⁸ President Ford wished to facilitate the re-establishment of the FEC and leave any other legislative changes until after the 1976 elections. Comment (1974) 'Partisan Wrangle Delays Campaign Bill': *Congressional Quarterly Weekly Report*, 34 (12) 603.

²³⁹ Hays did not seriously consider allocating Commission functions elsewhere, as Congress was under pressure to reconstitute the agency. Jackson B (1990) 28. Moderate Republicans and liberal Democrats had argued against the passage of any interim legislation designed to facilitate Commission functions. Bill Frenzel (R-MN) said 'Once that happens, the game is over, there'll be no election commission.' Comment (1976) *Congressional Quarterly Weekly Report*, 34 (6) 270.

²⁴⁰ www.brook.edu 8.3.01 document 2.10.

proposed changes to the structure and authority of the FEC, through its bill, S3065. The six-party affiliated Commissioners were to be joined by two independents.²⁴¹ The bill also contained provisions that would restrict FEC authority to investigate complaints, if they failed to meet certain criteria.²⁴² Opposition to the bill came from Republicans and Robert Griffin (R-MI) and Bill Brock (R-TN) proposed their own bill. Under Griffin-Brock, Commissioners would be re-appointed by the President and confirmed by the Senate. This would reconstitute the Commission in accordance with *Buckley*. Although the Griffin-Brock proposal was defeated twice and S3065 was passed on March 24, both were relatively conservative measures towards FEC reform.²⁴³

This was in stark contrast to the House version HR12406 which, under the stewardship of Wayne Hays, proposed major reductions in FEC power and authority. As had occurred on two previous occasions, 1972 and 1974, Hays prevailed in conference. This time, the fledgling FEC had already made itself sufficiently unpopular with both Parties for Hays to encounter only token opposition in conference committee. Many law-makers had complained that the FEC had gone beyond what Congress had intended in its interpretation of the law, and warned that Congress might move to limit its power if it was not more cautious.²⁴⁴ For example, Senator John Pastore (D-R-I) criticised the FEC, saying that 'we were running like scared rats...we thought the stronger we make it, the more the people

²⁴¹ Comment (1976) 'Senate Accepts Compromise Campaign Bill': *Congressional Quarterly Weekly Report*, 34 (13) 675.

²⁴² Comment (1976) 'Congress Clears New Campaign Finance Law': *Congressional Quarterly Weekly Report*, 34 (19) 1105.

²⁴³ Comment (1976) *Congressional Quarterly Weekly Report*, 34 (13) 675.

²⁴⁴ Comment (1976) *Congressional Quarterly Weekly Report*, 34 (6) 269.

²⁴⁵ Jackson B (1990) 28. Many in Congress had moaned their post-watergate enthusiasm for the agency. Hays commented 'the Commission went so far astray from Congressional intent in their interpretation of the law, that it appears wisest for Congress to re-evaluate this prior approach, and perhaps look toward a different way of monitoring election campaigns.' Comment (1976) 'Campaign Finance: Congress Weighing New Law': 76

would believe us.²⁴⁵ Opposition to FEC investigatory, rule-making, and enforcement activities, was reflected in bipartisan support for the conference report.²⁴⁶

The following provisions contained in the FECA 1976 related to the enforcement process:

1. The Commission was reconstituted with six full-time members, appointed by the President and confirmed by the Senate. The Secretary of the Senate and the Clerk of the House were retained as *ex officio* non-voting members of the Commission. This made them privy to private meetings concerning enforcement actions.²⁴⁷ Four affirmative votes would be required for the Commission to take any official action. This proviso included initiating investigations, issuing advisory opinions, regulations, civil actions and all other enforcement activities.²⁴⁸

2. Congress awarded itself the power to disapprove regulations and specific parts of regulations issued by the FEC. This was essentially a *de facto* line item veto. Congress vetoed the first two regulations proposed by the Commission. These included: (1) that the FEC should be the sole point of entry for the filing of disclosure reports; (2) that the office accounts of Congressmen were to be strictly regulated.²⁴⁹ This power was the most serious

Congressional Quarterly Weekly Report, 34 (6) 270.

²⁴⁶ In the votes to ratify the final conference report on the 1976 amendments, 218 House Democrats were supported by 73 Republicans, and 49 Senate Democrats were supported by 13 Republicans. Comment (1976) *Congressional Quarterly Weekly Report*, 34 (19) 1104.

²⁴⁷ On October 22 1993, a decision was handed down by U.S. Court of Appeals for the District of Columbia in *FEC v Nation Rifle Association, Political Victory Fund*, that Congress exceeded its authority placing *ex officio* representatives on the Commission. Comment (1993) 'Ruling May Unleash Torrent of Challenges to the FEC': *Congressional Quarterly Weekly Report*, 2944. The case was appealed by the FEC, but was dismissed for lack of standing. *FEC Twenty Year Report*, Chapter 5, 55. This process many critics of the FEC, who often referred to *ex officio* members as 'Congressional spies.'

²⁴⁸ Comment (1976) *Congressional Quarterly Weekly Report*, 34 (20) 1223.

²⁴⁹ Cowett A (1989) 'Walking on Eggshells: The Federal Election Commission and Political Regulation': 53.

presidential objection to the bill, as it could enable Congress to manipulate the effect of the law, in order to maximise partisan advantage.²⁵⁰ Additionally, advisory opinions issued by the Commission in lieu of regulations could only apply to specific cases of fact and contained no general applicability.²⁵¹

3. Commissioners were prohibited from engaging in outside business activities, and were given one year to terminate their private work after appointment. This was aimed at removing Commission Chairman, Thomas Curtis, who Hays had argued with on many occasions during 1974 and 1975.²⁵² As Curtis maintained a law practice in St Louis, pressure was applied to remove him under the guise of conflict of interest.²⁵³

4. The Commission was prohibited from investigating complaints that had not been signed, sworn and properly notarised. An investigation could only be initiated if, through the normal process of its duties, it found 'reason to believe'²⁵⁴ that a violation had occurred or was about to occur. Anonymous 'tip-offs,' administratively flawed complaints, and violations publicised in the media could not be investigated.²⁵⁵

5. The Commission was also mandated to employ informal 'methods of conference,

²⁵⁰ Comment (1976) 'Ford Agrees To Sign Campaign Finance Law': *Congressional Quarterly Weekly Report*, 34 (20) 1223.

²⁵¹ Comment (1976) *Congressional Quarterly Weekly Report*, 34 (19) 1105.

²⁵² When the Commission was barely one month old, Hays shouted at Curtis, telling him that the agency would not get a multiyear budget. Hays said, 'you're not going to set the ground rules, as chairman, I'll tell you. You're coming back every year for an authorisation.' Jackson B (1990) 27.

²⁵³ After the FECA 1976 was passed, Curtis resigned from the Commission. He wrote to President Ford, complaining that changes to the law undermined the independence of the Commission, and therefore no longer offered an opportunity of public service. Comment (1976) *Congressional Quarterly Weekly Report*, 34 (17) 1104.

²⁵⁴ The term 'reason to believe' is just one technical standard used by the FEC to indicate the stage an enforcement case has reached. Cain B & Lochner T (1999) 1906.

²⁵⁵ Comment (1976) *Congressional Quarterly Weekly Report*, 34 (20) 1224.

conciliation, and persuasion,²⁵⁶ when seeking compliance with the law.²⁵⁷ This provision was based on a voluntary compliance ethos and a belief that most of the regulated community wanted to comply with the law. It also recognised that an overly vigorous FEC might fall foul of first amendment protections in the courts.²⁵⁸

FECA 1979: Loosening The Law (2)

The law under which the FEC functioned was amended again in 1979. It was the product of a House bill, HR5010, and a broadly similar Senate version, S1757, both of which received a smooth passage through their respective chambers. After an unusually co-operative conference committee, President Carter signed the reconciled bill on January 8, 1980. The amendment was motivated by three concerns. Firstly, that the FECA was stifling grass-roots politics and restricting the role of Parties in the political process. This was addressed by allowing Parties to spend unlimited amounts on certain party-building activities. This would prove to make the regulation of 'soft money' or non-federal funds more difficult, despite its role in affecting the outcome of federal elections.²⁵⁹ Secondly, that the reporting requirements mandated by the act were too complex, repetitious and generally too burdensome. Congress responded by reducing the administrative responsibilities on filers, and more specifically by requiring fewer reports per election cycle. Thirdly, some in Congress complained that they were being unfairly treated by the FEC. The way it

²⁵⁶ Section 314 (a) (5) FECA 1976.

²⁵⁷ David P (1976) 279.

²⁵⁸ Curtis T (1979) 831.

²⁵⁹ The term soft money denotes 'funds raised and/or spent outside the limitations and prohibitions of the FECA. These non-federal funds often include corporate and, or, labor treasury funds, and individual contributions in excess of the federal limits, which cannot be legally used in connection with federal elections, but which can be used for other purposes.' FEC Twenty-Year Report: www.fec.gov/pages/ch3 24.8.00. Candidates and committees must keep their federal and non-federal funds separate. Although soft money expenditures are not supposed to benefit federal candidates, they do, by campaigning for federal and non-federal candidates at the same time, and by distorting the commonly understood meaning of 'party-building activities.'

monitored candidate committees through its compliance programme often irked incumbents. Therefore the House Administration committee removed the authority of the FEC to conduct the random audit of committees. Although its removal weakened the deterrent system, the FEC had suspended using random audit by 1978,²⁶⁰ after some in Congress likened them to 'fishing trips.'²⁶¹

Conclusion

In conclusion, the enforcement of political finance regulation has been undermined by the courts, the executive and most consistently, by Congress. In *U.S. v Newberry* (1921), the court declared that Congress lacked the authority to regulate primary elections. This nullified much of the effectiveness of the 1910 and 1911 Acts, and shaped the regulatory parameters of the 1925 FCPA. This decision was not reversed until 1941, when the court over-ruled the *Newberry* decision in *U.S. v Classic*. In 1973, the court also ruled that certain provisions of the FECA 1971 designed to control media expenditures were also unconstitutional. Although that decision would have adversely affected less wealthy candidates had it not been for Watergate and the passage of more comprehensive reform, the court made its most significant ruling in *Buckley v Valeo* (1976). In *Buckley*, the Supreme Court ruled that compulsory spending limits infringed freedom of speech

²⁶⁰ The FEC denied that Congressional pressure had been responsible for the suspension of random audit. They claimed that the suspension was the result of resource constraints. Light L (1980) 1024.

²⁶¹ The FEC had attracted criticism for carrying out allegedly unwarranted audits, after it often found committees in substantial compliance. Some in Congress claimed that the random audit of their campaigns would confuse the public, leading them to think violations had already been found. Members also claimed that it was unproductive, wasted money, and encouraged opponents to exploit the process for political gain. Alexander H (1984) 51. Consequently, the House Administration Committee voted by 19-2 to deny any more funding for random audit. Republican Commissioners voted to continue random audit, but all three Democratic Party appointees voted against it. Jackson B (1990) 30.

protected under the First Amendment. In the courts view, there was compelling governmental interest in limiting contributions, as this guarded against the real or perceived corruption of the electoral system. Contribution limits were designed to prevent the emergence of *quid pro quo* relations between contributor and recipient. Although the court took the view that political disbursements did not pose the same threat of corruption, as it was impossible for the individual to corrupt him/herself, the ruling on expenditure limits negated efforts to make electoral politics more egalitarian and circumscribed the disclosure model of enforcement. The electorate remained ignorant about political disbursements, as the law could not require their disclosure. Therefore, the democratic model of enforcement supported by Cain *et al* could only represent one facet, the origin, not the destination of political money. The court has also failed to clarify the constitutional uncertainty surrounding the law, and has often been loathe to convict in political finance cases. In *U.S. v United States Brewers Association* (1916), the court allowed the uncertainty surrounding the regulation of presidential electors and Senate races to continue. In *US v Burroughs* (1934), the court failed to convict, acquitting on the basis of a technicality, despite the respondent's challenge to the law and the multiple violations involved. Additionally, by erring towards strict constructionism, as in the *Newberry* case, the courts removed much of the statute's authority over the regulated community. By interpreting the constitution in this way, the statute effectively became a skeletal version of the one passed by Congress, and its utility was lost. Although few in number, these cases were particularly significant, as so few political finance cases reached the courts.

The Department of Justice has been unwilling to prosecute individuals for campaign finance violations. No prosecutions occurred under the 1907 Tillman Act, and the only case brought under the 1910 and 1911 Acts was discontinued after the respondent admitted the

offence.²⁶² This tradition of prosecutorial inertia continued under the 1925 FCPA. The few cases that were prosecuted tended to be related to ballot box stuffing or vote buying, perhaps not generically political finance offences. Justice did make some attempt to enforce the law by prosecuting a number of corporations in the late 1960s and early 1970s, but this was not indicative of any significant change in policy. For example, in 1972, when W. Pat Jennings, House Clerk, attempted to improve enforcement by referring 4,900 cases to Justice, they responded by prosecuting three cases. Justice also prosecuted a token number of referrals it received from Francis Valeo, Secretary of the Senate. When criticised for its lack of vigorous enforcement, the Department of Justice tended to respond by blaming Congressional officers, or by arguing that insufficient precedent existed to prosecute offenders. Campaign finance law was not a priority in the Department, and few staff or resources were ever dedicated to the public integrity section. Additionally, the post of Attorney General has traditionally been an appointment given to individuals as a reward for their role in the President's successful election. Therefore, if Justice prosecuted the opposing party, such action might be seen as politically motivated. Retaliation might come in the form of accusations relating to the governing party's political finances, or more seriously, obstructionism in the legislature. Additionally, by prosecuting the governing party, the Attorney General would be open to accusations of disloyalty from the rank and file and aggressive political lobbying and legal action should the respondent be a high-profile actor. The Department of Justice has preferred to concern itself with apolitical criminal offences. In so doing, it has managed to avoid political controversy, and avoid becoming involved in the complex constitutional issues that sometimes surround political finance cases. It has also saved public money by avoiding costly and protracted litigation,

²⁶² Orrin Bleakley (R-Pen), elected to the House of Representatives, resigned his seat after admitting exceeding the \$5,000 spending limit.

yet this policy has seriously undermined the enforcement of political finance laws.

Although the courts and the Department of Justice have played a significant role in promoting a *laissez-faire* regulatory environment, Congress has been most active in hobbling enforcement. Despite the historical scandals that have provoked Congress into passing legislation, much of the law passed has been inherently flawed, either by its narrow remit or by its definitional failures. For example, the Tillman Act failed to regulate Parties, committees, or candidates. It also failed to contain any disclosure mandates, making the Act's corporate prohibitions meaningless, as contributions were not subject to public scrutiny. The 1910 and 1911 Acts were a qualitative improvement on the Tillman Act. They included prohibitions on the sources of funds, mandated spending limits and provided for public disclosure. However, Congress squandered this legislative achievement, as neither Act was enforced. In the light of the *Newberry* decision, the 1925 FCPA failed to regulate the primary or nomination process. This narrow remit meant that a large proportion of the financial activities affecting the outcome of general elections went unregulated. Although one might not criticise Congress for passing a law that reflected constitutional realities, the 1921 decision was not the court's most persuasive. Had Congress displayed the political will to bring primaries into the regulatory framework, the court may well have supported a fresh legislative initiative. Justices Brandeis, Clark, Pitney and White argued that Congress did have the authority to regulate primaries, and Justice McKenna argued that it might have the authority to do so. When the court gave its express authority to regulate primaries in 1941, through its *Classic* decision, Congress failed to legislate until 1971. Congress wished to avoid regulating primaries, as expenditure limits would have reduced some of the advantages incumbents enjoyed over their less well-known, less well-financed challengers. The 1925 Act was also seriously undermined by the

numerous exceptions to its spending limits, and the way it defined 'political committee.' The reality was that spending limits became meaningless, and committees campaigning in one state were able to operate without being regulated at all. The 1971 Act also had a number of loopholes. By defining 'candidate' in such a narrow way, it allowed individuals to campaign without formally declaring their candidacy. This led to individuals behaving like candidates, campaigning and advancing their political careers, whilst avoiding regulation. Furthermore, the political finances of social clubs and other fraternal associations were not adequately regulated, and neither were loans or other familial gifts to candidates. Despite these weaknesses, the 1971 and 1974 Acts were more comprehensive than previous legislation. The 1971 Act brought primaries within the regulatory framework and attempted to control the spiralling costs of electioneering. A product of Watergate, the 1974 Act introduced spending limits, contribution limits, strict disclosure mandates and established the Federal Election Commission. Yet it was not long before Congress passed further legislation in the form of the 1976 and 1979 FECAs, that adversely affected enforcement. Congress could micro-manage the FEC rule-making process by exercising its *de facto* line item veto. The voluntary compliance ethos introduced by Congress also made it difficult for the FEC to resolve enforcement cases without entering into lengthy negotiation with respondents. Finally, Congress eroded the use of the media as a source of information about political finance abuse, as complaints would only be legally recognised and investigated if they met strict legal criteria. The 1979 Act made enforcement less meaningful as it legitimised and encouraged the use of 'soft money' for 'party-building' activities. As more money was spent outside Federal regulations, seeking compliance becomes increasingly marginal, as regulated money becomes a fraction of the whole. The Act also reduced reporting requirements, and more significantly for enforcement formally removed the authority of the FEC to use random audit.

In addition to these legislative issues, Congress has also shown a historical unwillingness to carry out the enforcement responsibilities it has awarded itself. It resisted initiatives to establish an independent enforcement authority, something that was called for in 1928, 1962 and 1970. The existing parochial enforcement arrangements appeared to suit vested interests in Congress. No enforcement mechanism was established under the Tillman Act, and the Clerk and Secretary of the Senate failed to enforce the 1910 and 1911 Acts. This *laissez-faire* enforcement ethos continued under the 1925 Act until the Clerk of the House, W. Pat Jennings, made an attempt to strengthen the process in the early 1970s. As the Clerk and Secretary were dependent on influential Congressional leaders to retain their positions, neither usually risked antagonising their employers, and would attempt to protect them from unwanted scrutiny. Congressional employees could be obstructive to those seeking disclosure information. Records were destroyed and access to important documents was arbitrarily withheld. Under the 1910 and 1911 Acts, no central disclosure repository existed, and under the 1925 Act, the repository had short opening hours, and only allowed the copying of reports by hand. Congress preferred to investigate alleged campaign finance violations itself, often through *ad-hoc* committees. This method of intra-Congressional regulation rarely led to substantive action being taken against wrongdoers, yet it provided the appearance of maintaining probity and compliance with the law. Although the courts and the executive have undermined the enforcement process, Congress has used legislative, budgetary, oversight, and appointment powers to ensure that enforcement never seriously challenged the interests of incumbents.

CHAPTER 2

FEC PERFORMANCE

Prior to Watergate and the establishment of the FEC, campaign finance laws were largely unenforced.¹ The long history of scandal, reform and non-enforcement was a cyclical process and something ingrained in political culture. To repair the integrity of the electoral process, the FEC was instructed to 'administer, seek to obtain compliance with and formulate policy'² with respect to the FECA.³ This remit led the FEC to becoming a small, but multifunctional bureaucracy with three primary roles:

1. administration of the Presidential Public Funding system
2. management of and providing access to, disclosure reports and other information
3. enforcement of disclosure requirements, limits and prohibitions on contributions.⁴

When commenting on or assessing FEC performance, some leading academics fail to establish benchmarks upon which the agency might be judged. For example, Cain and Lochner liken campaign finance violations to victimless crimes, in that they do not create a

¹ Gross K (1990) 'Enhancing Enforcement,' in Nugent M & Johannes J (Ed) *Money, Elections, and Democracy: Reforming Congressional Campaign Finance*. San Francisco, West View Press, 225.

² 2 U.S.C. 437c(b)(1) (1994).

³ Bowman J & Thomas S (2000) 'Symposium: Regulation of Politics, Federal Election Commission, Obstacles to Effective Enforcement of the Federal Election Campaign Act', *Administrative Law Review* 52 (2) 576.

⁴ The FEC refer to agency functions as programmes. These programmes are divided into core programmes, and management programmes. Core programmes include: disclosure, compliance, public financing, and election administration. Management programmes include: information technology, electronic filing projects, commission policy, and administration. FEC Budget Request 2001 www.fec.gov/ 11.7.01

⁵ This view is questionable, as a defeated candidate may claim injury or loss if his/her opponent enhanced their campaign by breaking campaign finance law. Additionally, there exists the more abstract injury or loss

readily identifiable injury or loss.⁵ They argue that as this precludes the establishment of an aggregate or baseline number of violations, it is difficult to assess the efficacy of enforcement regimes. For Cain and Lochner the perception of failure by 'some Parties' is a sufficient foundation upon which to base their later explanatory comments.⁶ This scenario leads them to ignore the measurable, often quantifiable, performance indicators that the FEC strives to achieve. For example, in response to the Government Performance and Results Act 1993, the FEC is required to set out clear performance objectives and goals.⁷ These institutional aims were first transmitted to Congress in 1995 in the form of a strategic plan.⁸ From these long-term objectives, an annual performance plan is drafted and submitted with the budget request to the Office of Management and Budget (OMB).⁹ These performance objectives have remained largely unchanged since their introduction. This reflects the enduring nature of institutional processes and the legal constraints placed on the agency.¹⁰

In the case of the FEC, GPRA objectives and goals are determined by individual parts of the bureaucracy and not by Commissioners. The structural composition of the Commission

to voters as a collective community. Perhaps Cain & Lochner might have substituted the word quantifiable for identifiable.

⁵ Cain B & Lochner T (2000) 'The Enforcement Blues: Formal and Informal Sanctions for Campaign Finance Violation': *Administrative Law Review* 52 (2) 632.

⁷ Although the GPRA was not implemented with any vigour until 1997, it was designed to address three governmental failures. Firstly, that there was an unacceptable level of waste and inefficiency in Federal programmes. Secondly, that attempts to improve efficiency were handicapped by the lack of clearly defined goals and insufficient information. Thirdly, that Congressional policy-making, oversight and budget decisions are hampered by insufficient attention to agency results. www.whitehouse.gov/omb 4.9.01.

⁸ www.fec.gov 5.9.01

⁹ The FEC is in a stronger position *vis a vis* the executive than many other agencies as it has concurrent submission authority. The budget and performance objectives are transmitted to the OMB first. The FEC receives a pass-back figure from OMB, which is the amount they are prepared to support. Should the FEC feel that this is significantly inadequate, they can appeal directly to Congress by presenting supporting arguments for their own figure. 2 U.S.C. 437d (9)(d)1.

¹⁰ Agencies are criticised from retrospectively 'adding new performance goals, omitting existing ones, or rewriting, and tinkering with others.' U.S. House of Representative's, Subcommittee on Governmental Efficiency, Financial Management and Intergovernmental Relations, Statement by Sean O' Keefe, Deputy Director, Office of Management & Budget, June 19 2001. www.whitehouse.gov/omb 4.9.01.

precludes long-term strategic management. Therefore, these performance indicators will be used more as an organisational tool in the discussion that follows and not as a representation of conscious management decisions from the top. When asked about GPRA performance objectives, Commissioner Mason commented:

David Mason. 'They are determined by the staffs and the individual offices involved and co-ordinated by the finance office. Those are bubble up processes from inside the agency and Commissioners don't participate in that goal-forming process. We fiddle with it a bit and say, "well, we ought to be able to do a little better here, or this doesn't look very important, or something like that."¹¹

David Mason. 'I understand why you are trying to use that as a tool, but to be blunt about it, I don't see much relationship between the GPRA and how the Commission operates. I don't see it as a particularly useful set of management tools, as representing a particularly useful set of management oversight tools for OMB or Capitol Hill. It may be different for other agencies, I don't know. If you had a single administrator, there are certain things that you could perhaps get into a more orderly process, but that would run counter to the very deliberate way the Commission was set up, to deliberately frustrate that sort of thing.'¹²

Despite this criticism, using the GPRA to examine FEC outputs is a worthwhile endeavour, as it enables observers to differentiate between what the agency tries to do and what academics and other observers think it ought to do.

¹¹ Interview with the author, Washington D.C. 22.10.01.

¹² Interview with the author, Washington D.C. 22.10.01.

In addition to setting out how agency resources are allocated between functional units,¹³ the budget request also contains a number of programme objectives. These objectives tend to be enduring statements of intent and sometimes contain idealist language like 'promoting public trust.'¹⁴ Programme goals are more numerous and have a more quantifiable, measurable quality. Despite the continuity of both indicators, they have sometimes been adjusted to reflect changing capacity, workload and institutional aspirations. Whilst these indicators are used in the examination of all three core programmes, the main focus of the chapter is dedicated to enforcement performance.

Administration Of Public Funding System

The public funding system provides financial support for those competing in Presidential primary and general elections. Parties also receive funds for the presidential nominating conventions in an election year. Although the U.S. Treasury acts as the funding repository, revenue for the programme is raised from a voluntary \$3 Federal Income Tax check-off.¹⁵ The FEC acts as a gatekeeper, determining eligibility criteria for primary matching funds, and assessing how much candidates should receive. Candidates have to raise \$5,000, in individual contributions of \$250 or less, in at least twenty States to become eligible for the programme.¹⁶ General election candidates receive a flat sum, which was established in 1976 at \$21.8 million for a major party candidate. This figure reached \$61.8 million in

¹³ The budget justification contains historical data to aid comparative examination and sets out the number of full-time employees allocated to particular divisions and offices.

¹⁴ FEC BUDGET REQUEST 2001 PROGRAMME III. PUBLIC FUNDING OF PRESIDENTIAL ELECTIONS

¹⁵ Couples have an opportunity to contribute \$6, if joint filers.

¹⁶ FEC Annual Report (1999) Presidential Public Funding (Ch5) 35.

1996 and \$67.56 million in 2000, as the formulae had been inflation indexed. The figure for nominating conventions was set at \$4 million in 1974, a figure that rose to \$12.3 million in 1996, and \$13.5 million in 2000. Presidential candidates must electronically submit disclosure reports to, and agree to be audited by, the FEC. If these Title 26 audits uncover any irregularities or errors, candidates or committees may have to make repayments to the Treasury. The FEC 2001 budget request set out the following objectives and goals for the Public Funding System:

(A) Objective: Certify the eligibility of Presidential candidates and committees for federal payments in a timely and accurate fashion.¹⁷

Goal: Process the certifications quickly and accurately.¹⁸

Process Performance: The data to establish threshold qualification and primary matching funds is received by the Deputy Assistant Staff Director (DASD). The DASD and a number of temporary staff verify the cheques by State, verify contributor information, and analyse submissions for any unusual patterns or trends.¹⁹ The process is then repeated twice by another member of staff, reviewed by the DASD, and finally checked by an in-house auditor. A range of information technology applications assist in certifying the legitimacy of submissions, which aids timeliness, and staff were praised for proactively working with candidates. Certifying convention funding and general election grants was accomplished quickly, as the process is straightforward and demands few resources. The recent

¹⁷ FEC Budget Request (2001) www.fec.gov. 11.7.01.

¹⁸ FEC Budget Request (2001) www.fec.gov 11.7.01.

¹⁹ The FEC, journalists, and other researchers have often used the identification of trends or conspicuous contribution patterns to uncover any number of nefarious strategies designed to evade FECA limits.

PricewaterhouseCoopers (PWC) audit found that staff followed standard review procedures and had a zero tolerance for errors.²⁰ However, the FEC has been less successful in achieving the timely completion of other Public Funding performance goals contained in the budget request:

(B) Objective: Promote public trust by ensuring that all public monies are accounted for and expended in compliance with the FECA.²¹

Goal: Complete all public funding audits within two years of the 2000 presidential general election.²²

Process Performance: The Commission has been criticised for the lack of timeliness in carrying out presidential, title 26 audits. These audits are an essential part of monitoring compliance with the law, and some have taken up to four years to complete.²³ This denies the electorate important disclosure information, and may result in a failure to recover public funds incorrectly released, as a three year statute of limitations applies.²⁴ There are a number of reasons for this lack of timeliness. Audits are nation-wide, and involve the scrutiny of many millions of dollars in transactions. Different state laws apply for primary elections, and involve many technical determinations relating to limits and qualifications. These processes make audits labour-intensive, and concomitantly, very expensive.²⁵

²⁰ PWC (1999) Technology and Performance Audit and Management Review of the Federal Election Commission, I 4.4.1.

²¹ Budget Request (2001) www.fec.gov 11.7.01.

²² Budget Request (2001) www.fec.gov 11.7.01.

²³ FEC Twenty-Year Report (1995): Presidential Public Funding, Audits. www.fec.gov/pages/ch2 24.8.00.

²⁴ www.opensecrets.org/pubs/law 3.3.01 A three-year statute of limitations applies to obtaining Treasury repayments, but violations of the FECA by candidates and committees can be subject to enforcement action for up to five years. Telephone enquiry to the FEC Press Office, 9.7.01.

²⁵ A Title 26 General Election audit takes on average 5,290 full-time employee hours (FTE), and costs \$142,000. A Title 26 Post Primary audit takes 5,085 FTE hours, and costs \$127,000. In 1996, the FEC carried out three general election audits, and eleven primary audits. PWC (1999) (vol 1) 4.4.2.

Streamlining the audit process, reducing Divisional reviews, abolishing some auditee waiting periods, employing more staff, and expanding the use of technology, are all measures that the FEC have taken to improve title 26 audit performance.²⁶ However, although 1992 audits were completed by 1994, the main Clinton/Gore 1996 committees were not audit-approved until June 3 1999. Another example of delay was Bob Dole's primary committee, Dole for President, Inc, which had a repayment determination of \$515,272 made in 1999 for over-spending.²⁷ Optimists might argue that this delay was an aberration, unrepresentative of future performance. For example, the 1996 elections involved widespread soft money abuses and illegal foreign contributions, which presented the FEC with a significantly increased workload.²⁸ Pessimists might point out that the litigation that affected the disputed 2000 election result, with its associated multi-million dollar defence fund spending, may again create an unexpected workload for the FEC. In summary, the FEC administered and managed the public funding system in a very similar way to that of its other responsibilities, rigorously, but lacking in timeliness. Like many bureaucracies, the FEC was found to consider efficiency and productivity as secondary priorities to confidentiality, impartiality and mistake avoidance.²⁹

Disclosure, Education and Outreach

Disclosure equips the electorate with information through a variety of media to enable them to make informed democratic choices. Interested observers have an opportunity to

²⁶ PricewaterhouseCoopers LLP (1999) 4.4.2.

²⁷ FEC Annual Report (1999) 38.

²⁸ FOOTNOTE 2 IN CHAPTER 1 DESCRIBES THE 1996 ABUSES AND SUBSEQUENT CONGRESSIONAL INVESTIGATION IN MORE DETAIL.

²⁹ PWC (1999) Executive Summary (ES-3).

access data concerning the origins, levels and frequency of contributions. In doing so, the FEC facilitates voluntary compliance with the FECA through 'sunshine' and openness. Larry Sabato asserted that, 'disclosure is the single greatest check on the excesses of campaign finance.'³⁰ Although broadly classified as disclosure responsibilities, the FEC carried out a number of diverse information management roles. Some of these were reliant on capital intensive information technology and some were very humanistic and involved conferences and workshops where people could ask questions and learn from FEC staff.

Review and Processing of Reports

The FEC attempted to achieve the following objectives and goals, which were also contained in their 2001 budget request.

(C) **Objective:** Review and process the financial reports filed by political committees, and the data taken from those reports, in an accurate, and timely manner.³¹

Goals:

1. Facilitate electronic filing of reports.
2. Place reports on the public record within 48 hours of receiving them.
3. Review all reports filed, 60% of which within 90 days.
4. Attempt to voluntarily correct the public record, by sending out Requests For Additional Information (RFAI).
5. Code and enter into the FEC's database 95% of disclosure reports within 45 days of their

³⁰ FEC Twenty-Year Report (1995): Best Efforts, www.fec.gov 24.8.00.

³¹ FEC Budget Request (2001) www.fec.gov 11.7.01.

³² FEC Budget Request (2001) www.fec.gov 11.7.01.

receipt.³²

Process Performance: The Disclosure, Data Systems, and Reports Analysis Divisions (RAD) held responsibility for achieving the objectives set out above.³³ The FEC has spent considerable resources encouraging electronic filing of disclosure reports and despite initial software compatibility problems, progress had been made.³⁴ The voluntary scheme, initiated in January 1997, had led to 1,000 committees filing electronically during 2000.³⁵ On June 15 2000 the Commission approved mandatory electronic filing for all committees receiving or spending in excess of \$50,000 per year. This became effective in January 2001, and should result in 98% of the regulated community filing electronically.³⁶ Reports had successfully been placed on the public record within 48 hours and in many cases within 24 hours, when filed electronically. RAD identified nearly 12,000 first and 6500 second RFAIs during 1996. For authorised committees, 40% related to mathematical errors, 23% related to missing reports, and 17% related to missing or inadequate information.³⁷ The remaining 20% related to FECA limitation or prohibition standards.³⁸ Levels for the year 2000 reached 13,475 first and 3,713 second RFAI requests.³⁹ A profile of the errors and violations identified for year 2000 data has not yet been published. Through review and clarification of transactions, an accurate public record was created.

³² FEC Budget Request (2001) www.fec.gov 11.7.01.

³³ PWC (1999) (vol 1) 4.2.4.

³⁴ As of November 1998, 250 committees filed electronically, although this represented a small percentage of all filers (3%). PWC (1999) 1 4.2.6.

³⁵ FEC Annual Report (2000) 1.

³⁶ FEC Annual Report (2000) 3.

³⁷ Bob Dahl of the Fair Government Foundation, a non profit organisation that promotes First Amendment rights' commented: 'the Reports Analysis Division (RAD) is given insufficient credit for both its appropriate monitoring function for enforcement purposes and perhaps more importantly, promoting compliance by encouraging correction of reporting errors or inadvertent violations of the law by committees.' U.S. House of Representatives, Committee on Government Reform, Subcommittee on Government Management, *Improving the Commission on Government Reform*, March 2000, p.

³⁸ PWC (1999) (vol 1) 4.3.1.1.

³⁹ FEC Annual Report (2000) 82.

Additionally, PWC carried out a survey of 353 committees from the filing community, using stratified random sampling. The results found that 86% of RAD staff answered questions promptly, 80% answered accurately and 67% stated that staffs were always available to respond to requests.⁴⁰ However, the filing community and others found the database somewhat dated and inflexible.⁴¹ Additionally, no database or manual record exists that collates financial disbursements. Therefore, the electorate remains ignorant of candidate and committee spending.⁴² For example, some not for profit, non-partisan groups receive funding from Party committees. Those funds are then spent in the furtherance of a political objective, yet they are exempt from the disclosure mandates contained in the law. Finally, the disclosure information on the database, when compared to the totality of unregulated, and unreported political spending, has become less meaningful, in the light of modern campaigning strategies.⁴³ Therefore, the database offers a snapshot of particular activity, but not an overall picture. A disbursement database would enhance the quality of disclosure. Despite process compartmentalisation (something prevalent across the board at the FEC⁴⁴) PWC concluded that the review and processing of reports was competently managed and productivity had increased.⁴⁵ Similarly, there appears to be a consensus that the FEC has been successful in achieving other objectives and goals that have helped to

⁴⁰ PWC (1999) 2 appendix b-1.

⁴¹ PWC (1999) 1 4.2.8.

⁴² PWC (1999) Executive Summary Exhibit ES1-ES4. This might be seen as a grave weakness in the utility of campaign finance data. The collection, analysis and disclosure of data on disbursements might prove just as informative to the electorate as data on contributions. Unlike receiving an unsolicited donation, choice is tangibly exercised when making expenditures. Therefore, spending may be indicative, or at least suggestive, of motivational behaviour and something that might well affect voting behaviour. According to Bob Biersack, deputy Press Officer at the FEC, attempts are being made to provide a database with information on disbursements but this is likely to take quite some time. Additionally, as the members of the Senate are not required to file electronically, data will remain incomplete in the future. E-mail response from Bob Biersack, 13.2.02.

⁴³ PWC (1999) 1 3.2.1.

⁴⁴ The PWC report found that FEC organisational units operate in a compartmentalized and autonomous manner that leads to diminished communication, collaboration, and innovation. PWC (1999) Executive Summary, 3.

⁴⁵ PWC (1999) Executive Summary, 5.

educate a broad constituency about political finance issues.

(D) **Objective:** Make the reports and data readily accessible to the public, media and filing community.⁴⁶

Goals:

1. Provide the public with Internet access to its disclosure databases, and digital images of the original reports.
2. Operate a storefront Public Records Office where reports and data is available in various forms, and where the public can access disclosure databases.
3. Operate a Press Office to assist the media with disclosure and dissemination of campaign finance data.⁴⁷

Process Performance: The FEC Internet web-site provides a range of campaign finance information, archive and administrative forms. Although it was updated in September 2000 and redesigned in 2001, there have been criticisms about the timeliness of the information posted.⁴⁸ Additionally, from the small group of filers (25) that was asked by PWC about the usefulness of the Internet web-site, 49% said that they had never accessed it.⁴⁹ However, as the PWC sample frame was small, the results should not be used to draw any substantive conclusions. The site averaged two million 'hits' per month, and in October 2000, received 10 million.⁵⁰ Finally, despite its apparent popularity, access to the digital images of the

⁴⁶ FEC Budget Request (2001) www.fec.gov 11.7.01.

⁴⁷ FEC Budget Request 2001 www.fec.gov 11.7.01.

⁴⁹ PWC (1999) 2 Q38.

⁵⁰ FEC Annual Report (2000) 6.

disclosure reports has not yet been provided.⁵¹

There is a broad consensus that the Public Records Office (PRO) provided a 'first class' storefront service. Its excellent reputation has been fostered since it opened its doors in 1975. The staff was found to be dedicated, knowledgeable, customer-friendly and responsive to individual needs. The PRO provided ample space, and its open plan working area reflected its egalitarian atmosphere. Additionally, the PRO provided extended hours, which included weekends and evenings, during busy filing periods.⁵² The 25 campaign finance indices also made the raw data more accessible and understandable for users. PRO staff conducted primary research for academics and students, and dealt with complex inquiries from Senators, members of Congress, and campaign organisations.⁵³ Divisional statistics for the year 2000 showed that the PRO had processed 1.6 million pages of data, dealt with 6,067 requests for finance reports, had 10,297 visitors and answered 11,183 telephone enquiries.⁵⁴ Craig Brightup, who worked in Public Records under Kent Cooper⁵⁵ from 1978-1981, explained why the PRO has been so successful:

Early on, we had to choose between two very different approaches to our data collection. The traditional view is to treat public records as a massive filing operation. That way, the main concern is keeping the information filed in proper order. The public can use the collection, if they can understand the filing system but the emphasis is on storing information. The alternative, which we opted for, was to treat our collection as public information, and make it as user-friendly as possible.

⁵¹ Digital images of reports can be accessed in-house, via the Public Records Office. FEC Annual Report (2000) 6.

⁵² Atlas S (1992) 'Frontline Heroes': *Government Executive* (March) 33.

⁵³ PWC (1999) 1 4.2.1.1.

⁵⁴ FEC Annual Report (2000) Appendix D, 84.

⁵⁵ Kent Cooper left to join another former FEC staffer, Tony Raymond, who set up the award-winning campaign finance Internet web-site, www.tray.com.

That way our visitors can easily become self-sufficient informed users.⁵⁴

Press Office staff summarise data on campaign finance, enforcement actions and issue press releases on the Commission's significant activities.⁵⁷ Although their primary constituency is the media, they have also provided researchers with an invaluable inter-face with the agency. The Press Office received 1,716 visitors during the year 2000 and dealt with 14,998 telephone enquiries.⁵⁸ It also acted as a repository for a substantial amount of campaign finance data and answered all requests made under the Freedom of Information Act.⁵⁹ Further objectives and goals contained in the budget request are set out and discussed below.

(E) Objective: Educate the public, the media, and the filing community about the legal requirements pertaining to disclosure, contribution limits, and prohibitions, and the public financing of Presidential elections - the core elements of the FECA.⁶⁰

Goals:

1. Operate a 1-800 telephone line, and maintain well-informed staff to answer enquiries.
2. Produce educational and information brochures to supplement the FECs' Annual Report.
3. Conduct technical workshops on a nationwide basis.
4. Provide guidance on the law by revising regulations and releasing advisory opinions.⁶¹

⁵⁴ Atlas S (1992) 33.

⁵⁷ FEC Twenty-Year Report (1995): Disclosure www.fec.gov 24.8.01. It issued 84 press releases during 2000. FEC Annual Report (2000) 82.

⁵⁸ The number of telephone calls received by the Press Office has risen incrementally. In 1977, it received just over 2000 calls, peaking in 1992, with just over 22,000. Similarly, the Public Records Office has also increased the numbers of visitors it has served. In 1978, the PRO served approximately 12,000 people. By 1994, this had risen to approximately 47,000. Federal Election Commission, Twenty Year Report, April 1995, 8-9.

⁵⁹ It processed 55 FOIA requests during 2000. FEC Annual Report (2000) 82.

⁶⁰ FEC Budget Request (2001) www.fec.gov 11.7.01.

⁶¹ FEC Budget Request (2001) www.fec.gov 11.7.01.

Process Performance: The FEC operated a number of outreach information and educational services. These have included the 1-800 free information service, which is staffed by public affairs specialists. Documents were also provided to the regulated community who requested them by telephone. The 24-hour automated FEC fax-line also remained popular with the filing community. In 1994, the first year of its operation, it dispatched 2,500 documents and demand during 2000 remained buoyant with 1,714 callers receiving 2,319 documents.⁶² Several Roundtables per year were held by the FEC, which generally catered for small groups of no more than twelve. Conferences were held regionally and focused on particular areas of the law, some of which have included Labor/Membership organisations, PACs, Candidates, and Parties. During 2000, 30 conferences were held.⁶³ FEC regulations and advisory opinions were made available via a range of documents and could also be found in an archived catalogue displayed on its Internet web-site. Finally, the monthly FEC in-house journal, the *Record*, could be requested free of charge and contained summaries of compliance matters, court cases, public funding issues, and campaign finance statistics. Although useful, due to its brevity, it acted more as a tool to identify particular issues for further research.

Compliance with and Enforcement of the FECA

The main part of this chapter is devoted to making a performance assessment of the FEC enforcement process. The introductory section explains how the Office of the General Counsel functions. The next section discusses the issue of enforcement timeliness. Timely

⁶² FEC Twenty Year Report (1995): Outreach www.fec.gov 24.8.00. FEC Annual Report (2000) 7.

⁶³ FEC Annual Report (2000) 82.

enforcement of campaign finance law is important if the electorate are to be able to make informed democratic choices at the polls. This will be followed by a discussion and evaluation of two new additions to the enforcement apparatus; the administrative fines programme and the alternative dispute resolution (ADR) programmes, each of which were designed to improve timeliness. The latter sections broadly deal with the issue of enforcement fairness. Some observers have attempted to characterise the Commission as partisan, whilst others have argued that it unfairly targets individuals because of their status. Finally, the enforcement priority system (EPS) is discussed. This attempts to prioritise cases deserving of Commission resources, and dismisses low priority and stale cases.

FEC: Office of the General Counsel

The Office of the General Council, which is staffed by approximately 100 full-time employees, is responsible for monitoring and ensuring compliance with the law.⁴⁴ To facilitate compliance, the Office of the General Council (OGC) operates the Commission's enforcement programme. The OGC becomes aware of violations in a number of different ways. The Commission may detect violations through the scrutiny of disclosure reports by the Reports Analysis Division. If a committee files reports that break the Audit Point Assessment, in that its reports appear to be substantially inaccurate or inadequate, they may

⁴⁴ The Office of the General Council employed 105 full-time employees (FTE), during 1999, 104 during 2000, with 108 projected for 2001. Of this complement, approximately 50% are dedicated to the enforcement programme. FEC Budget Request (2001) Summary www.fec.gov 11.7.01. An examination of how staff resources are allocated between functions revealed the following enforcement positions: 28 attorneys, 10 paralegal, 2 investigators, 5 secretaries, and 4 administrative assistants. Lawrence Noble held the post of FEC General Counsel from 1987 until his resignation in January 2001. Larry Noble is now Executive Director, and General Counsel at the Center for Responsive Politics in Washington D.C. FEC Annual Report (2000) 21. The post remained unfilled for nearly a year, until Lawrence H. Norton was appointed in August 2001. FEC Press Release August 20, 2001.

be referred for a 'title 2 audit for cause.' This may lead to substantive enforcement action, should the audit find violations of the Act.⁶⁵ The Commission also learns of violations through receiving complaints. Complaints must be made in writing and have to meet strict criteria if they are to be formally recognised and investigated by the Commission.⁶⁶ Internally generated referrals tend to yield proportionally more cases of reporting non-compliance than externally generated complaints. These *malum prohibitum* violations usually relate to reporting errors and the late filing or non-filing of disclosure reports. Examples of the more serious *malum in se* violations might include breaking contribution limits, making a contribution in the name of another or accepting foreign contributions.⁶⁷ The agency is often described as more of a 'responding agency' than an 'initiating one' as most cases of substantive non-compliance are brought to its attention by external complaints.⁶⁸

Table 2.1: Internal Referrals and External Complaints Received by the FEC.

	1994	1995	1996	1997	1998*	TOTALS
External Complaints	259	53	258	63	79	712
Internal Referrals	97	95	56	84	32	364

⁶⁵ PWC (1999) 1 4.3.1.2.

⁶⁶ The complainant must provide their full name and address and the complaint must be signed, sworn, and notarised. They must set out how a particular action has, or will, violate the FECA. Names of the respondent/s should be provided, the facts clearly set out and differentiation should be made between fact and hearsay. PWC (1999) 1 4.3.3.1.

⁶⁷ PWC (1999) ES-1.

⁶⁸ Light L (1980) 'Reform-spawned Agency Stirs Discontent': *Congressional Quarterly Weekly Report*, April 19, 1024.

Total New Cases	356	148	314	147	111	1076
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* Through September 30, 1998. Source: PWC Audit (1999) Exhibit 4-32.

Ginsberg and Shefter describe how both Parties engage in what they call a 'R.I.P.' strategy. This tactic of 'revelation,' 'investigation' and 'prosecution' involves both worthy and unworthy allegations of non-compliance to the FEC by individuals and organisations.⁶⁹ Other government agencies may also refer alleged FECA violations to the Commission for investigation. Finally, individuals may refer themselves to the Commission in a *sua sponte* admission.⁷⁰ This voluntary admission of guilt can be motivated by a desire to resolve an offence quickly and rarely involves wilful substantive violations. However, those who make a *sua sponte* admission often do so in the belief that they might benefit in some way. This is a mistaken belief, as the Commission does not seek lower fines from those making

⁶⁹ Cain B and Lochner (1999) 'Equity and Efficacy in the Enforcement of Campaign Finance Laws': *Texas Law Review*, 77 1891. Mary Meehan, a Washington-based journalist notes that candidates and ideological groups file numerous complaints against each other. Challengers file against incumbents, National Right to Work Committee against Labor Unions, National Abortion Rights Action League against anti-abortion groups, etc. Describing the political advantages of using the R.I.P. strategy, she said that 'it gives the opportunity to put out a press release, soaks up opposition resources in fighting the complaint, may discourage certain methods of fund-raising and in some cases, simply be used as revenge for complaints filed by the other side. Meehan M (1984) Policy Analysis No 42: *The Federal Election Commission, A Case for Abolition* www.cato.org/pubs/pas/pao42.

⁷⁰ *Sua sponte* the Latin for 'of your own volition.'

⁷¹ The Commission has often been criticised for the retributive way it treats those who make *sua sponte* admissions, as it tends to discourage voluntary compliance. Bob Dahl of the Fair Government Foundation, a non-profit organisation promoting First Amendment rights, found that *sua sponte* cases resulted in a civil penalty twice as often as other cases. These voluntary admissions of guilt also attracted a 50% higher level of fine than other cases. Only 14% of *sua sponte* admissions resulted in no action being taken. U.S. House of Representatives, Subcommittee on Government Management, Information and Technology, March 5 1998, 14. When asked about the severity of fines for those making voluntary admissions, Alex Vogel, General Counsel for the National Republican Senatorial Committee commented: 'Which is why we say don't ever talk. The toughest thing for me is when someone comes to me and says, 'look, we've discovered that we've made a mistake. We thought this was OK, but we've figured out that it's not.' A good example, not here but at the Republican National Committee, a donor would turn round and say 'I'm over my \$25,000 annual limit. I'm really sorry. I'll ask for all the money back, I'll never do it again, it was an accident.' They'd get fined. Absolutely get fined. Or they could do absolutely nothing and never do it again and the chances of them

voluntary admissions of guilt.⁷¹ If the statutory criteria are reached, all cases become Matters under Review (MUR) and they receive a number for identification and tracking purposes. The OGC then examines the case and makes a recommendation to the Commission as to whether there is 'reason to believe' a violation has occurred. Commissioners deliberate the case in closed session. If four of the six Commissioners find 'reason to believe,' an investigation is authorised and then conducted by OGC. A 'no reason to believe' finding results in the dismissal of the case without investigation.⁷² If the MUR is the result of a complaint, the complainant may challenge the Commission's dismissal of the case in District Court. The respondent may be offered the opportunity of 'pre-probable cause' conciliation. This means that the respondent and the Commission resolve the matter and reach an agreement prior to the next formal stage in the enforcement process. If this does not occur, the Commission deliberates the matter and may find 'probable cause to believe' that a violation has occurred. The respondent is then afforded another opportunity to conciliate with the Commission. However, the Commission may also reach a finding of 'no probable cause.' In which case, the Commission usually sends a letter to the respondent setting out the relevant regulations and reminding them of their duty to comply with the law.⁷³ The final option for the Commission if a respondent continues to resist conciliation efforts, is to resolve the matter in District Court.⁷⁴ Overall, the enforcement process involves multiple legal reviews and numerous Commissioner votes to authorise further action or dismiss the case.⁷⁵ Sanctions open to the Commission are somewhat limited as

getting fined are infinitesimally small. So what are you going to do? They are not going to go to the FEC.' Interview with the author, Washington D.C. 26.10.01.

⁷² Gross K (1990) 225-227.

⁷³ Lochner T and Cain B (2000) 636-637.

⁷⁴ The number of cases pending at the beginning of 2000 was 26, at the end of 2000 it had reached 36. During this time, it had won 7 cases and lost 3. FEC Annual Report (2000) 83.

⁷⁵ A case concluding in civil suit might have passed through twelve substantive stages, eight of which could require Commissioner approval. PWC (1999) 1 Exhibit 4-25.

the process is based on a voluntary compliance ethos. However, respondents may be sent an admonishment letter, receive an administrative fine, or negotiate a conciliation agreement with a financial penalty. If a violation involves large sums and appears deliberate, technically a 'wilful violation,' the matter may be referred to the Department of Justice for criminal investigation.⁷⁶ As litigation can be costly and onerous for the Commission and respondents, *malum prohibitum* violations are mostly resolved through administrative fines and *malum in se* violations are usually resolved through the negotiation of a conciliation agreement.⁷⁷

Despite the qualified success of the public funding programme and the unqualified success of the disclosure programme, enforcement performance has remained poor. Although the FEC was praised for its potency in the 1970s, enforcement has been the subject of criticism throughout the 1980s and 1990s.⁷⁸ Academics and journalists have used the following descriptions when referring to the agency, 'beleaguered,'⁷⁹ 'a toothless tiger,'⁸⁰ 'lapdog,'⁸¹ 'pussycat,'⁸² 'toothless watchdog,'⁸³ 'wobbly watchdog,'⁸⁴ 'sleeping watchdog,'⁸⁵

⁷⁶ The FEC and the Department of Justice entered into a Memorandum of Understanding in 1978. This governs the circumstances in which a criminal referral is warranted. Cain B & Lochner T (1999) 1899.

⁷⁷ By law, the Commission is required to 'correct or prevent violations by informal methods of conference, conciliation and persuasion and to enter into a conciliation agreement with respondents. FECA 1971 as amended, Title 2, 437g.

⁷⁸ Fred Wertheimer, President of Democracy 21 and former President of Common Cause said 'we were OK for about ten years. The reason was the mindset of people post-Watergate was that there might be some danger here....look, people went to jail for breaking campaign finance laws.' Interview with the author, Washington D.C. 25.10.01.

⁷⁹ Germond J & Witcover J (1981) 'Beleaguered FEC May Survive Hill Onslaught,' *Washington Star* (June 23) 3. Thomas S & Bowman J (2000) 578.

⁸⁰ *Congressional Record* (1989) (September 21) 21 329. Thomas S & Bowman J (2000) 577.

⁸¹ Stone P (1993) 'Teaching a Lapdog to Bite': *National Journal*, 25 (49) 2914.

⁸² Jackson B (1987) 'Election Commission Set Up as a Watchdog, Has Become a Pussycat': *The Wall Street Journal*, cxx 78 1.

⁸³ Comment: (1981) 'Toothless Watchdog': *Commercial Appeal* (June 2nd). Thomas S & Bowman J (2000) 577.

⁸⁴ Barnes J (1994) 'Wobbly Watchdog,' *National Journal*, 26 (14) 775.

⁸⁵ Barnes J (1997) 'Shh! Don't Wake the Watchdog': *National Journal* 29 (12) 583.

⁸⁶ Comment: (1997) 'Daring Dolittle': *Wall Street Journal* (January 17) 12. Thomas S & Bowman J (2000)

'feckless,'⁶⁶ 'pathetic,'⁶⁷ 'a self-licking ice-cream cone'⁶⁸ and the 'failure to enforce Commission.'⁶⁹ J. K. Galbrath views this regulatory failure as inevitable:

'Regulatory bodies, like the people who comprise them, have a marked life cycle. In youth they are vigorous, aggressive, evangelistic, and even intolerant. Later they mellow, and in old age - after a matter of ten, or fifteen years - they become, with some exception, either an arm of the industry they are regulating, or senile.'⁷⁰

Although Galbrath's description of regulatory failure is something of an exaggeration, the FEC compliance and enforcement record has attracted far more criticism than the Public Funding, Disclosure, Education and Outreach programmes. The objectives and goals that relate to the compliance and enforcement programme are set out and discussed below.

(F) **Objective:** 'The FEC compliance programme is premised on the belief that the Commission's first responsibility is to try and foster, on the part of the filing community, to voluntarily comply with the laws reporting requirements, fundraising restrictions, and public funding statutes. To buttress educational efforts, the Commission carries out a credible Compliance Programme.'⁷¹

Goals:

1. Enforcing the law in a timely and fair way against persons who violate the law.'⁷²

578.

⁶⁷ Cummings J (1997) 'Louisiana Republican Gives Election Panel a 'No 'Vote': *Wall Street Journal* (December 15) 24. Thomas S & Bowman J (2000) 578.

⁶⁸ This term was used in a 1995 report authorised by the House Administration Committee and referred to the Commission's ability to adjust its rulings and workload in order to justify its budget requests. Comment (1995) *Roll Call*, Monday, July 10, 4.

⁶⁹ Shannon E (1998) *Time Magazine*, 152 (11) 20.

⁷⁰ Quoted in -Cary W (1967) *Politics and the Regulatory Agencies*: McGraw-Hill Book Company, 2.

⁷¹ FEC Budget Request (2000) PWC (1999) 1 4.3.

⁷² FEC Budget Request (2000) & PWC (1999) 4.3.

2. Maintain up to 40% of total enforcement cases in an active status.
3. Close 225 cases, 55% of which would be through substantive action. This might include findings of no reason to believe.
4. Initiate 10 or 15 civil actions to enforce the law in cases where conciliation has failed, 2 U.S.C. 437g(a)(6).*
5. Maintain the Enforcement Priority Scheme, a system that prioritises resources and dismisses low rated or stale cases.
6. Conclude some or all of the major cases involving complex legal issues remaining from earlier election cycles, 1996 and 1998.**

Unlike Presidential Public Funding and Disclosure programmes, compliance and enforcement goals are more politically sensitive. Enforcement action may generate bad publicity, involve the levying of fines and may ultimately result in civil or criminal litigation. The relative modesty of compliance goals is a reflection of this sensitivity. Additionally, although all the goals set out above will be discussed in the performance assessment, they are less readily dealt with on a purely compartmentalised basis. Any attempt to do so, whilst organisationally convenient, would obscure understanding and reduce the validity of observations made. Therefore, active to inactive case ratios will be discussed in the first section on timeliness, as that goal and its achievement necessarily impacts on the general level of timely enforcement. Similarly, it would be inappropriate to discuss timeliness and fairness together, as they are separate issues. Fairness, whilst set out in the first goal, is something that is much more closely related to the Enforcement Priority

²³ FEC Budget Request (2001) Enforcement www.fec.gov 11.7.01. * As Commission decision-making is central to the resolution of legal issues' it is more appropriate to discuss the performance of this goal in the Chapter on Commissioners and not the bureaucracy. Similarly, it would be more appropriate to discuss the number of civil actions initiated by the FEC in the chapter on Commissioners.

System, which is set out in the fifth goal. This functional confusion is perhaps not surprising given the compartmentalised organisation and working practices of the Commission.⁹⁴

Process Performance: Timely enforcement is essential if the electorate is to be afforded the opportunity of making informed democratic choices. Timely enforcement of the disclosure provisions contained in the law allows voters to 'evaluate the connections between contributors and potential officeholders.'⁹⁵ The electorate takes on the role of the supervisory power by deterring any unethical or unseemly relationships between contributor and recipient. As all MURs remain confidential until they are concluded, it is only through the timely enforcement of substantive cases that the electorate are also made aware of any more serious non-compliance. The adverse publicity model of deterrence is underpinned by the possibility that individuals might alter their voting behaviour as violations are placed on the public record. Lengthy delays in identifying violations tend to make respondents less willing to conciliate as the three-year criminal statute of limitations approaches and the Commission attracts criticism, as it appears inefficient. Additionally, Cain and Lochner have argued that the electorate is less willing to alter their voting behaviour as a result of older violations.⁹⁶ Unfortunately, the FEC has a poor record in achieving timely enforcement. Former Commissioner Trevor Potter, a Republican appointee, felt that timeliness was a particularly significant problem at the Commission:

Trevor Potter. 'One of the goals that was discussed at

⁹⁴ Kevin Bacon, Partner PricewaterhouseCoopers LLP testified: 'FEC organisational units operate in a compartmentalised and autonomous manner that leads to diminished communication, collaboration and innovation.' U.S. House of Representatives, Committee on House Administration, May 18 1999 6.

⁹⁵ Malbin M & Gais T (1998) *The Day After Reform, Sobering Campaign Finance Lessons from the American States*: Albany, New York, The Rockefeller Institute Press, 36.

⁹⁶ The authors elaborate on this point by suggesting that whom one takes money from (e.g. the tobacco lobby) or gives it to (e.g. right wing evangelical groups) is more relevant to voters than whether donations comply with strict FECA standards. Cain B and Lochner T (1999) 1919.

the Commission when I was there was at least to turn cases around so that they were resolved by the next election cycle, so that if somebody was accused of breaking the law in an election, by the time they came up for re-election, the answer was out on the public record. The Commission never meets that in House races because it's only two years.⁹⁷

Mr Potter was then asked if this was an enduring problem.

Trevor Potter. I think it has been all the way through and still is. I don't think it is an unrealistic goal. It seems to me appropriate that if you have this sort of a process, to say that voters ought to know by the next election cycle what happened in the previous one, and we don't do that. Specifically, timeliness by the next election cycle which is a target the Commission set in the early 90s and has never met for House candidates. Sometimes does meet for Presidential, sometimes not, usually meets for the Senate, because it's six years.⁹⁸

Alex Vogel, General Counsel at the NRSC offered a similar portrait of enforcement timeliness. When asked if enforcement cases were resolved within one election cycle, he replied:

Alex Vogel. 'Oh never! I can guarantee you, if you walk into my office and say "I have a complaint from the FEC," I can promise you that, if you have a reasonably good lawyer, that it will never see the light of day until after you are elected. And people operate under a very simple principle "we'll deal with that after the election." "If I get elected to the U.S. Senate, I won't worry that I owe the FEC \$50,000, because I'm elected to the U.S. Senate." That's how people feel about it. You've got the idea that all compliance cases are by definition confidential until after they are done. It's political enforcement. Politicians respond to criminal liability, or bad PR. You're not going to get any bad press, the person filing the complaint might have a press conference, but any real meat is confidential until it's resolved. I can guarantee you, you know, in a two-year

⁹⁷ Interview with the author, Washington D.C. 24.10.01.

⁹⁸ Interview with the author, Washington D.C. 24.10.01.

election cycle, it will be after you are elected. So the vast majority of these things there is no real pressure.⁹⁹

Congress has also expressed its concern about the slow resolution of enforcement cases. The matter was raised a number of times during the agencies 1994 appropriations hearings. Commissioner Potter responded to questions by Representative Visclosky (D-IN) by conceding that the Commission still had cases on its enforcement docket from '1990, 1988 and some before that.¹⁰⁰ Another Democrat, George (Buddy) Darden (D-GA), commented at the same hearing:

'The most frequent complaint that we Members hear, and I realise the difficulty with which you operate, is the length of delays in enforcement.'¹⁰¹

Representative Darden then complained about how unwarranted or frivolous complaints were damaging the reputations of Members because they were not being resolved in a timely enough manner. Bob Livingston (R-LA), former Chair of the House Appropriations committee and long time critic of the FEC, also raised the issue of poor timeliness at the 1994 authorisation hearing. He commented:

'I understand the cases actually take four to six years to resolve at the FEC. Is that a good average of your matters under review?'¹⁰²

⁹⁹ Interview with the author, Washington D.C. 26.10.01.

¹⁰⁰ U.S. House of Representatives, Committee on Appropriations, Subcommittee on the Treasury, Postal Service and General Government Appropriations, 103rd Congress, First Session, 686-687.

¹⁰¹ U.S. House of Representatives, Committee on Appropriations, Subcommittee on the Treasury, Postal Service and General Government Appropriations, 103rd Congress, First Session, 690-691.

¹⁰² U.S. House of Representatives, House Administration Committee, Subcommittee on Elections, Fiscal Year 1994, 148.

Although Congressman Livingston was well aware that the majority of cases were resolved more quickly than this, the subcommittee was provided with an age breakdown of FEC MUR's.

Table 2.2: Breakdown of MURs by age category, March 1 1993.

Pre-MURs and RAD Referrals	42
MURs under six months old	131
From six months to one year	82
From one year to two years	49
From two years to three years	26
From three years to four years	10
Over four years	29

Source: U.S House of Representatives, Subcommittee on Elections, FEC Authorisation Hearings, Fiscal Year 1994, 148.

However, in fiscal year 1995, in written answers to questions submitted by the appropriations subcommittee, the Commission admitted that enforcement timeliness had 'degraded' during 1992-1994 in comparison with the previous two election cycles.¹⁰³ During authorisation hearings that year, Bob Livingston and Texas Democrat Martin Frost both criticised the continuing lack of timely enforcement. Bob Livingston commented:

¹⁰³ FEC Memorandum, April 5 1994, Final Responses to Questions Submitted by Chairman Hoyer in Conjunction with FY 1995 Appropriations Hearings, section relating to performance measurement.

The FEC has spun out so many regulations and conducted so many enforcement cases that drag on for years and years, that I fear that the FEC may be making criminals out of honest people whilst it does not effectively deter the serious offender.¹⁰⁴

Congressman Frost then engaged in a dialogue with FEC Vice Chairman Danny Lee McDonald, a Democratic Party appointee. The Vice Chairman responded to his questions by stating that simple cases might take an average of 8 months to complete and more complex cases substantially longer. The Congressman's testimony was indicative of the legislative dissatisfaction with poor timeliness and the fact that all enforcement took place after the election.¹⁰⁵ In fiscal year 1998, the appropriations subcommittee asked, 'during 1996, what was the average time for the resolution of cases? How has this changed over the past few years?' The Commission responded by setting out that:

In calendar year 1996, the average time for resolving activated cases was 277 days from the date of activation to the date of closure. This is an increase of 30 days from the average of 247 days active in 1995, and 115 days from the average of 162 days active in CY 1994.¹⁰⁶

Poor timeliness has been an issue that has concerned Congress enough to regularly discuss it through oversight, authorisation and appropriation hearings. However, what is less clear

¹⁰⁴ U.S. House of Representatives, House Administration Committee, Subcommittee on Elections, Fiscal Year 1995, 2.

¹⁰⁵ U.S. House of Representatives, House Administration Committee, Subcommittee on Elections, Fiscal Year 1995, 83-84.

¹⁰⁶ U.S. House of Representatives, Committee on Appropriations, Subcommittee on the Treasury, Postal Service, and General Government Appropriations, Fiscal Year 1998, 58.

is why they have repeatedly asked for quantitative data concerning average case closure times. These figures are essentially meaningless in that they lack validity. If the FEC chose only to pursue *malum prohibitum* violations (simple straightforward violations) timeliness would be impressive. If it chose to deal with significant numbers of difficult, complex cases involving multiple respondents and unsettled areas of law, timeliness would be much worse. Therefore, there is no average case and, consequently, there can be no meaningful representation of average case closure times. One might offer two explanations why Congress has continued to ask these seemingly inappropriate questions. Firstly, as the House election cycle is only two years, Congressmen may often find they are carrying out oversight, appropriation and authorisation responsibilities without understanding the minutiae of a particular policy area. Commissioner David Mason, a Republican Party appointee supported this view, 'they don't understand the inside operations of the Commission at all and that's not uncommon.'¹⁰⁷ Secondly, one might argue that senior members of Congress like Bob Livingston ask these 'inappropriate questions' for political reasons. Tina VanBrakle FEC Director of Congressional affairs supported this view:

Tina VanBrakle: I think that some of the key Members, who have oversight over the agency, do understand how we work. But that changes a lot, new members coming on the committee, and so forth. And it is very hard to keep all of them appraised. Sometimes I think they understand the law better than they admit to understanding it, they might want to prove something at the time.¹⁰⁸

Their purpose is not to aid understanding, but to criticise political finance regulation and bureaucracy in general. The appropriations hearings held on March 1 1995 provided a good

¹⁰⁷ Interview with the author, Washington D.C. 22.10.01.

¹⁰⁸ Interview with the author, Washington D.C. 18.10.01.

example of Livingston's strategy and the futility of attempts to quantify average case closure rates.

Rep. Livingston: 'Well, by my figures, between 1990 and 1995, with the money that we gave you, not the money you asked for, you had a 75 percent increase in five years. Now, that is a pretty rapid increase. Now, tell me, with that increase, say 1992, how long did it take you to dispose of an average case. In 1994 how long did it take you to dispose of an average case: And, as you have projected your numbers, by 1996 how long will it take you to dispose of your average case?'

FEC Chairman McDonald: I think it is a very critical question and here is the answer. You can have figures that say just about anything. We could pursue what amounts to traffic ticket cases and we could turn them around quickly. We can bring statistics in here every year and show you that we can turn out 50 cases an hour if that is what you want us to do. But the minute we do that, everybody is going to complain these cases have no impact on the process.¹¹⁰⁹

The analysis of enforcement timeliness through the use of statistics is also problematic for a number of other reasons. Firstly, individual MUR files are difficult to analyse due to their size and may include hundreds of pages of data. Secondly, cases often include diverse violation profiles and multiple respondents. Respondents in each case are dealt with as separate entities. Therefore, MURs held at the PRO are not particularly amenable to analysis, as each may involve a plurality of outcomes along different time frames. Additionally, if one examines FEC Annual Reports, they fail to differentiate between generic types of violation. Therefore, the performance data relating to the annual figure of total cases resolved is almost meaningless. Late filers and complex cases involving multiple respondents have been presented as an aggregate. Again, one might offer an

¹⁰⁹ U.S. House of Representatives, Committee on Appropriations, Subcommittee on the Treasury, Postal Service, and General Government Appropriations, Fiscal Year 1996, 324-325.

explanation for this strategy. The FEC, perhaps even more so since the introduction of the GPRA, are concerned about case numbers. Larry Noble, former General Counsel at the FEC said:

Larry Noble: 'On the one hand for greater law enforcement, you want to be able to focus on the large important cases, on the other hand, in terms of getting your numbers up, you want to focus on the lower cases. And people will tell you that there is a definite philosophy over the past couple of years at the FEC, "let's get the numbers up." We used to have to give figures, when I was there. I'm sure they still do about the average time a case was open. Well, you play, there are numbers games that get played. Every non-filer you put in that only took two or three months helps to drive your average down, versus the one case that takes three or four years. That is a dangerous game to play because you then don't take the three or four-year case and those are the cases that have real impact.'¹¹⁰

Therefore, this not only explains why the FEC does not present more meaningful performance data, but also why Congress is so determined to keep pressing the FEC to drive down average closure times. One might reasonably assert that Congress is attempting to influence the type of violations and cases the FEC ultimately enforces.

By focusing on respondents and not particular cases, Cain and Lochner avoided some of the methodological problems alluded to. They examined 79 of the 527 MUR files closed during 1991 and 1993. Yet even this sizeable task involved a relatively small sample frame over a two-year period.

¹¹⁰ Interview with the author, Washington D.C. 17.10.01.

Table 2.3: Time to Resolution of Claims against Respondents

TIME	RESPONDENTS (% TOTAL)
0-1 YEAR	31 (16.7%)
1-2 YEARS	100 (53.8%)
2-3 YEARS	41 (22.0%)
3-4 YEARS	7 (3.8%)
4 + YEARS	7 (3.8%)
TOTAL	186 (100%)

Source: Cain B & Lochner T (1999) 1915.

Although one might be cautious about drawing general conclusions from the table, it does show that enforcement timeliness is not as slow as Bob Livingston had described.

Journalists have also written about the poor record of timely enforcement, but the individual cases they describe tend to be unrepresentative and usually fail to explain the enforcement difficulties surrounding the case. For example, Peter Beinart described a 1988 case involving the Bob Dole campaign in which they had illegally co-ordinated spending

with a Political Action Committee, Campaign America, in order to exceed spending limits in Iowa and New Hampshire. He sets out how it took five years for the FEC to levy fines.¹¹¹ Another 1988 case involved George Bush allegedly accepting \$223,000 in illegal contributions, something that resulted in his lawyers being sent an admonishment letter three years after he had left office.¹¹² Finally, Brooks Jackson described a case involving Senator Alan Cranston (D-CA) who was involved in colluding with the commodity trader Mark Weinberg, to violate the FECA. The case focused on the lengthy delay between detecting the alleged violations (December 1983) and when the Commission began enforcement proceedings (October 1985). Weinberg described Commission staff as 'knuckleheads' and 'plodding bureaucrats.'¹¹³ Although these cases are anecdotal, there is a universal perception that enforcement timeliness is poor. The 1999 PricewaterhouseCoopers audit supported this assertion. 'Interviewees opined that the FEC takes too long in completing most compliance activities-from enforcement initiation and disposition to completing audits.'¹¹⁴ A number of explanations will now be offered to account for this bureaucratic failure.

The first explanation places the blame for slow enforcement on the Commission's management practices. Internally identified violations and external complaints are not immediately activated and worked but are placed on the Central Enforcement Docket (CED) until staff/resources become available. The first observation is that violations discovered by RAD tend to move through the enforcement process quicker than those

¹¹¹ Beinart P (1996) 'TRB from Washington, Doling it Out': *The New Republic*, April 8, 6.

¹¹² Shenk J (1997) 'Why the Federal Election Commission is a Lap-Dog for the Political Class': *U.S. News and World Report*, January 20, 31.

¹¹³ Jackson B (1990) *Broken Promise, Why the Federal Election Commission Failed*: New York, Priority Press, 3-5.

¹¹⁴ PricewaterhouseCoopers LLP (1999), *External Stakeholder Perspectives*, 3.2.

brought to the attention of the Commission by outside complaints. This is not surprising as external complaints often involve more complex *malum in se* violations and therefore demand more time and resources to resolve. However, the PWC report found that case activation times varied widely for similar violations. For example, two 'chronically' late filers arising out of the 1996 election cycle were tracked through the enforcement process. One was activated within 30 days and a conciliation agreement was reached two months later. The other case took eight months to activate and was not resolved until another five months had elapsed.¹¹⁵ However, the implicit criticism that identical violations ought to be resolved in similar time frames is flawed, as one respondent may fight the Commission, whilst the other may be amenable to conciliation. Yet the fact that some cases sit on the CED for months, has worrying implications for enforcement timeliness. Former Commissioner Potter described this problem:

Trevor Potter: 'If you look at the Commission's cases, it isn't that a complaint comes in and the process starts. A complaint comes in and the case is rated and it is put in Siberia, perhaps to be thought out when an attorney is available or just to be closed, never being dealt with. So there is an initial time lag. As opposed to taking it right in. You'd save a year on it if you assigned it immediately as opposed to putting it in the central enforcement docket. Also something that Jan (Baran) and I are both very conscious of is that a proceeding of the Commission has a very irregular pace. You get the complaint, you answer it and it goes away for a year. Then it either gets dismissed or it gets assigned. Then you get interrogatories, you answer them and you hear nothing for months. That is not the way most law enforcement agencies work. They get the answers, they look at them, they see you didn't answer all the questions, they ask you additional ones, it's an ongoing fluid process.'¹¹⁶

¹¹⁵ PWC (1999) Internal referrals, 4.3.3.5.

¹¹⁶ Interview with the author, Washington D.C. 24.10.01.

Criticism about these delays and the lack of communication/feedback from OGC were recurring themes in interviews with the regulated community. Donald McGahn, General Counsel at the National Republican Congressional Committee commented:

Donald McGahn: 'From what I've seen, you send a letter and 'let's say' it's a private case. You send a letter to opposing counsel, you get a reply the next day. You never get a reply the next day from the Counsels Office. Usually three days, five days, sometimes a week. Sometimes you send in something and you hear nothing back for months and months and then, all of a sudden, you get a letter responding to your first letter and you can't even remember sending the first letter. So you have to re-educate yourself on the entire file. And you're not really sure what's going on. So you have this 'cock ass' process where you know you're in trouble but you really don't know why because it was so long since you spoke to them.'¹¹⁷

Larry Noble agreed that 'administrative processes within the agency are cumbersome and lead to inefficiencies.'¹¹⁸ The slow investigation, administration and resolution of cases means that large numbers of cases remain on the CED 'unworked.' The poor record of active to inactive case ratios poses a serious challenge to the goal of timely enforcement. Although these figures show that the FEC has achieved their goal of actively 'working' 40% of their cases, the assumption that 60% might remain 'unworked' reflects the modesty of compliance goals.

Table 2.4: Active to Inactive Case Ratios.

¹¹⁷ Interview with the author, Washington D.C. 16.10.01. Bob Dahl of the Fair Government Foundation testified before Congress that 'months or even years after filing your response to a complaint, you get a letter from the FEC telling you of your fate.' U.S. House of Representatives, Committee on Government Reform, Subcommittee on Government Management, Information and Technology, March 5, 1998, 18.

¹¹⁸ Interview with the author, Washington D.C. 17.10.01.

	NUMBER	ACTIVE	% OF TOTAL	NUMBER	INACTIVE	% OF TOTAL	TOTAL
CY 1995	139		47%	155		53%	294
CY 1996	121		44%	151		55%	272
CY 1997	98		33%	198		67%	296
CY 1998	95		50%	94		50%	189
CY 1999	119		62%	74		38%	193
CY 2000	99		48%	108		52%	207
AS OF 31.8.01	110		55%	93		45%	203

Source: FEC internal memorandum held by the author, 17.9.01.

The budget request also sets out the goal of closing 225 enforcement cases per year, 55% of which should be through substantive action.¹¹⁹ Although the terminology and figures used in the budget request are often repeated and meant as a general guide, what one FEC staffer referred to it as, 'boiler plate language,' it is clear that the OGC has had some difficulty in handling its enforcement case load.¹²⁰ Although any number of variables can effect the ability of the OGC to close cases, the figures do show that a significant number of cases are left pending at the end of the year. This increases the number of cases dismissed as stale, adversely effects the ratio of active to inactive cases and reduces enforcement timeliness.

¹¹⁹ FEC Budget Request (2001) Enforcement www.fec.gov 11.7.01.

¹²⁰ Ian Stirton, FEC Press Office, 17.04. 02.

Table 2.5: OGC Case Closure Record 1977-1990

YEAR	TOTAL CASE-LOAD	CLOSED DURING YEAR	PERCENT CLOSED	PENDING AT END OF YEAR
1977	211	118	55.9	93
1978	574	401	69.9	173
1979	441	288	65.3	153
1980	407	193	47.4	214
1981	280	167	59.6	113
1982	226	133	58.8	93
1983	196	118	60.2	78
1984	361	189	52.4	172
1985	429	292	68.1	137
1986	328	185	56.4	143
1987	404	233	57.7	171
1988	407	187	45.9	220

1989	438	237	54.1	201
1990	396	159	40.2	237

Source: Centre for Responsive Politics www.opensecrets.org 3.3.01

Table 2.6: OGC Case Closure Record 1996-2001

YEAR	1996	1997	1998	1999	2000	2001
	229	244	213	150	140	170

Source: e-mail enquiry to FEC Press Office, received 24.04.02

Whilst poor management practices are a contributory factor in explaining why the OGC has been unable to improve enforcement timeliness, other factors are at least as important. For example, from 1980-1996 campaign finance spending grew by 256.5%, yet staffing levels only increased by 14%. The table below sets out the correlation between disbursements and staffing.

Table 2.7: Growth contrast between overall spending and FEC staffing level.

FEC ELECTION CYCLE	TOTAL SPENDING	ELECTION YR STAFF
1978	\$386 MILLION	223
1980	\$768 MILLION	270
1982	\$795 MILLION	226
1984	\$1.259 BILLION	230
1986	\$1.094 BILLION	229
1988	\$1.607 BILLION	252
1990	\$1.115 BILLION	241
1992	\$2.051 BILLION	266
1994	\$1.708 BILLION	293
1996	\$2.738 BILLION	308
1998	\$2.2-2.3 BILLION EST.	302

Source: Thomas S & Bowman J (2000) Symposium: 'Regulating Politics, Federal Election Commission, Obstacles to Effective Enforcement of the Federal Election Campaign Act,' *Administrative Law Review* 52 (2) 580-581.

One might argue that the Commission's workload has outgrown capacity. The increase in spending means that more transactions occur, more reports have to be filed and more complaints are made. Additionally, as electoral competition has stiffened, some in the regulated community have attempted to 'push the envelope.' This term refers to a willingness to operate closer to the margins of legality. What Larry Noble referred to as 'playing in the grey area.'¹²¹ This and the growth in numbers of respondents per MUR, have lead to increasing case complexity and further demands on available resources. Some of the larger cases may involve over one hundred respondents.¹²² The PWC audit noted that even when case numbers declined, case complexity had increased as a consequence of growing respondent numbers. 'As the number of respondents increases per case, each investigative step in the enforcement process consumes an increasing amount of resources to move the case forward.'¹²³

Table 2.8: Monthly average number of respondents per pending case represented
through financial years 95-01.

¹²¹ Interview with the author, Washington D.C. 17.10.01.

¹²² Colloquay (1994) 'Federal Election Commission, Problems and Possibilities': *Administrative Law Review*, 8 249.

¹²³ PWC (1999) E-S-8.

FINANCIAL YEAR	95	96	97	98	99	00	AS OF 31.8.01
MONTHLY AVERAGE NUMBER OF RESPONDENTS PER PENDING CASE	5.1	5.0	6.4	10.5	15.6	13.1	7.9

Source: FEC memorandum held by the author 17.9.01.

Table 2.9: Monthly average number of respondents per pending case represented through 95-01 as aggregates.

FINANCIAL YEAR	95	96	97	98	99	00	AS OF 31.8.01
MONTHLY AVERAGE OF TOTAL RESPONDENTS IN PENDING CASES	1537	1416	2071	2367	2968	2454	1597

Source: FEC memorandum held by the author 17.9.01

The final impediment to timely enforcement is the bureaucratic, cumbersome and labour-intensive enforcement process that was written into the FECA. The multiple stages designed to provide respondents with procedural protections also mandated specific waiting periods. Although this helps to prevent the use of arbitrary regulatory power in this First Amendment area, it also prevents the timely resolution of enforcement cases. The more basic stages of this process were alluded to in the introduction to this section. However, Thomas and Bowman have summarised how a 'routine matter' might work its way through the enforcement mechanism. Their table includes 17 stages and takes 362 days to complete.¹²⁴ Therefore, poor enforcement timeliness can only be accurately explained by a triage approach. Agency failures, whilst important, may be less significant when compared to other factors. The behaviour of the regulated community, staffing

¹²⁴ Thomas S & Bowman J (2000) 588.

constraints and the law itself all seriously hinder timely enforcement.

Despite the inability of the Commission to resolve enforcement matters within an election cycle, two new programmes have been initiated to improve this record. The Administrative Fine and Alternative Dispute Resolution (ADR) programmes both attempt to improve the timely enforcement of lower level violations. These programmes are discussed below.

The Administrative Fine Programme

The administrative fine programme was designed to increase timely disclosure, expedite the enforcement of late and non-filing cases and 'free up' resources in the OGC.¹²⁵ Whilst some evidence would support the successful achievement of the first two objectives, it is less clear if the programme will enable the OGC to process higher numbers of *malum in se* violations.

The programme was established by the Treasury and General Government Appropriations Act 1999 and came into force July 14 2000. Prior to the introduction of this pilot project, late and non-filers were dealt with through the multi-stage traditional arrangements described above. In order to resolve a case, the respondent had to be willing to enter into a conciliation agreement, admitting the violation and agreeing to pay a civil penalty. Under the administrative fines programme, cases can be resolved much more quickly because fewer stages are involved and respondents are not afforded the opportunity to drag out the process through conciliation. It is now a faster adjudicatory process, though due process protections have been built into the mechanism. For example, four of the six

¹²⁵ William Thomas, Chairman of the Committee on House Administration stated that the fines programme would 'free-up more resources to allow the OGC to deal with more important disclosure and enforcement efforts.' Comments made September 15 1999, *Federal Register*, 65 31 788, May 19 2000.

Commissioners still have to find 'reason to believe' that the respondent violated the law. Additionally, respondents have the right of appeal, something the FEC refers to as the 'challenge process.' The respondent may submit supporting documentation to an independent reviewing officer who then makes a recommendation to the Commission.¹²⁶ As of January 31 2002, the Commission had received 158 challenges, completed 111 and upheld the civil penalty in 80 cases.¹²⁷ The Commission calculates the level of fine by considering the following criteria:

1. election sensitivity of the report
2. if the committee is a late-filer, the number of days late
3. if they are a non-filer
4. the amount of financial activity on the report
5. number of prior civil money penalties for reporting violations.¹²⁸

A FEC press release dated January 11 2002 set out that 311 cases had been resolved through the administrative fines programme, with \$425,736 levied in fines. However, when the independent reviewing officer was interviewed in October 2001, she confirmed that 52 of those 311 cases had been referred to the U.S. Treasury as 'uncollectables' and three cases were being litigated in U.S. District Court.¹²⁹ When asked about the high level of uncollected fines Larry Noble commented:

¹²⁶ Shawn W. Werth is the independent reviewing officer at the FEC.

¹²⁷ FY (2003) FEC Budget Request, Appendix 1, Administrative Fines Programme, February 25, 2002, submitted to Congress and the OMB. www.fec.gov/pages/budget/fy2003 15.4.02.

¹²⁸ www.fec.gov/af 20.7.00.

¹²⁹ The FEC is not responsible for the active recovery of uncollected fines. These take on the status of debts to the United States and are referred to the U.S. Department of the Treasury for collection. Interview with Shawn Werth, Washington D.C. 15.10.01. By January 31 2002, 67 cases had been referred to the U.S. Treasury for collection. The Treasury had been able to collect the fines imposed in 7 cases. www.fec.gov/pages/budget/fy2003 15.4.02.

Larry Noble: The problem with political campaigns is that they are sometimes million dollar businesses, but clearly several hundred thousand dollar businesses that exist for a short period of time, then everybody goes away. They're transient. Often the Treasurer is a volunteer, sometimes they're a college student who didn't realise that they would have to pay a \$3,000 fine. So that's a problem, how far you take enforcement?¹³⁰

Despite the high number of challenges and the problem of uncollected fines, Commissioner Thomas noted that:

Commissioner Thomas: 'Prior to its introduction, the Commission was only able to handle maybe 30 cases of late and non-filers per election cycle. Now we process over 400.'¹³¹

This would support the view that enforcement of these generically low-level violations has improved significantly. Additionally, data suggests that the fines system may have improved the enforcement of more timely disclosure. Republican election lawyer Jan Baran said it, 'had raised consciousness and conscientiousness about filing on time.'¹³² Donald McGahn, General Counsel at the NRCC, described the programme as changing the 'atmospherics' in the regulated community.¹³³ Although data might also support Shawn Werth's assertion that the programme has resulted in more timely disclosure, the statistical improvements are not striking.

Table 2.9.1: Percentage of Reports Filed Late

¹³⁰ Interview with the author, Washington D.C. 17.10.01.

¹³¹ Interview with the author, Washington D.C. 18.10.01.

¹³² Interview with the author, Washington D.C. 18.10.01.

¹³³ Interview with the author, Washington D.C. 16.10.01.

<u>Type of Report</u>	<u>1996</u>	<u>1998</u>	<u>2000</u>
July Quarterly	25%	25%	18%
October-Quarterly	25%	24%	22%
12-Day Pre-General	18%	17%	13%
30-Day Post-General	22%	22%	17%

Source: FEC Annual Report (2000) 13.

More recent data published by the FEC indicates a more dramatic improvement.¹³⁴ The 2003 budget request asserts that only 11% of year-end reports were filed late in 2000, compared with 24% in 1998 and 22% in 1996. Yet it is difficult to establish a causal relationship between improvements in disclosure timeliness and administrative fines. The administrative fines pilot had preceded the introduction of mandatory electronic filing for most committees. Although the mandatory system only became effective in January 2001, the regulated community had already been preparing for its introduction.¹³⁵ Although capital intensive, electronic filing is easier, more convenient and is more likely to result in timely disclosure as it removes all issues related to the reliability and timing of postal

¹³⁴ However, this improvement may not prove to be an enduring one because the FEC has proposed to reduce the level of fines imposed by the administrative fines programme. A Notice of Proposed Rule Making (NPRM) was issued on April 25 2002 which sought to reduce the penalties imposed on those committees whose receipts totalled less than \$50,000. The concern has been that the rubric for the calculation of an administrative fine has led to penalties being levied in excess of that under more traditional methods of a conciliation agreement. Whilst public interest advocates have opposed the NPRM as enforcement deterrence has traditionally been weak, and the change will reduce the minimal deterrence now in place, what may be of more concern is the possibility that all non Federal receipts might be exempted from the programme under the NPRM. www.fecwatch.org 25.9.02 *Federal Register* 67 (80) 20461.

¹³⁵ FEC Annual Report (2000) 90-91.

delivery services. Alex Vogel, General Counsel at the NRSC, said that he thought the improvement in timely disclosure was probably due to a 50/50 combination between administrative fines and electronic filing.¹³⁶ Despite its unproven deterrent effect and the issue of 'uncollectables,' Republicans and Democrats have universally welcomed the programme. Republicans in particular, have tended to have a philosophical preference for the 'bright-line,' meaning certain/clear regulation, and see the fines system as a good example of that. Their support for the fines programme might be contrasted with their hostility towards expansive enforcement in uncertain, disputed areas of law. Bob Bauer the leading Democratic Party election lawyer also welcomed the introduction of administrative fines. He supported the programme as it took *malum prohibitum* violations out of the more formal, adversarial enforcement process. He commented:

Bob Bauer: "You fail to file 48 hour reports, even though the money involved is, 'a' no interest to anyone and 'b,' it appears in your next report. It has to appear on your next report, no one disputes that it has to be eventually disclosed to the public, and the next thing the person knows is that they are being interrogated by a Shining Path guerrilla, in a room with a single light bulb."¹³⁷

Finally, although the administrative fines programme has expedited the enforcement of late and non-filer violations and has been welcomed by lawyers from both Parties, its ability to 'free up' resources is uncertain. Interviewees were generally sceptical about the resource-saving attributes of the administrative fines system. Leading GOP lawyer Jan Baran said that he was 'dubious that resources will be freed up.'¹³⁸ Alex Vogel, General Counsel at the

¹³⁶ Interview with the author, Washington D.C. 26.10.01.

¹³⁷ Interview with the author, Washington D.C. 23.10.01.

¹³⁸ Interview with the author, Washington D.C. 17.10.01.

NRSC, said, 'I don't think resources are going to be freed up.'¹³⁹ Two serving Commissioners suggested that the OGC had not previously spent a great deal of time and resources enforcing the type of violations addressed by the administrative fines programme. When asked if the fines programme would 'free up' significant resources for the OGC, Commissioner Mason replied:

Commissioner Mason: 'What I expect is a relatively small effect. I don't think late and non-filers were a huge workload in the General Counsels Office to begin with. Maybe it was 10%, maybe it was 20% but never more than 20%.'¹⁴⁰

One might argue that the fines system just increases the Commission's capacity to deal with a larger number of disclosure violations than it had previously. This means that firstly prior to the introduction of the administrative fines programme, relatively few disclosure violations were substantively enforced and secondly that whilst the programme may have improved timeliness, it may generate more work for the Commission, not less. However, Larry Noble former General Counsel at the FEC disagreed with Commissioner Mason:

Larry Noble: 'The OGC may have put a disproportionate effort into enforcing disclosure in the past. The time the OGC was spending doing late filers and non-filers was ridiculous. But that is one of the reasons why the Commission has got the administrative fines programme, which I think is very important because it does allow you to put less resources into it.'¹⁴¹

¹³⁹ Interview with the author, Washington D.C. 26.10.01.

¹⁴⁰ Interview with the author, Washington D.C. 22.10.01.

¹⁴¹ Interview with the author, Washington D.C. 17.10.01. The PWC audit provided a breakdown of generic violations for 1998 which supports Larry Noble's assertion that the OGC did spend significant resources on late and non-filers. The compliance-related inventory found that 35% involved late and non-filers, 20% excessive contributions, 5% contributions made in the name of another, 10% involved independent expenditures that appeared co-ordinated and 30% contributions from labor unions and corporations. PWC (1999) 3.3.4.

The historical reputation of the Commission as a 'nit picker' might suggest that the OGC did spend a significant amount of time, staff and resources enforcing *malum prohibitum* violations. Additionally, as these cases would have improved their performance statistics, it might be unwise to conclude that minor violations only played an insignificant part in OGC activities prior to the introduction of the administrative fines programme. However, as the programme is still in its infancy, the FEC has as yet been unable to determine if any resources have been 'freed up'.¹⁴²

Alternative Dispute Resolution (ADR) Programme

The Alternative Dispute Resolution Act 1996 required all Federal Agencies to promote the use of ADR.¹⁴³ In their 2001 Report to the President, the Interagency ADR Working Group described the formal mechanism for resolving disputes as overburdened and slow. They also criticised the long periods of silence, the lack of face-to-face meetings and the negativity that is generated between those involved.¹⁴⁴ In October 2000, the *Federal Register* presented ADR as a solution to many of the problems inherent in traditional enforcement regimes. The benefits of ADR included 'savings of time and money, party satisfaction with the process and outcomes, high settlement rates and improved relationships'.¹⁴⁵

The FEC ADR pilot project was approved by the Commission on July 25 2000 and began

¹⁴² Interview with FEC staffers Shawn Werth, Ronald Harris and Kelly Huff, Washington D.C. 15.10.01.

¹⁴³ www.mediate.com 15.2.02.

¹⁴⁴ www.mediate.com 15.2.02.

¹⁴⁵ *Federal Register* (2000) 59200 & 59208-14, 65 October 4, 1.

on October 1 2000.¹⁴⁶ The programme aims to promote compliance with the FECA by encouraging settlements outside the more formal enforcement process. Although specific performance goals remain confidential, the broad objectives are to resolve complaints and internal audit referrals faster, reduce costs and reach agreements that are mutually satisfactory to the Commission and respondents. Before a case can enter ADR, the OGC and the ADR Office review it.¹⁴⁷ Suitable cases can be referred either by OGC or through assignment by the Commissioners. The process is based around bilateral negotiations between the respondent and a representative of the ADR Office. However, should this fail to resolve the matter, the Commission will pay for an independent mediator from the private sector to help bring the case to a conclusion. If both approaches fail, the case is returned to the OGC to enforce.¹⁴⁸

By September 2001 the ADR pilot had reached 34 agreements arising from 19 complaints, audit referrals and cases filed with the Commission. Those agreements attracted \$30,367 in civil penalties. When interviewed in October 2001, Allan Silberman said that the number of cases successfully resolved through ADR had increased to 27 cases, which involved 41 separate agreements.¹⁴⁹ Although the problems with average case closure statistics have already been discussed, the ADR average, at 86 days, was substantially more timely than the traditional enforcement process.¹⁵⁰ However, the ADR programme is not without its critics. Firstly, the ADR model may not be appropriate for this particular enforcement

¹⁴⁶ FEC Memorandum 28.9.01 PricewaterhouseCoopers Status Report.

¹⁴⁷ Allan Silberman, ADR Director stated that of the 61 cases reviewed during 2001, 17 were turned down as unsuitable for the programme.

¹⁴⁸ Alternative Dispute Resolution, Federal Election Commission, September 2000.

¹⁴⁹ By February 2002, 67 cases had passed through ADR. 21 were deemed unsuitable for the programme and were returned to the OGC for enforcement. 37 cases were resolved, which included 54 separate agreements with individual respondents. E-mail response to a research request made to Allan Silberman 23.2.02.

¹⁵⁰ FEC Memorandum 28.9.01 PricewaterhouseCoopers Status Report.

environment. For example, participants need to see an advantage in settling the case through ADR and a disadvantage by not doing so. One might argue that this is not the case under the current FEC system. ADR has not delivered many quantifiable benefits for the Commission, something important under the GPRA. Few cases have been resolved and the totality of civil penalties levied would indicate more of a symbolic function rather than a sanction. The types of cases going through ADR are often so insignificant that there is little advantage for the respondent in volunteering for the programme. Therefore, if one declines ADR, the most likely outcome will be that the Commission disposes of the case without any substantive action. GOP lawyer, Jan Baran commented:

Jan Baran. 'My impression is that they are handling relatively minor cases and my further impression is that if they had not indicated a willingness to participate in ADR, the relatively minor cases would probably evade enforcement entirely. If that is true, and ultimately we will have some indication of that, then ADR will be seen as a way to expand enforcement of lower level cases in some fashion. Or people will increasingly be aware that there is no percentage involved in volunteering for ADR because, chances are, the case will never get the Commission's attention.'¹⁵¹

Alex Vogel, General Counsel at the NRSC, was also critical of the way the FEC was attempting to use ADR:

Alex Vogel. 'Generally speaking, I think it's a good idea. But you know what the problem was? They would send us letters and say this looks like a good candidate for ADR and it would be a case where we didn't think we did anything wrong. I've got a candidate right now, John Ensign (R-NV). Last time he ran, someone filed a complaint and said the Ensign campaign took an awful corporate contribution because an Ensign sign was in

¹⁵¹ Allan Silberman confirmed that ADR was being used as a way to resolve cases that would otherwise be dismissed by the Commission under the traditional enforcement arrangements. The ADR Director viewed this positively as it gave respondents an opportunity to be heard and for their case to be resolved substantively. Interview with the author, Washington D.C. 17.10.01. This served the twin objectives of due process and the protection of political reputations. However, as the quotes indicate, other representatives of the regulated community interpreted this as an indication of the programme's irrelevance.

an auto dealership window. I responded and I said "look the Ensign campaign gave out 300,000 signs, they cannot possibly be responsible for the fact that some person put that in an auto dealership. It's no way a corporate contribution." Its not and it's the dumbest thing I've ever heard. The FEC sent me a letter and said would you like to enter into ADR? And I said I'm not going to settle this! We didn't do anything wrong. I didn't hear anything for months. Yesterday the Staff Director called me and said we'd really like to get into ADR on this one.'

Author: 'You know why, because it's also part of a numbers game.'

Alex Vogel: 'Oh yes, absolutely and ADR is very good at pumping up the numbers. And he's the cheerleader. I said, "Jim, why am I going to settle a case when I didn't do anything wrong, just so you can say we've got another ADR case and say now we've got the NRSC in ADR." He said that ADR can be resolved with no violation. Well that's the dumbest thing I've ever heard. Why would I want to enter into negotiations if there's no violation? Why don't you just find that there was no violation? You've got the Staff Director calling a national party committee, begging to put cases in ADR that aren't worth a nickel. It's a complete false structure of ADR.'¹⁵²

The largely trivial nature of the violations resolved through ADR has meant that the more experienced members of the regulated community have remained unenthusiastic about it. As Jan Baran commented, 'there's no percentage in it.'¹⁵³ This is significant because, as members of the political community remain unwilling to enter the process, numbers will remain at their current levels and aggregate timeliness will not improve as a result of the programme. Those who might be willing to enter ADR are likely to be the uninformed, who might think it's a good idea to avoid imminent enforcement, the poor who cannot

¹⁵² Interview with the author, Washington D.C. 26.10.01.

¹⁵³ Interview with the author, Washington D.C. 17.10.01.

¹⁵⁴ When asked about those who just want to clear a matter up even though enforcement was unlikely, Jan

afford a lawyer, or those who just want to clear a matter up for their own peace of mind.¹⁵⁴ However, although the programme does appear limited in its ability to improve the larger picture of enforcement timeliness, the programme does have other advantages. One needs to appreciate that the cultural mindset of those working in ADR is different to that of the OGC. Unlike the adversarial nature of the OGC activities, where litigation and civil fines are important, those in ADR are more interested in improving compliance through education. For example, many ADR agreements stipulate that respondents must attend a training seminar sponsored by the FEC. The ADR Director commented: 'Rather than just write out a cheque, they actually have to go to a seminar, a three-day seminar to learn about the FECA.'¹⁵⁵ Other educational efforts might require respondents to circulate documents to their staffs, which set out particular FECA mandates. Although these educational initiatives are worthy, it is difficult to see how they might be quantified in any future performance assessment. Trevor Potter, GOP lawyer and former Republican Commissioner, suggested that the \$348,000 dedicated to the ADR pilot programme might be better spent in establishing a special strike team in the OGC. He commented:

Trevor Potter. 'Three or four attorneys, a good leader and let them loose on the FEC caseload. Pick the high priority cases and run them through. I recognise that Congress not only didn't appropriate money for those purposes but specifically made sure they put them in ADR, which in many senses is a non-threatening programme as opposed to the strike force approach.'¹⁵⁶

Baran commented: 'Well I think there will always be folks like that. They will usually be individuals from small organisations. They get these letters from the Commission and don't want the expense of a lawyer, don't want legal advice. I just turn myself into ADR and sort this out. I mean, if they went to a lawyer for a thirty-minute conversation, they'd say, "look, if you don't volunteer for ADR the chances are you'll never hear from these people again." Interview with the author, Washington D.C. 17.10.01.

¹⁵⁵ Interview with the author, Washington D.C. 15.10.01.

¹⁵⁶ Interview with the author, Washington D.C. 24.10.01.

One might argue that both ADR and the Administrative Fines Programmes are non-threatening initiatives. Yet the two programmes do not have equal value. The fines programme has been worthwhile as it appears to have had some impact on improving timely disclosure and those cases that involve late and non filers no longer consume OGC resources.¹⁵⁷ The utility of ADR is much less certain. The \$348,000 cost of the one year pilot, the low level of usage, the apparent desperation of the Staff Director to attract willing respondents and the largely inconsequential violation profile all undermine the value of the programme. However, as both initiatives have a low political impact on the regulated community, it is likely that Congress will continue to support them.¹⁵⁸

Enforcement Fairness

Introduction

The second performance goal to be examined is that of fairness. The regulated community has defined fairness in different ways. The two main Parties have tended to stress the importance of enforcement that treats them equally. Therefore, fairness becomes an issue related to ensuring non-partisan enforcement. Cain and Lochner argue that members of Congress often suggest that FEC enforcement fails because it is biased and politically partisan. Daniel Ortiz referred to this issue in his introduction to a 1994 FEC symposium.

¹⁵⁷ Commissioner Mason commented that OGC had complained about the removal of late and non-filer violations from their enforcement profile. He explained how late and non-filer cases could be worked by those otherwise unoccupied because they were waiting for responses from the more important complex cases. Additionally, late and non-filer work had been employed as a useful training aid for new members of staff. Commissioner Mason recalled why the OGC had objected to having the majority of their *malum prohibitum* work removed: 'They made some arguments about having a balance of work in terms of training new people and filling in the gaps. When somebody is already working on a case but waiting for deposition transfers to come back and they really don't have much to do and they need a small case to fit into.' Interview with the author, Washington D.C. 22.10.01.

¹⁵⁸ The Administrative Fines programme has been given a new 'sunset' authorisation of December 31 2003.

He commented:

The closer panelists were affiliated with the major political Parties, the more they worried over the Commission's lack of independence from political players on the other side.¹⁵⁹

An alternative definition of fairness concerns the Commission's respondent and violation profile. The criticism has been that the FEC has sought to enforce the law in an unfair way against less powerful minor Parties, their candidates and other 'small fry' within the regulated community. John Bolton, former under-secretary of State, referred to these entities as the 'widows and orphans' of the political community.¹⁶⁰ Daniel Ortiz commented:

The outsiders, on the other hand, worried more about the Commission's lack of independence from the established Parties in general. To the first group, in other words, independence meant bipartisan control, whereas, to the other group, that view represented the exactly the problem.¹⁶¹

Conversely the FEC has also been criticised for its unwillingness to enforce the law against the rich or powerfully placed. 'Outsiders' explain this by alluding to the unequal political influence of respondents and their ability to marshal top class legal talent against the Commission. They further argue that this affects the type of violations the Commission has been willing and able to address. For example, it has been criticised for being overly

¹⁵⁹ Ortiz D (1994) 'Symposium on the Federal Election Commission': *Journal of Law and Politics*, 10 370.

¹⁶⁰ Interview with Jan Baran, Washington D.C. 17.10.01.

¹⁶¹ Ortiz D (1994) 370.

zealous in the enforcement of *malum prohibitum* violations, which tend to be committed by inexperienced, less significant players. And for being overly lenient in the enforcement of *malum in se* violations, which are said to be committed by the more experienced, powerful players. One particularly important management tool that affects the decision-making process in the OGC is the enforcement priority system (EPS). This 'organic' system was introduced in 1993 to bring about a more rigorous method of allocating enforcement resources.¹⁶² The EPS determines which cases are activated, which remain unworked and which cases are dismissed. This system will be examined and assessed as it has a direct effect on the fairness of enforcement. However, in order to maintain the organisational rigour of this discussion, the issue of enforcement fairness will be only discussed as it relates to the OGC and not the Commission. The broader issues of 'regulatory capture' are dealt with in the later chapters on Commissioners and Congress.

Fairness Defined As Non-Partisan Enforcement

Ginsberg and Shefter have asserted that members of the regulated community often attempt to use allegations of wrongdoing to attack their political opponents through the R.I.P. strategy, though there is little evidence to show that either of the Parties has successfully co-opted the FEC in order to gain an advantage.¹⁶³ However, groups on the right have long criticised the Commission for 'tilting to the left.'¹⁶⁴ In 1980 Richard A. Viguerie, an election consultant specialising in conservative issues commented:

¹⁶² Referring to a description of EPS by the FEC General Counsel, PWC (1999) 4.3.3.3.

¹⁶³ Ginsberg and Shefter explain the revelation investigation and prosecution (R.I.P.) strategy as follows: 'unable to gain control of their opponents' institutional bastion through the normal channels of electoral competition, Democrats and Republicans use allegations of impropriety to discredit and weaken the other.' Cain B and Lochner T (1999) 1891.

¹⁶⁴ Comment (1980) *Congressional Quarterly Weekly Report*, April 19, 1025.

The FEC obviously is populated by liberals. It's a potentially dangerous thing and ought to be abolished.¹⁶⁵

More recently, Bob Livingston referred to Larry Noble as the 'Ralph Nader regulator,'¹⁶⁶ the charge being that he had exercised his discretion in the OGC in a way that Republicans either disapproved of, or felt was particularly damaging to their interests.¹⁶⁷ In support of the politically partisan hypothesis, Cain and Lochner refer to a 1994 comment made by Elizabeth Hedlund, a public interest advocate and former Director of FEC Watch, who described the Commission as partisan. However, her later explanatory comments revealed that she was referring to Commissioners, not the bureaucracy or the OGC.¹⁶⁸ As a public interest advocate, her views were probably better represented by comments made in another panel discussion held that year when she criticised the agency for being an equally balanced Democratic-Republican Commission.¹⁶⁹

Evidence to support the partisan hypothesis is weak. The Commission was deliberately structured as a bipartisan agency to 'prevent it from becoming the vehicle for partisan purposes'¹⁷⁰ and the Act 'provides that no more than three members of the Commission may

¹⁶⁵ Comment (1980) *Congressional Quarterly Weekly Report*, April 19, 1025.

¹⁶⁶ Interview with Tina Vanbrakle, FEC Director of Congressional Affairs, Washington D.C. 18.10.01.

¹⁶⁷ Thomas and Bowman noted how one newspaper quoted former Chairman of the House Appropriations Committee, Bob Livingston (R-LA), as saying that he was convinced that 9 out of 10 cases pursued by the FEC were against Republicans. This was rejected by the authors as wrong. Thomas S and Bowman J (2000) 606.

¹⁶⁸ Ortiz D (1994) 387.

¹⁶⁹ Colloquay (1994) 239.

¹⁷⁰ Thomas S and Bowman J (2000) 'Symposium Regulation of Politics, Federal Election Commission, Obstacles to Effective Enforcement of the Federal Election Campaign Act': *Administrative Law Review*, 52 (2) 590.

be affiliated with the same political party.¹⁷¹ Six Commissioners, three Democrats and three Republicans have traditionally been appointed and confirmed by the Senate, with four votes required to authorise any substantive action.¹⁷² Additionally, not only does the agency structure protect respondents from partisan enforcement, Larry Noble, the General Counsel at the FEC, has also attracted criticism from both major Parties.¹⁷³ The fact that Larry Noble has proved to be equally unpopular with Democrats and Republicans would suggest a non-partisan enforcement ethos at the top of the OGC management structure. This thesis was supported by the PWC Audit, which found that disclosure and compliance activities were executed without partisan bias.¹⁷⁴ In their study, PWC carried out a telephone enquiry of 353 randomly selected filers. They concluded that there was a general perception that Commission staff acted in an impartial and independent manner.¹⁷⁵ Of the 14% of filers who had some contact with enforcement staff, 73% agreed that they acted in an independent and non-partisan manner.¹⁷⁶ Therefore, the bipartisan structure of the Commission and the even-handed treatment of both Parties by the General Counsel have ensured that there is little evidence to support the politically partisan hypothesis.

Unfair Discrimination Against the 'Widows and Orphans'

Of the Political Community.

During the 1970s, the Commission was criticised by parts of the regulated community and

¹⁷¹ Thomas S and Bowman J (2000) 590, referring to the FECA 2 U.S.C 437c(a)(1).

¹⁷² The Federal Election Commission, *The First Ten Years* (1975-1985) 11.

¹⁷³ In 1998 Eliza Newlin Carney wrote in the *National Journal* that she found 88% of cases involving Democrats resulted in a fine compared to 55% for Republicans. Thomas S and Bowman J (2000) 606. A study carried out by the Fair Government Foundation found that between 1994-1997 of the 685 cases in their sample frame, 36% were Democrats and 32% Republican. www.house.gov/cha/business 15.9.00.

¹⁷⁴ PWC (1999) Executive Summary 2.

¹⁷⁵ PWC (1999) Executive Summary 8.

¹⁷⁶ PWC (1999) 3.1.

the courts for enforcing the law in a way that treated minor candidates, small donors and grass roots organisations unfairly. A number of these allegations were described in testimony given before the Committee on House Administration during the ninety-fifth Congress. The hearings discussed a bill to amend the FECA, which would have provided public funding for Congressional elections. Mary Meehan, Treasurer of the Committee for a Constitutional Presidency, who opposed the Bill, referred to the *Le Roy B. Jones v Unknown Agents of the Federal Election Commission* (1977) case as an example of skewed enforcement. She testified how FEC field investigators had harassed Le Roy Jones, a contributor to fringe candidate Lyndon LaRouche's 1976 presidential campaign. Jones was a 59-year-old retiree with a long history of heart attacks. Jones testified that Keith Vance, a senior investigator with the FEC, had called at his home at 7.45 am, demanded bank records and had made intimidating threats.¹⁷⁷ Vance was alleged to have said:

'If you don't give me the information I ask for, you could get sentenced up to ten years in jail and be given a \$10,000 fine. You've got a nice house here, you wouldn't want to lose it would you?'¹⁷⁸

Although Vance offered a different version of the conversation, Jones immediately handed over his Federal income tax records, signed a document allowing investigators to inspect his bank records and then visited his doctor.¹⁷⁹ Another case that Meehan referred to was that of John Adams, a 61-year-old retiree who was partially disabled from an injury

¹⁷⁷ U.S. House of Representatives, Committee on House Administration, Testimony of Mary Meehan, Treasurer of the Committee for a Constitutional Presidency, 1977, 392.

¹⁷⁸ Jackson B (1990) 8.

¹⁷⁹ Jackson B (1990) 8-9.

sustained in the Second World War. Adams had entered and won the 1976 New Hampshire Republican Primary but was defeated in the general election by the Democratic incumbent. Meehan then described how the FEC had sent him threatening letters about his failure to file candidate reports. Adams, whose only income was a \$173 per month Navy disability pension, replied to the Commission in September 1976, calling collect as he had no money. He left a message for the General Counsel saying that 'he had asked for no money, had received none and had spent none' on his campaign. Later that year, the FEC filed suit in District Court against Adams asking that he be fined up to \$5,000. After filing a default motion, the case went to court in January 1977. A senior FEC attorney was despatched to argue the case. The Judge found in favour of the FEC, fining Adams \$100 and ruling that he disclose the requisite information. However, the Judge criticised the FEC attorney, asking, 'if he didn't have any better things to do with his time?' Further research revealed that the Judge's attitude towards the FEC was much more aggressive than Meehan had suggested. A number of interviewees indicated that he had said, 'I will rule in your favour, but never come back to this state again.'¹⁸⁰ Adams failed to pay the fine or attend court as he was living in an Old Soldiers' Home in Massachusetts.¹⁸¹

Meehan commented:

The FEC was advertised by Common Cause as a genuinely independent agency, which would enforce the law without fear or favour. Instead, it has proved to be the neighbourhood bully of American politics, picking on the little guys and running away when the real toughs come on the scene. The FEC has, in fact, been trampling all over the Bill of Rights when dealing with the little guys.¹⁸²

¹⁸⁰ Interview with Larry Noble, Washington D.C. 17.10.01.

¹⁸¹ U.S. House of Representatives, Committee on House Administration, 1977, 392.

¹⁸² U.S. House of Representatives, Committee on House Administration, 1977, 393.

When asked if the FEC enforces the law unfairly against 'small fry,' Jan Baran replied that it was an accurate criticism at times. He said the issue came up regularly and offered two explanations why it was such an enduring perception:

Jan Baran: 'There have been episodes where the agency has sued people that really seemed to be on the fringes of politics, that are not particularly important and there is no legal principle involved.'¹⁸³

Mr Baran supported this assertion by referring to some of the older cases described by Meehan *et al*. One might argue that Jan Baran was referring to some of the errant practices carried out during the Commission's infancy.¹⁸⁴ However, Jan Baran then explained that inconsequential members of the regulated community might still find themselves being sued by the Commission if the agency wished to clarify a point of law.

Jan Baran: 'Sometimes the Commission will go against some organisation if they feel there is a principle at stake. So you'll see them suing a group like Christian Action Network, which is an obscure fundamentalist religious organisation in the mountains of rural West Virginia that ran some television advertisement in Richmond about the position of Al Gore and Bill Clinton on homosexual rights. They think it's a very important case to bring because they want to experiment with their express advocacy theories.'¹⁸⁵

¹⁸³ Interview with the author, Washington D.C. 17.10.01. Brooks Jackson described how the agency earned an early reputation as a 'fusspot' by bringing lawsuits against fringe candidates for failing to file disclosure reports despite their poor showing at the polls. Jackson B (1990) 29-30.

¹⁸⁴ The Commission's field investigators not only attracted criticism from the regulated community as set out above, they were also disliked by Congress. These investigators included former New York and Washington police officers, a former army criminal investigator and a former member of the CIA, were gradually replaced by 'less troublesome, desk-bound lawyers.' Jackson B (1990) 7-9.

¹⁸⁵ Interview with the author, Washington D.C. 17.10.01.

The 1996 Christian Action Network case involved media messages clearly intended to criticise Clinton and Gore's liberal policies on homosexuals and was commissioned with the intention of influencing voters in the 1992 election. However, as it failed to 'expressly advocate' the election or defeat of a clearly named candidate, it was protected under the First Amendment. The FEC lost the case and the Christian Action Network evaded Federal regulation.¹⁸⁶ Evidence tends to support the assertion that the FEC enforces the law against 'widows and orphans' if legal principle is involved. One of the earliest examples of this was a 1980 case involving the Central Long Island Tax Reform Immediately Campaign. This non-profit organisation favoured lower taxes and smaller government. CLITRIM produced a pamphlet that set out the voting record of their local Congressman on this issue. The results showed 21 votes for higher taxes and bigger government and three votes for lower taxes and smaller government. The FEC sued CLITRIM alleging that it had used 'express advocacy,' failed to file and failed to publish the requisite disclaimer notice. However, the pamphlet only cost \$135 and failed to mention any federal election or the political party of the Congressman. The FEC lost the case and the late Judge Irving R. Kaufman of the U.S. Court of Appeals was particularly critical of the FEC. He commented:

The insensitivity to First Amendment values displayed by the Federal Election Commission in proceeding against these defendants compels me to add a few words about what I perceive to be the disturbing legacy of the Federal Election Campaign Act. The defendants

¹⁸⁶ The 'express advocacy' standard was established in *Buckley v Valeo* (1976) and reaffirmed in *FEC v Massachusetts Citizens for Life, Inc* (1986). However, this standard has largely made a nonsense of the law. For example, in an interview with Commissioner Scott Thomas, he said 'if I was a candidate standing for election and someone said Scott Thomas was a 'wife beater' think about that in November. That would still not reach an 'express advocacy' standard.' Interview with the author, Washington D.C. 18.10.01. A more common sense or expansive definition of 'express advocacy' was established in *FEC v Furgatch* (1987). This was based on (1) an unmistakable and unambiguous message, (2) a clear plea for action and (3) it must be clear what action is being advocated. However, this was successfully challenged in *Maine Right to Life Committee, Inc. v FEC* (1996). Campaign Finance Reform Issues Brought to the Forefront by the Special Investigation, Committee on Governmental Affairs, U.S. Senate 1997 31-32.

in this case (CLITRIM) undertook to spend the modest sum of \$135 for the purpose of preparing and circulating to their fellow citizens a pamphlet addressed to the issue of tax reform, specifically advocating their belief in the necessity of significant reductions in current taxation levels. Further, the pamphlet assessed the legislative record of their Congressman on issues implicating taxation and government spending. It is this conduct that the FEC seeks to 'enjoin' because the defendants chose not to register their activity with the federal government. I confess that I find this episode somewhat perverse. It is disturbing because citizens of this nation should not be required to account to this court for engaging in debate of political issues.¹⁸⁷

The historical action taken against 'small fry' alluded to by Jan Baran *et al* was not a conscious management decision to target minor players; more likely, it was the result of overzealous field investigators and the insensitivity of an agency in its infancy. However, the determination of the agency to pursue low-profile 'widows and orphans' where a legal issue is at stake, should not be underestimated. Yet others have argued that the reason why the FEC enforces the law against so many grass roots organisations and minor candidates is that they tend to commit far more frequent and easily detectable violations than their more experienced counterparts. For example, in 1979, Neil Staebler, a former Commissioner and Democratic Party appointee commented:

'We had a study made by Peter Hart and Richard Wirthlin two years ago. They found that the campaigns most likely to have trouble with the forms were the very tiny ones, those of the minority party or vanity candidates, where there was not much manpower available and where the candidate, the candidate's wife, and a few friends tried to do everything.'¹⁸⁸

¹⁸⁷ Comment (2002) '\$135 of TRIM Brochures Brings FEC Lawsuit, Should Pamphleteers Be Licensed?' www.senate.gov 26.2.02.

¹⁸⁸ Muller N (1979) 'Reflections on the Election Commission, An Interview with Neil O. Staebler: Regulation, *AEI Journal on Government and Society*, March/April 36.

Over twenty years later, former Commissioner Trevor Potter described a similar scenario.

He commented:

Trevor Potter: 'By and large, the Commission will go after anyone for a clear-cut violation. You fail to file a report, it doesn't matter who you are. However, it tends to be more widows and orphans who commit the clear-cut violations. Because the better funded committees, the Parties etc, have lawyers and accountants whose job it is to make sure that they file their reports on time, that they don't report taking a corporate cheque if they're not allowed to, simple violations. So by that wonderful French phrase, both the rich and the poor can sleep under the bridges of Paris. There is a consequence of enforcing the law flatly on these technical areas. The consequence is that you tend to get more widows and orphans. You tend to get more of the smaller committees who didn't understand the rules, didn't have the money to pay an accountant, never thought to hire a lawyer.'¹⁸⁹

When interviewed, Donald McGahn offered a more comprehensive explanation why minor players were more likely to attract the attention of the OGC. This explanation relates to the erroneous behaviour of inexperienced entities, the financial and professional advantages of more experienced players and the desire of the OGC to maintain performance by 'keep their numbers up.'¹⁹⁰

Author: 'The FEC has been criticised for going after the small fry, what one commentator described as the 'widows and orphans' of the political community. How would you respond to this view, and why has it been such an enduring perception?'

¹⁸⁹ Interview with the author, Washington D.C. 24.10.01.

¹⁹⁰ Larry Noble argued that 'a numbers game is played in the OGC.' The larger, more complex, cases make the numbers look bad and the average case closure times look bad. The simple cases that involve *malum prohibitum* violations are more quickly resolved and 'chalk up the numbers.' Interview with the author, Washington D.C. 17.10.01.

Donald McGahn. I would say there is a lot of truth in it. In my experience, it's the first-time vanquished candidate who's sloppy who ends up paying the fine. Now is that because the FEC is picking on the little guy? I don't know. It's probably an over-simplification. The fact is that, if you are a well-entrenched incumbent, you probably have professionals running your campaign. You've done it before, you know the pitfalls. You're not gonna make the first time rookie mistakes. So that could be one explanation. Another explanation is that experienced guys are smart enough to know a problem when they see it and pull in an expert, whether it be an attorney or an accountant. They deal with the reports analysts at the FEC properly and they resolve the issue right there, it doesn't go any further. Whereas the first timers don't do that. Sometimes they let things fester. They leave blanks on their reports, they don't get the paperwork for reattribution to redesignation, and they end up getting a full-scale field audit. You really don't see people who have been here more than two years getting audited but what you do see are the first-time campaigns getting audited. When you do an audit, you're gonna find something wrong and when they find something wrong you're probably gonna pay a fine. So that could be one explanation. Also, assuming you had a well entrenched incumbent and a new-comer who both get in trouble for the same fine, the new-comer is not going to be able to raise money, so he's not going to be able to pay an attorney. He's left on his own, he doesn't understand the FEC process, which frankly is bizarre. A lot of it is word of mouth, passed on through oral tradition, as to who the lawyers are and sort of how to navigate them and their bureaucracy. So they are not really equipped to deal with things, so they're not in the same situation. It doesn't mean that the FEC is picking on the little guy, but on the other hand, if you are an FEC Counsel and you've got to go against committee Chair X, who's got the guy who's done the past two Republican Presidential elections as counsel defending him and he knows the guy is 'gonna rip you a new one' every time you call him, versus some guy sitting in the middle of nowhere who's sitting at his kitchen table with his wife, scared of the auditors of the FEC. Which is an easier way to close a file and get a fine? It's incredibly apparent. Your ability to bring home the bacon matters, and it's a hell of a lot easier to bring home the bacon and get somebody who has nobody to stand up for him than someone who does.¹⁹¹

Author. 'I've noticed that FEC performance indicators all seem to be quantitative, rather than qualitative. Therefore it's just the numbers of cases. I don't think that is very helpful because sure, you may have a fairly large number of cases dealt with, but those cases may be incredibly simple, reporting violations, things like that, and many of the more substantive or difficult cases just don't get looked at.'

Donald McGahn. 'I would actually agree with that, it's the same point I have just made. You pick the path of least resistance of how you are going to move up the office and if that is pure numbers, rack up the numbers. You know, we have a College football rating system in this country which people criticise for the same reason. There's top ten teams who play nobody all year until they get to a Bowl game. Sure, if that's how you get ranked, play cream puffs all year. Same things with the Counsel's Office: take on the easy guys. You know 69 and 3, but the 3 that you lost were on national television. In boxing, 50 and nothing, if you go down to third graders.'¹⁹²

Bill Allison, Senior Editor at the Washington-based Center for Public Integrity, also criticised the OGC for its faulty priorities. He commented:

Bill Allison. 'I've gone through the files. A lot of them are looking at irregularities. I wouldn't even call them third-party candidates. Like, somebody files and manages to get on the ballot and never files for Congress, or a national office and never files the requisite FEC forms. They will spend a lot of time tracking somebody like that down and making them comply with the disclosure parts of the law. And when you have the flip side, which is fairly serious malfeasance on the part of a campaign and doing some of the things the FEC is supposed to go after, like co-ordinating the message between political party and independent groups like labor unions, the FEC doesn't

¹⁹¹ Interview with the author, Washington D.C. 16.10.01.

¹⁹² Interview with the author, Washington D.C. 16.10.01.

¹⁹³ Interview with the author, Washington D.C. 22.10.02.

spend as much resources on that."¹⁹³

One might conclude that the OGC does enforce the law against far more 'widows and orphans' than it does against significant repeat players. However, whether as a result of carelessness, ignorance or inexperience, first time candidates and minor players are the ones most likely to commit technical, easily detectable violations. As the FEC is often described as a responding agency not an initiating one,¹⁹⁴ it is not surprising that the agency enforces the law in these manifest cases.¹⁹⁵ As Trevor Potter commented, the FEC will go after anyone for a clear-cut violation. Additionally, one might argue that as long as OGC performance continues to be measured in a quantitative way, the agency is likely to continue in the vigorous enforcement of these lower level violations. Not only is it an effective way to close more cases and improve active to inactive case ratios, it also improves timeliness. The less experienced entities tend to be more co-operative and deferential towards the OGC. As minor players cannot buy high price legal talent, are often unaware of how the system functions or how seriously the OGC views their violation, 'widows and orphans' usually wish to pay the fine and resolve the matter at the earliest opportunity. However, one should note that some members of the regulated community have attempted to exploit the maturing sensitivities of the agency towards vulnerable actors. Larry Noble commented that:

Larry Noble: There were a couple of bad cases early on in the agency's history, where it went after some

¹⁹³ Interview with the author, Washington D.C. 22.10.02.

¹⁹⁴ Light L (1980) 1024.

¹⁹⁵ Although externally generated complaints uncover proportionally more cases of substantive non-compliance than the FEC, many are easily detectable technical violations, like late filing or exceeding the annual \$25,000 contribution limit. PWC (1999) E-S 4. However, some have supported the enforcement of low level violations as it sends a message to the regulated community that the Commission is enforcing the full spectrum of the law. U.S. House of Representatives, Committee on House Administration, Testimony of Kevin Bacon (PWC) May 18 1999 16.

widows and orphans. I don't think that's true anymore. The thresholds the agency has, I think, prevent that to a large degree and also the agency shows discretion on individual cases. I know where bad stories came to light about somebody and the agency let them go. Having said that, I was also there when a lot of people would come in with sob stories and you'd look into them, or you tried to look into them, and they turned out not to be true. They come in and say, 'I'm broke, I've got no money. I owe hundreds of thousands of dollars.' I'd say let me see your tax returns and they wouldn't give them to you. It gets suspicious then. You send them an interrogatory and say, "well let's see your assets" and they won't answer. So I think that reputation comes from the early days of the agency, it's no longer true.¹⁹⁶

Enforcement Decision Making

Introduction

Two less frequently heard criticisms of the OGC is that they either avoid enforcing the law against high-profile well-financed entities or that, conversely, they unfairly target these powerful repeat players. This is allegedly achieved through the biased exercise of prosecutorial discretion. One might argue that those working in the OGC have a greater degree of freedom than that possessed by staff in other regulatory agencies. This could be explained by referring to the unique structure of the Commission. The lack of a permanent Head or Chief Executive ensures that no one individual exerts control over the agency. The even numbered Commission, essentially a body of six equals, is then further divided

¹⁹⁶ Interview with the author, Washington D.C. 17.10.01.

through the convention of appointing three Democrats and three Republicans. Finally, in order to check any predilection for empire building, Congress divided the bureaucratic power structure between two Statutory Officers, the Staff Director and the General Counsel. Trevor Potter described this as 'highly unusual,' saying that 'most agencies have one single person as Chairman in charge, or a single Staff Director.'¹⁹⁷ Former staff director John Surina described the agency as a 'creature that evidences balance within balance in every direction.'¹⁹⁸ Although Mr. Surina said that this can lead to timidity, A. J. Cowett argued that because of this structure, 'staff tended to gain a greater degree of autonomy.'¹⁹⁹ However, evidence to support a *laissez faire* attitude amongst OGC staff towards high profile actors is weak. The PWC audit described the agency culture as follows:

'A siege mentality best defines the organisational culture. FEC staff behaviours reflect defensiveness from enduring external criticism, battle fatigue from constant adversarial conflict and an instinctive mistrust that the filing community is opportunistically gaming the system. The organisation views the world from an 'us' versus 'them' perception.'²⁰⁰

The OGC staff exercise their mandate free from most of the more overtly political sensibilities that impinge on Commissioners. As they have no Party interest to serve and no Congressional patron to answer to, the 'staff can be truly aggressive at times because they know they'll be rolled back' by the Commission.²⁰¹ Therefore, if a *laissez faire* enforcement attitude does exist towards high profile actors, it is a criticism that ought to be directed at the Commission not the OGC. The second criticism, which asserts that the more visible repeat players are being discriminated against through deliberately skewed enforcement, is

¹⁹⁷ Interview with the author, Washington D.C. 24.10.01.

¹⁹⁸ Letter written by Staff Director John Surina to A. J. Cowett in response to the latter's thesis entitled '*Walking on Eggshells*': June 20 1989.

¹⁹⁹ Cowett A (1989) 60.

²⁰⁰ PWC (1999) 3.3.7.

²⁰¹ Cowett A (1989) quoting John Surina, 59.

certainly a sustainable one. By way of a disclaimer, one should note that substantive action, either to authorise an investigation or file suit, rests with the Commission, not the OGC and that the Commission may direct the activation or deactivation of a case at anytime. Yet both criticisms can only be discussed in an informed manner if one understands the EPS, a management tool that attempts to bring rigour to the exercise of OGC prosecutorial discretion.

OGC Enforcement Priority System (EPS-1)

Prior to 1993, the OGC attempted to pursue all enforcement cases irrespective of their importance or triviality. The lack of differentiation and prioritisation meant that few cases received adequate attention by staff and enforcement was particularly slow.²⁰² The General Counsel, frustrated with this situation, wrote a memorandum to the Commission:

'We have become more and more dissatisfied with the length of time it is taking us to complete enforcement cases. As we have noted on many occasions, we have too many cases for too few people. While many of our cases need more than one staff member assigned, the staff resources are just not present.'²⁰³

On December 13 1993, the Commission announced that it had now developed an objective method for ranking enforcement cases.²⁰⁴ Historically, the Commission had been unwilling to prioritise cases as they wished to avoid being placed in the unenviable position of

²⁰² U.S. House of Representatives, Subcommittee on Government Management, Information and Technology, Committee on Government Reform and Oversight, Testimony of Lawrence Noble, FEC General Counsel, March 5 1998.

²⁰³ Memorandum to the Commission written by Lawrence Noble FEC General Counsel, September 22 1992, PWC audit 4.3.3.3.

²⁰⁴ Colloquay (1994) 258.

explaining why they were pursuing a particular case, which might involve an incumbent.²⁰⁵ Therefore, this initiative was seen as a bold but positive step by many in the OGC. Once a case is received by the OGC it is rated by the Central Enforcement Docket according to a set of confidential criteria. Although the specific point scoring and rating system remain confidential, the broad issues that determine the ranking of cases are as follows:

1. who the respondents/players are.
2. impact on the process.
3. intrinsic seriousness of the violation.
4. topicality of the activity.
5. development of the law.
6. subject matter.
7. countervailing considerations.²⁰⁶

Despite the confidentiality surrounding EPS criteria, some further clarification can be made. Firstly, violations committed by high profile repeat players are scored more highly than those committed by inexperienced poorly funded candidates. The justification for this is that enforcement against these players has a greater effect on the regulated community than taking action against a candidate who failed to win many votes and who is unlikely to run again.²⁰⁷ The second criteria might involve making a judgement about how seriously a violation affected the outcome of an election.²⁰⁸ For example, a high scoring for 'impact on the process' is likely if a candidate's treasurer accepted a large illegal corporate contribution

²⁰⁵ Colloquay (1994) 259.

²⁰⁶ Disclosure made in 1994 under the Freedom of Information Act, PWC audit 4.3.3.3.

²⁰⁷ Interview with Scott Thomas, Washington D.C. 18.10.01.

²⁰⁸ Lochner T and Cain B (2000) 'The Enforcement Blues: Formal and Informal Sanctions for Campaign Finance Violations': *Administrative Law Review*, 52 635.

in the hope of securing victory in a close race. Thirdly, 'intrinsic seriousness' may relate to the amount of money involved or whether the violation was 'knowing and wilful'.²⁰⁹ Although difficult to prove, 'knowing and wilful' violations in 'bright line' areas of the law are taken very seriously by the FEC. They may chose to prosecute as a civil matter, or refer the case to the Department of Justice under the memorandum of understanding 1978.²¹⁰ The fourth, fifth and six variables are less clear but may well relate to jurisprudential issues.²¹¹ For example, the Commission may wish to resolve an outstanding matter through the courts in order to clarify the law and re-establish regulatory certainty. These factors could also relate to areas of the law that need stronger enforcement efforts due to widespread violations.²¹² Finally, an example of 'countervailing circumstances' could involve consideration of the age and timing of a violation. For example, if the OGC found that the violation was committed in a previous election cycle, the statute of limitations might preclude successful enforcement. In 1998 Commissioner Thomas testified before Congress on the matter of investigating older violations of the FECA:

Investigations of activity more remote in time usually require a greater commitment of resources, primarily because the evidence of such activity becomes more difficult to develop as it ages. The longer these cases remain unassigned because of inadequate resources, the more the utility of commencing an investigation declines, until, eventually, activation of a case would not be efficient use of Commission resources.²¹³

Matters scored highly enough to warrant Commission resources remain on the CED until

²⁰⁹ Thomas S and Bowman J (2000) 582.

²¹⁰ Interview with Commissioner Scott Thomas, Washington D.C. 18.10.01.

²¹¹ Thomas S and Bowman J (2000) 582.

²¹² U.S. House of Representatives, Committee on Appropriations, Subcommittee Treasury, Postal Service, and General Government Appropriations, fiscal year 1998 68.

²¹³ U.S. House of Representatives, Committee on Appropriations, Subcommittee Treasury, Postal Service, and General Government Appropriations, FY 1999 9.

staff can be assigned to actively work them. As the EPS is a ranking system, the Commission dismisses cases either because they have grown stale through remaining unworked on the CED, or because they are deemed to be a low priority and therefore do not warrant the use of OGC resources.²¹⁴ However not all lower priority cases are squeezed out of the system, as an additional tier of less significant cases operates to ensure that the full spectrum of violations is enforced.

The PWC audit concluded that the EPS was a sound management tool. It set out that:

The EPS is a reasonable triage approach and operates without evident partisan bias. EPS allows the FEC to exercise prosecutorial judgement while providing sufficient structure to differentiate among cases for Commissioner disposition.²¹⁵

However, the PWC audit was somewhat limited in its analysis. The audit, whilst comprehensive, was more orientated towards an assessment of management competency, practices and tools. Therefore, many of the concerns and criticisms of the EPS by the regulated community were ignored. The first criticism, which was alluded to in the introduction to this section and something that generally emanates from the right, seeks to challenge the way the OGC treats certain high profile actors. The second criticism, which tends to come from those who favour more expansive regulation, asserts that the EPS

²¹⁴ If a case is to be officially defined as low rated, its EPS numerical score must fall below an established threshold U.S. House of Representatives, Committee on Appropriations, Subcommittee Treasury, Postal Service, and General Government Appropriations, Congressional testimony of Larry Noble, March 5 1998 38.

²¹⁵ PWC (1999) E-S 4.

results in far too many dismissals, something that undermines deterrence. Finally, many find the way the Commission keeps the EPS ranking criteria confidential either puzzling or ill conceived. By hiding which violations the FEC considers serious and deserving of enforcement, is anathema to the way most regulatory agencies operate.

In 1998 the House Committee on Government Reform and Oversight investigated a number of campaign finance violations that led to criticism of the OGC and Lawrence Noble in particular.²¹⁶ The case centred on large illegal foreign donations made to both Democrat and Republican candidates by a well-known German businessman, Thomas Kramer. The Democratic Senatorial Campaign Committee alleged that Howard Glicken, a senior Democratic Party fundraiser, had solicited a \$20,000 contribution from Kramer in April 1993. After being fined \$323,000 Kramer submitted an affidavit to the Commission setting out that a Democratic Party fundraiser had advised him to route his contribution through another person as he was a foreign national. Kramer then followed this advice and made an illegal conduit donation through his Secretary, Terri Bradley. Evidence suggested that this Democratic fundraiser was the regular White House visitor and former finance Chair of Al Gore's 1988 presidential race, Howard Glicken. However, an OGC memo relating to the decision not to pursue the matter was heavily criticised by Republicans and the media. Chair of the House Committee on Government Reform, Dan Burton (R-IND) addressed FEC Associate General Counsel Lois Lerner, commenting:

'If you were on this side of the chair and you were reading this, "Because of Mr. Glicken's high profile as a prominent Democratic fundraiser, including his

²¹⁶ U.S. House of Representatives, Committee on Government Reform and Oversight, Federal Election Commission Enforcement Actions: Foreign Campaign Contributions and other FECA Violations, March 31, 1998.

potential fund-raising and support of Vice President Gore's expected Presidential campaign, it is unclear that this individual would agree to settle this matter short of litigation."²¹⁷ and then you drop the case, you did not send a criminal referral to the Justice Department and yet you knew that that was a \$20,000 illegal campaign contribution. Illegal. It was against the law. And then you read this, along with the other actions that were not taken by your agency, it certainly appears as though there was a reason why you didn't send this to Justice.²¹⁸

The Republican view that was generally articulated through what Henry Waxman (D-CA) referred to as 'innuendo,' implied that the OGC did not wish to antagonise the White House, as Glicker was expected to assist Al Gore's 2000 presidential race.²¹⁹ The 300 pages of Congressional testimony contained numerous references to the failure of the OGC, all of which implicitly ascribed preferential treatment being afforded to Glicker. These criticisms were made more explicit in the 1449 page report that was published by the committee on November 5 1998. It commented:

Furthermore, the FEC's statement linking Glicker to Vice President Gore as an apparent reason for not pursuing the matter appears to be a particularly ill-conceived message that the FEC does not prosecute cases when met with resolve and political connections.²²⁰

However, if one considers the EPS criteria and the high score repeat players attract, it was

²¹⁷ General Counsel's Report in the matter of Greenberg, Traurig, Hoffman, Lipoff, Rosen and Quentel *et al* MUR 4638 December 19, 1997.

²¹⁸ www.comm.house.gov 7.10.02.

²¹⁹ U.S. House of Representatives, Committee on Government Reform and Oversight, Testimony of Henry Waxman (D-CA), March 31, 1998, 101-102.

²²⁰ U.S. House of Representatives, Committee on Government Reform and Oversight, 'FEC Enforcement Practices and the Case against Foreign National Thomas Kramer: Did Prominent DNC Fundraisers Receive Special Treatment?' November 5, 1998, 2-3. Interim Report. www.house.gov/reform/reports/fundraising/index.htm. Full Report

unlikely that the memorandum represented anything to substantiate the claims of preferential treatment. When asked about the case and the OGC report, Lawrence Noble commented:

Larry Noble. 'The Glicken case, in retrospect we probably should have gone after him more seriously, but there was a preliminary report and things developed. I remember when that report crossed my desk and I remember hesitating at that stage and there's a point when you decide I'm not gonna send it back, I'm just gonna send it on. Little did I know! But it was one of those that I hesitated, I knew what he meant, the person who wrote it meant, and it wasn't the way it read. It was unfortunate. But, one, its hard and, two, the way the law is set up it isn't easy to get solicitors, and, three, sometimes its difficult to find out who they were. I really wish we'd gone after him; we did later on. But there was nothing nefarious about that case. What we were facing, what that statement was meant to deal with, was that fact that this was a resource issue. What the staff were saying was that this guy is gonna fight us tooth and nail and its gonna be a long fight and we're running up against the statute of limitations and let's just cut it off. When the agency gets bogged down so much, the statute of limitations passes after a big investigation and it turns out to be a waste.'²²¹

Other parts of the general counsel's memorandum contain references to the time constraints alluded to by Lawrence Noble. The report stated:

'While this office would generally recommend a 'reason to believe' finding against Mr Glicken and conduct an investigation into the two DSCC contributions, because of the discovery of complications and time constraints, this office does not now recommend proceeding against this identified individual, or the DSCC.'²²²

Donald McGahn, general counsel at the NRCC, commented on the Glicken case and was asked:

²²¹ Interview with the author, Washington D.C. 17.10.01.

²²² U.S. House of Representatives, Committee on Government Reform and Oversight, March 31, 1998 4.

Author. 'Does the FEC shy away from powerful or high profile respondents, those likely to generate flak, those likely to defend their case aggressively?'

Donald McGahn. 'It goes back to what we talked about earlier. Pick on the guy who can't help himself, as opposed to the guy who...the big guy. But hearing you read that memo, seems to me a candid assessment by counsel, because one of the questions the Commission is going to ask is, 'can we conciliate this and not go to court.' And that is saying no, co's the guy's not going to conciliate because he's going to run to the press and you know if you want him, you, the Commission's, gonna have to vote to go to court. We're gonna have to prove it in court. And if we can't, we can't. It doesn't mean that Larry Noble is backing down to some high priced Democrat.'

Author. 'So he's just being realistic.'

Donald McGahn. 'Yea, I think he's just being realistic. And some of the stuff is difficult to prove and if you want to go after the campaign entity, it's a bit easier because they are regulated. They file reports. They're not going to want to go and mess with the FEC too much because they are afraid they might get audited some day, or maybe they are on the radar screen. Nobody is really sure what happens, so you want to be co-operative. If you are not subject to FEC jurisdiction and you don't have to file reports, you can be a little more aggressive.'²²³

When asked about the case, Commissioner Thomas commented:

Scott Thomas. 'The famous quote in the Glicker case, I always felt was twisted by the media. The point made by the General Counsel's office was that we're up against a statute of limitations and if we pursue this additional allegation, most likely this fellow, with a lot of money, will assert defences and will be able to drag out the process. Clearly, I think the Commission would have been delighted to pursue that violation or any other sexy violation if we thought we could win it, if it was serious enough.'²²⁴

²²³ Interview with the author, Washington D.C. 16.10.01.

²²⁴ Interview with the author, Washington D.C. 18.10.01.

However, for groups like the Fair Government Foundation (FGF), the comments of Commissioner Thomas represent exactly what is wrong with the OGC and the EPS.²²⁵ They argue that the OGC use EPS criteria as a justification to pursue controversial cases involving legal uncertainty and to unfairly target the high profile repeat players they disapprove of. Bob Dahl, President of the FGF, commented:

'The worst effect of this case priority system is how it has turned enforcement priorities upside down. It gives extraordinary attention to a few juicy enforcement cases and deliberately neglects a vast number of 'routine' cases. The basic bread and butter aspects of the law (which affect the broadest range of the regulated community and for which there is generally wide agreement on what the law says) are ignored in favour of exploring the frontiers of the law or only the big fish. FEC enforcement is not a general store, it is a boutique.'²²⁶

However, the Commission deliberately set out to target the 'big fish' Dahl referred to. Commissioner Thomas explained that when the EPS was being developed, the FEC felt justified in prioritising enforcement against repeat players. He commented:

Scott Thomas. 'If you have got something that is a more significant case, that is a bigger amount of money, it involves someone who is involved in the process who will potentially continue to do this...that's the kind of case you want to pursue. Much more than maybe some peripheral player, minor or new party candidate, who will probably never be heard from again.'²²⁷

²²⁵ The FGF is a non-profit organisation established to inform the public about threats to First Amendment Rights and unnecessary government interference and regulation

²²⁶ U.S. House of Representatives, Hearing on Oversight of the Federal Election Commission, Testimony of Bob Dahl, President of the Fair Government Foundation, March 5 1998 16.

²²⁷ Interview with the author, Washington D.C. 18.10.01.

Lawrence Noble was asked:

Author. 'When considering enforcement proceedings against individuals, the first criterion affecting that decision under the EPS is who the respondents/players are. What is the significance of this particular criteria for the way the FEC exercises prosecutorial discretion?'

Larry Noble. 'It goes back to the widows and orphans. Obviously you want to concentrate on people who are in it constantly, the big players, the political Parties, the professionals, the ones who you get a bigger bang for the buck in affecting how things get done. Going after the one-time solicitor who has never been involved in politics before and will never be involved in politics again may not be worth it. And we live in a world where we have limited resources. So one of the factors you consider is who are the players. Are these the political Parties? Are these the major actors? People who are constantly involved in the process. If so, that generally weighs on the side of, "yea, you do want to go after them."²²⁸

Lawrence Noble explained that although the EPS builds in a proclivity for the OGC to recommend enforcement action against high profile respondents, the Commission may ultimately decide not go after somebody because they are scared of them. However, one might repeat the disclaimer that this discussion focuses on the bureaucracy, not the Commissioners. It is clear that the EPS helps to ensure that violations committed by high profile actors do attract the attention of OGC, whatever the eventual outcome. Therefore, at a staff level, it is highly unlikely that high profile actors would receive any preferential treatment, quite the opposite in fact. Secondary data and elite interviews support the assertion that high profile actors are actively targeted by OGC. The contentious issue is not empirical but normative. The OGC view this targeting as something desirable and necessary, yet others view it as unfair and discriminatory.

²²⁸ Interview with the author, Washington D.C. 17.10.01.

Perhaps the most serious criticism of the EPS is that it undermines deterrence by dismissing too many cases. If large numbers of cases are dismissed without being investigated or put before the Commission, respondents are not only denied due process but also the consequences of breaking the law become marginal. Low rated and stale dismissals are set out in the table below.

Table 2.9.2: Data showing the numbers of low rated and stale dismissals.

	CY95	CY96	CY97	CY98	CY99	CY00	CY01 31.8.01	TOTAL
LOW-RATED	66	34	128	49	45	42	16	380
STALE CASES	54	52	79	48	14	6	2	255
TOTAL	120	86	207	97	59	48	18	635

FEC memorandum held by the author, 17.9.01.

In testimony before the House Administration Committee, Kevin Bacon, a partner in PWC, commented that 'no Commissioner, staff member, or independent observer would be satisfied with the number of cases dropped for staleness or a low EPS rating.'²²⁹ PWC sampled the OGC enforcement caseload from January 1 1994 to September 30 1998. It

²²⁹ U.S. House of Representatives, House Administration Committee, FEC Authorisation Hearing, 18.5.99 www.house.gov/cha/business 28.11.00.

found that of the total 1,179 cases, 661 were dismissed under the EPS. One might note that in addition to these EPS dismissals, a large number of other cases were dismissed for unspecified reasons.

Table 2.9.3: Summary of case disposition, January 1 1994 - September 30 1998.

2%	SUIT AUTHORISED	29 CASES
22%	CONCILIATION	262 CASES
1%	PROBABLE CAUSE*	13 CASES
12%	REASON TO BELIEVE*	140 CASES
3%	NO REASON TO BELIEVE	36 CASES
33%	LOW PRIORITY DISMISSAL	388 CASES
23%	STALENESS DISMISSAL	273 CASES
3%	OTHER DISMISSAL	37 CASES

* With no further action.

Source: PWC (1999) Exhibit ES-1.

Most interviewees expressed serious concern about the number of cases dismissed by the FEC. Some observers particularly critical of the EPS have referred to these dismissals as 'case dumping.' Larry Noble was asked about the efficacy of deterrence in light of the PWC figures, he commented:

Larry Noble: 'I think it affects it a lot. Obviously in any law enforcement, the less chance you think there is about getting caught, the less deterrence there is. You

know I'm gonna drive home late at night and there is not going to be any cops on the road, whether I'm gonna speed or not, I think it does affect it. There are cases that are low rated because they're just not worth it, not worth pursuing and I say that, even if we were given a blank cheque on enforcement, a lot of complaints that came in, you would dismiss, not worth going after. Minor things, petty things. You always have a certain amount of discretion in law enforcement that you are not going to go after everything. But the disturbing ones, the ones that you should have gone after but eventually you just dismiss them because they got too old, you just didn't have time to go after them. That was for me the real sign: how many cases we were dismissing because they were stale. They were the ones you held onto because you should go after them but after a while they got too old, more than the low rated ones. Even the low rated ones, with enough resources, your threshold for dismissing low rated cases would have changed. Meaning that there were cases that they were dismissing as just not being worth it, but would have been worth it if we had enough resources. The big-ticket items were the stale ones, were getting dismissed, you'd held onto, thinking you'd like to get to but got dismissed. And it does affect deterrence. There's certain people you can tell that there is no enforcement going on and they're gonna follow the law. But there are other people who at least round the edges push the envelope. Are gonna assess the field and think what are the chances of getting caught. If the odds of going after you are small and if they do go after you it will be way after the election and you get a small penalty, that's ok, it becomes the cost of doing business. Most people want to comply with the law. I then think that what starts happening in politics as in anything else, as the cost of complying goes up, they start thinking about non-compliance, especially around the edges. There are candidates who will accept illegal corporate contributions fully knowing that they are accepting illegal corporate or union contributions. They are clearly the minority and those are really the bad actors. The more dangerous part of it is pushing the envelope. Meaning there is a grey area and saying well, I'm gonna play in the grey area and maybe just for sport, occasionally I'll go over the line and not worry about it because the cost of enforcement is low and the benefit of playing in the grey area is high. It increases my

²³⁰ Interview with the author, Washington D.C. 17.10.01.

chances tremendously of winning.²³⁰

Donald McGahn was also asked to comment on the PWC EPS dismissal statistics:

Donald McGahn. 'Well, it sends a very strong message, that you be one of the 6 out of 10 that get away scot-free and not have to do anything. I think it sends an awful message. It's something that frustrates me here, as someone who represents the regulated community, because what I see is the 4 out of 10, or whatever the statistic is, who are in trouble, who tend to be the first time candidates who couldn't pay a lawyer or an accountant at the threshold of their campaign. They lost and have no money to pay a fancy guy like me and are at the mercy of the five lawyers' with one guy falling asleep at the FEC. And how many times have you heard the FEC referred to as the 'toothless tiger' because it can't enforce the law? That is the test that really bolsters that. But the staleness issue is something I never understood, because I know they are busy, some of these cases are factually complex, but it is not really fair to the regulated community to just leave them hanging, because you want a resolution. Now, were you guilty, or weren't you? Did you commit a violation, or didn't you. Who knows? But the person who took time to file the complaint thought there was something wrong. Under oath, which is what it has to be. Well, we just didn't get to it. So if you have a choice, breaking the law, you can do it right, or you can do it sort a not so right way for what ever reason, there is a pretty good chance you can get away with the not so right way.²³¹

When asked the same question, former Commissioner and GOP lawyer Trevor Potter commented:

Trevor Potter. 'Well, first the figures are dismal, secondly there is a legal question as to whether the FEC has statutory authority to dismiss any cases. The statute is very clear, the statute says that the Commission shall vote. There isn't a procedure in the statute that allows for the dismissal for staleness. The statute says that the Commission shall review the complaint. If the

²³¹ Interview with the author, Washington D.C. 16.10.01.

Commission finds by a vote of four, it shall proceed. These are cases where the Commission are not reviewing the complaint, co's the Commission is deciding that they've got too many cases. The real question you want to look at is, how many higher rated cases are being dismissed as opposed to pursued? The ones that are decided important and then dismissed because they are stale are a real danger sign.²³²

However, Jan Baran offered a more positive view about the efficacy of the EPS. He viewed the PWC dismissal figures as rational administration. When asked how these statistics might affect the credibility of deterrence he replied:

Jan Baran. 'Well I don't think it does, although I think it can be used as ammunition by the public integrity constituents. But the vast number of complaints that go through a law enforcement agency are dismissed. Civil complaints that are lodged with a prosecutor, even criminally, after they are reviewed, when they assess the resources they have and the priorities they have, prosecutors will simply not pursue, as with the majority of complaints filed with that agency. A combination of two things: most importantly, either someone doesn't seem to have done something wrong, or did something so minor that it is not worth spending time on. You can't arrest and prosecute every jaywalker.'

Author. 'Can I come back to you on that? When I spoke to Larry Noble he wanted to differentiate between a low EPS rating and staleness. I think what he was saying was that it is fair enough if you are dismissing cases for a low EPS rating, but if you are dismissing cases for staleness, the reason why they are stale is that you held onto them because they are important and you need to try and enforce the law. Therefore, if you are getting rid of a large number of cases because of staleness then that is serious.'

Jan Baran. 'But they haven't investigated it, so they don't know if it is a serious case do they?'²³³

²³² Interview with the author, Washington D.C. 24.10.01.

²³³ Interview with the author, Washington D.C. 17.10.01.

Jan Baran's comments are indicative of a particularly hostile attitude towards laws that are seen to infringe First Amendment protections guaranteed under the U.S. Constitution. Therefore, the introduction of the EPS, high rates of dismissals and the consequent effects this might have on any notion of deterrence are viewed as a desirable thing. For Jan Baran, the agency is merely being rational, forward thinking and adopting practices which have long since been the norm in other regulatory agencies.

However, if one examines the figures that set out stale and low rated dismissals, the FEC has been able to reduce the number of stale dismissals significantly. Therefore, one might argue that since the completion of the PWC audit in 1999, the EPS appears to be functioning more as it was intended, primarily filtering out the less significant cases. Commissioner David Mason was asked about the 59% dismissal rate contained in the PWC audit:

David Mason. Well, first of all one of the criticisms levelled at the Commission before I came was the dismissal rate, cases dismissed, and I took it as part of my charge to lower that rate, to lower the number quite substantially. So I would start off by saying that the problem is quite a lot smaller than that figure and the Commission has been addressing quite substantially the number of stale dismissals over the past two or three years. It's pretty small, down to single digits per year. So I think it was a valid criticism before. In defence of the people here before, the Commission had asked substantially for more enforcement resources in the period running, particularly 96, 97, 98, and hadn't gotten it from Congress.¹²³⁴

¹²³⁴ Interview with the author, Washington D.C. 22.10.01.

A final criticism of the EPS is the secrecy that surrounds it. Republican and Democrat election lawyers complain that there is a lack of 'bright line' regulation. They argue that the EPS should be used to send a clear message to the regulated community about what the FEC considers serious and therefore likely to attract enforcement action. Although the FEC maintains this secrecy in order to stop actors rationalising their behaviour, Alex Vogel, general counsel at the NRSC, said that this occurs. If the law suggests that something is illegal but this area is not being enforced, clients will be advised accordingly. Therefore, the lack of clarity produces the behaviour the FEC wish to discourage.

Author. 'In certain regulatory agencies they communicate to the regulated community, 'this is what we think is important, do this and we are going to go after you.' The FEC seems to operate in exactly the opposite kind of manner. Because we have the EPS and we have five or six criteria, not exactly a mystery what they are, although it is a bit of a mystery how these things are weighted and the various tiers that occur. So what they want to do is make it a secret, so the regulated community isn't getting any kind of direction. Is this necessarily a good thing?'

Alex Vogel. 'You're absolutely right. No. Prior to being in this kind of work, I've advised people in other regulated communities, the communications industry, the insurance industry, and it's the exact opposite. The goal of most regulators is that we have this group of regulations and we want the community to comply. Voluntary compliance based on clear standards is a much more efficient regulatory process than hiding the ball, then sporadically jumping at people not knowing.'

Author. 'Isn't this to stop the regulated community from rationalising their behaviour in terms of well, this I know they won't go after me for, so don't comply with the law?'

Alex Vogel. 'It's incredibly inefficient, if that's their thought process. What it has led to on the ground, in the real world, how we advise people, well...the best example is issue ads. Issue ads were not an issue so to

speaking before 96, then after 96 Party committees spend millions of dollars and there was an issue about whether Clinton actually wrote the scripts himself and whether he co-ordinated those issue ads. There were all these enforcement cases that went nowhere. The Presidential audits from 96, they finished work on the Dole audit a month ago. A full cycle later, nothing came out of that. We get to 2000, we all sat down for the 2000 election campaign, the NRC, everyone, all right where are we on issue ads? It was clear that tons of people didn't like it and tried to raise all kinds of ruckus and get millions of dollars pumped out of the audit and other stuff. And enforcement, well, nothing had been decided, what had been decided was dismissed. The public views of the Commissioners were not favourable, Scott...But the perfect example, what happens in 2000 is that it has never been enforced effectively. The regulations are totally grey in that area, so they're not likely to go after you on this. But we're doing exactly what they don't want us to do, so how else are we supposed to operate?²³⁵

Bob Bauer described the EPS as a 'mystery to people in the regulated community.'²³⁶ He criticised the secrecy that surrounded enforcement priorities and argued that the FEC should send a clearer message to the regulated community.

Bob Bauer. 'From the regulated community's point of view it is still not clear. The Chairman of the SEC will come in and say we are now emphasising X, we are very concerned with unauthorised trading on the NAZDAK. So you know, if you are a brokerage firm, what is going to be looked at. Even before the EPS came into affect, the Commission tried to hide what its enforcement priorities were. As you know, political committees can be audited for cause and the audit criteria, the way points were assigned to warrant an audit, had never been disclosed on the grounds that if committees knew what they were supposed to do, they might just do it. It doesn't make a whole lot of sense.'²³⁷

²³⁵ Interview with the author, Washington D.C. 26.10.01.

²³⁶ Interview with the author, Washington D.C. 23.10.01.

²³⁷ Interview with the author, Washington D.C. 23.10.01.

One might argue that the regulated community has a legitimate grievance concerning the lack of bright line regulation. But that lack of clarity and certainty is often the result of the Commission's inability to marshal the four votes required to enforce the law and not a particular fault of the EPS. Partisan and ideological disagreement, coupled with legal uncertainty, can lead to 'reading of the Commission' as described by Alex Vogel. The regulated community makes educated guesses concerning what is likely to be enforced. Alex Vogel commented on this lack of bright line regulation:

Alex Vogel. 'Sometimes people say to me, people who decide to run for office and they say what do I really have to watch out for, aside from the mechanical file this, disclose that. 'What kind of things will really get me in hot water?' Well, taking money from a foreign national will really get you in hot water. Because it's one of the things that is now reasonably clear and there's no wiggle room. The process of getting to that was tortured! And I've got memos from my files from previous people who sat in this office five years ago and said, 'well, ya can't do it for a Federal account, but I don't see why ya couldn't do it for soft money, or maybe the building fund.' Even that, which is now incredibly clear, which is a really bright line, was such a tortured process.'

'We would be thrilled to have bright line, black letter, if you do X, Y will happen, on any number of lower level operational and mundane things. Foreign nationals, \$1,000 limits, disclosure, filing time lines, electronic filing. Screw up this and you're gonna get hit with. I would love to be able to say to my clients, 'if you hold the cheque for more than ten days and don't deposit it, it's a \$1,000 cheque, you'll get a \$200 fine.' I would love that. With the exception of the administrative fine stuff for filing, I can't really effectively tell them what will happen to them if they've made a mistake.'²³⁸

²³⁸ Interview with the author, Washington D.C. 26.10.01.

The lack of bright line regulation is endemic in an agency headed by six equals, yet the EPS now functions quite well. It helps in the rational allocation of OGC resources given the CED caseload, enforces a full range of serious and less serious violations and disposes of low rated and stale cases. Commissioner Mason was asked:

Author. 'The EPS has been criticised for its role in allocating staff and other resources in enforcement matters at a particular juncture and not as a system to send a particular message to the regulated community. How would you respond to this?'

David Mason. 'I don't think it was intended to send a message to the regulated community. It was intended, as I understood it and how I see it works, triage, process exclusive to sort out substantial and insubstantial matters and then, among the substantial matters, to set out some degree of importance. I think that is what it's for. I approached it with some degree of sceptically but I think it's useful as a tool for exactly that reason. For example, the tier 1 and tier 2 distinctions are distinctly there to maintain some level of enforcement against the important, but not earth-shattering, enforcement complaints. In that sense, probably there is some message received ultimately by the regulated community. But they have a harder time predicting which complaint will be enforced against.'

Author. 'So maybe not giving a clear message is a good thing?'

David Mason. 'Yes, yes.'

Author. 'Because then they don't start to rationalise the process and, as Larry says, you start to think about breaking the law as part of the cost of doing business.'

David Mason. 'So by having that, leaving them with some uncertainty, in a system where you don't have the resources to enforce every substantial complaint.'

Author. 'It becomes like roulette.'

David Mason. 'Yes and leaving them with that and as long as there is a reasonably high degree of possibility

that their case will come up and their case will be selected, in this system, that can work as a deterrent.²³⁹

Conclusion

One might conclude this chapter by saying that there appears to be a universal consensus amongst election lawyers, Commissioners and Congressmen, that enforcement timeliness is poor. Whilst the Commission has been able to actively work 40% of its enforcement caseload, one might argue that this particular goal was a modest one in light of the widespread criticism directed at timeliness. However, the plurality of reasons for this enduring problem is worth reiterating. The growth in campaign spending from \$386 million in 1978, to \$2.3 billion in 1998 has not only meant an increased workload for the FEC, but Congress has been reluctant to allow the Commission to recruit sufficient staff to keep pace with this change. Additionally, the growth in case complexity and the number of respondents per case, coupled with the multi-stage enforcement process and the increasing willingness of the regulated community to 'push the envelope,' all create more work for the OGC and hinder timely enforcement.

Larry Noble was correct in his observation that there has been a philosophical change in the enforcement ethos which has sought to improve timeliness through the introduction of new low impact programmes. Both the administrative fines programme and the ADR pilot are examples of these. These low impact programmes avoid controversy, help to improve performance statistics, and in the case of the fines programme, help to promote bright line

²³⁹ Interview with the author, Washington D.C. 22.10.01.

regulation. Although the FEC claims that the fines programme has significantly increased disclosure timeliness are difficult to substantiate because of the preparation for and then the introduction of mandatory electronic filing, most observers view the programme as a success. However, a number of observers both inside and outside the Commission were sceptical about the programme freeing up the resources alluded to in the Federal Register. Additionally, although the problem of uncollected administrative fines is not the responsibility of the FEC, if large numbers of cases remain as 'uncollectables,' the programmes deterrent effect will decline over time. The positive response demonstrated by election lawyers and other members of the regulated community for the administrative fines programme might be contrasted with that for the ADR pilot. Many interviewees were unenthusiastic, unaware or critical of the programme. Some saw it as a cynical ploy to 'get the numbers up,' others just saw it as unsuitable for this particular regulatory environment as there was no 'percentage in it.'²⁴⁰

In assessing the fairness of enforcement, the partisan hypothesis had little or nothing to commend it. The agency structure prevents any one Party from co-opting the agency for partisan purposes. Poorly funded inexperienced actors have been subjected to more enforcement action than their status might warrant. During the Commission's infancy, this scenario resulted from institutional insensitivity and led to the much-talked about cases referred to by Mary Meehan, Jan Baran and Scott Thomas. As the agency has matured, it has become more sensitive, yet these actors still find themselves the subject of enforcement because they commit most of the easily detectable violations, either through ignorance of the law or inexperience. Another reason why widows and orphans might be subjected to

²⁴⁰ A comment made by Jan Baran, Interview with the author, Washington D.C. 17.10.01.

enforcement action in what appears to be a relatively minor violation is that a legal principle is involved. Finally, the cynical view that 'small fry' are easily intimidated, usually wish to settle as soon as possible and help to get the 'numbers up' should not be dismissed. The stable OGC violation profile is not comprised of the big 'sexy' cases referred to by Commissioner Thomas, but far more routine, often *malum prohibitum* violations committed by those without the resources to employ election lawyers and accountants. These cases make up the majority of statistics that represent enforcement performance. Others have argued that the FEC positively shy away from enforcing the law against high profile respondents. The memorandum relating to the Glicker case was used to assert this criticism. However, the EPS positively weight cases that involve high profile actors as these players are in a position to violate the law in the future. Some, like GOP lawyer Jan Baran and Bob Dahl of the FGF, argue that this unfairly discriminates against high profile players. Yet it is appropriate to regulate wealthy high profile players more strictly than the transitory actor unlikely to attract more than a few votes. Finally, in the past, the EPS has been legitimately criticised for dismissing too many cases and thereby undermining deterrence. A large number of low priority cases were dismissed in 1997, which resulted from the 1996 scandals, and far too many stale cases have been dismissed in the past. However, since 1999 the dismissal rate of stale case has been significantly lowered.

CHAPTER 3

FEC Commissioners

OGC staff and the General Counsel in particular exercise considerable bureaucratic authority, yet the *de facto* locus of power resides with the Commissioners. In this chapter the way in which those at the apex of the structure affect the nature and effectiveness of enforcement will be examined. Firstly, the structure and record of FEC leadership will be reviewed. One might justify this review because leadership, or the lack of it, can have a significant impact on agency performance. Secondly, the role and function of *ex officios* on the Commission will be discussed. As these Congressional representatives were entitled to attend Commission meetings where MURs might be discussed and voted on, their role has attracted criticism from a number of quarters. Thirdly, the Commissioner appointment process will be discussed. The politicisation of appointments and the Congressional dominance over the system has arguably produced an agency lacking in independence. Fourthly, the common criticism that the agency suffers from partisan immobilism will be examined. Whilst this criticism may be accurate at times, partisanship is only one factor that contributes to the outcome of enforcement decisions. Other factors that feed into the deliberative process are: consensus amongst Commissioners, legal interpretation, evidentiary and regulatory philosophy. Finally, as Commissioners are responsible for authorising civil actions where conciliation has failed, some observations will be made about the Commission's court record.¹

¹ In accordance with the GPRA, the Commission aimed to 'conclude some or all of the major cases involving complex legal issues remaining from earlier election cycles, 1996, and 1998.' It also aimed to 'initiate 10 or 15 civil actions to enforce the law under 2 U.S.C. 437G(a)(6).' FEC Budget Request (2001) Enforcement www.fec.gov 11.7.01.

Commission Leadership

The FECA (1974) established an eight-member body, six Commissioners with full voting rights and two non-voting *ex-officios*. Congress deliberately created a weak leadership structure at the Commission. The Chairman and Vice-Chairman are elected annually by their Commissioner colleagues and neither position is vested with any additional powers. Unlike the FEC, the Securities and Exchange Commission (SEC), the Federal Communications Commission (FCC) and the Federal Trade Commission (FTC) each have a chairperson who acts as a clearly identified leader and chief executive.² Due to the political sensitivity of its mandate, the Commission was designed to function as a panel of six equals. However, the Chairman moderates debate in Commission meetings, signs documents and performs a number of additional administrative duties. Additionally the Vice-Chairman will chair the agency's finance committee and will present and justify the budget request to Congress. Although the Chairman may exercise discretion in setting institutional goals, these may change as a new Chairman affiliated to the opposing Party assumes office.³ As the General Counsel and Staff Director manage the permanent bureaucracy, power is divided at staff level and the agency experiences 'multiple direction' from the top.⁴ The collegiate leadership structure and the transient nature of the

² LA Forge A (1996) 'The Toothless Tiger, Structural, Political and Legal Barriers to Effective FEC Enforcement: An Overview and Recommendations': *The Administrative Law Journal*, 10 362.

³ Former Staff Director, John Surina described how chairmen often felt pressure to be the fourth swing vote in order to avoid their tenure being associated with too many deadlocked vote tallies. He also noted that once a Commissioner's Chairmanship had ended, that contrarian vote might be reversed at a later stage of the enforcement process. Therefore, the willingness to risk antagonising one's Party or a particular sectional interest may only be a temporary aberration with some FEC Chairmen. Letter from John Surina held by the author, June 20 1989.

⁴ Cowett A (1989) 'Walking on Eggshells: The Federal Election Commission and Political Regulation' 44.

Chairmanship and Vice-Chairmanship were reflected in their cursory description in the FECA. The law stated:

The Commission shall elect a chairman and a vice-chairman from among its members for a term of one year. A member may serve as chairman only once during any term of office to which such member is appointed. The chairman and vice-chairman shall not be affiliated with the same political party.⁵

The PWC audit (1999) criticised the FEC leadership structure. It concluded:

The FECA appears to have deliberately created diffused leadership roles amongst the Commissioners and statutory officers, making it difficult for the organization to speak with one voice or provide clear direction to the FEC.⁶

Commissioners frequently act independently, instead of as a body in managing the agency. Many times, no action is taken on a subject because no four members can reach agreement on an appropriate course of action. In interviews, many staff expressed a feeling that all their hard work and effort had gone for naught and that their work is not worth the effort when Commissioners fail to reach closure.⁷

Commissioner Mason also alluded to the problem of forging a consensus amongst Commissioners over policy issues.

Commissioner Mason: 'I have certainly participated in, made efforts to try to forge more consensus like that among the Commission and it is a very difficult, frustrating process. Because you are dealing with six people who bring different things to the table, different views, and ultimately there is no-one to settle issues and erm, given the way Commissioners are appointed, and the way they view their jobs, it is not common to get a very strong four or five member consensus to any definite policy. There is a collegial attitude, of deference, where if one Commissioner feels strongly about something, the other Commissioners are reluctant

⁵ FECA Title 2 437c (D) 5.

⁶ PWC (1999) 3.3.6 3-21.

⁷ PWC (1999) 3.3.6 3-21.

to say, well I'm sorry you're just not gonna get what you want.⁸

Republican election lawyer and former Commissioner, Trevor Potter also referred to the lack of leadership at the Commission:

Trevor Potter: 'One of the problems with the FEC is that there is nobody at the top. No one person.'

Author: 'So it's kind of a problem of leadership.'

Trevor Potter: I think there is a vacuum of leadership. You have a Commission that has a rotating Chairman, it's certainly governing by committee. It's not designed to have any one person in charge. As you know, all other staff, General Counsel, Staff Director, can be hired and fired by a majority of the Commission. There has been a deliberate attempt at diffusion at Staff level, then the removal of a strong executive, charitably out of concern that the Commission would be too aggressive. Less charitably, so that it wouldn't be aggressive at all. But no, there isn't a centralised leadership.⁹

However, Bill Allison, senior editor at the Center for Public Integrity, argued that the FEC was not the only agency that experiences regular changes in leadership. He suggested that the revolving Chairmanship at the FEC was not an adequate reason for lacklustre leadership. He also opined that other agency Chairs had been much more willing to go to Congress and ask for legislative change and assistance. When interviewed, he commented:

Bill Allison: 'I haven't seen the Commissioners begging Capitol Hill to change the law, so they can really crack down on people and it would seem that the FEC would have a certain amount of weight. The FBI Director asking for this, that and the other thing. You see the head of Central Intelligence going in closed-door sessions, but every Federal agency...the Heads of it go'.

Author: 'But these ones have a permanent Head and the

⁸ Interview with the author, Washington D.C. 22.10.01.

⁹ Interview with the author, Washington D.C. 24.10.01.

FEC doesn't. Is that one of the major problems? This rotating Chairmanship and Vice-Chairmanship? You can't have a strategic vision.'

Bill Allison: 'Think how many changes there have been at the FAA probably not the best example because of the air traffic control system has been a mess and the IRS computer stuff has been a mess. But overall, every agency has to deal with this to some extent and with the FEC it seems that, except when they have the opportunity when it was kind of their.....the soft money co-ordination of the '96 campaign was essentially an FEC issue, much more than a Justice issue, or something that Congress should be looking at and that was a time when essentially all they did was to ask for more money. They didn't ask for revising the statute, they didn't go to Congress and say listen, we need more money if we are going to investigate it. The approach was entirely different, that we have this huge backlog of cases and we can't get to this one. Well, what's more important than a Presidential election? What's more important than that investigation?'¹⁰

The Commission has been poorly led. Yet this enduring characteristic was more the product of Congressional self-interest and less the product of individual failure at the FEC.¹¹ Congress structured the agency in a way that would discourage strategic planning.¹² The one-year Chairmanship and lack of powers associated with the Office was a deliberate hobbling strategy. The separation of power at staff level was also designed to encourage rivalry between the agency's two Statutory Officers, Staff Director and General Counsel. Additionally, Congress has been more willing to accommodate agency requests for

¹⁰ Interview with the author, Washington D.C. 22.10.01.

¹¹ FEC Annual Report (1997) 31.

¹² Alex Vogel, general counsel at the NRSC, criticised the political structure of the Commission and referred to the sometimes difficult relationship between Commissioners and the FEC general counsel. He commented: 'The political structure that is imposed on the Commission, the General Counsel's office does something, then it goes to the Commission. The political structure of the Commission, I think, makes that impossible.' 'The problem is that so many people have been in charge that you've had the Commissioners fighting Larry and Larry was the Office of the General Counsel and was such a clearly defined political force on one side or the other. The other, as far as I was concerned. It was better to have no enforcement.' Interview with the author, Washington D.C. 26.10.01.

legislative change from those bodies whose mandate does not directly affect their chances of reelection. For example, the agency makes annual recommendations for legislative change, which are submitted to Congress and published in its *Annual Report*. Yet those recommendations designed to improve enforcement have often been ignored by Congress.¹³ Furthermore, Bill Allison's statement that the agency failed to ask Congress for additional funding to investigate the allegations surrounding the 1996 elections was inaccurate. Republican appointee and FEC Vice-Chair Joan D. Aikens asked Congress for supplemental funding of \$1.7m (1997) and \$4.9m (1998) to enable the agency to investigate the alleged abuses. Commissioner Aikens testified:

'We propose to augment the floor budget with a special multi-year and multi-disciplined project to mount an appropriate investigative response to the extraordinary problems associated with the 1996 elections. Among them are several allegations of violations of unparalleled scale. These cases entail complex factual matters, contentious legal and constitutional issues, and involve millions of dollars and thousands of financial transactions requiring detailed review.'¹⁴

Bob Livingston (R-LA) Chairman of the House Appropriations committee responded to Aikens request for what she described as 'discrete units' by commenting, 'I dare say, if soft money has gone up by 171 percent, if the FEC stationed a person in the Lincoln Bedroom,

¹³ The Commission has recommended on several occasions that it be granted injunctive relief and random audit power. Injunctive relief would allow the Commission to expedite its enforcement procedures in cases where violations were clearly being committed in the run up to an election. Additionally, the Commission has asked Congress to restore its power to randomly audit the accounts of political committees in order to help facilitate voluntary compliance with the Act. This power was revoked by Congress in 1979. Both recommendations were contained in FEC Annual Reports 1996 and 1997 and neither has been authorised by Congress. Cain & Lochner also note how the FEC has called for the reintroduction of random audit authority in almost every annual appropriation hearing. Cain B & Lochner T (1999) 'Equity and Efficacy in the Enforcement of Campaign Finance Laws': *Texas Law Review*, 77 1899. One might argue that the Commission now 'self-censors' the legislative recommendations it makes to Congress, especially in the area of enforcement, as it views the resultant Congressional inertia as unproductive. Therefore, the strategy has changed to one that involves making recommendations that Congressmen are more amenable to. The administrative fines programme for *malum prohibitum* violations would be an example of this.

¹⁴ U.S. House of Representatives, Committee on Appropriations, Subcommittee Treasury, Postal Service, and General Government Appropriations, Fiscal Year 1998, 8-9.

it might take care of that.¹⁵ Despite making similar pleas before the Senate Committee on Rules and Administration, both supplemental budget requests were denied.¹⁶

Ex-officio Commissioners

The Secretary of the Senate and Clerk of the House were designated as the *ex-officio* members of the Commission. However, Congressional officers rarely performed this role in person. Each officer nominated a special deputy who was entitled to attend the closed executive sessions of the Commission. When sitting in executive session, Commissioners might deliberate enforcement matters and discuss the formulation of new rules and advisory opinions. Some politicians saw the special deputies as performing a useful function, acting as liaison officers between the two bodies, facilitating the free flow of information and articulating Congressional views.¹⁷ Yet others have described them as 'Congressional spies.'¹⁸ Jan Baran said that, 'they are spies, they sit there like brooding taskmasters.'¹⁹ The reform community has also been particularly critical of the special deputies' place on the Commission. They see their close proximity to the decision-making process as ethically problematic. The criticism was that the special deputies might use their position to influence Commission votes on enforcement cases and litigation.²⁰ When asked if *ex-officios* voted on enforcement matters, the Commissioner commented:

Commissioner Mason: 'Not to my knowledge but I

¹⁵ U.S. House of Representatives, Committee on Appropriations, Subcommittee Treasury, Postal Service, and General Government Appropriations, Fiscal Year 1998, 31.

¹⁶ FEC Annual Report (1997) 31. 'Detailed Budget History' FEC Congressional Affairs Office, Revised July 2001.

¹⁷ Cowett described how Commissioners might 'bounce' ideas off the special deputies in order to gauge Congressional opinion before committing to a particular action. Cowett A (1989) 40.

¹⁸ Common Cause described the *ex officios*/special deputies as 'little more than spies.' Cowett A (1989) 40.

¹⁹ Donovan B (1993) 'Ruling may unleash torrent of challenges to the FEC': *Congressional Quarterly Weekly Report*, 51 (43) 2944.

²⁰ The Center for Responsive Politics campaigned for the removal of FEC *ex-officios*. They argued that *ex-officios* undermined both the Commission's independence and the confidentiality of its investigations. www.opensecrets.org/pubs/law 15.4.02.

wouldn't be surprised if there hadn't been some system to, for them to register, at least, for instance, we have these tally votes through which most of the business of the Commission is conducted. If there is not an objection on a tally vote, then matters are passed, without coming to a formal Commission meeting. It wouldn't surprise me if the Commission didn't have a system where *ex-officio* members could object and force the item onto the agenda at which point they couldn't vote. They were clearly prohibited from exercising that authority but they might have had that kind of power.'

Author: 'Some method of articulating their objections or concerns?'

Commissioner Mason: 'Yes, yes, that was the express reason for them being here. It would be very odd if they weren't able to do that.'²¹

Bob Livingston (R-LA) criticised the presence of *ex officios* in the fiscal year 1994 authorisation hearings held before the House Subcommittee on Elections. Firstly, Livingston asked a number of questions designed to establish who paid the salaries of the special deputies and their secretaries. As Livingston has long held the belief that the FEC was inefficient and wasteful, this particular probe was designed to confirm that view. However, this failed as the special deputies were on the Congressional payroll and the FEC only funded the salary of one secretary for each of the Congressional representatives. Secondly, although the traditional orthodoxy has been that the special deputies represent Congressional interests as a whole, Livingston's next criticism alleged partisan bias. In dialogue with Commissioner McDonald, Livingston alluded to the fact that the Clerk of the House and Secretary of the Senate were chosen by the majority Party leadership in each chamber. He then noted how the Clerk and Secretary then appointed the special deputies respectively. Livingston's charge was that as the Democratic Party controlled the House

²¹ Interview with the author, Washington D.C. 22.10.01.

and Senate the special deputies represented their 'vantage point' and that the minority Party had no such representation on the Commission. Finally, whilst Bob Livingston initially feigned ignorance about who acted as the Secretary of the Senate's special deputy, he later remarked that this individual, former U.S. Senator Wyche Fowler (D-GA), was the subject of an FEC enforcement action surrounding his 1993 re-election defeat in Georgia. However, although the potential conflict of interest was clear, the Congressman was assured that Fowler would recuse himself of any deliberations involving his own case. Whilst Livingston was able to successfully exaggerate the significance of *ex officios* for partisan purposes and in the furtherance of a particular philosophical attitude towards regulating political money, much of his approach was designed to undermine the credibility of the FEC.²²

One might argue that although *ex-officios* were proscribed from voting, they exercised some influence on the Commission. Additionally, Commissioners seeking re-appointment were likely to be mindful of offending their Congressional patrons. Larry Noble noted how some Commissioners would pull back from enforcement as they lobbied to secure re-nomination to the Commission or obtain a job in the private sector.²³ Therefore, the views of *ex-officios* might have assumed a disproportionate influence over those Commissioners nearing the end of their six-year term.

Larry Noble: 'There's actually a real case of where a Commissioner was punished very directly in the reappointment process because of a vote she had taken. There were two terms open. Her six year reappointment term and because another Commissioner had left, there

²² U.S. House of Representatives, Committee on House Administration, Subcommittee on Elections, Fiscal Year 1994, 168-175.

²³ Interview with the author, Washington D.C. 17.10.01.

was a two-year term also. She was given the two-year term because of some of her votes.²⁴

However, the debate was brought to a close when the D.C. court of appeals in *FEC v NRA Political Victory Fund* (1993) ruled that the presence of the two *ex-officios* had broken the separation of powers.²⁵ After the Commission lost its Supreme Court appeal in *FEC v NRA Political Victory Fund* (1994) for 'lack of standing,' the Commission was reconstituted as a six-member body.²⁶

Commissioner Confirmation Process

Members were originally appointed on a staggered basis so that one Commissioner affiliated with each of the main Parties would become eligible for reappointment every two years.²⁷ As FEC appointments have not been viewed as a priority in the Senate and because some appointments can be affected by partisan or ideological disagreement, the

²⁴ Interview with the author, Washington D.C. 17.10.01. Another case that was said to illustrate the ability of Congress to punish Commissioners for an unpopular vote involved Neil Staebler, a Democratic Party appointee. Commissioner Staebler became the 'swing vote' siding with Republicans in the 1975 advisory opinion concerning Sun Oils' political action committee, SunPAC. The 4-2 vote permitted SunPAC to solicit voluntary contributions from its employees and stockholders. This decision was particularly unpopular with organized labor who successfully lobbied to ensure that Staebler was not re-appointed. Light L (1980) 'Reformed-spawned Agency Stirs Discontent': *Congressional Quarterly Weekly Report*, April 19, 1021.

²⁵ Mann T (1997) 'Campaign Finance Sourcebook, Implementing and Enforcing Federal Campaign Finance Law': 277. www.brook.edu 20.6.02.

²⁶ The Federal Election Commission, 'Twenty Year Report' April 1995 37.

²⁷ FECA 1974 437c (2) (i) two of the members, not affiliated with the same political party, shall be appointed for terms ending on April 30, 1977; (ii) two of the members, not affiliated with the same political party, shall be appointed for terms ending on April 30, 1979; (iii) two of the members, not affiliated with the same political party, shall be appointed for terms ending on April 30, 1981. Federal Election Laws compiled by the Federal Election Commission, January 2001 25.

²⁸ Vacillation over FEC appointments and re-appointments has meant that some seats have either remained empty, often for extended periods, or vacancies have been filled through 'holdover' seats where Commissioners continue to perform their duties after their term of office has expired. Commissioner Mason was asked how his views on enforcement differed from those of his predecessor? Commissioner Mason replied: 'Well, that's difficult to say because the seat I'm in was vacant for a couple of years.' Interview with the author, Washington D.C. 22.10.01. In an interview with Donald McGahn, General Counsel of the NRCC, this issue of Commissioner seats remaining empty was raised. He commented; 'Yea, right now I believe that Commissioner Daryl Wold and Karl Sandstrom's terms are up. I think they are holdovers. So far there hasn't been any action publicly on what's gonna happen there and large part of that is Senate confirmation. Right now the Senate is controlled by the opposition Party so you know, the FEC is the least of the priorities right

confirmation process can often be delayed.²⁸ However, appointees affiliated to both Parties are effectively bound in a symbiotic relationship grounded on the premise of mutual success or mutual failure. For example, if one nominee is opposed during their Senate hearing, it is unlikely that the other appointment will be confirmed either.²⁹ Bill Frenzel (R-MN) explained:

'The history of confirmation shows that when one appointee is having trouble getting through the Senate sieve, the one in difficulty stands with the one who is not and neither moves through the process; they are always moved in tandem because of the delicate political nature of the system and therefore, if one doesn't make it, the other does not either.'³⁰

Commissioner Scott Thomas was asked:

Author: 'How might one understand the appointment process? After reading many confirmation hearings, it seems somewhat of a foregone conclusion.'

Commissioner Thomas: 'Well, I don't know about a foregone conclusion but there have been Commissioners who have wanted to be re-appointed and who were in essence told, no. I think Frank Reiche was a perfect example of that. He did want to be re-appointed, but I think he heard through the grape-vine that even his friends didn't want him re-appointed (laughter).'

Author: 'But once you get to a confirmation hearing?'

Commissioner Thomas: 'Oh sure, but that's fairly common for the way our Federal Government operates. For the most part, if you can get to the stage where the

now, what with fighting terrorism and all that. You're right, notwithstanding that, historically it took Brad Smith, David Mason, and Daryl Wold for ever to get on the Commission, and Karl.' Interview with the author, Washington D.C. 16.10.01. Another reason for the delay in filling vacancies is the increasing use of 'holds' in the Senate. A hold is where a Senator requests that the leadership delay a pending activity. No rule authorises or legitimises a hold, yet its use has grown over time through custom and practice. Senators are not obligated to make any request for a hold public and secrecy usually dominates the practice. www.tcf.org 7.7.02.

²⁹ Cowett A (1989) 43. The subcommittee on Privileges and Elections is responsible for FEC Commissioner confirmation hearings.

³⁰ Center for Responsive Politics 'Justice Delayed Justice Denied' www.opensecrets.org 3.3.01.

President is willing to make the appointment and if you happen to be the opposite Party and the folks in the opposite Party leadership are willing to support you, once you get that far, usually you have fair sailing. On some of the confirmation hearings, occasionally someone would make a run trying to derail somebody. I recall when Commissioner Elliott was up for reappointment, Congressman Pete Stark (D-CA) wanted to derail her. She had come from the American Medical Association PAC, she had worked for years.'

Author: 'And she was getting a pension from it as well.'

Commissioner Thomas: 'Right, she was getting a pension. Congressman Stark has several run-ins with the AMA and AMPAC and was thinking that she was not the best of choices to be over here. So he took a run at her at one of the hearings but was not able to generate enough support.'³¹

Author: 'And obviously if you vote against their guy, they'll vote against your guy because of the convention of dealing in pairs.'

Commissioner Thomas: 'Right.'³²

Mitch McConnell (R-KY), reform opponent and former Chair of the Senate Rules Committee, also made reference to the somewhat illusory nature of the confirmation process. Speaking at the March 8 2000 hearing to confirm Brad Smith's appointment he said:

'Ultimately both sides bluster and delay a bit, create a little free media attention and then move the nominees forward. In fact, the Senate has never voted down another Party's FEC nominee in a floor vote or even staged a filibuster on the Senate floor.'³³

Therefore, despite the controversy that has surrounded some FEC appointments, once

³¹ The relationship between Stark and AMPAC is reviewed in a latter section of this chapter discussing partisan deadlock on the Commission.

³² Interview with the author, Washington D.C. 18.10.01.

³³ www.rules.senate.gov/hearings 7.7.02.

individuals reach their confirmation hearing, it is highly unlikely that nominees will fail to gain the necessary constitutional approval from the Senate.³⁴

Nomination Source of FEC Commissioners

The law set out that, 'no more than three members of the Commission appointed under this paragraph may be affiliated with the same political party'³⁵ and that four Commissioner votes were required in order for the FEC to enforce the law.³⁶ Therefore all actions of the Commission had to be authorized by an affirmative two-third mixed majority of votes. The law also mandated that the FEC Chairman and Vice Chairman were to be elected by the Commission on an annual basis and that they too should not be affiliated with the same political party.³⁷ The 1974 Act mandated that two Commissioners were to be appointed by the President, two by the Speaker of the House and two by the President *pro tempore* of the Senate.³⁸ In a further departure from constitutional orthodoxy, the House of Representatives was also authorized to participate in the confirmation process.³⁹ However, the decision handed down in *Buckley v Valeo* (1976) ruled that Congress had exceeded its authority in appointing Commissioners by violating Article II, section 2 of the U.S. Constitution, something commonly known as the 'appointments clause.' Consequently, the Congressional appointments to the Commission were deemed to have intruded on the

³⁴ Larry Noble commented that 'what you're seeing in hearings, is what is already been decided. The hearings are somewhat *pro forma*, in fact, in some instances, they waive the hearings.' Interview with the author, Washington D.C. 17.10.01.

³⁵ FECA 1974 437c (1). Although the Commission has variously been described as 'independent,' 'partisan,' and 'non-partisan,' the body is most accurately described as 'bi-partisan.'

³⁶ FECA 1974 437g (a) 2.

³⁷ FECA 1974 437c (5).

³⁸ www.opensecrets.org/pubs/law 3.3.01

³⁹ Prior to the *Buckley v Valeo* decision, FEC confirmation hearings held in the U.S. House of Representatives took place in the Committee on House Administration which was chaired by long-time reform opponent, Wayne Hays (D-Oh). As House members are constantly electioneering due to their two-year terms of office, they have been particularly sensitive to reform efforts and have jealously guarded their prerogatives in this area. By authorising the House leadership to select Commissioners and participate in the confirmation of nominees, the Chambers opponents to the 1974 Act were placated.

powers of the executive. Although the court directed that only the President could appoint Officers of the United States, subject to the advice and consent of the Senate, the Party leadership within each chamber has continued the tradition of sending the President a list of its 'preferred candidates.'⁴⁰ This tradition has led to the development of an arrangement where the House and Senate make alternate *de facto* appointments.⁴¹ The nominational model that was established by the 1974 Act has been an enduring one. The division of Commission appointments between President, House and Senate has meant that Congress has continued to dominate the appointment process. However, one might argue that this domination has been tempered on occasions through the President's ability to make 'recess appointments.' Recess appointments allow appointees to serve without confirmation until after the end of the Senate's next session.⁴²

Commissioner Mason offered a useful insight into the FEC appointment process, drawing on constitutional theory, political reality and personal experience.

Author: 'How is somebody likely to get on the Commission? I know the constitutional theory, that they are supposed to be appointed by the President but that is not really the case. That Congress has a significant impact on who becomes appointed. I just wondered how that actually works?'

⁴⁰ www.opensecrets.org/pubs/law 3.3.01 Tina VanBrakle (Director of Congressional Affairs at the FEC) alluded to the Congressional domination of the appointment process despite the Buckley decision. She commented, 'Yes, oh yes, even though the President nominates, we know how it works, it's a gentleman's agreement, the names go forward.' Interview with the author, Washington D.C. 18.10.01.

⁴¹ Wilkinson F (1994) 'Best Little Sinecure in Washington, no-one does less with more than the Federal Election Commission': *Rolling Stone*, 680 37.

⁴² President Reagan replaced Frank Reiche by giving fellow Republican Thomas Josefiak a recess appointment. More recently, President George W. Bush replaced Daryl Wold by awarding a recess appointment to Michael Toner, the former chief counsel to the Republican National Committee. Larry Noble commented how Toner would prove a useful ally for Bush and his Party on the Commission when they write new rules to implement the Bipartisan Campaign Reform Act (BCRA) 2002 www.motherjones.com 30.6.02. Common Cause *et al* have expressed concern that the Commission has attempted to emasculate much of the BCRA through drafting new rules and through narrow interpretation in order to undermine the original intent of Congress. Mesidor C www.commoncause.org 30.6.02.

Commissioner Mason: I'd start off with a broad comment about the American system. With Senatorial advice, gives Senators in particular and sometimes House members, gives them fairly substantial influence over Presidential appointments. Even sometimes when they are dealing with a President from the opposite party. In addition, there are specific statutes with most of the independent regulatory agencies, including the FEC, relating to party membership, five-member Commissions and only three members can be of any one party. On a typical Commission the President's Party has the majority but there are minority seats. The strongest tradition is that the President, in appointing candidates to the opposite Party's seats will defer to that Party, especially in the Senate. It is not universal by any means but has probably become stronger over the past twenty to thirty years. But it could depend a lot on the strength of the opposite Party in the Senate. If you ever got to the point where the President's Party held sixty or more seats, at that point, the President might well appoint people entirely of his own choosing, with little reference to the minority Party in the Senate. The current situation, where you have half-and-half, and have had for about a decade or so, prerogative becomes pretty powerful. The fairly formal and informal system by which these things are communicated involves, or at least did, under the constellation of the Clinton administration and the Republican controlled Senate, a letter from the Secretary of the Senate, who is appointed by the majority leader, to the President recommending a candidate for a particular job. Under Senator Lott (R-MS) who had effective power to make that recommendation, varied...depending on the job. For instance, with the Federal Communications Commission, Senator McCain (R-AZ) had a candidate, before McCain's Presidential run, a candidate who he favoured, who had some opposition from other Republican forces, and Lott ended up threading the needle by saying that he would defer to McCain on one recommendation, and defer the other to the Chairman of the House committee who had jurisdiction.... who was more reliably conservative and someone much more to their liking. So in many ways the deference is to the Chairman of the committee but in that illustration, not always and not completely. In the case of the FEC this was at the time I was appointed deference was given to Senator McConnell (R-KY), who was both Chairman of the relevant standing

committee and also Chairman of the Republican re-election fundraising, and so it was his recommendation that mattered most. The other residual piece of the tradition is that despite *Buckley*, you will recall the original statute appointed Commissioners directly by various people in Congress and that was disallowed by the Supreme Court. The political deal which ensued demanded that they retain the system of House and Senate seats. And so, Commissioner Wold, my colleague, was Congressman Bill Thomas (R-CA), Chairman of the relevant House committee, Commissioner Sandstrom next-door here, was recommended by Speaker Gephardt (D-MO), excuse me, give him credit, Leader Gephardt, and so there is this residual tradition whereby Commissioners hold House or Senate seats at the recommendation of key House and Senate leaders. The respective Party leaders, particularly in the House are particularly jealous about retaining that right.⁴³

Commissioner Mason's explanation of the appointment process has shown how the *Buckley v Valeo* (1976) ruling on presidential appointments has been relegated to the status of a constitutional fiction. The White House's deferential attitude towards the legislature's 'preferred candidates' has enabled it to avoid unnecessary conflict with Congressional leaders.⁴⁴ The system also allows chief executives to talk tough on campaign finance issues without them having to assume the responsibility for the weak enforcement of the Statute.⁴⁵

⁴³ Interview with author, Washington D.C. 22.10.01.

⁴⁴ The Center for Responsive Politics in 'Justice Delayed Justice Denied' set out how successive Presidents have been unwilling to risk a battle with Congress over FEC appointments. www.opensecrets.org 7.7.02.

⁴⁵ On the subject of FEC appointments, Francis Wilkinson commented, 'Clinton did more to undermine legitimate reform than a thousand Rostenkowski's famously free steak dinners. After months of unexplained delay, the President announced his intention to reappoint Lee Ann Elliott and Danny Lee McDonald to their third terms on the Federal Election Commission. Clinton owed nothing to either of them; he could have named any number of energetic and effective people to the six-member FEC. But Clinton was unwilling to buck the established way of doing business, which is to cede control over FEC appointments to Congress.' Wilkinson F (1994) 37. Similar criticisms of President Clinton were expressed in a *New York Times* editorial, 'There are four openings on the Commission, which he could have filled with distinguished, independent individuals eager to staunch the flow of tainted money. Indeed, the people he asked to rally support for campaign finance reform, former Vice President Walter Mondale and former Senator Nancy Kassebaum Baker, urged yesterday that he do that. Instead he is moving to appoint political partisans with no gusto for reform or strong enforcement. This week, after Senate Majority leader, Trent Lott, said he would hold up other nominations until the four F.E.C. seats were 'filled to our mutual satisfaction,' Mr. Clinton confirmed his intention to rubber-stamp Mr. Lott's two nominees. 'Mr. Clinton's F.E.C. Fold': *New York Times*, June 19 1997, 22.

James Barnes, writing in the *National Journal*, was critical of President Clinton's unwillingness to fill vacancies on the Commission with independent-minded individuals who might be willing to take a more expansive regulatory attitude towards enforcement. He commented:

'President Clinton says he deplores campaign finance abuses. But just how tough a watchdog is he willing to put on the case? With four slots opening up on the six-member Federal Election Commission (FEC), campaign reform advocates say he has an opportunity to turn the timid agency around. So far, the President appears to be letting sleeping dogs lie. Reformers groaned in January when the White House re-nominated John W. McGarry, a 74-year-old FEC veteran, for a fourth term on the Commission. "By continuing the *status quo*, you are signalling that you don't think change is necessary or that there is a need for stronger regulation in the campaign finance arena," said Kent C. Cooper, executive director of the Center for Responsive Politics. When it comes to FEC appointments, Clinton has been anything but bold. His two previous choices were also partisan retreads: in 1994, he renominated Republican Lee Ann Elliot and Democrat Danny L. McDonald to third terms on the Commission.⁴⁶

Therefore, undisturbed by the *Buckley* decision, the *status quo* appears to suit the mutual interests of the White House and Congress. Yet Larry Noble argued that this method of

⁴⁶ Barnes J (1997) 'Pit Bulls Shouldn't Apply, Shh! Don't Wake the Watchdog': *National Journal*, 29 (12) 583. Elizabeth Drew described President Clinton's hypocrisy towards campaign finance reform. She wrote, 'an indelible scene from the Clinton-Gingrich fandango following the Republican take-over of the House was of the two pudgy, gray-haired, garrulous wonks at a more-or-less impoverished town meeting in New Hampshire on a sunny Sunday afternoon in January 1995, shaking hands on Gingrich's proposal that they name a 'blue-ribbon commission' on campaign finance reform. Clinton accepted in a heartbeat. A commission was never formed, though Clinton, knowing that Gingrich didn't really want reform, made some lets pretend moves toward naming commission members -exploiting as he often did, well-meaning and even distinguished figures. Clinton, who could change his position in a flash, was at least consistent in his cynicism on the subject.' 'He supports it but he doesn't do anything' former Clinton aide George Stephanopoulos told me. He's conflicted.' Drew E (1999) *The Corruption of American Politics. What Went Wrong and Why*: Birch Lane Press, 144.

appointment had not always been the case and that the President could legitimately reject the individuals recommended to him by the Congressional leadership. When asked about the subordinate role the White House has played in FEC appointments, he commented:

Larry Noble: 'It doesn't have to be that way. Now there is a myth that has come up, which came up frankly with the Brad Smith, or was repeated, with the Brad Smith appointment. Personally I like Brad Smith but at the time the Brad Smith appointment came up, what was said by the White House, the Clinton White House was, the Republicans get to pick their own Commissioner, that the White House doesn't have any say in it. In fact that's not true. Commissioner Tom Harris, who was a Democrat, who was affiliated with labor, the National Right to Work Committee objected to him and Ronald Reagan refused to reappoint him to the Commission. Which is how Scott Thomas got his seat. What that showed was that a President could say to the other side, to the Democrats, a Republican President, I don't like this guy, I don't want him, give me some other names. And accordingly the Democrats gave him other names. So the idea that Clinton had no choice in the matter was just not true, but that is the conventional wisdom.'

Author: 'That was unusual though, wasn't it?'

Larry Noble: 'That was unusual, yes. So you start from the premise that they each have their seats, then you add to the mix that FEC appointments are not considered that important and what happened with the Clinton administration was that they traded the Brad Smith appointment for judges. So it became an important seat because Clinton was able to get a number of judges.'⁴⁷

It was President Gerald Ford who initially sought to defer to the will of Congress over FEC appointments. By ruling that the Commission had been appointed in an unconstitutional manner, the *Buckley* decision meant that the FEC was no longer authorized to exercise its

⁴⁷ Interview with the author, Washington D.C. 17.10.01.

executive powers.⁴⁸ Post *Buckley*, there was intense pressure to reconstitute the Commission so that it could administer the Public Funding System necessary for the candidates to fight the 1976 presidential election.⁴⁹ With his authority strengthened by the *Buckley* decision, Ford could have nominated individuals of his own choosing. Yet he chose not to, preferring to re-nominate all those originally appointed under the pre-*Buckley* arrangements dominated by Congress.⁵⁰ Ford was unlikely to try and assert presidential power because Congress was determined to reassert its own authority in light of Watergate and Vietnam. Additionally, unlike traditional incumbents of the White House, Ford lacked any democratic legitimacy. Ford won the Presidency because of Spiro Agnew's tax evasion and the impeachable offences of Richard Nixon. Finally, as Ford was a former minority leader in the House and given his unique political circumstances, he was determined to try and maintain an effective and harmonious relationship with Congress.⁵¹ Less than a year later, President Jimmy Carter was thwarted in his attempt to appoint Susan King to the Commission. She had the support of Common Cause and the United Auto-Workers Union. However, House Speaker, Thomas 'Tip' O'Neill (D-MASS) objected to Carter's choice, calling her a 'do-good Common Cause type.' Determined to secure an appointment of his own choosing, O' Neill lobbied the administration and obtained a seat on the Commission for John Warren McGarry, a former employee of the House Administration Committee.⁵²

⁴⁸ The Commission ceased to exercise its executive powers on March 22 1976. The Federal Election Commission (1995) 'Twenty Year Report': 5.

⁴⁹ The 1976 amendments to the 1974 Act took effect in May 1976, when the Commission was reconstituted. The Federal Election Commission (1995) 'Twenty Year Report': 5.

⁵⁰ The only Commissioner not to seek re-appointment was the then FEC Chairman Thomas B. Curtis. Wayne Hays had been successful in discouraging Curtis from sitting on the reconstituted panel by proscribing Commissioners from engaging in private business. As this condition meant that Curtis would have had to give up his St. Louis law practice, he asked the President not to re-appoint him. Jackson B (1990) *'Broken Promise, Why the Federal Election Commission Failed'*: Washington D.C. Twentieth Century Fund Paper, Priority Press Publications, 28.

⁵¹ www.ford.utexas.edu 7.7.02.

⁵² Jackson B (1990) 29.

Independence of the Commission

The most frequent criticism directed at the Commission is that it lacks independence. Former FEC Chairman Thomas Curtis (1975-76) described the agency's lack of independence as a 'serious impediment to the success of voluntary compliance.'⁵³ Herbert Alexander also described how the Commission had been circumspect about taking a lead in the campaign finance debate. He commented that 'the FEC continually looks over its shoulder for fear that Congress is watching and would disapprove.'⁵⁴ Others have highlighted the FEC's unique mission as a body that regulates those who control its budget, powers, staffing level and the appointment of its Commissioners. Although the Commission's independence has been undermined by the micro-management strategies of Congress, something that usually occurs under the guise of legitimate 'oversight,' the focus of this discussion remains the appointment process.⁵⁵ However, one might note that whilst the reform community desires an independent blue-ribbon Commission, insulated from the political realities of the day, others desire a model that reflects and represents that political reality.⁵⁶ The concept of a truly independent Commission becomes a normative one. Therefore the best way forward in this discussion would be to examine the Commissioner selection criteria set out in the law. It directed that, 'Members shall be chosen on the basis

⁵³ Curtis T (1979) 'Reflections on Voluntary Compliance Under the Federal Election Campaign Act': *Case Western Reserve Law Review*, 29 851.

⁵⁴ Gross K (1996) 'The Enforcement of Campaign Finance Rules: A System in Search of Reform': *The Administrative Law Journal*, 10 365.

⁵⁵ Micro-management strategies are the attempts most often associated with Congress, which are designed to alter agency behaviour. One example alluded to by James Barnes, writing in the *National Journal*, noted that, 'Congress doles out the FEC's annual appropriation and lawmakers haven't hesitated to rein in the agency when they think it's getting too aggressive.' Barnes J (1994) 'Wobbly Watchdog': *National Journal*, 26 (14) 777.

⁵⁶ For a description of the most recent prescriptions for the introduction of an apolitical enforcement mechanism see, Democracy 21 (2002) *No Bark, No Bite, No Point, A Case for Closing the Federal Election Commission and Establishing a New System for Enforcing the Nation's Campaign Finance Laws*: Project FEC, Washington D.C.

of their experience, integrity, impartiality, and good judgement.⁵⁷ The first two criteria, 'experience and integrity,' are worthy attributes and rarely present too many difficulties for those charged with making such assessments. It is customary to submit a comprehensive *curriculum vita* to the Senate Rules committee, which aids them in evaluating the experience of the nominees. Additionally, it is also customary to solicit and to submit numerous written statements of support from highly placed individuals known to the nominee. These statements are usually for the record, but supporters might have an opportunity to articulate their faith by reading a statement out before the committee. Although the Senate Rules Committee will have access to the FBI files of nominees, the supporting statements usually serve to establish the integrity and stature of the nominee. However, controversy arises in defining and assessing the third and fourth criteria, 'impartiality' and 'good judgement.' Those outside the traditional two-Party system have argued that the bipartisan nature of the FEC precludes the possibility of impartiality.⁵⁸ Additionally, the concept of 'good judgement' is also an elusive one. For example, might one attribute 'good judgement' to a Commissioner who views his/her role as representing the interests of incumbent politicians and other members of the regulated community, or one that sees their role as defending the more abstract concept of the public interest. Although these two roles are not necessarily mutually exclusive, they often can be.

Any pretence of impartiality was dispelled when Senator Ted Stevens (R-AK), ranking member of the Senate Rules committee, commented:

'We appoint these people on a political basis, knowing

⁵⁷ FECA 1974 437c (3).

⁵⁸ Lochner T & Cain B (1999) 1896.

full well that they are partisan; they are partisan in a totally political sense. The FEC is an equally balanced Commission.⁵⁹

Joshua Shenk, writing in *U.S News and World Report* opined:

The FEC's leadership is a cozy deal. Congress controls who becomes a Commissioner. The President merely rubber-stamps recommendations from Capitol Hill. That means Commissioners owe their \$115,700-a-year jobs to the party machinery. When the regulated control the regulators, oversight goes soft.⁶⁰

Francis Wilkinson, writing in *Rolling Stone* magazine, expressed similar views:

The fact that FEC regulators rely on the regulated members of Congress for the continuation of their paycheques is a fairly gaping flaw in the electoral system. It's comparable to allowing criminal defendants control over the career of judges.⁶¹

⁵⁹ www.opensecrets.org 3.3.01 Referring to Senator Stevens statement made whilst sitting on the Senate Rules Committee July 15, 1987.

⁶⁰ Shenk described this as 'a polite, but not rigidly observed tradition.' Shenk J (1997) 'Why the Federal Election Commission is the lap dog for the political class': *U.S. News and World Report*, January 20, 37.

⁶¹ Wilkinson F (1994) 37. Peter Stone, writing in the *National Journal* opined that 'the White House continues to let Congressional leaders handpick FEC Commissioners, which critics say is akin to letting the foxes guard the chicken coup.' Stone P (1993) 'Teaching a Lapdog to Bite': *National Journal*, 2914.

Fred Wertheimer, president of the Washington-based public interest advocacy group Democracy 21 and former president of Common Cause, has been highly critical of the Commission's lack of independence and weak enforcement efforts. When referring to FEC Commissioners, he commented:

Fred Wertheimer: 'You have to understand the mindset, the Commissioners of this agency, is that their constituency is the regulated community. That means members of Congress, political Parties and big donors as opposed to the constituency of the general public. Of making sure there is a sense that people had better comply with the law; the normal standards and philosophy of law enforcement do not apply to this agency. It's like you start off and you try to figure out how to make this work for the potential violators, rather than the potential community. If that is correct, if that is the mind set, then you are trying to minimise your impact on this community and certainly the most powerful players in this community. And the Commissioners are sent there, they're not sent there on innocent terms. Only one of these Commissioners, Scott Thomas, is classic mode, public service mode, he's there to do the job. That doesn't mean that from my standpoint he does everything right, but he fits one mould. He was willing to take on the Democrats, he's been willing to take on Clinton, but by and large, this is kind of a partnership and if people stray, they get told in no uncertain terms by the Hill.'⁶²

Donald McGahn, general counsel at the NRCC also alluded to the FEC's lack of independence and the parochial nature of appointment.

Donald McGahn: 'The Commission is nothing more than Congress' constitutional power to be the final judge in its own elections. That is where it comes from, the creation of House and Senate. So because of that,

⁶² Interview with the author, Washington D.C. 25.10.01. Democracy 21 has been critical of the links Commissioners have had with the regulated community prior to their appointment. Of the 20 appointees who have served on the Commission since it was established, 16 had such ties. Curtis, Staebler, Thompson, Tiernan and Springer were former Congressmen. Friedersdorf, Mason, McGarry and Sandstrom had been Congressional or White House Staff. Aikens, Toner and Josefaik had political Party backgrounds and Elliot, Harris, Potter and Wold had represented members of the regulated community before the FEC or and the courts. Democracy 21 2002 61.

how independent can you be? When with the stroke of a pen, you're out of business tomorrow. It's not really like other agencies. It's not an executive branch agency. You have the President who nominates and the Senate confirm, the President appoints. But it's not like other agencies because you have the charge of the fox guarding the hen-house. You gonna appoint your guys to make sure you are taken care of. The original intent was for it to be a glorified Congressional committee. That's the way I see it. But over time it has got more independent and more money. The flip side is that you have a certain Senator who wants their guy on the Commission, just cos they want them. You can't really stop that but that doesn't really get you the most qualified person either.⁶³

Notwithstanding the significant patronage power exercised by certain Congressional leaders, the Commissioner appointment process can be a pluralistic affair. For example, the appointment of Commissioners involves a political process that accommodates and in some ways gives indirect representation to the input of sectional interests like business, labor and political Parties. These bodies participate in the appointment process by articulating their nominational preferences to the Party leadership. That input helps to shape the composition and outlook of the Commission. Despite that influence, Commissioners do not become the mere delegates of those interests but their well-known views about regulation and certain sectional affinities do feed into the decision-making process. Herbert Alexander criticised the factional nature of FEC appointments, commenting:

The process of appointing members of the Federal Election Commission has been a continuing source of conflict. The opposing influences of labor and business frequently are brought to bear on appointments. The conservative and liberal wings of both Parties screen

⁶³ Interview with the author, Washington D.C. 16.10.01.

each nominee, giving special attention to his or her views. Expertise and political cronyism often vie as criteria for appointments.⁶⁴

Commissioner Mason expressed the view that 'using appointments to affect the enforcement process is absolutely a normal part of the policy process.'⁶⁵ One might argue that the views of sectional interests have even become institutionalised in particular seats, taking on an enduring character.⁶⁶ This view suggests continuity between departing Commissioners and their successors. Cowett appeared to support this thesis when he wrote:

'One very ironic finding of the case study on advisory opinion voting is that while the President (and Congress) seek to replace commissioners with whom they are not in agreement philosophically, the replacement Commissioners may end up voting in a very like manner as the member being replaced. As one Commissioner jokes about this phenomenon: 'the seats are infectious.'⁶⁷

Francis Wilkinson commented that, 'In 86, Democrat Scott Thomas inherited the Commission's AFL-CIO seat.'⁶⁸ Although Commissioner Thomas and Jan Baran rejected the idea that sectional interest or particular philosophical views enjoy a longevity that outlives any one Commissioner, Larry Noble was far less dismissive of the idea. Commissioner Thomas was asked:

Author: 'Do particular seats on the Commission have an enduring, or institutionalised character? For example in Rolling Stone magazine you were described as sitting on the AFL-CIO seat.'

Commissioner Thomas: 'I think that is obviously an

⁶⁴ Alexander H (1984) *Financing Politics, Money, Elections and Political Reform*: Washington D.C. Congressional Quarterly Press 47.

⁶⁵ Interview with the author, Washington D.C. 22.10.01.

⁶⁶ Commissioner Mason commented that 'a lot of senior staff have been here since the Commission opened up. So people have got kind of set in their ways and thinking.' Interview with the author, Washington D.C. 22.10.01

⁶⁷ Cowett A (1989) 'Walking on Eggshells': *The Federal Election Commission and Political Regulation*, senior thesis Harvard College, 43.

⁶⁸ Wilkinson F (1994) 38.

over-statement. I think if you wanted to draw a line, you could say that I had been executive assistant for my predecessor, Tom Harris, and before he was appointed as one of the original Commissioners had been associate general counsel at the AFL-CIO. But obviously I had never worked for the AFL-CIO and I had no labor, no labor law background. Even so, it is pretty hard to say that I have any ties to the labor movement now. That is not to say that over the years I have not got to know many of the political people involved in the AFL-CIO as I have with the RNC, the Republican National Committee, because they have business before the FEC. They tend to come to the FEC when they have got issues, so I've got to know a lot of them. But it's kind of hard to say that I'm the AFL-CIO lackey at the FEC. If you look at my voting record, I've probably voted against the AFL and labor unions as much as I've voted against those on the business side of things.'

Author: 'But more generally, across the board, in other seats as well? You couldn't say that a particular seat is perhaps representative of particular interests, or that people on the outside see a particular seat as someone they could go to that's sympathetic to them?'

Commissioner Thomas: 'Well I think it is probably true that some Commissioners have friends and connections that were helpful to them in finding their way to the FEC. I suppose those friends and connections if they have an FEC issue, will have a natural connection at least in that area and want to go to that person and ask how to get the FEC to help on that particular issue. But that would be my situation as well. There are folks that I know that are involved in helping the various unions with their legal campaign finance work. I suppose I am a natural person for them to go to and say, 'hey we have a legal issue. What do you think we ought to do about that and should we go to the FEC and ask for an advisory opinion?' Those kinds of connections are very logical. So the way that works out, you could go down the current list of Commissioners and if you wanted to, you could probably find out that there were certain people, or certain organisations who were helpful to them in finding their way to the FEC.'

Author: 'But these relationships are not institutionalised, they're not kind of long-term, as people come and go, things change.'

Commissioner Thomas: 'Exactly, I think it's much more along those lines. It's hard to say that there is a union seat at the FEC, or that there is a right wing crazy seat.'⁶⁹

Jan Baran was asked:

Author: 'Do particular seats on the Commission have an enduring or institutionalised character? For example, in an article in *Rolling Stone*, Scott Thomas was described as sitting in the AFL-CIO seat.'

Jan Baran: 'No, I don't think so. I think that can only be said because there have only been two particular Commissioners on that particular seat, over the past 26 years now. He was the executive assistant to Tom Harris, who was former deputy general counsel of the AFL-CIO, although Scott has never worked for a union himself. Commissioner Thomas has never had a job in his adult life outside that agency. He started work there as a law clerk, when he was at George Town Law School, in 1977. He then joined the general counsel staff after graduation, then became an executive assistant, then a Commissioner. He may break the record for longevity and collect a pension still a relatively young man. I think it is more accurate to say that there are Republican seats, and Democratic seats, but I don't think it has been carved out in any other type of way. I don't think that the labor unions would view Scott Thomas as their guy. Certainly not in the way Tom Harris clearly was. That was where he worked for twenty-five years.'

Author: 'I just wondered if there were particular sections of society or the political community that see a particular seat as theirs, or a particular Commissioner as kind of representing their interests?'

Jan Baran: 'No, but I think there are Commissioners over time that are strong advocates for a particular point of view. I think Tom Harris when he was on the Commission was undeniably a very strong advocate of organised labor, who watched out for their interest very, very assiduously. I think when she was there, Commissioner Aikens was a strong advocate of corporate political action, political action committees.'

⁶⁹ Interview with the author, Washington D.C. 18.10.01.

She was one of the four Commissioners who approved an opinion that in 1975 allowed a Company to have a political action committee, Tom Harris being one of two who dissented against that. And Lee Ann Elliot was also a big PAC supporter, she came from a PAC.

Author: 'AMPAC.'

Jan Baran: 'AMPAC, right. But now that the composition of the agency has changed and we've got new people there, they actually come from different backgrounds. David Mason comes from a Senate foundation, Daryl Wold was a practitioner in California, Brad Smith was a Professor.'

Larry Noble was also asked:

Author: 'Do particular seats on the Commission have an enduring or institutionalised character? For example, in an article in Rolling Stone magazine Scott Thomas was described as sitting on what's known as the AFL-CIO seat?'

Larry Noble: 'That's because the seat was originally held by Tom Harris, who was a very strong labor supporter. To a certain degree there is some sense that Commissioners bring a certain perspective. I think traditionally, but it's hard to say traditionally, as there have only been two Commissioners in the Scott Thomas seat. Tom Harris was definitely from the AFL-CIO, he was appointed because of his ties to the AFL-CIO.'⁷⁰

Author: 'He was General Counsel to the AFL-CIO.'

Larry Noble: 'Yea and had a long history at the AFL-CIO. Then there was Scott Thomas, so you only have two Commissioners in that seat. Yea, I think Commissioner Thomas tries to bring somewhat of a union perspective to things. I think on the other side, Lee Ann Elliot's seat, she's now left, she definitely saw herself as the champion of corporate interests. Yea

⁷⁰ *Congressional Quarterly Weekly Report* described how a defeated House candidate (Rep. Robert Tiernan D R.I.) and friend of majority leader Tip O' Neill had indicated his interest in a Commission seat. Fred Wertheimer, then President of Common Cause, was quoted at the time as saying, 'the law setting up this commission shouldn't be considered the Congressional Retirement Act of 1974.' Shortly thereafter, the AFL-CIO informed O'Neill that it wished to place a spokesman on the election commission. Comment (1974) 'Election Commission: Regulator of Refuge?': *Congressional Quarterly Weekly Report*, 3442.

there is some of that. I think it has probably got weaker over the years, but yea there is some of that, sure.'

Author: 'Are there any other seats that you can think about that would have an institutionalised character? Perhaps a representative role in a way.'

Larry Noble: 'It's gotten vaguer, I think right now I would say, ...I think Commissioner Sandstrom tries to bring a Party perspective, a political Party perspective and he's a Democrat. He brings a Democratic Party perspective. Has that traditionally been true? Frankly, John McGarry, who he replaced, was from the House of Representatives, not a member of the House, but was on a committee of the House, I think. Tip O' Neill. So yes, there is that perspective on the Seat, yes. On the Republican side, the Lee Ann Elliot seat, Lee Ann Elliot herself voted a corporate perspective. Joan Aikens was more of a Republican Party perspective. It has evolved somewhat, but there were some views that Commissioners held and there were some places where they came from, but to a certain extent it is being diluted, but it's still there to a certain extent. Trying to think about what I would say about the present Commissioners. Brad Smith brings a very deregulation view, as does David Mason. Now I would say that probably Daryl Wold brings more of a Party perspective to it I think, local political Party perspective. That's where he came up from but I don't think they consciously think about that when they appoint Commissioners as much as they may have at one time.'

Author: 'It's just something additional to try and make sense.'

Larry Noble: 'Yea, I think you can look at it that way. I think definitely with Commissioner Sandstrom, you can look at a Party perspective. He brings a Party perspective to it, as does Commissioner Mason, and Daryl Wold.'⁷¹

Perhaps with the exception of Scott Thomas, who was appointed as a compromise choice at the time, one might find it difficult to conclude that Commissioners are appointed

⁷¹ Interview with the author, Washington D.C. 17.10.01.

because of their 'impartiality.' Not only are they appointed as Republicans or Democrats, but also as individuals with well-known views as regulators, or deregulators, as defenders of labor, corporate interests, Parties or PACs. As Robert Mutch said, 'Congress wants more than the statutory balance between Republicans and Democrats on the Commission, Congress wants the right kinds of Republicans and Democrats.'⁷² Yet the complaint of the reform community, and people like Fred Wertheimer in particular, is that the FEC fails to represent the interests of the electorate or the general public.⁷³ One might argue that Commissioners exercise their 'good judgement' on behalf of those interests whom they have a natural affinity with, or in the furtherance of a particular philosophical view. Although public interest advocates see this as something undesirable, or unethical, others view this as perfectly legitimate. For example, when asked about the Bradley Smith appointment, Commissioner Thomas expressed the opinion that because a certain percentage of the American public held an ultra deregulatory view concerning campaign finance issues, one might reasonably expect those views to be represented on the Commission.

Author: 'It just strikes me as odd that someone that doesn't believe in the statute would want to be on the Commission.'

Commissioner Thomas: 'I gather his interest in particular is that he likes the subject area, as much as anything. But I suppose that he does want to the extent possible to push Commission decision-making to the point where it will use express advocacy tests where he

⁷² Jackson B (1990) 10.

⁷³ Project FEC Task Force, a project of Democracy 21, has published four principles upon which they base their 'model' enforcement body. The principles include regulatory independence, greater enforcement authority, adequate funding and meritorious appointments. On meritorious appointments the statement read: 'The process for appointing the person or persons in charge of the enforcement entity must be designed to create the best chance for appointments based on qualifications and merit, not political or ideological ties. The process must create the best chance for obtaining appointees who recognise that the public, not the 'regulated community' is their principal constituency.' 'Project FEC Task Force Releases 'Statement of Principles' Press Release February 20, 2001 2.

thinks it's appropriate as opposed to a common-sense, more free-form approach. And I'm sure that is a goal of his to deregulate some of the Commission's enforcement efforts and approaches, and to get the Commission to back off some of its enforcement efforts. That I think is to be expected. But if you think about it, one sixth of this Commission taking that approach probably compares with, I'm sure, at least one sixth of the American population if you gave them that question.'

Author: 'So it's a fair view that's out there and therefore it's legitimate that it's represented on the Commission?'

Commissioner Thomas: 'One could argue that.'⁷⁴

The Role of Senior Election Lawyers in the Appointment of FEC Commissioners

As their six-year term nears expiration, Commissioners have been obliged to lobby for reappointment. Of strategic importance to any Commissioner's chances of securing reappointment, are the views of Washington's leading election lawyers. The most influential lawyers are Bob Bauer, representing Democrats, and Jan Witold Baran, representing Republicans. The scenario where Commissioners lobby to secure the approval of their respective Party's election lawyers is clearly at odds with the independence of the Commission. For example, a Commissioner seeking to enforce the law might find it difficult to cast their vote against a respondent who was being represented by an election lawyer whose approval was necessary to gain reappointment. Perhaps the most ethical

⁷⁴ Interview with the author, Washington D.C. 18.10.01.

⁷⁵ Abstentions are when a Commissioner decides not to cast a yes or no vote. Letter to the author, from Ronald M. Harris, Freedom of Information Officer, Federal Election Commission, 2.10.00.

⁷⁶ A recusal is when Commissioners voluntarily absent themselves from any discussion of a particular matter. Harris R 2.10.00.

The Commissioner does not have to divulge the reason for a recusal but they, according to law, usually involve: bias or conflict of interest, or because of the relationship between someone acting in a judicial, or in this case, quasi judicial capacity and the respondent/s. www.lectlaw.com/def2/q118. 10.11.00.

It would be difficult to conclude whether a large number of recusals on a Commissioner's record meant an

option for a Commissioner who was placed in this position might be to abstain⁷⁵ or recuse.⁷⁶ Francis Wilkinson described the close relationship between the regulator and regulated as follows:

'Undercapitalized and forever struggling to make do, the FEC resembles a small family business that never quite turns a profit. Everyone in the tight, incestuous world of the FEC is known to the others by his or her first name. The commissioners are Lee Ann and Danny, John and Joan, Scott and Trevor. The two dominant election law attorneys Bob the Democrat and Jan the Republican, have a warm rapport and even jointly filed an official comment with the FEC recently. Like favourite uncles, Bob Bauer and Jan Baran know the family's most intimate secrets. The fact that the family is charged with dispensing justice to Bob and Jan's powerful clients, who, in turn, effectively determine the family budget and individual career prospects, helps to keep everyone close.'⁷⁷

Perhaps the most salient examples of Jan Baran's influence in selecting Republican nominees to the Commission were the appointments of Trevor Potter, who was appointed November 22 1991 and, more recently, Michael Toner who was appointed March 29 2000. Trevor Potter and Michael Toner had both been lawyers practising in the area of election law and Federal ethics at Wiley, Rein and Fielding, the Washington D.C. firm where Jan Baran is Partner and Head of the Election Law and Government Ethics division.⁷⁸ It was likely that Jan Baran recommended Potter to the White House as a reliable Republican voice on the Commission, having both worked together on the 1988 Bush campaign.⁷⁹ However, Commissioner Potter was to adopt a more independent outlook than anyone had

indication of high ethical calibre, or a general disinterest in enforcement.

⁷⁵ Abstentions are when a Commissioner decides not to cast a yes or no vote. Letter to the author, from Ronald M. Harris, Freedom of Information Officer, Federal Election Commission, 2.10.00.

⁷⁷ Wilkinson F (1994) 38.

⁷⁸ www.fec.gov/members/toner 27.7.02. 'Trevor Potter, Commissioner.' Biography supplied by Ron Harris, FEC Press Officer, Press Release January 1995.

⁷⁹ www.publicintegrity.org 27.7.02.

expected.⁸⁰ Alex Vogel, General Counsel at the NRSC, commented about the appointment:

Alex Vogel: 'When the President appoints someone to the Supreme Court well I'm gonna appoint this guy, he's a Republican once he's on the court, he's there for life, who knows how he's gonna vote!'

Author: 'Which has happened before.'

Alex Vogel: 'Which has happened before; with Commissioners, it's the same thing.'

Author: 'Trevor Potter.'

Alex Vogel: 'Trevor. He's the gold standard. Trevor was a guy, Jan's protégé, everyone knows where Jan stands. Trevor gets on the Commission and immediately starts voting against Jan's clients. People were saying, what? Then people were saying well, Trevor went native, say what you will about Trevor, he voted against Republican people. Trevor was a fourth vote. It can happen against either side.'⁸¹

Lawyers may also find themselves in a position where they are deemed insufficiently supportive of a Commissioner's effort to gain reappointment. Election lawyers are likely to be mindful about the possible retaliatory consequences of any tepid responses they make to Commissioner overtures. Wilkinson described how:

'Danny Lee McDonald spent much of the past year alternately sulking and sucking up because the House Democratic leadership and its lawyer, Bob Bauer, did not embrace his reappointment.'⁸²

Commissioner Mason was also asked about this issue:

⁸⁰ Peter Stone commented in the National Journal, 'The FEC's tougher stances are generally attributed to the influence of Trevor Potter, a Republican and the Commission's vice chairman, who has surprised many observers with his outspoken advocacy of stronger enforcement.' Stone P (1993) 2914.

⁸¹ Interview with the author, Washington D.C. 26.10.01.

⁸² Wilkinson F (1994) 38.

Author: 'It was just that there was criticism that Commissioners would be lobbying for reappointment whilst sitting on enforcement cases?'

Commissioner Mason: 'Sure and again because Congress is the regulated entity that just makes it an even more sensitive problem than it would be. Both from the perspective of the Commissioner subject to some sort of influence from Congress, but also to the issue of would a Commissioner who still holds power for some period of time represent an implicit threat to members of Congress who failed to support him.'

Author: 'So it's not just one way traffic then?'

Commissioner Mason: 'I don't think (pause) it would be a losing game for a Commissioner to do that in the long run, so I don't think that has happened in practice.'⁸³

James Barnes, writing in the *National Journal*, quotes Jan Baran on this issue:

'I am enthusiastically for the reappointment of all sitting commissioners and so are the three dozen or so clients that I represent before them,' Baran joked. 'You don't have to be a nuclear physicist to think that if somebody wants to get reappointed, it has to go through essentially a political process to do that, he added, choosing his words carefully. 'Anybody who is engaged in that political process has to decide if they are going to say anything about that reappointment, and if so, what they are going to say. And in any case they have to live with the consequences of their statement or actions.'⁸⁴

The appointment process is a political one, with Congressional leaders and their election lawyers being the most significant influences. That process has led to a Commission that reflects not only the interests of those who appointed them but also the fundamental disagreements Americans have about political finance regulation. The Commission is not and has never been the 'blue-ribbon' independent panel the reform community has long

⁸³ Interview with the author, Washington D.C. 22.10.01.

⁸⁴ Barnes continued, 'most election lawyers will speak about the issue only if guaranteed anonymity. 'It's an outrage,' one said. Said another: 'The renomination efforts of commissioners consume the energies and attention of commissioners, the commission staff and sometimes apparently [Members of Congress] and even those who represent people before the commission.' Barnes J (1994) 'Watching the Watchdog': *National Journal*, April 23, 985.

advocated. However, some thought the introduction of term limits might reduce the appearance of cronyism and inject greater independence into the Commission.

Introduction of Term Limits for FEC Commissioners

In 1997 the Senate introduced term limits for FEC Commissioners, something that was included in the Treasury and General Government Appropriations Bill. Many groups who had campaigned for a more independent FEC saw the change as a positive one. For example, Public Campaign, a non-profit, non-partisan group who opposed the influence of special interest money on public policy commented:

Every Commissioner now serving has been at the agency for at least two six-year terms and one has been there since the agency opened its doors twenty years ago. Because they usually want to keep their lucrative positions, making over \$115,000 a year, Commissioners are hesitant to interpret or enforce the law in a way that would hurt their chances of reappointment. Term limits for Commissioners would enable them to make more independent judgements regarding violations of the law.⁸⁵

Therefore, as Commissioners have no prospect of being reappointed, many in the reform community argued that individuals would become less mindful about making unpopular enforcement decisions. Similarly, many Republicans expressed their support for the introduction of term limits. Larry Craig, Chairman of the Republican Policy Committee in the Senate, summarised their views in a 1998 vote analysis. Craig wrote:

The FEC is the most politically sensitive agency of the Federal Government. Any of its actions can raise serious political, ideological and constitutional

⁸⁵ www.publiccampaign.org 27.7.02.

questions. For it to have any appearance of objectivity, its powers must be evenly divided between the two Parties. For that reason, by law, three of its Commissioners are Republicans and three are Democrats.⁸⁶ If there were any imbalance, any actions the FEC took would appear to be, or would be, biased. Last year, Congress acted to increase the objectivity of the FEC by putting term limits of 6 years on FEC Commissioners. If any Commissioner had lifetime tenure and his or her political views changed to support the other party, then the balance of the Commission would be destroyed. By instituting term limits, Congress further safeguarded objectivity.⁸⁷

Despite Craig's rhetoric concerning the creation of a more independent Commission, the following rider tempered the practical effect of term limits. The law stated that 'this term limit applies to individuals nominated by the President to be members of the Federal Election Commission after December 31, 1997.'⁸⁸ The FEC notes in its 1997 *Annual Report* that President Clinton 'announced three nominations and his intention to nominate a fourth prior to the December 31 deadline.' It continued, 'if the Senate confirms these nominees, they will be eligible for one additional term of office.'⁸⁹ Therefore, because of the 'grand-fathering' clause and serving out unexpired terms, some of the current Commissioners may serve until 2009.⁹⁰

A number of interviewees made compelling arguments against the introduction of Commissioner term limits. In fact, if one considers the four standards set out in the FECA Commissioner appointment criteria, 'experience, integrity, impartiality and good

⁸⁶ That particular statement is often expressed but is inaccurate. The law states that 'No more than 3 members of the Commission appointed under this paragraph may be affiliated with the same political party.' FECA 1974 as amended, 437c (a) (1).

⁸⁷ www.senate.gov/irpc/27.7.02.

⁸⁸ FECA 1974 as amended, Title 2 437c (a) 2.

⁸⁹ FEC Annual Report (1997) 31.

⁹⁰ Commissioner Danny Lee McDonald may serve until 2005. Commissioner Mason, the current Chairman, may serve until 2009. Commissioner Scott Thomas may serve until 2009. Commissioner Karl Sandstrom's term expired on 30 April 2001 and he is currently serving as Vice-Chairman. Commissioners whose terms have expired, if not renominated, may continue to serve until their replacement has been appointed. Commissioner Bradley Smith may serve until 2005. Commissioner Toner may serve until 2008.

judgement,' term limits are likely to hinder the recruitment of individuals with such qualities. Donald McGahn opined that few individuals of stature would be willing to sever their business/professional relationships to secure a position in public service that only lasted for six years.

Author: 'Now you have these term limits, do you think this will have any significant effect...now that Commissioners cannot lobby for reappointment?'

Donald McGahn: 'It could, although I am aware that there is lobbying going on as we speak. What you kind of had was that you had Commissioners on there for a long long time. Scott Thomas was in the counsel's office, I mean he is FEC through and through, and he brings to the table a certain perspective. Term limits would change the perspective every so often, by brute force if nothing else. But then you are gonna have to ask who is going to take off six years to go and be on the FEC? It's not like being the Head of the Security and Exchange Commission. It's not a golden parachute to go to the Federal Election Commission and cash out. I mean what are you going to do with it once you get done? Trevor Potter was a Commissioner, he makes a good living in private practice, writes a lot. Gets his name out there. He's done it.'

Author: 'I put this to Ronald Harris (FEC Press Officer) and he said people want to go there because of public service.'

Donald McGahn: 'That could very well be, I mean Brad Smith is a Professor. So for him it makes sense to do a Commission stint, he's published on this stuff and you know, OK. He's not cashing out but it furthers him down his career. Dave Mason's an academic. Daryl was a California election law lawyer. But you know, do you want academics? Or do you want people like me? Or people like Bob Bauer on the other side of the isle, who actually know where the bodies are buried and how (pause) where the real loopholes are, not the imagined loopholes.'

Author: 'Why are people gonna take six years off, when Congress says you have to break all these ties, don't you?''

Donald McGahn: 'Right, right.'

Author: 'So that will have a significant effect on your livelihood and your career.'

Donald McGahn: 'You could get like a thirty year old, thirty something who could do it and then get off and still make partner in a law firm before he gets entangled in all sorts of outside financial interests. Other than that, who else is gonna want to do it who understands campaigns?'⁹²

Commissioner Thomas was asked:

Author: 'What do you feel about term limits, in terms of their advantages and disadvantages? I'm talking about Commissioner term limits. Because we've got this grand-fathering as well haven't we, so?'

Commissioner Thomas: 'Well, I've always thought that term limits are a goofy idea anyway, whether its members of Congress, even for President, certainly for Commissioners at the FEC. My sense of it is, if you've got somebody who's competent and everybody thinks is doing a good job and would be a real asset to continue on, that person ought to be able to do so. In this area, perhaps more so than most, having institutional memory, having experience, having an ability to see where all of the different programmes and processes and budgeting efforts fit together and how things can be improved, is beneficial. So I have always...when I've been up for reappointment, I've tried to let folks know that I think that I've done a good job and that I point to some of the areas that I've worked on that have improved the agency's processes and issues that is has pursued. And make the pitch that that kind of work ought to be continued. But there are some who think that just bringing in new blood is enough of a benefit in and of itself to warrant to force some folks out. I would always,particularly in the area of elected positions outside in the Congress, it seems absurd to deprive the

⁹¹ The law stated that 'such members of the Commission shall not engage in any other business, vocation, or employment. Any individual who is engaging in any other business, vocation, or employment at the time of his or her appointment to the Commission shall terminate or liquidate such activity no later than 90 days after such appointment.' FECA Title 2 437c (d) (3).

⁹² Interview with the author, Washington D.C. 16.10.01.

whole electorate of the chance to vote for someone.⁹³

Larry Noble, former General Counsel at the FEC and now Executive Director at the Center for Responsive Politics, expressed his opposition to Commissioner term limits.

Author: 'In the past, the Centre for Responsive Politics has criticised the Commissioners for making enforcement decisions, whilst lobbying for reappointment. In your view, what are the advantages and disadvantages of the introduction of term limits for Commissioners introduced in 1997?'

Larry Noble: 'I took a strange view, in that I departed from the common view held in the reform community. I'm against term limits. Or in favour of term limits, if the term is very long. Perhaps that's the best way to put it. I'm against short term limits. And the reason for that, and I've seen this happen you give them one six-year term, they're not looking to get reappointed, they're looking to get another job. So human nature what it is, they start worrying about angering their allies, be they Republican or Democratic. Are they gonna get another job in another administration?'

Author: 'Oh I remember you!'

Larry Noble: 'Yea, so frankly, I think, I know I saw that happen. Commissioners switch positions as their terms came up. Where they knew they weren't gonna get reappointed, or they decided they didn't want to get reappointed, they would start pulling back from an enforcement standpoint. That is the distinctive impression, and I've actually been told this off the record, that certain Commissioners have been warned that they were burning bridges. So the idea to me of having a six-year term limit does not help at all and frankly it frightens me. In the perfect world, have a two-year term, and you only get reappointed if you're doing a good job. If you had a President who said I'll only reappoint Commissioners who are doing a good job of enforcement. The problem is that that is not reality so you look at other models of how you get politics out of the system. And the starkest model is the Federal Judiciary. A lifetime appointment and I think they do that with the election office in Canada. So you

⁹³ Interview with the author, Washington D.C. 18.10.01.

basically have a lifetime appointment and you get that out of the process. You don't have to worry now about who you are going to anger. You have this job for life. That's not realistic when it comes to Commissioners. So I would look at the next one, which would be the FBI. Make it a ten, fifteen-year appointment. Then if you want to get it term limited, then at least give them a number of years, where they don't have to start worrying about what's going to happen.⁹⁴

Interviewees expressed their support for the introduction of term limits often commented on the need for 'fresh ideas' and 'new blood' at the Commission. Others argued that a more regular turnover of Commissioners would end what they saw as an undesirable isolationist institutional culture. Jan Baran was asked:

Author: 'What view do you have about the introduction of term limits for Commissioners and will this change or stop the process that you have described where election lawyers and Congressmen are lobbied to appoint or reappoint Commissioners?'

Jan Baran: 'I think its probably a good idea, because it increases the likelihood that there will be some changeover, new blood at the Commission and will introduce individuals with different perspectives and new ideas on a more regular basis. It will also reduce the pressure on Commissioners to seek their own reappointment to the Office. I don't think it's going to fundamentally change most of the problems, but it will ensure that at least some new ideas will be introduced at an agency, which by its rules is increasingly isolated. Cloistered. Twenty-five, thirty years ago, it wouldn't violate a rule to talk to Commissioners about problems, or pending advisory opinions, or giving them some idea about what people are thinking outside, but now, like other agencies, you have to observe these *ex parte* rules and the Commissioners tend to lead existences that basically isolate them from the outside, not just political forces, but anybody's opinion, its all formalized. They don't go to political functions anymore, they do go to political conventions every four years, they stopped that for a while. And they never

⁹⁴ Interview with the author, Washington D.C. 17.10.01.

actually see any of the respondents that their staff is investigating, in fact they never directly hear from the lawyers representing the people being investigated. They are actually very isolated from the interface that the community has with that agency in terms of compliance and enforcement.⁹⁵

Commissioner Mason expressed a similar view concerning isolationism at the Commission and asserted the need for fresh ideas. Whilst unconvinced about the merits of one six-year term, he was not opposed to term limits in principle.

Author: 'How do you view the introduction of term limits introduced in 1997? On balance, do you think they have more advantages than disadvantages?'

Commissioner Mason: 'Well, in practice its very difficult to see because they haven't really affected Commission operations. In theory I'm in favour of term limits, or rotation schemes. I don't think one term is sufficient, that makes Commissioners too much like tourists. At least to the staff who run it. But at least at this Commission in particular is a good illustration er, when I arrived courtesy of Trevor's seat being vacant, the other five Commissioners when I was nominated were here, the most recent arrivals to the Commission had come in the early 1980s. Commissioner Thomas, I think had been appointed Commissioner in 86, but he'd been here long before then as a Staffer. So you had roughly the same group of people interacting from about 1981 to 1998. And that I believe, is a problematic situation. It didn't have to do with those particular people having any unique deficiencies or anything like that, it just establishes a policy group and it doesn't change very much over that long period of time. You do tend to run into some problems. And Trevor brought in and out was not enough to fundamentally change things. So I think from the history of the Commission there is a fairly good argument that you need to do something to get more turnover than there had been, at least for that 18-year period.¹

⁹⁵ Interview with the author, Washington D.C. 17.10.01.

Author: 'Since the removal of *ex officio* members, some of your Republican critics say that the Commission is increasingly cloistered and that this isolation is undesirable. How would you respond?'

Commissioner Mason: 'Well, again I'm not sure that the removal of *ex officio* members has really changed the Commission that much. I think it was part and product of the lack of turnover that I mentioned amongst the Commissioners, and the staff. A lot of the senior staff have been here since the Commission opened up. So people have got kind of set in their ways and thinking, and I think that is a valid criticism to agree. It's been addressed fairly substantially by investing in new Commissioners. But there is again related to Congress as a regulated entity. When I worked at the defense department in legislative affairs, there was a very robust communication back and forth between the defense department and the legislative branch. We had annual appropriation and authorization bills. We had vigorous sets of hearings, we had instructions, or requests that could be communicated through explicit legislation and we could do things through letters from committee chairmen who are obviously in positions of power, down to informal inquiries and phone calls from members of staff from low-ranking members of Congress, up and down the scale quite a bit, and so you aren't in any sense isolated. The general critique was that the system was too open and the department was too open to outside influence. Not per se, in an improper way, but rather in a way that prevented sound management and sound policy making. The problem wasn't so much corruption, as too many cooks spoiling the proverbial broth. And I think that criticism was valid there, but that was my previous executive branch experience. Here it is very, very different. Members and staffers, despite the sometimes vitriolic statements you read about general policy, are very reluctant, and very careful about attempting to intervene. In all sorts of informal contacts that were an absolute everyday occurrence in the defense department are very little in evidence here. Both sides are very sensitive, and very careful to this phenomenon, that dealing with policy makers are also dealing with people who they regulate. And I think that care on both sides makes it very difficult to have more formal and informal contacts but more robust contacts, that you see at other agencies. While my sense is that other independent agencies that contacts aren't as robust as

they were at defense, but they are much more common and that for a member of Congress to write a letter, or to pick up the phone and call about a regulatory matter, isn't seen as *per se* as problematic. Whereas here, it is. Even in cases where it may not be *per se* problematic, it is perceived that way. That understandable care, that understandable reticence is really one of the things that has contributed to our isolation. Because people on the Hill feel like can't call us, or they shouldn't call us.⁹⁶

Congressmen wish to avoid communicating with the Commission for two reasons. Firstly, their election lawyers usually advise against it because a seemingly innocuous question might provoke an advisory opinion that is damaging to their Party's interest. Any change in the law can affect the outcome of electoral competition. Therefore, the 'amateur' is discouraged from 'meddling' in the professional's territory. Alex Vogel, general counsel at the NRSC, was asked about the educational roundtables organised by the FEC.

Author: 'The FEC have, if you look at the appendix to the PWC audit, very boring reading but they talk about the outreach, the roundtables.'

Alex Vogel: 'They are ignored by the regulated community.'

Author: 'Yes!'

Alex Vogel: 'That is because in a way the Party committees take some blame for that. We have basically said to our..to our regulated ...to our subsidiaries and our candidates, don't ever talk to the FEC, don't trust the FEC don't tell them anything, call us first. Don't ask for an advisory opinion. Leave the professional election law to the election lawyers. And you go run for office. So to some degree that's part of that.'⁹⁷

Secondly, the regulated community have been unwilling to initiate communications with the FEC is because of the real or perceived ethical hazards involved. Commissioners and

⁹⁶ Interview with the author, Washington D.C. 22.10.01.

⁹⁷ Interview with the author, Washington D.C. 26.10.02.

staff are bound by strict rules of confidentiality surrounding all ongoing enforcement cases.⁹⁸ Perhaps the most potentially hazardous situations for Commissioners are the social ones. Brooks Jackson described the case of the 'Blabbermouth Commissioner' in his book, *Broken Promise, Why the Federal Election Commission Failed*. FEC Vice-Chairman Vernon Thompson, a Republican appointee, divulged damaging information concerning a 1976 enforcement case involving Jim Sasser (D-TN).⁹⁹ The breach of confidentiality took place whilst Thompson was socialising in Washington's University Club. After the story was published in the press a few days prior to the election, the FEC attempted to trace the source of the leak. Commissioner Thompson subsequently admitted that he had discussed the case with Melvin Laird, former Secretary of Defense shortly after voting on the matter.¹⁰⁰ Commissioner Mason alluded to the ethical problems associated with these interpersonal meetings:

Commissioner Mason: 'Once you are over here and people from the Commission historically have been somewhat reticent about going to Congress and explaining what we are doing and opening themselves up to communications from Congress. I've tried to do some of that sort of thing but in many cases I see problems that come up that way. When I was fairly new here, I went over to talk to the Senate AA's, the Chiefs of Staff of the Republican Senators to give them some observations about the Commission and after the talk, one of them came up and asked me, what could have been, what could have developed into a fairly sensitive enforcement related question. But I was able to handle it and give him appropriate guidance without causing

⁹⁸ Jan Baran alluded to the FEC's rules prohibiting *ex parte* communications. The Federal Code of Regulations states 'no person outside the agency shall make or cause to be made to any Commissioner or any member of any Commissioner's staff any *ex parte* communication regarding any candidate or committee's eligibility for or entitlement to public funding; any audit; or any pending or prospective Commission decision regarding litigation, including whether to initiate, settle, appeal, or seek certiorari (to be informed of, or to be made certain in regard to), or any other decision concerning a litigation matter.' CFR 201.3 (a). The regulations also set out that Commissioners are to prevent individuals from breaking these rules and if unable to, they should report the matter to the 'Designated Agency Ethics Official.' CFR 201.3 (c) (1).

⁹⁹ Jim Sasser served for 18 years in the U.S. Senate and after being nominated by President Clinton went on to become American Ambassador to China 1996-99.

¹⁰⁰ Jackson B (1990) 10.

any ethical problems for me, or for him. But it was a situation where the red flags started going up and so when you are in that sort of situation, the normal policy discussions, or normal administrative discussions, can very quickly lead to abnormal discussions.¹⁰¹

As Congressmen and Commissioners are wary of initiating dialogue with each other outside the bounds of traditional oversight, the appointment process takes on even greater significance. Term limits help to ensure that Commissioners do not have an opportunity to 'go native,' adopting an 'agency view' but continue to act in a way that is broadly representative of those who supported their appointment. Term-limited Commissioners are likely to be more concerned about their impending change in employment status and less concerned about enforcement of the statute. Larry Noble suggested that if Commissioners were limited to one six-year term, their primary objective whilst serving on the Commission would be to find another job. Consequently, Commissioners would be mindful about angering their allies in government or the private sector. Therefore, term limits help to remind Commissioners of their loyalties. The need to secure an appointment outside the FEC when their term has expired helps to ensure that Commissioners do not become 'independent' but exactly the opposite.

The problem for Congress was how to install enough independence in the Commission for its decisions to be seen as legitimate by the electorate and respected by the regulated community, without setting up a body that was so emboldened by that independence that it ignored the views or concerns of Congress and that trampled over First Amendment

¹⁰¹ Interview with the author, Washington D.C. 22.10.01.

¹⁰² Explaining the birth of the FEC, Francis Wilkinson wrote, "The FEC elicits some sympathy for getting off to a bad start in life. It was designed in the early 70s to be hide-bound. This is generally attributed to Congressional cynicism, which naturally played its part. But it was also due to Congress' recognition that

protections.¹⁰² Congress also wanted to avoid the Commission becoming dominated by one political Party or ideological perspective. These fears led to the creation of a body characterised by an even number of Commissioners, a bipartisan lock on appointments and a mixed majority-voting requirement. A quote taken from the 1976 landmark *Buckley v Valeo* case set out the thinking behind the structure created:

'Election campaigns are the central expression of this country's democratic ideal. It is therefore essential in this sensitive area that the system of administration and enforcement enacted into law does not provide room for partisan misuse or for administrative action which does not comport with the intent of the enabling statute. At the same time it is recognised that the authorities charged with administering and enforcing the law must have the independence required by the tripartite system of government set up by the Constitution. To mediate between these conflicting concerns, the bill provides that the Commission shall initiate investigations, bring judicial actions, and take other steps of comparable importance only upon the affirmative vote of four of its six members. The four-vote requirement serves to ensure that enforcement actions, as to which Congress has no continuing voice, will be the product of a mature and considered judgement.'¹⁰³

Partisan Immobilism and the FEC Decision Making Process

There has been no shortage of commentators willing to criticise the structure of the Commission, most of whom judge that it builds in the inevitability of partisan deadlock.

regulating political behaviour in a democracy is a very delicate business. The creation of a super agency capable of riding roughshod over campaign finance activities was rightly viewed with trepidation. Fearful of losing control, Congress made the FEC bipartisan, with three Republican seats and three Democratic seats. Politicians leaned on their Party's appointees for favourable treatment; appointees, dependent on the politicians for reappointment, often complied.' Wilkinson F (1994) 38.

¹⁰³ Thomas S & Bowman J (2000) 'Symposium: Regulation of Politics, Federal Election Commission, Obstacles to Effective Enforcement of the Federal Election Campaign Act': *Administrative Law Review*, 52 (2) 590.

Fred Wertheimer, President of Democracy 21, recently described the Commission as having 'a structure that is designed by format for stalemate.'¹⁰⁴ Brooks Jackson in *Broken Promise* described how an even number of Commissioners effectively builds gridlock into the process.¹⁰⁵ A press release issued by Democracy 21 quotes an editorial from the *Washington Post* that said, 'the bipartisan nature of the FEC also guarantees paralysis.'¹⁰⁶ Peter Beinart, writing in *The New Republic* said that, 'the FEC often deadlock along party lines.'¹⁰⁷ Eliza Carney, writing in the *National Journal*, commented, 'the six-member panel, split evenly between Republicans and Democrats, often deadlocks along party lines.'¹⁰⁸ Bill McAllister and Benjamin Weiser opined in the *Washington Post*, 'when the Commission gathers around its ninth-floor conference table in the old Potomac Electric building on E Street NW, the central issue is often whether the FEC will take action or deadlock three to three along Democratic and Republican Party lines.'¹⁰⁹

Allegations of Campaign Finance Violations Resulting in Partisan Deadlock

In 1986 the American Medical Association Political Action Committee (AMPAC) allegedly spent \$259,000 in an attempt to defeat Representative Pete Stark (D-CA). AMPAC opposed Stark because of his support for Medicaid, the government medical cover provided for poor and low-income families. Brooks Jackson described how Stark, who also chaired the Congressional committee dealing with Medicaid, referred to AMA

¹⁰⁴ Interview with Fred Wertheimer, President of Democracy 21, and former President of Common Cause, Washington D.C. 25.10.01.

¹⁰⁵ La Forge A (1996) 'The Toothless Tiger, Structural, Political and Legal Barriers to Effective FEC Enforcement': *The Administrative Law Journal*, 10 359.

¹⁰⁶ Democracy 21, press release relating to 'Project FEC,' issued Tuesday, December 19, 2000.

¹⁰⁷ Beinart P (1996) 'TRB From Washington, Doling it Out': *The New Republic*, 214 (15) 6.

¹⁰⁸ Carney E (1997) 'Besieged FEC Gets Dissed On All Sides': *National Journal*, 29 (21) 1038.

¹⁰⁹ Weiser B & McAllister B (1997) 'The Little Agency That Can't, Election-Law Enforcer Is Weak by Design, Paralyzed by Division': *Washington Post*, February 12, 1997 1.

leaders as 'troglydotes.' In their attempt to elect Stark's opponent, Republican David Williams, AMPAC appeared to co-ordinate their expenditures with the candidate's own campaign, something which qualified as a contribution and exceeded the \$5,000 PAC limit. The law states: 'expenditures made by any person in co-operation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents, shall be considered to be a contribution to such candidate.'¹¹⁰ In his report, the FEC general counsel recommended that the allegations should be investigated. However, the Commission deadlocked with three Democrats finding 'reason to believe' and three Republicans against. Partisan deadlock at the 'reason to believe' stage attracts particular criticism because it prevents the establishment of the facts. Additionally, Republican appointee Lee Ann Elliott had voted against the investigation whilst she still received her \$18,831 annual pension from AMPAC.¹¹¹ Whilst AMPAC could not have legally revoked Commissioner Elliott's pension rights, the financial relationship justified a recusal.

After a three-year investigation into the NRSC and their alleged overspending in the 1988 campaign of former Senator Conrad Burns (R-MT), the Commission deadlocked. Three Democrats voted to proceed, two Republicans against and one Republican abstained.¹¹²

By 1989 Kenneth Gross, Democratic Party election lawyer and former FEC Associate General Counsel, commented, 'important issues are not being resolved because of party-line splits.'¹¹³ The Democracy 21 Report (2002) supported the partisan deadlock thesis and

¹¹⁰ FECA Title 2. 441a (7) (B) (I).

¹¹¹ Jackson B (1990) 31-33.

¹¹² www.opensecrets.org/regulation/deadlock. 12.11.00.

¹¹³ Jackson B (1990) 35. Prior to her FEC appointment, Commissioner Elliott had advised the AMA on their PAC activities in Chicago for 28 years. Staroba K (1990) 'Talking Politics Talking Turkey': *Association Management*, 42 (11) 46.

described a number of more recent cases.

In 1993, the DSCC alleged that the NRSC had exceeded the limit on co-ordinated Party expenditures in the Georgia Senate runoff election. It was likely that co-ordination had a significant effect on the outcome of the election as the National Institute on Money in State Politics found that the best-funded candidates won 83% of elections in Georgia.¹¹⁴ The Commission voted along partisan lines, with three Democrats finding reason to believe and three Republicans against. In 1996, the Commission found that the 1996 Dole for President Committee had received illegal contributions from the RNC. Whilst the general counsel recommended to proceed with enforcement action, the Commission deadlocked along partisan lines.

Finally, the Haley Barbour case involved an investigation of the RNC and their relationship with a non-profit corporation, the National Policy Forum. The general counsel recommended that the Commission find 'probable cause to believe' that both organisations had received illegal foreign donations and had used these donations to influence the outcome of Federal elections.¹¹⁵ Again the Commission split along Party lines with the three Democrats supporting the general counsel's recommendation and the three Republicans voting against. However, whilst the public is not made privy to the evidence in any enforcement case placed before the Commission, the contrarian votes in Haley Barbour may well have been justified. An investigation by the Senate Committee on

¹¹⁴ The 83% figure covers the years 1992-1996. www.nvri.org 6.8.02.

¹¹⁵ The law states 'it shall be unlawful for a foreign national directly or through any other person to make any contribution of money or other thing of value, or to promise expressly or impliedly to make any such contribution, in connection with an election to any political office or in connection with any primary election, convention, or caucus held to select candidates for any political office; or for any person to solicit, or accept, or receive any such contribution from a foreign national. FECA Title 2. 441e (a).

Governmental Affairs concluded that 'evidence obtained by the committee demonstrated that the National Policy Forum did not engage in any campaign-related activities in 1994 or 1996.' 'Therefore it was not subject to restrictions on foreign funding.'¹¹⁶ One might argue that this case involved unethical campaign funding practices but not illegal ones.¹¹⁷

These cases show that the traditional orthodoxy is that the agency suffers from immobilism due to defensive partisanship. When partisan deadlock does occur on the Commission, it is often highly significant, as it tends to relate to important cases involving large sums of money: high profile actors, unsettled areas of the law and partisan issues.¹¹⁸ For example Trevor Potter commented:

Trevor Potter: 'One of my colleagues who is no longer there on the Commission used to rise up in righteous anger when people used to talk about three/three ties. This is Lee Ann Elliot, 'I've done my research and ninety-five point seven percent of all cases are resolved without any sort of tie vote.' Correct! But important cases, if you looked at where the tie vote cases were, every single case was an important case. Every one of those was a crucial case, a very partisan case.'¹¹⁹

Bill Allison was also critical of the incestuous relationship Commissioners had with the two major Parties. He commented:

Bill Allison: 'But when you are all under the same roof and the Commission itself is political, a certain number

¹¹⁶ U.S. Senate, Committee on Government Affairs, Investigation into the Illegal and Improper Activities Surrounding the 1996 Presidential Election. www.senate.gov 8.8.02.

¹¹⁷ www.pbs.org/newshour/campaign 8.8.02.

¹¹⁸ Conclusions of Bruce Bordner, a doctoral candidate at Woodrow Wilson Department of Government, www.public-i.org/story 29.2.00. Kenneth Gross, former FEC Associate General counsel (1980-1986), expressed his surprise that there were not more party line splits resulting in deadlocked votes. Gross K (1991) The Enforcement of Campaign Finance Rules, A System in Search of Reform, *Yale Law & Policy Review*, 9 291. Lawrence Noble has expressed similar sentiments saying that the three-to-three partisan splits are 'oversold,' and that it 'oversimplifies the issue to put it in straight Republican/Democrat terms.' Colloquay (1994) 'Federal Election Commission Panel Discussion, Problems and Possibilities': *The Administrative Law Journal*, 8 226-228.

¹¹⁹ Interview with the author, Washington D.C. 24.10.01.

from each party, the President chooses the swing vote. These are people who know the Parties, are familiar with the Parties, their best friends are in the Parties and they are overseeing the whole bowl of wax.¹²⁰

Whilst partisan deadlock has undermined the efficacy of the Statute in a number of important cases, journalists and the reform community present the decision-making process in caricature. This discussion will illustrate the infrequency of partisan deadlock, will argue that most cases generate consensus and that legal interpretation, evidentiary and philosophical outlook all effect the outcome of Commissioner deliberations.

Firstly, FEC staffers carried out an examination of the enforcement decisions that resulted in a three/three split, or deadlocked Commissioner vote tally. The sample frame included 4,725 votes cast from 1993-1999. They found that only 2.56% of Commissioner vote tallies resulted in a three/three split and that not all of those were along partisan lines.¹²¹

When asked to confirm this rarity, he commented:

Jan Baran: I agree with you that there are fairly few instances where the Commission actually deadlocks, three-to-three and even in those-three-to-three deadlocks, there will be occasions when the composition of the two sides is not necessarily partisan one way or the other.¹²²

Commissioners are also aware that recurrent partisan deadlock will not only attract criticism in the press and the reform community but complainants may also sue the agency.

¹²⁰ Interview with the author, Washington D.C. 22.10.01.

¹²¹ Thomas S & Bowman J (2000) 591. Particular cases have been written about to support the partisan deadlock thesis, but as they number only a few, one might be cautious about their statistical reliability. The Center For Responsive Politics refer to the 1988 case of Conrad Burns, who was subject to a three-year FEC investigation that ended in partisan deadlock. www.opensecrets.org/regulation/deadlock 12.11.00. Another case involved the Democratic National Committee and President Clinton's 1992 presidential campaign. The allegations involved illegal co-ordination between the candidate and the DNC. Shenk J (1997) 'Designed for Impotence': *U.S. News & World Report*, 122 (2) 42.

¹²² Jan Baran, Wiley, Rein and Fielding. Interview with the author, Washington D.C. 17.10.01.

For example, if the Commission dismisses a case because of 'impermissible interpretation of the statute' or because of 'arbitrary and capricious' decision-making, a court may find that the agency has acted 'contrary to law.'¹²³ One case where this occurred involved the NRSC, which was alleged to have evaded limits on Party aid to particular candidates through 'bundling.' The Committee had allegedly solicited cheques without an identified payee, paid them into their bank account and then periodically disbursed \$545,249 in funds to their preferred candidates. This mechanism was designed to circumvent the contribution limits enshrined in the FECA and upheld in *Buckley*. The NRSC claimed to have been a passive agent, merely passing on 'earmarked' contributions. When the Commission voted on the matter, it rejected the general counsel's recommendation to proceed and split along Party lines. However, on 24 January 1990, a Federal Judge ruled that the Commission had been 'arbitrary and capricious' in not pursuing the NRSC and therefore had acted 'contrary to law.'¹²⁴ Yet one should not overestimate the likely success of this strategy as legal decisions may be politicised and the courts have generally adopted a deferential attitude towards the FEC because they possess exclusive civil jurisdiction.¹²⁵ The FEC has also challenged the legal 'standing' of those attempting to enforce the law in this way.¹²⁶

Secondly, the majority of enforcement decisions do not involve a formal meeting of the Commissioners. Enough consensus prevails for the Commission to exercise its

¹²³ See *Democratic Senatorial Campaign Committee v FEC* 745 F. (1990), *Common Cause v FEC* 489 F. (1980). The law states, 'any party aggrieved by an order of the Commission dismissing a complaint filed by such a party under paragraph (1) or by a failure of the Commission to act on such complaint during the 120-day period beginning on the date the complaint is filed, may file a petition with the United States District Court for the District of Columbia.' FECA Title 2. 437g (8) (a).

¹²⁴ Jackson B (1990) 35-36. See *Common Cause v Federal Election Commission* Civil Action 89-0524.

¹²⁵ Colloquay (1994) 242-43. FECA 437c (b) 1 sets out; 'the Commission shall have exclusive jurisdiction with respect to the civil enforcement of such provisions.' Exclusive civil jurisdiction also prevents others from attempting to enforce the law through the courts. A complainant must lodge their allegation directly with the FEC. Such complaints must clearly differentiate between fact and hearsay evidence and must be signed, sworn and notarised.

¹²⁶ Democracy 21 (2002) 15.

enforcement responsibilities by 'voting in circulation.' Larry Noble explained:

Larry Noble: 'A matter is circulated around the Commissioners, where they vote on paper, it doesn't go to the Commission, it doesn't go to the table, as long as there's agreement on it. Now a Commissioner can object, and it will have to be put on the agenda for discussion, or they can object for the record, meaning they don't want to discuss it, they know that there are four or five votes to go forward. The more controversial things, or sometimes a Commissioner will raise a non-controversial objection on a minor point and it will go to the table. But the majority of things get done in circulation.'¹²⁷

An agency ridden by partisan deadlock is unlikely to be able to function in the way Larry Noble described. Former Republican appointee, Max Friedersdorf commented:

'Before I got here, I imagined there would be a lot of deadlocks, but most decisions are, though, unanimous, 6-0, because the cases are clear-cut. If we have differences, it's usually over interpretation of the law, not due to partisanship.'¹²⁸

However, this consensus is also criticised by the reform community. Groups like Democracy 21 and the Centre for Public Integrity (CPI) have argued that where enforcement might have a significant impact on the regulated community, Commissioners affiliated to both Parties collude to defuse complaints. For example Marianne Holt from the CPI referred to this practice as 'back-room trading.'¹²⁹ Similarly Alex Vogel general counsel at the NRSC commented that:

Alex Vogel: 'Big violations that involve real issues of how large institutions in the political environment operate, are the ones that inherently run up against the inability to get four votes, or that both sides are doing it and it seems to be working rather well for both sides, so

¹²⁷ Interview with the author, Washington D.C. 17.10.01.

¹²⁸ Light L (1980) 21.

¹²⁹ www.public-i.org 10.8.02.

¹³⁰ Interview with the author, Washington D.C. 26.10.01.

no one wants to touch it."¹³⁰

Allegations surrounding the 1996 presidential campaigns of Bob Dole and Bill Clinton were often described as examples of this. Yet this case will show that the 'back-room trading' thesis has its weaknesses and that a third factor, legal controversy, may influence the decision-making process far more.

Both candidates had agreed to abide by spending limits in exchange for public funding. It was alleged that in order to evade these spending limits the rules on soft money were broken by both candidates. It was permissible for Parties to raise and spend soft money, which is unregulated at Federal level, on 'get out the vote drives,' Party-building activities and 'issue discussion,' something upheld by the courts and protected under the First Amendment. Individuals, groups, labor unions and corporations have been able to contribute unlimited amounts of soft money which has been used to pay for 'issue discussion' in the media.¹³¹ However, Mablin and Gais noted how these campaigns exploited the margins between 'issue advocacy' and 'election advocacy.'¹³² The practice of using soft money in this way was legal, as long as the message did not expressly advocate the election or defeat of a clearly identified candidate. The criticism has been that 'issue advocacy' and 'election advocacy' are synonymous. This method of campaigning was criticised by Eliza Newlin Carney who commented in the *National Journal*:

'In the 1995-96 election cycle both Parties raised and spent unprecedented sums of 'soft' or unregulated, money on multi-million-dollar advertising campaigns that masqueraded as legislative advocacy but were widely perceived as blatant electioneering. The

¹³⁰ Interview with the author, Washington D.C. 26.10.01.

¹³¹ U.S. Senate, Committee on Governmental Affairs, 'Investigation into the Illegal and Improper Activities Surrounding the 1996 Federal Elections'. 1997, 6.

¹³² Mablin M & Gais T (1998) *The Day After Reform: Sobering Campaign Finance Lessons from the American States*. New York, The Rockefeller Institute Press, 11.

explosion in the use of soft money rendered existing limits on campaign contributions all but meaningless.¹³³

It was further alleged that the election messages paid for with soft money were also coordinated with the candidates. Coordinated expenditures were considered an 'in-kind contribution,' making them subject to FECA contribution limits, and the prohibitions relating to corporations and labor unions.¹³⁴

The FEC audits of both presidential campaigns concluded that they had broken the law and the 'issue advertisements' should have been counted against their expenditure limits. Therefore, the professional staffs recommended that the Clinton campaign repay \$7m in public funds and the Dole campaign repay \$17.7m. However, the Commission unanimously rejected the repayment recommendation, voting 6-0 against.¹³⁵

Fred Wertheimer criticised the soft money loophole and suggested that Commissioners voted against enforcement because of their role as defenders of Party:

Fred Wertheimer: 'The Commission's most egregious act has been to play the principal role in opening the soft money loophole, which is a loophole that ate the law, and then refusing to address the problem. We spent five years in the Commission in the 1980s with a proposed rule-making to stop the problem. Then they refused to enforce the law when people were blatantly breaking the law.'

Author: 'So this rule-making, that was the late 70s wasn't it? '78 was it?'

Fred Wertheimer: 'Well, their initial rule-making that opened the loophole was 78. I wrote a letter to them in

¹³³ Carney E (1997) 'Besieged FEC Gets Dissed On All Sides': *National Journal*, 29 (21) 1038.

¹³⁴ www.cfinst.org/eguide/coordin 9.8.02.

¹³⁵ Suro R (1998) FEC Lets '96 Campaigns Off on 'Issue Ads': *Washington Post*, 21.

1984 asking them to adopt a regulation to stop this problem. The whole soft money problem is simply a cheating system. It was created at a national level simply to cheat and evade the campaign finance laws. We proposed a rule-making that was at the Commission for five years. We were in court twice, and at the end of the process, the Commission said basically they saw no evidence that anyone was doing anything here. The only thing they did do was adopt a disclosure, as part of the regulation request, which is the only reason you have disclosure of these contributions. And since then we've been working to get this problem fixed and constantly run into the roadblock of the Commission. In 1996, I served as a counsel for Common Cause in writing to the Justice Department for a special prosecutor to investigate Clinton and Dole's misuse of soft money in their campaigns. I was involved in the legislative efforts that created the special prosecutor system. But the problem was that the FEC simply wasn't enforcing the law. The long and short of it was that it was very controversial, there were a number of people in the Justice Department who wanted to go forward, but in the end, Reno killed it. But it went back to the auditing staff who found that Dole and Clinton had broken the law, but the Commission overruled them. The enforcement staff then found that they had broken the law, and the Commission overruled them. And then just recently, in 2000, we ran into the same problem at the Congressional level, so we filed complaints with the Commission against Hillary Clinton, John Ashcroft, and a number of others, and the campaign committees. We just got the results back, and again the staff has ruled for us, and again the Commission has overruled them again. So basically, they seem to have as their role in life to protect the regulated community, rather than to enforce the law.¹³⁶

Fred Wertheimer elaborated on how soft money was used to circumvent contribution limits in Hillary Clinton's New York race for election to the U.S. Senate.

Author: 'Soft money is regulated at state level, is that right?'

Fred Wertheimer: 'Well, yes and no.'

¹³⁶ Interview with the author, Washington D.C. 25.10.01.

Author: 'This is what the Republicans are telling me.'

Fred Wertheimer: 'In theory it is supposed to be raised and spent under state law, but most of the state laws don't limit this money. It's not regulated in the sense that it ...and as a practical matter, there's no enforcement of soft money and its potential use in Federal elections. No. The soft money system from its beginning, was a cheating system, the word, it's the worst possible word, soft money sounds very innocent, very relaxing, it was a cheating system. It was created to get around every limit in the Federal law. And to this day it's a cheating system. Now this latest case, Senator Clinton goes out, creates a joint committee, with the Senate Democratic campaign committee, goes in New York and personally I solicit money from you. She goes to an event and she asks you for a thousand dollars' that's all you can give me. And also could you give me a hundred thousand dollars? I can't use this for my campaign, so you give her the money that the law is supposed to prevent you from doing. She takes that money, she sends it through the process to the state party, the state party then co-ordinates with the Clinton campaign to design the ads, and the money is spent. The claim is there's nothing wrong with that, at that point we have no laws.'

Author: 'Is this related to express advocacy?'

Fred Wertheimer: 'Well the claim is, but no, not in reality. The money goes from the national party, to the state party and is spent by the state party. No court in this country, none, has ever said that an expenditure by a party or a candidate, requires express advocacy, none. Now the argument has been made that it does. Those findings have only been made with regard to outside groups. Third party groups. Now the idea that a candidate, I run an ad two weeks before an election, beat the hell out of my opponent and don't say vote for me and vote against the opponent is not a campaign ad, is ludicrous, beyond belief. Hillary Clinton, these people are controlling the ads. It's not like the party is controlling the ads and Parties are in the business of electing people. So you're telling me that a party is running an ad to...before an election, that's not a campaign ad, it's issue discussion because it doesn't say vote for, so.'

Author: 'Phoney issue ads.'

Whilst there has been criticism of the Commission's record of regulating soft money, the reason for voting against enforcement may not be due to the bipartisan collusion often suggested. For example, Commissioners are commonly faced with a lack of clarity surrounding the law, or they may believe that the regulations allow for a particular activity. For example, Roberto Suro, staff writer at the *Washington Post*, explained why the Commission failed to support enforcement against the Dole and Clinton committees:

'Commissioners argued that there was no obvious standard to determine when 'issue advertisements' should be counted against spending limits for individual candidates and when they counted as Party spending which is not subject to strict regulation by the Commission.'¹³⁷

The FEC Budget Request (2000) also asserted how increasing legal complexity had undermined the enforcement process:

The Commission grapples with such complex legal matters as determining when improper coordination between a candidate and a labor union or corporation occurs, analyzing whether soft money is being used to fund contributions to Federal candidates, defining what type of entity qualifies as a political committee and determining when a person qualifies as a member of a membership association.'¹³⁸

Furthermore the allegations made by Fred Wertheimer concerning the campaigns of Hillary Clinton (D-NY), John Ashcroft *et al*, relate to joint fundraising committees. Although these

¹³⁷ Suro R (1998) 21. The Commission has sought guidance from Congress on what might constitute an 'issue advertisement' and what might constitute an 'electioneering message.' For example, in fiscal year 1999 appropriation hearings Commissioner Thomas said to Rep. Anne Northup (R-KY) 'What we are asking in our legislative recommendation in that regard is that, if you will, help us to try to clarify when there is sufficient coordination to amount to an in kind contribution and also help us to define the line between something that someone would agree is pure issue advocacy, has nothing to do with the Federal Election process, and something that, on the other hand, does have to do with the election process; it's electioneering in purpose and effect in every sense.' U.S. House of Representatives, Committee on Appropriations, Subcommittee on the Treasury, Postal Service, and General Government Appropriations, 1999 25.

¹³⁸ PWC (1999) 4.3.3.5.

entities were used to raise hard and soft dollars, Alex Vogel was of the opinion that no wrongdoing had occurred because the regulations specifically allowed for the establishment of these entities:

Alex Vogel: 'We've just had in the last few days, I don't know if you saw this, but the Commission ended a number of MURs related to joint fund-raising committees. Hillary Clinton, Giuliani, John Ashcroft, have all been involved in joint fundraiser committees.'

Author: 'Is this to do with coordination?'

Alex Vogel: 'That was the argument. There's a campaign and there's a party committee and they get together and form a third entity, together, a joint fundraiser committee, which raises hard and soft money. The soft money goes to the party committee, and the hard money goes to the candidate. Well Democracy 21, Wertheimer, and all these folks, had filed a complaint, that this was unlawful, that.'

Author: 'Were they saying that they were funnelling the soft money back through?'

Alex Vogel: 'Exactly. The problem is that the regs specifically provide for joint fundraising committees, and there was no evidence that anyone was doing that. So you have the general counsel's office finding reason to believe on everything, with a 55-page general counsel's report, saying throw the book at everybody, and the Commission saying absolutely not. So not only do you have these two forces in the Commission, Democrats versus Republicans, it was almost like the general counsel's office was an island to itself.'

Author: 'I spoke to Scott Thomas, and he said well...we rung our hands and then we didn't do anything.'

Alex Vogel: 'Scott's approach was well, let's find a violation but not fine anybody because what they were doing was probably not against our interpretations at the time. Well then, they couldn't have done anything wrong.'¹³⁹

¹³⁹ Interview with the author, Washington D.C. 26.10.01.

Whilst the candidates in 1996 and 2000 benefited from employing soft money to purchase 'issue advertisements' of questionable legal status, Commissioners have a duty to interpret the law as they understand it. This may result in deadlock, partisan or otherwise, or it may generate consensus. The agency tends to attract criticism from the reform community when the Commission fails to act, usually citing partisanship or bipartisan collusion, or it attracts criticism from First Amendment advocates when it does act because it is accused of encroaching on constitutionally protected free speech. Particular controversy has surrounded Matters under Review (MURs) and court cases involving 'express advocacy' and 'coordination,' both of which are discussed below.

Case Law: Express Advocacy

The *Buckley v Valeo* 424 U.S. 1 (1976) decision established the so-called 'magic words test' in defining 'express advocacy.' A communication was only defined as 'express advocacy' if it included words like, vote for, elect, support, cast your ballot for, Smith for Congress, vote against, defeat or reject a clearly identified candidate.¹⁴⁰ This was a narrow interpretation, though a clear definition. The Supreme Court in *FEC v Massachusetts Citizens for Life* 479 U.S. (1986) revised the express advocacy standard ruling that the communication could be less direct than the examples established in *Buckley*. The court ruled that 'the fact that the message is marginally less direct than 'vote for Smith' does not change its essential nature.'¹⁴¹ This was an important case as it adopted a broader 'common sense' definition of what constituted express advocacy. In *FEC v Furgatch* 807 F. 2d 857 (1987) a lower court ruled that 'the list in *Buckley* does not exhaust the capacity of the

¹⁴⁰ *Buckley v Valeo* (1976) 424 U.S. 44 n.52.

¹⁴¹ www.commoncause.org 8.8.02.

English language to expressly advocate the election or defeat of a candidate.' The *Furgatch* case established three considerations when defining express advocacy: (1) the speech is 'unmistakable and unambiguous, suggestive of only one possible meaning'; (2) the speech must present a 'clear plea for action'; and (3) it must be clear what action is being advocated.' However, other Federal appeals courts have reverted to the 'magic words' test established in *Buckley*. Such cases have included *Faucher v FEC* 928 f. 2D 468 (1991), *FEC v Central Long Island Tax Reform Immediately Committee* (CLITRIM) 616 F. 2d 45 (1980) and *FEC v Christian Action Network* 894 F. 946 (W.D. Va. 1995) (3d Cir. Aug 2, 1996). Thomas and Bowman have argued that the narrow 'magic words' standard would 'eviscerate' the statute as corporations, foreign nationals and labor unions could break contribution limits by spending unlimited amounts of soft money dedicated to unambiguous electioneering under the guise of 'issue advertisements.'¹⁴² Therefore in October 1995 the Commission promulgated new regulations that incorporated the *Furgatch* ruling. The new regulations were especially unpopular with First Amendment Republicans and established a more expansive 'common sense' definition. Part (a) was more in line with *Buckley* and employed key words like 'vote for President,' 're-elect your Congressman,' 'support the Democratic nominee,' 'Smith for Congress,' etc. Yet part (b) set out that: (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.'¹⁴³ However, the Commission's regulations were successfully challenged in *Maine Right to Life Committee v FEC* 914 F. (d.Me.1996). The regulations were deemed to be unconstitutional and such 'issue advocacy' could only be regulated if it

¹⁴² Thomas S & Bowman J (2000) 596.

¹⁴³ www.fec.gov/members/thomas 29.7.02.

was clearly 'coordinated' or authorized by the candidate. The broader 'reasonable minds' part of the regulations were also ruled contrary to the First Amendment in *Virginia Society for Human Life v FEC* (4th Cir. 2001).¹⁴⁴

First Amendment advocates refer to the *MRLC Inc v FEC* (1996) and *VSHL v FEC* (2001) cases and argue that the Commission should adopt the narrower 'magic words' definition of express advocacy. When asked about express advocacy, Jan Baran commented:

Jan Baran: 'Well, you have two Supreme Court decisions, and several courts of appeals, courts of appeals who have interpreted the Supreme Court's decisions as saying express advocacy means X. The Federal Election Commission passes a regulation that says we define express advocacy as X, and also Y. And the courts, three now, have declared Y unconstitutional.'¹⁴⁵

However as Commissioners have been unable to reach agreement on the appropriate standard to apply, a compromise solution was found.¹⁴⁶ On September 22 1999 the Commission ruled 6-0 not to enforce part 'b' of the regulations in either the 1st or 4th Districts as the Commission had lost cases in the geographical areas administered by those courts.¹⁴⁷ Republican Party appointees Smith, Mason and Wold have adopted a narrow interpretation, relying on the 'magic words test' first established in *Buckley*,¹⁴⁸ whilst Commissioners McDonald and Thomas have adhered to the broader 'reasonable minds' standard established in *Furgatch*. Commissioner Thomas explained the problems inherent

¹⁴⁴ Democracy 2 (2002) 55.

¹⁴⁵ Interview with the author, Washington D.C. 17.10.01.

¹⁴⁶ Other examples where the Commission has 'locked-up' in cases involving 'express advocacy' have included: MUR 4204 (Americans for Tax Reform), MUR 3678 (Clyde Evans), MUR 3616 (Nita Lowey for Congress), MUR 3376 (Gerry Studts for Congress Committee), MUR's 3167 & 3176 (Christian Coalition), and MUR 3162 (Citizens for Informed Voting in the Commonwealth). www.fec.gov/members/thomas. 11.8.02.

¹⁴⁷ www.fecwatch.org/law/court/opinion/vshl 11.8.02.

¹⁴⁸ When serving on the Commission, Commissioners Joan Atkins and Lee Ann Elliott also adopted the 'magic words' approach to defining what constituted express advocacy. See MUR 4204 Americans for Tax Reform as a representative example of this legal disposition. www.fec.gov 13.8.02.

in the narrow 'magic words' approach to express advocacy:

Author: The FEC has also been criticised for going after disclosure violations at the expense of going after substantive violations, how fair is this criticism?

Commissioner Thomas: Well, there's sort of a parallel problem that results if you start saying that certain kinds of paid advertising are not election related. If you say that an ad put out by a group that says Scott Thomas who happens to be running for Senate is a wife beater and doesn't pay his taxes and has missed half of his votes in Congress. Think about that in November. That kind of an ad. I suppose if the FEC and no-one else wants to think that that is an election-related communication means that not only can corporate money be used to pay for it, you can get around the prohibition on corporate expenditures, but you will likewise be saying that that is not an election-related communication for disclosure purposes. You won't require the group that undertake that activity to register as a political committee to disclose all of the money that is raised and spent to do that. So it kind of goes hand in hand. You start seeing the government enforcement body backing off of calling certain activity campaign-related, for the purposes of limits and prohibitions, you'll also find that there is suddenly a backing off of disclosure. And that is really what I think has happened.¹⁴⁹

Commissioner Thomas also alluded to his difference of opinion with Commissioner Smith on the definition of express advocacy:

Author: In your opinion, the appointment of Commissioners who oppose the constitutionality of the statute they're enforcing, how do you feel about this?

Commissioner Thomas: I would have to say it makes me a little uneasy, and I think as a general proposition, you have to be very careful that if you are going to be putting people at an agency that they will enforce the laws that are on the books. Your question, I assume, alludes to Commissioner Smith. His many other writings indicate his scepticism of the constitutionality

¹⁴⁹ Interview with the author, Washington D.C. 18.10.01.

of at least some of the provisions of the statute. He was grilled mercilessly about whether he would nonetheless enforce the law; of course he said, yes, of course I will enforce the law that's on the books and my sense is that yes, he has been willing to do that. It has led him in some cases to, I think, say that we need to have a very clear 'express advocacy' test in order to apply certain provisions of the law and he goes much quicker to that approach than I would. I'm more of a if John Hue citizen on the street would clearly understand that this particular communication was clearly designed to influence the election, and had no other plausible purpose, we ought to treat it as an election-related communication.'

Author: 'A common-sense approach.'

Commissioner Thomas: 'A common-sense approach.'¹⁵⁰

Commissioner Sandstrom has been less supportive of the 'reasonable minds' express advocacy standard and might be described as the contrarian or less predictable Democrat on the Commission.¹⁵¹

Case Law: Coordination

Similar legal problems have also affected what constitutes a 'coordinated expenditure' and what constitutes an 'independent expenditure.' Whilst *Buckley* upheld contribution limits on 'coordinated expenditures,' it ruled that 'independent expenditures' could not be limited and were unconstitutional. Mindful that those engaged in political activity might circumvent contribution limits by passing off a coordinated expenditure as an independent one, the *Buckley* court defined contribution as follows:

¹⁵⁰ Interview with the author, Washington D.C. 18.10.01.

¹⁵¹ See MUR 4922 Suburban O' Hare Commission ("SOC") involving express advocacy. www.fec.gov/thomas 29.7.02.

'A contribution included not only contributions made directly or indirectly to a candidate, political party, or campaign committee..but also all expenditures placed in cooperation with or with the consent of a candidate, his agents, or an authorized committee of the candidate.'¹⁵²

The statute also established that:

'An expenditure made in 'cooperation, consultation or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents, shall be considered to be a contribution to such candidate and therefore subject to the contribution limitations.'¹⁵³

The statute defined an independent expenditure as follows:

'An expenditure by any person expressly advocating the election or defeat of a clearly identified candidate which is made without cooperation or consultation with any candidate, or any authorized committee or agent of such candidate, and which is not made in concert with, or at the request or suggestion of, any candidate, or an authorized committee or agent of such candidate.'¹⁵⁴

This broad standard was further clarified in Commission regulations, which asserted that an 'expenditure' would not be considered 'independent' if there was:

'Any arrangement, cooperation, or direction by the candidate or his or her agent prior to the publication, distribution, display or broadcast of the communication.'¹⁵⁵

Therefore the case law established in Buckley, the FECA statute law and the Commission's Federal Regulations all established a broad definition of what constituted coordination. The application of this standard was designed to protect the efficacy of contribution limits and

¹⁵² Buckley (1976) 424 U.S. 78. Thomas S & Bowman J (2000) 597.

¹⁵³ FECA, 2 U.S.C. 441a (a) (7) (B) (1) 1994. Thomas S & Bowman J (2000) 598.

¹⁵⁴ FECA 431 (17).

¹⁵⁵ 11 C.F.R. 109.1(b)(4)(i) (1999). Thomas S & Bowman J (2000) 598.

in doing so, protect the integrity of the electoral system. However, in keeping with the judicial activism that challenged the 'reasonable minds' definition of express advocacy, the courts have developed a 'coordination' standard that is much narrower than that previously established. The narrow interpretation enables the regulated community to comply with the letter of the law but not the spirit or statutory intent. For example, in *FEC v Public Citizen* (1999) the court opined that discussion between spender and candidate did not meet the consultation or coordination standard and the Commission's regulations were ruled invalid. The Commission also lost a coordination case against the Christian Coalition in 1998. The Commission alleged that the Christian Coalition 'had repeatedly cooperated and consulted with Republican candidates for Federal office, their campaigns and the NRSC.'¹⁵⁶ The Commission asserted that these activities had amounted to an in kind corporate campaign contribution, which was contrary to section 441b of the FECA. The Commission also alleged that the Coalition had expressly advocated the election or defeat of clearly identified candidates, which was something that breached the prohibition on independent corporate campaign expenditures. The court ruled against the Commission on 5 of the 6 allegations involving coordination and established its own narrower standard.¹⁵⁷ Washington law firm, Wiley, Rein and Fielding incorporated this new standard into their Internet Homepage advice for candidates which read:

'A 'coordinated expenditure' is an expenditure for a general public political communication featuring a clearly identified candidate that is:

¹⁵⁶ Thomas S & Bowman J (2000) 600.

¹⁵⁷ The court ruled that 'the First Amendment required different treatment for 'expressive,' 'communicative' or 'speech-laden' coordinated expenditures, which feature the speech of the spender, from coordinated expenditures on non communicative materials such as hamburgers or travel expenses for campaign staff.' Thomas S & Bowman J (2000) 601.

1. Paid for by any person other than a candidate, a candidate's authorized committee, or a party committee, and is created, produced, or distributed at the request or suggestion of a candidate, a candidate's authorized committee, or a party committee.

2. After a candidate has exercised control or decision-making authority over the content, timing, location, mode, intended audience, volume of distribution, or frequency of placement of that communication or;

3. After substantial discussion or negotiation between the creator, producer or distributor of the communication, or the person paying for the communication, and a candidate, or a candidate's authorized committee, or a party committee regarding the content, timing, location, mode, intended audience, volume of distribution or frequency of placement of that communication, the result of which is collaboration of agreement.¹⁵⁸

Whilst this narrow standard might enable or even encourage the regulated community to 'push the envelope,' circumventing the original Congressional intent, the court expected its decision to be appealed. The court opined:

This court is of the opinion that this order in relation to counts I, II, and III involves controlling questions of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation.¹⁵⁹

However Commissioner Sandstrom joined with Republican affiliates Elliott, Mason and

¹⁵⁸ www.wrf.com/publications 9.8.02.

¹⁵⁹ Thomas S & Bowman J (2000) 603.

¹⁶⁰ Thomas S & Bowman J (2000) 603.

Wold in voting against the appeal.¹⁶⁰ The *FEC v Christian Coalition* case has contributed to the lack of legal clarity surrounding the definition of coordination. For example, whilst the regulated community may be guided by the narrow standard set out by the district court, that ruling does not amount to binding legal precedent on other Federal Courts. Additionally, Thomas and Bowman have asserted that individual Commissioners have applied the coordination standard in an inconsistent manner, often in similar cases.¹⁶¹ Until the U.S. Supreme Court resolves this and other definitional issues, enforcement decisions may continue to appear arbitrary and confusing to the regulated community.

Furthermore, the Commission has been hesitant to authorise enforcement in the area of coordination because communication between individuals and groups is endemic in electoral politics. For example, Commissioner Mason commented:

Commissioner Mason: 'Why Commissioners vote in the way they do is always a mixed question of fact and law, with frequently policy considerations thrown in. In other words we sometimes view decisions as policy tools, or as influenced by policy purposes. And so sometimes we'll find quite a bit of static back and forth between policy decisions and preferences, particularly on unsettled areas such as co-ordination. If we have an unsettled policy area, we are often quite reluctant to take definite enforcement action. In part because of notice concerns, and in part because of whatever differences have caused the lack of policy clarity also going to bedevil us in trying to come to an agreement about what the appropriate standards should be in the enforcement arena.'

Commissioner Mason: 'The vagueness that Jan was talking about is also present many times and the issue that has been bedevilling the Commission the past dozen years or so is issue co-ordination. The problem here, not only in my mind is that OK, how do you draw

¹⁶⁰ Thomas S & Bowman J (2000) 603.

¹⁶¹ Thomas S & Bowman J (2000) footnote 140 at 599.

up a definition that says defined a certain amount of contact having crossed a line, like the \$1000 limit, a fairly arbitrary line, but one you have to draw somewhere. The bigger form is that the contact between candidates and Parties, and candidates and interest groups, is the norm, is the general rule. So to use two American companies, K-Mart, and Wall-Mart, the retailers are talking to each other is an unusual situation, is suspect per se. So in anti-trust law you don't need to establish a whole lot of contact to establish a violation. Anytime there is a collusion of some sort between two ostensible competitors, there's something odd going on. With candidates and political Parties and outside interest groups, one of the earliest definitions I was given of politics is that it was a conspiracy to seize power...through legal means of course. The campaigns are all about building coalitions. Candidates, when they run for office, try to attract not just individual voters but groups, and they appeal through their labor unions, parent associations in schools, and specific groups. And so the sorts of communications that could end up deemed as coordination are going on all the time, and in fact are the normal rule of politics, in fact they are the currency of politics.¹⁶²

Alex Vogel also concluded that, because communication between Parties, candidates and other actors was inherent in the political process, the FEC tended to vacillate over what 'coordination' standard to apply.

Author: 'A broad general question. What has been your general experience of FEC enforcement?'

Alex Vogel: 'Inconsistent and spotty on all sides. They have let some large issues that I think should have been enforced get away.'

Author: 'Examples at all?'

Alex Vogel: 'The Democrats and the Unions coordination. In some cases, the unions sat at the table, I mean physically sat in the room, while the DNC worked out their political plan and said 'well this is where we are going to spend our money and what do

¹⁶² Interview with the author, Washington D.C. 22.10.01.

you think?' And they said 'that's not unlawful coordination.' And so I think they have let some really big ones get away and I think they have focussed on ..'

Author: 'I think this idea of coordination because I've interviewed three or four Commissioners and I think what they are actually saying is that there is an institutional culture in the regulated community, where they do speak to each other, this is inherent.'

Alex Vogel: 'This is what political Parties do.'

Author: 'And to try and regulate against that, ..is a waste of.'

Alex Vogel: 'And by the same token, they won't kind of cut us loose and say 'yes, this is what political Parties and organisations do, they talk to each other, they talk to their candidates. You shouldn't try and get them not to talk to each other. So...there was a huge enforcement case against the Coalition and a number of business groups that went on forever. In that position, people spent millions of dollars on legal bills, defending themselves against coordination and at the same time most of the Commissioners recognised this is what we do. They can't seem to decide one way or the other.'¹⁶³

Unlike other areas of law enforcement, what constitutes a violation under the FECA and what constitutes permitted behaviour appears to be a matter of opinion at the FEC and in the courts. Controversy as well as legal uncertainty feeds into the decision-making process. Lisa Gordon, writing in the *Minnesota Law Review* opined, 'taken together, political and constitutional demands have transformed campaign finance jurisprudence into a quagmire of rules and exceptions.'¹⁶⁴ Consequently, the Commission's failure to act is not always motivated by partisan self-interest or mutually beneficial 'back-room trading'. This discussion will continue to show that Commissioner decision-making is a far more

¹⁶³ Interview with the author, Washington D.C. 26.10.01.

¹⁶⁴ Gordon L (1997) 'Colorado Republican Federal Campaign Committee v Federal Election Commission: A Court Divided-One Opinion Properly Subjects Campaign Finance Jurisprudence to a Reality Check': *Minnesota Law Review*, 81 (6) 1568.

complex process than many journalists appreciate.

The fourth factor that influences how Commissioners cast their vote in enforcement cases is evidentiary, or the facts of the case. After the General Counsel has submitted his report, which contains a factual and legal analysis, the Commissioners consider it. When asked how might one try and understand the Commission decision-making process, and why Commissioners vote in the way they do, Commissioner Scott Thomas replied:

Commissioner Thomas: It's a process that most might describe as not pretty. But the basic process is set up so that most Commission decisions are at least based on some reasoned legal analysis that comes out of our Office of the General Counsel. They prepare a legal General Counsel's report that lays out the rationale, the legal arguments and the actual evidence. That sits before us to help the Commissioners make a decision.¹⁶⁵

Lawrence Noble spoke about preparing General Counsel reports and how important they were in affecting how individual Commissioners voted.

Larry Noble: There were cases where I felt that the record made by the Office of the General Counsel, put certain Commissioners who did not want to go forward in an impossible position where they had to vote to go forward. They just could not ignore the evidence, and those were the satisfying times.¹⁶⁶

However, when Jan Baran was interviewed about the deliberative process, he was critical about the way evidentiary was presented before the Commission.

Author: This is the 64,000-dollar question. How might one best understand the Commission decision-making

¹⁶⁵ Interview with the author, Washington D.C. 18.10.01.

¹⁶⁶ He continued to say that sometimes, no matter how well you put a case together, you knew Commissioners weren't going to go forward, the 1996 violations affecting both parties were an example. Interview with the author, Washington D.C.17.10.01.

process and why do Commissioners vote in the ways they do?

Jan Baran: 'Well, you know, 80 to 90 % of the time the voting isn't particularly difficult. Someone didn't file a report, someone didn't file a report. If someone accepted excessive contributions, it's a mathematically, it's a mathematical demonstration of evidence that they went over a thousand dollars. And that is the vast majority of the cases.'

Author: 'And then they talk about voting in circulation, don't they?'

Jan Baran: 'And then they circulate it. And then things are easy. It's only when they get into these more ambiguous legal areas, and they are areas that require both conclusions of law, as well as supporting evidence that the get all bollixed up. And there the decision-making usually revolves around, again we don't know because we're not there but...we're not privy to the discussion, we don't know what the discussion's like, the transcripts of these closed meetings are not publicly available, but I suspect that the discussion will reflect on many of these contentious issues reflects a difference of opinion between the Commissioners about what the law actually says. What is express advocacy, what is co-ordination, things of that sort. Then I suspect, in a minority of times, the dispute may be over whether or not there are actually enough facts to support a conclusion.'

Author: 'Evidential.'

Jan Baran: 'Evidentiary. Which always mystified me because again there is no presentation of the evidence to the Commissioners, except by the General Counsel's office. There is no hearing. The Commissioners are not present at the depositions. There is no record that Commissioners, any Commissioners' actually read the transcripts of the testimony that their staff may take and how they accumulate the facts has always been a mystery to me.'¹⁶⁷

Although it may be impractical for Commissioners to examine all the facts first hand,

¹⁶⁷ Interview with the author, Washington D.C. 17.10.01.

Baran makes a valid argument for greater rigour to be injected into the presentation of evidentiary.

Trevor Potter explained how evidentiary might be reconciled with partisanship.

Trevor Potter: 'I think it is fair to say that Commissioners are appointed as Republicans or Democrats, and view their roles at least to some extent as protectors of their Party interest. That doesn't mean that they will always vote for their Party, or never find that their Party was wrong. But you can tell when a case comes up, by which Commissioners are asking pointed questions, as to which is one Party or the other. It doesn't mean that you won't find a vote, but it does mean that perhaps properly the General Counsel is going to be held by the Democratic, or the Republican Commissioners to really provide the proof, before they will go forward. Because Commissioners appointed by their Party want to be able to justify the Commission's actions against the Party. They want to make certain the Commission's on strong grounds. They may well have to explain it in 'cocktail Parties,' or in meetings, so they would like to make sure the Commission has a strong case, if the Commission doesn't, they are going to be disinclined to go forward.'¹⁶⁸

Finally, the philosophical and ideological attitudes Commissioners have towards regulating constitutionally protected free speech also feeds into the deliberative process.¹⁶⁹ This has often been characterised as Democrats who wish to regulate, and Republicans who do not.

Yet this fails to articulate the philosophical pluralism that can exist on the Commission.

Donald McGahn commented:

Donald McGahn: 'Whereas you can get a good government Democrat and good government Republican. You can get a First Amendment Democrat,

¹⁶⁸ Interview with the author, Washington D.C. 24.10.01.

¹⁶⁹ Lawrence Noble described how all 'FEC enforcement inevitably involves the regulation of core first amendment, or raises first amendment issues.' He said that, 'If the FEC was to decide not to get involved in core first amendment areas, it might as well close the door, go home.' Interview with the author, Washington, 17.10.01.

a First Amendment Republican. You know, it's not necessarily partisanship.¹⁷⁰

Commissioner Thomas illustrated this point by referring to former Commissioner Staebler, a Democratic Party appointee who joined with Republicans to open up an opportunity to solicit contributions from corporate employees.¹⁷¹ He also described how Commissioner Frank Reiche, a Republican appointee from 1979-1985, had developed a reputation for voting in an expansive manner. Trevor Potter was also more inclined to regulate politics than many of his Republican colleagues agreed with.¹⁷² At the Heritage Foundation, Commissioner Mason 'accused' him of having an expansive view of regulatory power, something Potter denied.¹⁷³ Commissioner Bradley Smith, appointed in February 2000, is the most conservative member on the Commission and has written widely on his constitutional and philosophical opposition to the statute he is charged with enforcing.¹⁷⁴

Commissioner Thomas: 'We have a fair philosophical divide right now at this agency. Some Commissioners who are, say, less inclined to like this law in the first place. They're more inclined to want to say that these kinds of laws, restricting contributions, and reporting requirements, are onerous and that they tread on First

¹⁷⁰ Interview with the author, Washington D.C. 16.10.01.

¹⁷¹ This was the high-profile 1975 Sun Oil political action committee case (SUNPAC). Commissioner Staebler was accused of being anti-union by allowing corporations to solicit political contributions. Staebler rejected this criticism, commenting, 'I am a strong believer in everyone's being able to participate in the political process and I think the law required the decision I reached. People accused me of stretching the law. I did not, but if I had had to stretch, I would have, because I think it would be very bad government, very bad politics, to permit one part of our society to do things forbidden to other parts.' Muller N (1979) 'Reflections on the Election Commission': *Regulation*, March/April 37.

¹⁷² Commissioner Mason saw Trevor Potter as responsible for enabling the Commission to enforce areas of the law that infringed first amendment rights. Interview with the author, Washington D.C. 22.10.01.

¹⁷³ Commissioner Mason, appointed in 1998, occupies the seat formerly held by Trevor Potter, who resigned in 1995.

¹⁷⁴ This appointment was very controversial, and was opposed by members of Congress and the 'good government groups.' Bill Allison, senior editor at the Center for Public Integrity described it as a bit like putting a tax cheat in charge of the IRS, with that kind of contempt for the laws. Interview with the author, Washington D.C. 22.10.01. The Clinton administration used this controversy to their advantage by not opposing his nomination. They were able to trade his appointment for concessions from the Republicans on selecting judges. For that reason, the Bradley Smith appointment became important for the Administration. Interview with Lawrence Noble, Washington D.C. 17.10.01. According to Trevor Potter this belief that the statute stifled political activity, and was unconstitutional, or at least undesirable, was present in the 1980s and 1990s, but Commissioner Smith is just more vocal about his views. Interview with the author, Washington D.C. 24.10.01. In 2001, Professor Bradley Smith published, *Unfree Speech, the Folly of Campaign Finance Reform*: Princeton University Press.

Amendment. There are other Commissioners who take the position that the laws are in fact very important and, in a sense, they foster speech and associational interests for your average citizen because you put some restraints on those persons and organisations who have huge amounts of money at their disposal.¹⁷⁵

Commissioner Thomas then described how this divide could sometimes make the resolution of enforcement cases more difficult, especially when they involved large sums, or ingenious ways of circumventing the law.¹⁷⁶ Commissioner Mason agreed with Commissioner Thomas, asserting that where unsettled policy areas existed, the philosophical divide fed into the enforcement process and made the resolution of cases difficult.¹⁷⁷ Trevor Potter commented on his experiences at the Commission and how he became frustrated with weak enforcement.¹⁷⁸

Trevor Potter: 'I think there have been Commissioners and remain Commissioners who are not convinced that campaign finance laws are a good idea.'

Author: 'Mentioning no names!'

Trevor Potter: 'In the past and presently have publicly said that these laws place a great burden on people and are contrary to the tradition of the First Amendment. Brad Smith is much more open about it now, but in the 80s and 90s there were Commissioners who felt just as strongly that the laws stifled political activity and they opposed that stifling. So the result is that you have a Commission that requires a two-third majority to take any action. It's referred to as a majority but if you think of it, it's a two-thirds majority to do anything and I think that remains a problem. There are lots of times the Commission should have taken action and hasn't. That is certainly true now. Then in terms of my own experiences, it was both exciting to be there and to sort through a lot of this and frustrating because there were

¹⁷⁵ Interview with the author, Washington D.C. 18.10.01.

¹⁷⁶ Interview with the author, Washington D.C. 18.10.01.

¹⁷⁷ Commissioner Mason said that, 'Where we are locked up three /three on a policy issue, it is unrealistic to expect that when the same issue is enthused into an enforcement case that we are going to do anything other than lock-up three/three.' Interview with the author, Washington D.C. 22.10.01.

¹⁷⁸ Commissioner Trevor Potter served 1991-1997. FEC Twenty Year Report, 36.

a number of occasions where I felt fairly strongly that a particular action should be taken and the law should be enforced and there was some combination of colleagues who felt otherwise. Now I would be a little careful about the notion of a fourth vote because that suggests that in the context there were three Democrats who were strongly pro enforcement and that I was just there to give them the extra vote to push the law and I don't think that was accurate. I think one of the things that I found during my time there was that the Democrats have been given a free ride because they could vote for enforcement knowing that it wasn't going to happen. Knowing that there were going to be three Republicans opposed. Also that was sometimes true when the cases involved Republicans, but then those votes disappeared when the cases involved Democrats. Be that as it may, I found my presence scrambled the voting dynamic but instead of that making four votes, that sometimes meant that there would be myself and one other in favour of enforcement and you would suddenly have a bipartisan group of Democrats and Republicans against it.¹⁷⁹

Although Jan Baran described how the Commission had characteristics in common with other regulatory agencies, he also illustrated its unique role in attempting to reconcile these philosophical differences:

Jan Baran: There is a Kabuki theatre played here in Washington with respect to any enforcement agency. You have the government decision-makers, you have the constituency of those who are affected by the government decisions. Then you have self-described public advocates, and the public advocates think the agency is not doing enough. The people subjected to the agency's actions think that they are excessive, and somewhere in between we actually have a resolution between those viewpoints. But the debate tends to get more extreme because we have an underlying dispute over exactly what we should be regulating, and how should that law be enforced. And these are diametrically...sort of like having a Federal Commission on abortion, no-one will be happy. There will be extremes on both sides. I think it is remarkable that we have as much regulation as we do. Thirty years

¹⁷⁹ Interview with the author, Washington D.C. 18.10.01.

¹⁸⁰ Interview with the author, Washington D.C. 17.10.01.

ago, we didn't have any.'¹⁸⁰

Whilst enforcement has been weak, this failure should not be attributed to mere partisan paralysis. The evidence presented has shown that, whilst it tends to be the high profile cases that result in Commission deadlock, these cases are few in number and their partisan composition may be mixed. Additionally, the vast majority of decisions result in a consensus of opinion because cases are clear and the evidentiary is compelling. Individual interpretation of the case law also affects how Commissioners cast their vote in enforcement cases. Commissioners will refer to the relevant cases in their concurring or dissenting opinions.¹⁸¹ The Commission's unwillingness to act owes more to the controversy surrounding issues like express advocacy and coordination and less to the 'back room trading' commonly referred to. Finally, the philosophical attitudes Commissioners have towards regulating political money and constitutionally protected free speech also influences their decision-making. The interplay of these variables amongst the six Commissioners does not generate the frequent partisan deadlock described by the reform community and other critics.

Further Legal Issues: Civil Enforcement in the Courts

The FEC budget request (2001) set out two legal goals for its compliance programme. Firstly, it aimed to 'initiate 10 or 15 civil actions to enforce the law in cases where the conciliation process had failed.'¹⁸² The FEC *Twenty Year Report* (1995) asserted that the

¹⁸⁰ Interview with the author, Washington D.C. 17.10.01.

¹⁸¹ A number of articles, speeches, concurring and dissenting opinions written by the Commissioners can be accessed from www.fec.gov.

¹⁸² FEC Budget Request (2001) www.fec.gov 11.7.01.

Commission had won 90% of the 350 court cases it had been involved with since 1980.¹⁸³ Of the 1,179 cases between January 1994 and September 1998, 2% resulted in a suit authorization. The FEC initiated 6 civil suits in 1996, 7 in 1997, 5 in 1998, 2 in 1999 and 5 in 2000.¹⁸⁴ Whilst these figures suggest that the FEC has become less willing to litigate in recent years and has not been reaching the target set in its Budget Request, quantitative data may not be a reliable indicator of agency performance. For example, if the regulated community is not brought into voluntary compliance by administrative fines, ADR or educational outreach, the resultant increase in litigation might be interpreted as a failure of these programmes. Additionally, the number of suits authorized by the FEC may not reflect the current state of litigation as respondents and other 'aggrieved' actors may bring cases against the FEC. Cases where individuals and groups seek redress against the FEC are referred to by the agency as defensive cases. Suits brought by the FEC are commonly referred to as offensive cases and here the agency assumes the status of the plaintiff. Consequently, the FEC does not always have strategic control over litigation choices. The second goal set out in the Budget Request was to 'conclude some, or all of the major cases involving complex legal issues remaining from earlier election cycles, 1996 and 1998.'¹⁸⁵ One might argue that the discussion focusing on the Commission's decision-making process has shown that a number of significant issues remain, and are likely to remain unresolved until binding legal precedent is established by the U.S. Supreme Court. Despite

¹⁸³ FEC *Twenty Year Report* (1995) 10. During 1984, 27 court cases were closed. The FEC won 19, lost 3, 3 were voluntarily dismissed and 2 were dismissed as moot. FEC Report *The First Ten Years* 10.

¹⁸⁴ Ian Stirton, FEC Press Office 24.4.02. The PWC (1999) audit set out that the FEC had referred 18 cases to the Department of Justice Public Integrity Section over the past six years. PWC (1999) 2.3.1. The formal relationship between the FEC and the Department of Justice concerning criminal referrals is set out in the 1978 Memorandum of Understanding. This establishes the basis upon which the FEC should refer serious 'knowing and wilful' violations to the Department of Justice for criminal prosecution. In addition to the 'knowing and wilful' standard, other criteria to be considered included whether the violation involved a significant amount of money and whether it involved 'aggravated intent.' Federal Register 43 (27) Wednesday, February 8, 1978 5441.

¹⁸⁵ FEC Budget Request (2001) www.fec.gov 11.7.01.

the methodological problems alluded to and the prevailing controversy and legal uncertainty surrounding definitional and First Amendment issues, most interviewees, with the exception of Commissioner Thomas, concluded that the Commission's court record was poor.

Whilst Jan Baran has attributed the Commission's court losses to its attempts at enforcing unconstitutional expansive regulation, he also opined that the FECA had become obsolete in light of changing technology.

Author: 'The FEC has been criticised for its poor record in litigation cases, you mentioned that 50% of the Commission's problems is the current law, which is illogical, and not susceptible to enforcement, could you explain or expand on that?'

Jan Baran: 'Where did I say that?'

Author: 'It was in the *National Journal*.'

Jan Baran: 'Fifty percent of their problems is that they have a statute that is sometimes inscrutable. The Congress passed a law, that doesn't really define things like independent expenditures very well, that doesn't deal with precise definitions of the most basic terms like what's a contribution, what's an expenditure. The *Sun Hill* case in *Buckley v Valeo* spent much of its time narrowly defining the term expenditure and the term, for the purpose of influencing. The statute is not easy to enforce, or even interpret in the first place. That would be true for the Federal Election Commission as well as in court, and anyone trying to comply with it. Then there are areas where the shortcomings of the statute have been identified and judged by the courts and by Congress for multiple reasons have not been able to, or have refused to actually address the issue. Often the statute is declared a problem in some way, constitutional or otherwise, the courts and Congress will respond by passing another law. They said well OK, we're gonna fix the problem that the courts have identified, well we haven't had any change in the law since 1980 and during that period of time we've had the

phenomenon of soft money. You've had the growth of issue advertising, you've had the introduction of mediums of communication that were not even imagined, when the law was passed: the Internet, cell phones, even fax machines, cable broadcasting was really not contemplated at the time the whole regulatory scheme was enacted in the early 1970s. A time when all communication was contemplated from three major television networks, whose viewers have declined at least 50%, and of course is in stiff competition with multiple other avenues of communication. This has produced a lot of problems for the agency. How do you regulate the Internet? How do you regulate the increasing variety of public debate and political discussion that goes on? Because the statute in some ways didn't anticipate they were going to regulate at all. Of course the courts have cut that back over the years, but...., that's the problem the Commission faces, and rather than make a decision in some of these areas like on the definition of express advocacy, on which I'm sure you're familiar, about which the courts have repeatedly rebuffed the Commission, the Commission should tell Congress, look we can't do anything about this because this is what the courts have said. If you want to do something about this you have to change the law.'

Bob Bauer also supported the views expressed by his Republican counterpart, Jan Baran.

Bob Bauer: 'The problem may not be so much the way the statute was drafted, more that the statute is obsolete. The statute was drafted in a completely different time and place in utterly different political conditions and so it has been virtually upgraded by force of will. It has adapted in some circumstances to conditions utterly unknown to the people who wrote it.'

Author: 'Changing media?'

Bob Bauer: 'Absolutely, and the way money is raised, the way money is spent. Looking at how they are spending it and so forth. And the second problem is that the clash is always between not so much in the way the Congressional enactment has developed but between Congressional enactment's and the current state of American constitutional jurisprudence and that is the fundamental problem. What they are really complaining about is not that you can't write a provision saying that

campaigns cannot do X, they can write it and they can write it very clearly. The problem is they are going to have trouble passing it by a Federal Judge.¹⁸⁶

In addition to the statutory obsolescence alluded to by Jan Baran and Bob Bauer, Commissioner Mason opined that most violations of the FECA related to behaviour that was *malum prohibitum* not *malum in se*. He asserted that the reason why Commissioners were often unwilling to press enforcement or file suit in District Court is that the Act rarely dealt with issues involving 'evil intent.' Many violations resulted from breaking an arbitrary administrative prohibition. He also argued that court cases lacking in evil intent meant that the judiciary were unwilling to impose significant sanctions in the way of fines.¹⁸⁷

Author: 'Is one of the main problems that the FEC has in enforcement is not the more traditional explanations but that it is actually the law itself?'

Commissioner Mason: 'Oh, absolutely. That is the case. Part of it is the fact that the statute is almost wholly prophylactic and there's almost, very few exceptions, things in the Act aren't *malum in se*, they're not bad in of themselves, they're simply prohibited for administrative reasons. That's one big problem that we have. What's the difference between a, an \$1100 contribution and a \$900 contribution? Well, frankly nothing. Simply an arbitrary legal line drawn at such a point to prevent undue influence from being employed from a contribution that's too large. There could be a very vigorous argument about whether \$1000 is already way too high or already way too low. Wherever you

¹⁸⁶ Interview with the author, Washington D.C. 23.10.01.

¹⁸⁷ Mablin & Gais explain how campaign finance violations are not viewed as seriously as the other cases they routinely deal with. They refer to the situation in Minnesota where campaign finance cases must be prosecuted. State prosecutors and the judiciary are equally unenthusiastic about prosecuting these 'Twinkies' cases. A Minnesota attorney explained the 'Twinkies' moniker, 'the prosecutors believe they do not have the same discretion as they do on a burglary, robbery or murder, when it comes to cases like this. It's assigned to somebody in the Sheriff's office who can't get out of the duty. It's nothing to get your teeth into. Then every once in a while you get a 'Twinkies' case that makes them even more reluctant to get involved. There was one criminal prosecution and conviction of a retired apartment caretaker because he had a little get-together for residents of the apartment. A political candidate came and spoke and the manager gave out Hostess Twinkies. That may be immoral, unconstitutional, fattening, or inappropriate given the contents of Hostess Twinkies-out to have been convicted of bribery? They didn't want to prosecute but they did. There was a conviction. Who had the Twinkies all over their face? Not the defendant who was found guilty, but the county attorney who prosecuted. Yuk!' Mablin M & Gais T (1998) 42-3.

draw the line, a dollar above, or a dollar below, it really doesn't make any difference. So that's one of the problems. So that when someone makes these contributions, most of the time as was recognised in Buckley, even the larger ones, nothing bad *per se*, was intended. Sometimes the violations that we do see, and sometimes prosecute are, appear to be, free of evil intent. They are pursued by candidates and staff members who are just eager to win and they want to raise as much money as they can by people who are enthusiastic about candidates and want to help as much as they can without any expectation on either side of anything improper going on. That is a big part of our problem. That most of the time there isn't any ill intent behind the violations and therefore Commissioners are reluctant to come down too hard on violators who appear to have lacked any evil intent. In the past when we have gone to court we have had trouble getting large fines imposed because judges have the same reaction. There's actually a chapter in the Gais book where the prosecutors in Wisconsin state laws have tried to push a little harder on criminal prosecutors for election law cases. They refer to Twinkies cases, and Twinkies cases are little snack cases that are insubstantial and if you are a local prosecutor deciding if you want to bring a case that has do with drugs and guns, or something like that, or a political case, it doesn't even have to be corruption *per se*, a violation on administrative limits....you have to kind of wonder. That problem is there.¹⁸⁸

However, the most widely held criticism has been of the litigation choices made by the FEC. Therefore, court losses are attributed to the faulty or unwise enforcement decisions made by Commissioners. Whilst the reform community have consistently criticised the Commission's timidity, Republican and Democratic Party lawyers argue that the agency has been foolhardy in attempting to litigate cases involving unsettled areas of law. The PWC (1999) audit set out that:

'A consistent legal theme shared by most practitioners was the FEC use of the compliance process to set policy. Those attorneys who represent the filing

¹⁸⁸ Interview with the author, Washington D.C. 22.10.01.

community suggested that the FEC should focus on settled areas of law. They suggested that enforcing and litigating unsettled areas of the FECA misused FEC limited compliance resources. On the other hand, several public interest advocates thought that the FEC was not aggressive enough in pursuing compliance actions to affect unsettled areas of the law.¹⁸⁹

Donald McGahn criticised the Commission's approach to litigation commenting:

Donald McGahn: 'Their court record is abysmal. And if they wouldn't go after people in court on frivolous legal theories, where the courts have already said it's a first amendment right to do what ever it is at issue and they keep trying to come up with new mousetraps to catch somebody. They had to pay court fees in a recent case on the fourth circuit. In an enforcement matter they had to pay some thirty grand. So I think smarter enforcement may be the way to go.'

Author: 'Doesn't the FEC structure, with three Republicans and three Democrats?'

Donald McGahn: 'Yea, you would think. But the Commission, the Commissioners are not judges. Unlike,...well you don't have to be a judge to be a judge, you don't have to be a lawyer to be a judge but today every judge I know is a lawyer. Whereas the Commissioners are not all lawyers they're not trial lawyers, they're not litigators, they're not necessarily steeped in rules of civil procedure and the merits of cases.'

Author: 'So they are going with the recommendation of the general counsel then?'

D. 'Yea.'¹⁹⁰

Bob Bauer expressed a similar criticism of the Commission's enforcement choices:

Author: 'Firstly, I wanted to bring up Commissioners. Since Trevor Potter left, and with the appointment of Brad Smith and David Mason, do you think there has been a move away from enforcement?'

¹⁸⁹ PWC (1999) 3.2.2.

¹⁹⁰ Interview with the author, Washington D.C. 16.10.01.

Bob Bauer: The problem the Commission has had is not so much its willingness to enforce, but the strategic choices that they made. The way they went about their enforcement responsibilities. Which as you know by looking at the court decisions met largely with failure, and while some people would say that the Commission is lacking enforcement vigour, some people might say, Commissioner Sandstrom is an example, is really interested in organising the enforcement strategy a little bit more carefully and choosing their cases a little bit more wisely. So that (a), they have enforcement priorities, and (b), when they seek to enforce, for example by litigation, they stand a better chance of bringing cases that are likely to be successful. So while it is true Bradley Smith represents a peculiar choice for the Commission, Mason and Wold, and to some extent Sandstrom, also represent a move away from a mode of doing business, a way of doing business, that is by and large not terribly successful.¹⁹¹

One might argue that whilst litigating in unsettled, or controversial areas of the law might result in more court losses, it tends to be these controversial areas that have the most significant impact on the regulated community. Therefore, if one were to adopt a cautionary, restrained litigation policy, although the Commission might be more successful in court, its impact on the regulated community would be less. Evidence suggests that this more inhibited approach is what Commissioners Smith, Mason and Toner wish to develop. Not only is that evidence presented in the discussions focusing on express advocacy and coordination but Commissioners have also called for this change during their confirmation hearings. Commissioner Thomas referred to this when interviewed about enforcement strategy:

Commissioner Thomas: It's no mystery that some of the newer Commissioners, even at their confirmation hearings, argued that the FEC ought to basically back off of trying to pursue tough cases that involved the

¹⁹¹ Interview with the author, Washington D.C. 23.10.01.

more complex areas of the law, like what is coordination, like what is express advocacy, instead the Commission ought to focus on what the Commissioners said were 'meat and potatoes' type of violations. Late filing of reports, inadequate disclosure of reported information, or just the very straightforward \$1000 excessive contribution cases. And that I think pressure from some of the newer Commissioners has really led to a shift in Commission emphasis, there's no doubt about that.¹⁹²

Larry Noble noted that whilst the Commission had lost a number of cases, this was to be expected when regulating a First Amendment policy area. Yet he also attributed the Commission's poor litigation record to its unwillingness to lodge appeals in cases where it lost. For example, if respondents consistently appeal unfavourable decisions and the FEC does not, one might expect the Commission's court record to be poor. However, despite these problems, the former FEC General Counsel was not overly dissatisfied with the Commission's litigation record.

Author: 'The Republicans in particular have criticised the FEC for its poor record of litigation in enforcement cases. For example, I'm thinking of coordination and express advocacy. Is this an accurate and fair criticism?'

Larry Noble: 'It is true that the FEC has lost several cases. I don't think the criticism is totally fair as to a certain extent the Commission is working with one hand tied behind its back. And to answer this question, I have to start with one proposition. The FEC is regulating first amendment area, and that is always very difficult. It is true that many courts have been very hostile to regulation in this area. However, what also happens is that the FEC has lost some cases but because of the make up of the Commission it has not appealed some of these cases. So what happens right now in many instances, that only when the FEC wins is it appealed by the other side. Which means that the other side keeps trying to get it overturned. When the FEC loses a case the FEC often doesn't appeal it. A classic example of that is three/three splits, or sometimes not

¹⁹² Interview with the author, Washington D.C. 18.10.01.

even three/three splits. The coordination case, the big coordination case that that the FEC lost to the Christian Coalition, was a decision 4 to 2, not to appeal the decision. And what was so shocking about that was that the district court judge who wrote this long treatise on co-ordination and recognising in it that she was writing new law expected the case to be appealed, said in her opinion that she expected the case to be appealed. And the FEC by a vote of 4 to 2 decided not to appeal. And yes, the FEC lost their case, and nobody will ever know what would have happened had the FEC appealed. Now, also what is often ignored in those claims is that when cases have gone up to the Supreme Court, sometimes the FEC are not involved, and the court has reversed lower courts. The two cases I'm thinking of is the Shrink Missouri PAC case which dealt with contribution limits. The FEC would not get involved in that case even though I thought it should, and the Supreme Court upheld contribution limits. This was this case about state law. Most recently, in the Colorado Republican case, which is called Colorado Republican Party 2, not the earlier case, which the FEC did lose,¹⁹³ the Supreme Court by 5 to 4, upheld the FEC's position. If you go back and look at what pundits were saying, what observers were saying before those two cases, 'oh the government's gonna lose. The Supreme Court's gonna finally strike down these laws.' But actually when these cases get in the Supreme Court, the record has not been bad at all. It's rather a complicated scenario recognising that it is a hard area to regulate, and the courts have not always been friendly, but also the FEC has not always been as aggressive as it should be in trying to get these cases resolved.¹⁹⁴

¹⁹³ Larry Noble is referring to the Supreme Court loss in *Colorado Republican Campaign Committee v FEC* 116 2309 (1996). The decision obligated the FEC to prove coordination between Party and candidate in cases involving allegations of excessive spending. This case was significant because it up-held First Amendment protection, which was established in *Buckley*, for unlimited expenditures made independently of the candidate. www.freedomforum.org 9.8.02. Salant J (1996) 'Ruling Loosens Reigns on Parties': *Congressional Quarterly Weekly Report*, June 29 1857. The more recent case, *FEC v Colorado Republican Campaign Committee* (2001) was successfully argued by the FEC. The Supreme Court held that coordinated Party expenditures could be limited. The court rejected the Party's argument that 'unrestricted coordinated spending is essential to a Party's nature because of its unique relationship with candidates.' <http://supct.law.cornell.edu/html> 9.8.02. The Supreme Court Justices voted 7-2 against the FEC in Colorado (1) and 5-4 in favour of the FEC in Colorado (2). The plurality of opinion meant that the rulings had limited application to the facts of each case and have not extinguished the controversy or uncertainty surrounding a number of enforcement issues.

¹⁹⁴ Interview with the author, Washington D.C. 17.10.01.

Commissioner Thomas expressed a similar view to that of Larry Noble. The Commission had established a reasonably successful record in a difficult policy area.

Author: 'The Republicans that I've spoken to have pointed to the FEC's record of losing in court. They are saying that the FEC are going after the wrong things and bringing unwarranted cases.'

Commissioner Thomas: 'Actually if you look at our Supreme Court record, most recently, the Colorado Republican Party litigation that err, whether the party or not co-ordinated party expenditure limits, whether is was constitutional, a lot of folks thought we might lose that. Actually, I thought we might lose that. But we won. In the area of express advocacy, the only case that the FEC ever brought, a case that the Commission itself brought,...FEC v Massachusetts Citizens for Life, we won on the underlying issue of whether those communications were express advocacy. It's just that the court on its own initiative carved out an exception, that, well, there are certain kinds of non profit, ideological corporations that we'll let spend money for those kind of express advocacy. You know it's true that there have been courts, district courts, and courts of appeal that have seized on the express advocacy test to say that certain proposed regulation was unconstitutional. But in terms of FEC court battles we can always point to other decisions that go the other way and whether or not the Supreme Court has resolved these big issues.....in many cases the Supreme Court has not yet. So I don't think that the FEC's record is that bad. If you look at what's going on you'll also see that there has been one lawyer and his related groups has been bringing lots of these lawsuits around the country. And they don't even involve the FEC, many of them are state level challenges, the state provisions are analogous to the FEC rules. And a lot of the losses that everybody points to....and attributes as if they were FEC losses, have not involved us, ..and our lawyers didn't get a chance to argue, so when you look at the cases where our lawyers have had a crack at it, I think we've done pretty well.'¹⁹⁵

¹⁹⁵ Interview with the author, Washington D.C. 18.10.01.

Finally, Commissioner Thomas and Commissioner Mason opined that respondents unwilling to engage in the conciliation process tended to be the ones with substantial financial resources and, or a strong legal argument. Both Commissioners were asked:

Author: 'As the FEC only attempts to litigate so many civil cases per year, and high-profile, well financed individuals are most likely to fight the FEC, do these individuals enjoy certain *de facto* immunities from enforcement?'

Commissioner Mason: 'I don't think so. There was some discussion of litigation strategy in the PricewaterhouseCoopers Report, which I agreed with. It appeared to me that the Commission, at least historically, had not been using litigation as a strategic enforcement tool. That they hadn't been choosing what kind of cases they wanted to litigate and pursue those cases with particular vigour. Rather they had been litigating wherever people would fight and that those willing to settle cases were settled out, or those that were stubborn for one reason or another...that meant that the Commission's opponents would consistently be actually the people who had the resources to fight, and were unwilling to knuckle under through the administrative process, or people who thought they had a very good argument. And the result of those is that the Commission's record has been particularly poor. You should have expected that, given the policy you follow. So we haven't really approached a strategic litigation policy. It's been more of a complex problem and we don't have any consensus on the Commission about that. In the last few years we have not been as ready to take cases to litigation.'¹⁹⁶

Commissioner Thomas responded:

Commissioner Thomas: 'I think that they don't enjoy immunities from enforcement. But if they are willing to pour a lot of resources into defending themselves, they can sometimes beat us because they are willing to put high price legal talent to assert the various legal defenses that some judge might ultimately come to accept, I suppose if you look at it as a matter of odds, if

¹⁹⁶ Interview with the author, Washington D.C. 22.10.01.

you have the money to fight, and raise all sorts of defenses before a judge you are going to have a better record at getting a favourable ruling from a judge than someone who doesn't even try to go before a judge.¹⁹⁷

One might argue that the Commission's litigation record reflects the courts' general hostility towards regulating constitutionally protected free speech, the controversy and lack of clarity surrounding issues like express advocacy and coordination and the fact that the most combative respondents also tend to be the most well resourced. Consequently, the FEC's Supreme Court record has been mixed and its record in District Courts has been poor. Additionally, whilst the Commission may wish to bring cases of its own volition before the Supreme Court in order to enforce the law and establish legal clarity, it was proscribed from doing so by the high Court in *FEC v NRA Political Victory Fund* (1994).¹⁹⁸ However, a more strategic approach to FEC litigation policy may develop as a consequence of the new litigation committee that was established by Commissioner McDonald in 2000.¹⁹⁹

¹⁹⁷ Interview with the author, Washington D.C. 18.10.01.

¹⁹⁸ This stipulation did not apply to cases involving the Presidential Public Financing Programme. Ordinarily, the Commission must seek permission from the Department of Justice to bring a case before the Supreme Court, or seek its approval to allow the Commission to represent its self before the Court. *FEC Twenty Year Report* (1995) 10.

¹⁹⁹ In dialogue with Congressman Kolbe (R-AZ) Commissioner McDonald alluded to his colleagues oversight responsibilities at the Commission. He commented 'This year I have appointed a litigation committee to perform the same function with respect to litigation that is undertaken by our General Counsel's Office, both on the enforcement level to make sure that we have an appropriate balance in the scope of the litigation to pursue our enforcement actions, and also to be involved in any policy decisions that may necessarily arise in the postures in litigation defending the interpretation of the constitutionality of the provisions of the Federal Election Campaign Act. U.S. House of Representatives, Committee on Appropriations, Subcommittee on the Treasury, Postal Service and General Government Appropriations, FY 2001 21.

Conclusion

In conclusion, the FEC experiences inadequate leadership because power was deliberately diffused amongst the collegiate Commissioner structure and was further divided between General Counsel and Staff Director. This makes agreement on policy goals difficult to achieve. When the Commission's Chairman enunciates policy, that policy generally becomes transitory as the new Chairman affiliated to the opposite Party assumes office. Commissioner Mason opined that this was a deliberate Congressional strategy to prevent strategic planning by the Commission. The presence of *ex officios* on the Commission reflected Congressional interest in the Commission's advisory opinions, rule-making and enforcement activities. Although interviewees representing diametrically opposing views both described the *ex officios* negatively, either referring to them as 'Congressional spies' or 'brooding taskmasters,' their influence over the enforcement process remains unclear. Whilst *ex officios* were proscribed from voting in enforcement matters, they may have exerted an indirect influence by articulating Congressional views. The convention of confirming each Party's nominee in tandem is a reflection of the political nature of appointment and of a Commission equally balanced between Democrats and Republicans. Despite the *Buckley* decision, the *de facto* appointment process remains divided between President, Senate and House. This 'gentleman's agreement' has ensured that Congress and their two leading election lawyers, Bob Bauer and Jan Baran, continue to dominate

Commissioner selection. Whilst different incumbents of the White House may either be more or less assertive in ensuring their own choices are confirmed by the Senate, Presidents have generally sought to placate any strong Congressional objections. The Commission is not and was not designed to be independent. The fear that the Commission might 'provide room for partisan misuse or for administrative action which does not comport with the intent of the enabling statute' was expressed in Buckley.²⁰⁰ Therefore, Congress established a bipartisan structure and a mixed majority-voting requirement. Whilst Democracy 21 has advocated the establishment of an enforcement body insulated from politics and headed by one 'highly visible, publicly credible administrator,' historical precedent suggests that Congress would oppose such a proposal.²⁰¹ The introduction of Commissioner term limits was also designed to reduce the agency's independence. Those at the apex of the structure lose institutional memory, Commissioners become more like 'tourists' and obtaining employment elsewhere becomes the primary consideration. Commissioners limited to one six-year term are likely to be particularly mindful about angering their allies in government and the private sector. Those who assert the need for term limits usually refer to a need to 'infuse new blood' into the Commission. However, this is a bogus argument as the recent 'infusions,' Commissioners Smith, Mason and Toner, either oppose the constitutionality of the statute or are just unenthusiastic about regulating political money and free speech. Whilst partisan deadlock has undermined enforcement of the statute, public interest advocates and journalists misrepresent the Commission's decision-making process. Consensus, legal interpretation, evidentiary and philosophical outlook all affect how Commissioners cast their vote. Finally, although interviewees either thought that Commissioners had made inappropriate legal choices or no legal choices, the

²⁰⁰ Thomas S & Bowman J (2000) 590.

²⁰¹ Democracy 21 (2002) 36.

Commission's court record has not been impressive. These court losses, coupled with the departure of Trevor Potter, and the arrival of Commissioners Smith, Mason and Toner, will result in a much more cautionary and restrained attitude towards litigation.

CHAPTER 4

Political Management of the Enforcement Process

Public interest advocates have often referred to the FEC as a 'toothless watchdog,' as an ineffectual enforcer of the law which adopts a *laissez-faire* attitude when it comes to regulating important issues and high profile actors.¹ However, for some incumbents the FEC stifles politics, infringes free speech, burdens candidates and grass roots organisations with unnecessary regulations, punishes the innocent and is an inefficient and wasteful bureaucracy. Bob Livingston (R-LA) commented:

The FEC has become a burdensome bureaucracy which makes running for office and participating in the electoral process a complex and dangerous endeavour.²

Whilst Wayne Hays (D-OH) proved the exception, it has generally been conservative Republicans who have expressed this latter view. One can explain, at least in part, the weak enforcement alluded to by the reform community by examining the way some incumbents have used their budgetary and oversight power to undermine enforcement. Should enforcement be perceived as too regulatory or aggressive, these actors rein in the agency through budget cuts, micro-managing resources by ring-fencing appropriations, authorising

¹ Comment (1981) 'Toothless Watchdog': *Commercial Appeal*, June 2, referred to in Thomas S & Bowman J (2000) 'Symposium: Regulation of Politics, Federal Election Commission, Obstacles to Effective Enforcement of the Federal Election Campaign Act: *Administrative Law Review*, 52 (2) 577.

² Broder S (1995) 'Watchdog Without A Bite?': *Washington Post*, 21.5.95.

³ In their study of state level election agencies, Mablin & Gais commented that 'we heard stories about agency budgets being slashed after the agency had investigated a legislator or a legislator's ally.' Mablin M & Gais T (1998) *The Day After Reform, Sobering Campaign Finance Lessons from the American States*: New York, The Rockefeller Institute Press, 29.

expensive and lengthy investigations of the agency and targeting senior staff for removal.³ Consequently the nature of enforcement affects FEC Congressional relations. When the agency pursues more cases of offensive litigation, drafts unpopular rules and increases fines, so the relationship deteriorates. Ironically, Bob Livingston (R-LA) alluded to this in the agency's FY 1995 authorisation hearing when he asked Commissioner Potter:

Rep. Bob Livingston: 'Is it possible that the FEC decision-making could be influenced or intimidated by an influential Member who may have jurisdiction over the FEC?'

Commissioner Potter: 'When an enforcement agency has an oversight component, you ask, is there a risk that it will be intimidated or influenced? There is always a risk. That risk is inherent in a statutory scheme where the government branch that is confirming members of the commission and appropriating our budget and overseeing us is also comprised of individuals who may from time to time come before the commission.'⁴

As the agency responds to the will of Congress, pursuing enforcement that has less substantive impact on the regulated community, incumbents and their political allies, so

³ In their study of state level election agencies, Mahlin & Gais commented that 'we heard stories about agency budgets being slashed after the agency had investigated a legislator or a legislator's ally.' Mahlin M & Gais T (1998) *The Day After Reform, Sobering Campaign Finance Lessons from the American States*: New York, The Rockefeller Institute Press, 29.

⁴ U.S. House of Representatives, House Administration Committee, Subcommittee on Elections, FY 1995 180.

calmer relations ensue. This view finds theoretical support in the work of Barry Weingast who attributes the fluctuation in agency behaviour to the changes in committee and subcommittee membership. Weingast and Moran comment:

'Congressional committees play an important role in determining regulatory policy. Second, if the policy preferences of the committee members remain stable for long periods of time, then, *ceteris paribus*, agency policy remains stable. Third, one important determinant of agency policy change is a change in the composition of the oversight committees. And finally, those agencies not pursuing Congressional interests are most likely to bring forth Congressional sanctions.'⁵

Compelling evidence to support Weingast's view will be presented in this discussion. During the 1990s Republicans like Bob Livingston (R-LA), Jim Kolbe (R-AZ), Bill Thomas (R-CA) and Mitch McConnell (R-KY) used their budgetary and oversight powers to foster a more acceptable non-controversial form of regulatory enforcement. They prefer a disclosure-based model encompassing bright line regulation in the form of administrative fines for late and non-filers combined with low impact programmes like ADR and educational outreach. These initiatives are sometimes described in Congressional hearings as 'thinking outside the box,' which is code for enforcement that is less adversarial and has a less substantive effect on the regulated community.⁶ Commissioner Sandstrom commented:

'Until the Commission is able to stop the flow of party soft money and non party issue ads, judging its performance by programmes like 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

⁵ Cowett A (1989) 'Walking on Eggshells: The Federal Election Commission and Political Regulation': 16. Referring to Weingast B & Moran M (1983) 'Bureaucratic Discretion or Congressional Control? Regulatory Policy-Making by the Federal Trade Commission': *Journal of Political Economy*. 91 774-5.

⁶ Asserting his satisfaction with the Administrative Fine and ADR programmes, Jim Kolbe (R-AZ) complimented the Commission for thinking 'outside the box.' U.S. House of Representatives, Subcommittee on the Treasury, Postal Service and General Government Appropriations, FY 2001 2.

ship sank.⁷

However, this regulatory penchant is not only limited to Republicans and FEC critics. Steny Hoyer (D-MD), a more supportive voice and current ranking member of the FEC's appropriation committee, has frequently expressed the view that accurate and timely disclosure should be the FEC's main priority.⁸ Therefore incumbents of both Parties often see the American electorate as the most desirable regulator. They imply that a well-informed citizenry exercising their suffrage deters any unseemly relationships between contributor and recipient. However, whilst information is important, the apparent passion that some Congressmen display towards disclosure is often merely a ruse designed to avoid addressing the inadequacies and resource constraints that inhibit more traditional methods of enforcement. Neither Party calls for any significant increases in investigators, lawyers or accountants. The regulatory vision preferred by Congress has much in common with the views of Bruce Cain and Todd Lochner. For them, enforcing the current system of limitations and prohibitions is undesirable and doomed to failure. They opined:

If politics is indeed a market, then let the market solve the problem. Consider abolishing contribution and expenditure limits and instead emphasize transparency based on immediate Internet disclosure. If voters actually care about where a candidate's money comes

⁷ www.fec.gov/members/smith 7.9.02. Whilst Commissioner Smith referred to Commissioner Sandstrom as 'pro enforcement,' the previous chapter described him as 'unpredictable.' However, whilst Commissioner Sandstrom's comments clearly allude to the weakness of traditional enforcement, he was instrumental in developing the Commission's ADR programme. U.S. House of Representatives, Committee on Appropriations, Subcommittee on the Treasury, Postal Service and General Government Appropriations, FY 2001 6.

⁸ Congressmen Hoyer commented, 'I look forward to working with you to ensure, as I know the Chairman wants to, as well, not only that we have proper disclosure of who is contributing to candidates, but also that the public has quick and easy access to that information so they can use it to make decisions on elections.' U.S. House of Representatives, Committee on Appropriations, Subcommittee on the Treasury, Postal Service and General Government Appropriations, FY 1999 16. During FY 2001 hearings of the same committee he commented, 'what the Congress expects and what I think the American public expects, is for the elections to be run as openly and as honestly as is possible, irrespective of which Party, because in the final analysis, the American public wants to make a judgement based on as much information as they can get as quickly as they can get it.' U.S. House of Representatives, Committee on Appropriations, Subcommittee on the Treasury, Postal Service and General Government Appropriations, FY 2001 23.

from, or how much money is spent, let them vote on such distaste. Should they not to do so, or they simply do not inform themselves on the matter, so be it-such is the nature of living in a democracy when voters are not, in fact, made in Madison's image.⁹

Although government that has a duty to protect the integrity of the electoral system, many inside and outside Congress oppose the use of regulatory power in this policy area. As such, disclosure has generally been supported, whilst enforcement has been opposed and undermined. This assertion was put to Tina VanBrakle, FEC Director of Congressional Affairs:

Author: 'I don't know if you would confirm this ..Congress seems to be saying really we don't need to address some of the more substantive violations because what the FEC should be doing, what it was formed for, was essentially disclosure.'

Tina VanBrakle: 'Right, put it out, no matter what they're doing, just put it on the public record.'

Author: 'Sure, that people should be voting at the ballot box according to financial relationships, contributions and disbursements and that is really what you should be doing. Whether the FEC agree with that or not.'

Tina VanBrakle: 'Well, I'm not going to answer for the FEC, you will get the Commissioners to answer those kind of questions. It's hard to see how a programme can be successful if there is no enforcement of disclosure and I know that a lot of Republicans and I think some Democrats now on the Hill would like us to become more of a disclosure organisation...rather than an enforcement organisation.'

Author: 'This is what I'm getting from Republicans. Look, the FEC shouldn't be worried about all these substantive violations, it's not their role, it's not what they were set up to do. They should enforce disclosure and they should enforce it better.'

⁹ Cain B & Lochner T (1999) 'Equity and Efficacy in the Enforcement of Campaign Finance Laws': *Texas Law Review*, 77 1935.

Tina VanBrakle: 'Yea, exactly, that is the Republican position. Yea, we're not out there to figure out express advocacy and what soft money is allowed and so forth but we should be enhancing the disclosure aspect of it. And that is kind of where we're heading. It's not a good question for me to answer, I'd rather you talked to the Commissioners about that.'

However, a weakness in Weingast and Moran's Congressional control thesis is that they fail to consider how other variables might affect agency behaviour. For example, little has been written on the way the White House, through the Office of Management and Budget (OMB), can affect enforcement performance. Favourable responses to FEC budget's requests and offering political support when Congressional relations become strained or confrontational could make the OMB a valuable FEC ally. Conversely, and this has been more common, a lack of support from OMB and the administration can contribute to the agency's fiscal and political difficulties. By way of an introductory context, the first part of this chapter sets out some of the unique financial characteristics of the FEC and discusses agency workload, staffing and budgets requests. This will be followed by an examination of FEC Congressional relations. Although the relationship has often been strained by particular actions of the regulated and the regulator, the relationship has endured two identifiable periods of conflict. During the late 1970s and early 1980s the relationship deteriorated as a result of the FEC's unpopular random audit programme and because those philosophically opposed to campaign finance regulation won control of the White House and the Senate.¹⁰ The second phase in worsening relations began in 1994 when Republicans won control of the House, and then the Senate the following year. This particularly confrontational period in FEC/Congressional relations lasted for approximately

¹⁰ Other factors responsible for worsening relations between Congress and the FEC were discussed in earlier chapters. Early criticisms of regulatory behaviour included: over zealous litigation against 'widows and orphans,' aggressive field investigators and acting on unsubstantiated allegations.

four years. During this four-year period, key Republican leaders perceived the FEC as too regulatory and vigorous in their enforcement efforts. Today, FEC/Congressional relations have become far more accommodating and consensual. Both institutions now appear to understand each other, with one interviewee remarking off the record, 'it's like a 'love-fest' at the moment.' However, this new working relationship has come at a price. The nature of enforcement now reflects the Congressionally preferred model alluded to earlier in the introduction.

FEC BUDGETARY POLITICS

Budget Size and A Mandate That Increases Fiscal Vulnerability

In comparison to other Federal Regulatory Commissions' the FEC budget is small. Brooks Jackson described it as having 'one of the smallest budgets of any Federal agency.'¹¹ The Table below illustrates the relative size of the FEC budget.

Table 4.1: U.S Federal Regulatory Commission Budget Requests

Title	Request	Year	Source
Securities & Exchange Commission	466.9m	2003	www.sec.gov
Equal Employment Opportunities Commission	303m	2001	www.eeoc.gov
Federal Communications Commission	278m	2003	www.fcc.gov
Federal Trade Commission	171m	2003	www.ftc.gov
Commodity Futures Trading Commission	82.8m	2003	www.cft.gov
Federal Election Commission	46.9m	2003	www.fec.gov

Although the budgetary decisions of those who hold power over the Commission might involve quite modest sums, because the budget is small, these can have a considerable effect on the agency's ability to enforce the law. Larger agencies may have more capacity to

¹¹ Jackson B (1990) *Broken Promise, Why the FEC Failed: Twentieth Century Fund Paper 66.*

make savings and might be more adept at managing fiscal cuts through efficiency measures, reducing staff through attrition, or delaying the implementation of non-essential new programmes. Whilst the FEC has been able to make considerable productivity gains over the years, especially in requests for additional information (RFAs) and data coding, the FEC cannot rely on this strategy as a long-term solution to fiscal constraints when faced with the realities of increasing case complexity, higher numbers of respondents per MUR and rising levels of financial activity.¹² A full budgetary history is set out in appendix E.

Additionally, staffing levels at the Commission have not kept pace with the growth in political contributions and disbursements, both of which increase agency workload.¹³ As disbursements increase, so do the number of transactions to be processed, reports scrutinised, (RFAs) issued, more violations are detected and more complaints are received.¹⁴ In 1980, political disbursements in Federal elections stood at \$768 million and the Commission had a total of 270 FTEs. By 1996, disbursements had grown to \$2.738 billion, a rise of 256.5% since 1980 whilst staffing had only risen by 14% to 308.5 FTEs.¹⁵ The work of the Commission is by its very nature highly labour-intensive and staff salaries and other benefits consume approximately two thirds of the agency's budget.¹⁶ Thomas and Bowman asserted that 'analyzing records, taking depositions and drafting reports,

¹² In 1988 the Commission issued 12,786 RFAs. By 1996 this had increased to 21,500. Additionally, in 1988 the average number of itemised transactions coded per FTE was 73,699. By 1996, this had increased to 119,386. Thomas S & Bowman J (2000) 581. Similarly, the PWC (1999) audit alluded to FEC productivity gains, noting that 1.9m transactions had been entered and coded during 1996, compared to 0.8m during 1990-91. The report also suggested that whilst the enforcement caseload might justify budget increases above 'normal inflation-adjusted levels, this should be conditioned on the agency's progress in implementing opportunities to increase productivity.' PWC (1999) E-S 10.

¹³ Staffing levels are measured and referred to as full-time equivalents or FTE's.

¹⁴ Thomas S & Bowman J (2000) 581.

¹⁵ Thomas S & Bowman J (2000) 580.

¹⁶ FY 2000 budget \$38,275,065 (personnel costs \$25,530,642).

FY 2001 budget \$40,410,900 (personnel costs \$27,757,000). *FEC Annual Report (2000)* 32.

¹⁷ Thomas S & Bowman (2000) 582.

interrogatories and briefs takes investigators, auditors and lawyers.¹⁷ Therefore, staffing levels have a significant effect on agency performance. The OGC accounts for just over 25% of the agency budget and over 30% of its FTEs.¹⁸ However although OGC staffing had risen from a September 1996 low of 88 FTEs to 113 in FY 2000, if one examines the functional allocation of staff, a bleaker picture emerges.¹⁹ For example figure 4.2 shows that relatively few lawyers were available for to work in 'front line' enforcement duties and the OGC only employed two investigators.²⁰

Table 4.2: OGC Staffing Profile FY1999

	Enforcement	PFESP*	Policy	Litigation	Other	Total
Attorneys	27	11	10	9	1	58
Paralegal	10	5	2	1	0	18
Investigators	2	0	0	0	0	2
Ethics	0	1	0	0	0	1
Library	0	0	0	0	2	2
Secretaries	4	1	1	2	1	9

¹⁸ *FEC Annual Report (2000)* 33.

¹⁹ In an answer to questions submitted by Congress during FY 1997 appropriation hearings, the agency explained why they had not recruited more lawyers for the OGC. Previously, representatives of the agency had attended law schools as part of the annual autumn recruiting programme. However, due to budget constraints' this was cancelled in 1995 and 1996. Additionally, recruitment was also constrained by a hiring freeze from November 1995 through to October 1996. These factors, coupled with natural attrition, meant that the OGC became seriously understaffed. U.S. House of Representatives, Committee on Appropriations, Subcommittee on the Treasury, Postal Service, and General Government Appropriations, FY 1998 54.

²⁰ U.S. House of Representatives, Committee on Appropriations, Subcommittee on Treasury, Postal Service, and General Government Appropriations, FY 1999, 36. Brooks Jackson criticised the lack of investigators in the OGC. He opined, 'The FEC lacks the most basic tools for conducting real investigations-investigators. The tragedy is that the Commission once had a staff of such investigators, including former New York and Washington police officers, a former army criminal investigator, and a former member of the Central Intelligence Agency. But it got rid of them.' Jackson B (1990) 7-8. Prominent fund-raiser and former Congressman, Tony Coelho (D-CA), commented 'there's basically been an attempt on the part of some people to try to make the FEC non-effective by withholding money. And they succeeded to a great extent.' Shenk continued 'the staff is bone thin: the FEC has only two investigators to cover its thousands of cases; its lawyers are saddled with as many as a dozen cases each.' Shenk J (1997) 'Why the Federal Election Commission is a lap dog for the political class': *U.S. News & World Report*, January 20, 31. Whilst Shenk accurately referred to the 'bone thin' staffing levels and overworked lawyers, the FEC investigates thousands of respondents per year, not thousands of cases.

Administrative	4	0	0	1	4	9
Total	47	18	13	13	8	99

Source: U.S. House of Representatives, Committee on Appropriations, Subcommittee on the Treasury, Postal Service and General Government Appropriations, FY 1999 36. * Public Financing, Ethics and Special Projects.

In contrast to the rather Spartan staffing levels of the OGC, the Department of Justice assigned 125 staff to investigate the allegations surrounding the 1996 Federal elections. Additionally, in 1997 the Senate Governmental Affairs committee reportedly requested \$6.5m and 80 staff to investigate the 'illegal and improper' activities arising from the same election cycle.²¹ The Senate committee proposed to employ 28 lawyers on the majority side and 20 on the minority side. The Chairman of the committee, Senator Fred Thompson (R-TN) commented, 'if you're not willing to pay the freight, don't load the wagon. We are about serious business, it will take money.'²² Conversely, the administration and Congress have ensured that the FEC has had difficulty matching available resources with the increasing demands made of it.

How Much Is Enough?

Estimating and managing the increases in the agency's workload has also been difficult. Some increases, like those arising from a presidential election year, can be planned for and incorporated into budget requests. However, unexpected increases in workload, like the steep rise in financial activity surrounding the 1992 campaigns and the extraordinary number of complaints that arose from the 1996 elections, cannot be planned and budgeted

²¹ The Senate Committee on Governmental Affairs was authorised to investigate the allegations surrounding the 1996 Federal elections by Senate Resolution 30, passed in March 11 1997

²² Thomas S & Bowman J (2000) 583.

²³ In 1990, political disbursements stood at \$1.115 billion; by 1992 that figure had nearly doubled, reaching \$2.015 billion. A similar trend occurred between the 1994 and 1996 Federal elections. In 1994, \$1.708 billion

for.²³ Therefore a small agency like the FEC which has little or no excess capacity in its budget often finds it difficult to cope with any additional burdens without a supplemental appropriation, the 1996 allegations being a case in point. Additionally, as the FEC regulates incumbents, it has been acutely aware that its actions attract particular scrutiny. Therefore, it has been careful not to make inflated budget requests. Commissioner Joan Aikens commented:

This agency has always been careful in its budget requests not to ask for the moon if we don't think it is necessary. Most agencies will pad their budgets so they can get cut and not worry about it. We have always tried to be honest with them because we know we are under extra scrutiny. When you regulate the guys that authorise and appropriate you, you've got to be careful. So we know we're under extra scrutiny, so we don't ask for extra appropriations. We only ask for what we think is necessary to do the job.²⁴

Larry Noble was particularly critical of the conservative budget requests made by the agency. He opined that the requests made were pitched below what was needed because the Commission wished to avoid offending Congress and was mindful about provoking Congressional retaliation:

Larry Noble: I always felt that the agency should ask for what it needs and be told no and that be placed on the record. Because then what happens is that if you agreed to what they say ultimately and you can't do the work, you're saying that I can do the work for that much money and then they come back next year and they say why couldn't you do the work? Well the answer was that we didn't ask for what we needed, you told us not

was disbursed. This increased by over \$1 billion to \$2.738 by 1996. Thomas S & Bowman J (2000) 580. The FEC attributed the sharp rise in campaign activity in 1992 to the following: a competitive three-way Presidential election, the impact of the 1990 census and redistricting, the impact of a large number of retirements and an anti-incumbent feeling amongst the electorate. Letter to Senator Wendell Ford (D-KY) Chairman of the Senate Committee on Rules and Administration from FEC Chairman Scott Thomas May 14 (1993) 8.

²⁴ Cowett A (1989) 49.

to ask for what we needed.'

Author: 'This is what I didn't understand, if you look at the budget request (2001) it says that we are not going to ask for any more staff this year but it will severely limit our ability to enforce the law.'

Larry Noble: 'Right, that is about a negotiation. That the number they will ask for will be a low number that they ultimately ask for. That in the end is all anybody looks at. So I was always frustrated that I'd go off with a budget request, there were some years that they would put in what I asked for and I must say I became part of that culture too. Whilst I would ask for more than they would ask for, I would not necessarily ask for all that I thought we needed because there is a level at which they are just going to laugh at you. But my frustration would be, I need fifteen more people and they would ask for three and then the next year they'd say why didn't you get the work done? Well we told you that we needed more people, no you only asked for three more people and that is the game that is played. The agency is far too concerned about what Congress thinks. They view it as if they'll get angry at us they'll give us even less. Well you know, if you don't ask, they're perfectly happy to cut you even further and they know that you aren't gonna start any problems with them. I think the agency should be much more aggressive about its budget.'²⁵

Although Commissioner Aikens and Larry Noble asserted that the Commission had been circumspect about setting the level of the Commission's budget requests and staffing needs, this had not always been the approach. This modesty was brought about after more ambitious requests were repeatedly denied by Congress. Consequently, the Commission concluded that making budget requests significantly above inflationary levels was a pointless exercise. Congress has appeared more content when the Commission self-censored its requests for funding. For example, in the FY 2001 appropriation hearing Chairman Jim Kolbe (R-AZ) commented in his opening statement:

²⁵ Interview with the author, Washington D.C. 17.10.01.

Let me begin by saying that I want to give you a pat on the back, I want to commend you on your budget justification documents that have been used in preparing this years budget request. I think it is fair to say that this is the first time in nearly six years that the Federal Election Commission has not painted a picture of doom and gloom over its current and past budgets. I think there has been a real concerted effort made to concentrate on what can be done with the resources available rather than simply focusing on all the things that have been missed because of the things that were not provided in appropriations in past years. I think it is a positive development of looking at the glass being half full rather than half empty.²⁶

More recently, one might argue that the Commission has internalised an attitude that discourages asking Congress for what the agency might require, instead it asks for what Congress might conceivably agree to. When asked why the Commission had not asked for any additional enforcement staff in the FY 2001 budget, Donald McGahn replied:

Donald McGahn: Perhaps for years they asked for the Moon and the stars and they never got near the Moon and maybe they are trying to put in a more realistic request.²⁷

When asked the same question, Commissioner Mason confirmed the change in budgetary expectation:

Commissioner Mason: We stopped after 98 asking for additional staff because we realised we weren't going to get any. And prior to 98, Commissioners had understood that but felt that they ought to continue to do that anyway to set the record out and say, here's the reason why were not getting at these cases. My view

²⁶ U.S. House of Representatives, Committee on Appropriations, Subcommittee on the Treasury, Postal Service and General Government Appropriations, FY 2001 1.

²⁷ Interview with the author, Washington D.C. 16.10.01.

was that that wasn't helping us any. We might as well stop asking for what we're not going to get. It was better to devise ways to do a better job with what we had and then go back after we'd made a good faith effort to whittle down the size of the problem. Instead of saying, well we need a hundred more people, you know what, gee, you know what ten, we could eliminate this problem, so we'd have a much better case.²⁸

In summary, the combination of a small budget, the sometimes unpredictable yet growing agency workload, staffing constraints and the Commission's modest budget requests, make it particularly vulnerable to the fiscal predilections of the executive and Congress.

FEC/Congressional Relations

The FEC is unique in that it regulates those who control its budget. This has enabled Congress to micro-manage FEC enforcement through appropriation, authorisation and oversight hearings.²⁹ One of the earliest indications of Congressional willingness to exert its influence over FEC enforcement was the 1979 removal of random audit authority. Random audit not only promoted voluntary compliance but also acted as a deterrent to wilful non-compliance.³⁰ The audit programme aimed to examine the committees of approximately 10% of House and Senate candidates. After the FEC investigated Charles Rose (D-NC) and Willis D. Gradison (R-OH) on groundless and anonymous complaints, Congressmen asserted their opposition to what they saw as FEC intrusion in their affairs.³¹ Congressmen preferred what Brooks Jackson called the 'honour system,' where voluntary

²⁸ Interview with the author, Washington D.C. 22.10.01.

²⁹ When interviewed, Fred Wertheimer said 'all oversight is intimidation acts and constraints.' Interview with the author, Washington D.C. 25.10.01.

³⁰ La Forge A (1996) 'The Toothless Tiger-Structural, Political and Legal Barriers to Effective FEC Enforcement: An Overview and Recommendations': *The Administrative Law Review*, 10 377.

³¹ *Democracy* 21 (2002) 72.

compliance is assumed on trust.³² Despite being introduced in 1976, Wayne Hays (D-OH) expressed his hostility to random audit when he shouted at FEC Chairman Thomas Curtis:

'Are you coming to my District without a complaint to audit me? If you're getting your authorisation from me you won't. I don't trust you or anybody else spot-checking. I'm telling you over my dead body are you sending anybody anywhere unless you send them everywhere.'³³

As House elections took place every two years, Representatives were particularly irked by the negative connotations that might be drawn by being audited by the FEC.³⁴ Referring to the Congressional reaction to random audit, Jan Baran commented 'you would have thought that someone had planted a nuclear device on Capitol Hill, everyone was scared.'³⁵

When Theodore M. Risenhoover (D-OK) was audited, he told FEC Commissioners:

'Congress meant well when it passed the FECA but it may have created a monster. You may see the legislation completely gutted. If you think we can't change this legislation, or repeal it, you're wrong.'³⁶

James J. Delaney (D-NY), the Chairman of the House Rules Committee, also voiced his

³² Jackson B (1990) 69.

³³ *Democracy* 21 (2002) 73.

³⁴ Connitt A (1980) 22.

³⁵ O'Connor C (1986) 'Who's Afraid of the F.E.C.?:' *The Washington Monthly*, March 1986 22.

³⁶ Gross K (1991) 'The Enforcement of Campaign Finance Rules: A System in Search of Reform' *Yale Law & Policy Review*, 9 290.

opposition to the random audit programme when some irregularities were found in his accounts. Delaney questioned 'the wisdom of Congressmen appropriating money for the sake of investigating themselves.'³⁷ Random audit was also criticised by Frank Thompson (D-NJ), former Chairman of the House Administration Committee.³⁸ Unfortunately, the staff that carried out random audit during 1976 and 1977 were often described as inept, inexperienced, rude and overzealous. James Delaney (D-NY) said that those who audited his books 'didn't know a thing about the law.'³⁹ However the programme was not funded adequately, lacked staff and the inexperience alluded to might be expected of a fledgling agency.⁴⁰ Despite these failings, Common Cause asserted that one third of House members audited had received illegal contributions.⁴¹ The combination of poor audit performance and Congressional hostility to the programme provoked the House Administration Committee to stop funding the initiative. This was later upheld by the full House in a voice vote. Although the Senate deleted the provision in conference committee, the Commission dropped the programme in 1978 when the FEC divided along partisan lines on the issue. Less than a year later the matter was dealt with in a more substantive manner when the FECA 1979 removed FEC random audit authority.⁴² Whilst the reform community and the

³⁷ O'Connor C (1986) 26.

³⁸ Gross K (1991) 290. Thompson was convicted of bribery in 1980 and sentenced to three years in Federal Prison. He served two years of that sentence and became a Washington lobbyist before his death in 1989. www.princeton.edu

³⁹ O'Connor (1986) 26. La Forge described random audit performance as 'poor' and Robert Mutch described it as 'slow and flawed.' La Forge A (1996) 377.

⁴⁰ La Forge A (1996) 377.

⁴¹ Kemper V (1995) 'Take the Money and Run': *Common Cause Magazine*, 1995 22.

⁴² When interviewed in 1979, Commissioner Neil Staebler described how the random audit programme functioned. He said 'all campaigns for a given seat are handled together-incumbents, as well as major and minor party challengers. Results are announced simultaneously, unless some serious violation is encountered that holds one contest up for a longer period of time. There is a modest threshold for the number of dollars spent, so some of the tiny campaigns are exempt from auditing.' Whilst Commissioner Staebler opined that generally Congress 'has never seriously attempted to change an agency decision.' Saying that 'most Congressmen, an overwhelming number, took us as a necessary evil-or even a desirable influence and did not attempt to tamper,' he did say that the random audit programme 'had been subject to considerable attack by Congress.' Muller N (1979) 'Reflections on the Election Commission' 'An Interview with Neil O. Staebler': *Regulation*, March/April 34.

FEC have advocated the reintroduction of random audit authority, many Congressmen view it as unnecessary, undesirable and intrusive. When interviewed Larry Noble advocated its reintroduction and Donald McGahn made the case against:

Larry Noble: 'I always thought that the agency and a lot of people agree with this and thought the agency should have been able to do, was the random audit authority, which was taken away from us. This affects deterrence. The ability to just randomly audit committees and the fact of the matter is if you're out there, there's certain people who follow the law no matter what you do. There's certain people you can tell that there's no enforcement going on and they're gonna follow the law. But there are other people who at least around the edges push the envelope, are gonna assess the field and think what are my chances of getting caught, and that's deterrence.'⁴³

Author: 'What do you think of Congress taking away random audit authority from the FEC? Do you think there is any need for it to be reintroduced?'

Donald McGahn: 'No, I don't think so. They are very expensive for everyone. I think the reports are pretty good as they are, and because we have elections at such a frequent rate here, I feel they are the ultimate corrector and so compared to your opponent and the watchdog groups, you're kept pretty honest on what you do. And when you look at the audits that have been conducted because there have been reporting irregularities, you may know some that have resulted in criminal conduct or something that was really serious but my recollection is that most of them involve stuff that is not the end of the world. Stuff that is wrong, against the regs, but is not really corrupting, just sloppiness, reporting violations, that sort of thing. It's not worth random audit. California still has that, they can randomly audit. It's a whole different process. California auditors tend to come from accounting backgrounds, other agencies, professional auditors. They don't really care about politics. And they do their job and they are polite and they actually send out a questionnaire. The questionnaire says, how did we do?'

⁴³ Interview with the author, Washington D.C. 17.10.01.

Author: 'I think the FEC has that as well.'

Donald McGahn: 'I'm not sure they do. I've never seen one. I've never got to fill one out.'

Author: 'They do for ADR anyway.'

Donald McGahn: 'They may do for ADR. But I don't think they do for anything else. Whereas the FEC Counsels and auditors tend to be not what the California auditors are. They all seem to share this good government, fighting Watergate....I see that time and time again. I walk in the room and they think they're fighting Richard Nixon all over again. They're not and that zeal sometimes gets in the way. I've heard horror stories of people who have been audited by the FEC. Rude treatment and they come and camp out in your office, weeks at a time, going through everything and they always want more paper and sometimes if you give the auditors what they want, they will still turn to an enforcement matter and the general counsels office say that is not good enough, you need this other kind of proof and I can't imagine that with a random authority.'⁴⁴

The FEC has regularly recommended the reintroduction of random audit authority, often choosing to do so in the form of a legislative recommendation published in their annual report. However, this proposal has not been made by the Commission since 1997. One might argue that this policy change was consistent with the view already expressed by Commissioner Mason, when he opined that making requests for resources or powers unlikely to be granted by Congress is not only a fruitless exercise but does little for FEC/Congressional relations.

However, the difficulties the FEC experienced with Congress in the early 1980s were more the product of philosophical zeal and less about trying to micro-manage FEC enforcement.

⁴⁴ Interview with the author, Washington D.C. 16.10.01.

Instead of trying to shape a more desirable enforcement ethos, Republicans attempted to abolish the Commission. Commissioner Thomas commented:

Commissioner Thomas: 'When the Republican tidal wave in 1980 swept through Washington, there was a ground swell of strength for the Republicans. For a couple of years the abolishment of the FEC was in the Party platform and then you sort of saw a shift away.'⁴⁵

Republicans won control of the Senate in 1980 and Ronald Reagan, who had urged President Ford not to reconstitute the FEC after the *Buckley* decision, became the new incumbent in the White House.⁴⁶ Although the low 1980 (\$8.1m) FEC appropriation may have had more to do with a reduced workload brought about by the 1979 amendments to the FECA, budget cuts in the following two years appeared politically motivated.⁴⁷ In a proposal made before the Senate Appropriations Committee, Senator Ted Stevens (R-AK) attempted to cut off funding to the FEC though this was defeated in a 12-12-vote tally. A further proposal to limit FEC funding to six months was more convincingly defeated by the full Senate when it voted 65-31 against. Senator Roger Jepsen (R-IA) then proposed the abolition of the FEC altogether but Jepsen failed to muster the necessary support when the matter came before the Senate Rules Committee.⁴⁸ Wendell Ford (D-KY), the minority leader on the Rules committee, defended the FEC against the Republican attacks and was said to have engaged in some 'highly charged discussions with Jepsen.'⁴⁹ However the

⁴⁵ Interview with the author, Washington D.C. 18.10.01.

⁴⁶ Jackson B (1990) 31.

⁴⁷ The FECA 1979 reduced the number of disclosures mandated under the 1974 Act. The 1979 amendments are described in chapter 1.

⁴⁸ Jackson B (1990) 31.

⁴⁹ Cowett A (1989) 51. Senator Ford went on to become Chairman of the Senate Rules committee.

Congressional disdain felt towards the Commission was articulated through budget process.⁵⁰ In 1981 the Commission was awarded \$2.5m less than requested and in 1982 it was cut again, receiving \$4.3m less than requested.

The next significant deterioration in FEC/Congressional relations came about when Republicans won control of Congress in 1994. In FY 1995 Appropriations Chairman Bob Livingston (R-LA) attempted to reduce the FEC appropriation by 10.3% or \$2,800,000 despite the Treasury, Postal Service and General Government Appropriations committee budget only being cut by 7/100's of 1% that year. As five months had already elapsed in that fiscal year, the 10.3% cut would have equated to a 20% reduction in operating funds for the remaining four months. However, as the Senate opposed the cut, a \$1,458,000 rescission was agreed by House and Senate conferees.⁵¹ Livingston had justified the cut after he allegedly became frustrated at the Commission's unwillingness to modernise and invest enough resources in computer technology. Criticising the rescission, the Commission commented 'ironically, the sanction for the perceived lack of investment in computers is a cut in budget authority to make that investment-somewhat of a non sequitur.'⁵² Livingston's spokesperson, Quinn Hillyer, commented:

'We expect them not to ask for any more money until they put the money to good use instead of into a bureaucratic black hole. We don't want them hiring more people to sit around and twiddle their thumbs. There is no reason why they can't get the job done if they are organised and efficient. We will give them money for computers and not for personnel.'⁵³

⁵⁰ Cowett A (1989) 50-51.

⁵¹ Stone P (1995) 'Whose Campaign Reform?': *National Journal*, 6.3.95 1365. In 1994 Livingston had won a retroactive cut in the FEC budget in a House floor vote but this was later blocked by the Senate. Curran T (1995) FEC: 'Self Licking Ice-Cream Cone': *Roll Call*, 41 (3) 1 & 13.

⁵² FEC Budget Crisis Backgrounder, letter appended to FEC press release December 30 1994.

⁵³ Kemper V (1995) 23.

The starkest disparity between funds requested and those appropriated occurred during FYs 95, 96 and 97. The worst of these years was FY 1995 when the Commission requested \$31,820,000 and received \$25,648,000. Commissioner Lee Ann Elliott explained that computer expansion had been suspended because of the FY 1995 rescission. She commented, 'we literally have wires hanging out of the ceiling, waiting to be connected to personal computers.'⁵⁴ Livingston was also successful in reducing the agency budget in FY 1996 by 11% below that requested. In FY 1997, the Commission originally drafted a \$33,632,000 budget request (20.10.95), but this was reduced after negotiation to \$30,887,000 (8.2.96). Despite that revision, Congress appropriated \$28,165,000 and denied the supplemental request of \$1.7m to investigate the 1996 allegations.

Not only was Chairman Livingston instrumental in determining the level of FEC appropriations, he was also the driving force behind directing how those funds were spent. This practice is commonly referred to as 'earmarking' or 'ring-fencing.' Contrary to the opinion often expressed by the reform community, ring-fencing appropriations is neither unusual nor necessarily born out of evil intent.⁵⁵ However, in the case of the FEC, ring-fencing has been employed to undermine the agency's ability to enforce the law and has also been used to send clear political messages to the Commissioners and the OGC. Substantial amounts of the annual appropriation have been earmarked for 'modernisation' and computer upgrades.⁵⁶ In FY 1996 \$1.5m was earmarked for automated data processing (ADP); FY 1997 \$2.5m was earmarked for a further ADP upgrade, in FY 1998 \$3.8m was

⁵⁴ Kemper V (1995) 22.

⁵⁵ These are technically referred to as category 'b' earmarks and only assume legally binding status when inserted into the text of an appropriation bill that is enacted by Congress. However, earmarks are usually only inserted into the relevant committee report on the appropriation bill. In this latter case, the earmark is not legally binding, it merely becomes persuasive. www.house.gov/rules 31.8.02.

⁵⁶ The term 'modernisation' is often used in a disparaging way by FEC critics who like to characterise it as a 'creaking bureaucracy' and therefore in need of modernisation.

earmarked for computerisation and in FY 1999 \$4.4m was earmarked for computerisation.⁵⁷ Ring-fencing at the levels described significantly reduces the amount of resources available for traditional enforcement that requires personnel. Tina Vanbrakle alluded to the inherent 'trade-off' between I.T investment and enforcement.

Tina VanBrakle: 'We're not like Mr Livingston thought, you know he kept saying that we were supposed to spend money on computer upgrades, and it's true, that we didn't sink a lot of money into computerisation because we wanted to enforce the law. Republicans and Democrats just don't like being regulated. That's basically the bottom line.'⁵⁸

However the PWC (1999) audit found that the Data Systems Division had expended more resources on ADP and other computer modernisation initiatives during FYs 1996, 1997 and 1998 than had been earmarked by Congress. Therefore the recurrent charge that the FEC was unwilling to modernise was essentially a political strategy. Eliza Newlin Carney commented in the *National Journal*:

'Livingston has long argued that the FEC dumps too much money into investigations and enforcement, and not enough into simply collecting and publicizing candidates' contributions and spending records. One of the ways he's reined in what he regards as the FEC's overzealous enforcement efforts has been to explicitly require the agency to use large chunks of its budget only for computer modernization projects.'⁵⁹

Jim Kolbe (R-AZ), Chairman of the FEC's appropriations subcommittee, shared Livingston's view about the Commission's faulty enforcement priorities:

'As it relates to the issue of compliance, my concern is that all of your energy seems to be dedicated to investigating possible campaign violations. I don't see,

⁵⁷ Detailed Budget History, FEC Congressional Affairs, updated July 2001.

⁵⁸ Interview with the author, Washington D.C. 18.10.01.

⁵⁹ *Democracy* 21 (2002) 74.

in the budget, initiatives that target prevention and deterrence of possible violations-educational ways in which we can keep it from happening in the first place.⁶⁰

This description of OGC enforcement bears little resemblance to the way the agency functions. Firstly, the FEC is a responding agency, not an initiating one. It responds to the complaints made by the public, or the regulated community. The only compliance activity it carries out in the absence of a complaint occurs through the scrutiny disclosure reports. Secondly, all complaints have to meet strict criteria, being signed, sworn and notarised and differentiating between fact and hearsay. Thirdly, the OGC is proscribed from investigating any allegation without the affirmative votes of four Commissioners. Such criticism supports the thesis set out in the introduction that oversight has largely been political, not rational.

Commissioner Thomas supported this explanation by asserting that there was a clear Congressional policy not to allow OGC staffing to increase during 1995, 1996 or 1997.⁶¹ In *Roll Call*, the Commissioner explained how Bob Livingston had been 'lobbied pretty hard by some folks in the conservative side of the aisle to come down hard on the agency.'⁶² Relations did not improve as the agency continued to ask for additional funds and more enforcement staff. Frustrated at the Congressional response to the supplemental request made to address the 1996 allegations, Commissioner Joan Aikens testified that, 'the agency needed investigators, attorneys, auditors, systems analysts, and clerical support staff to

⁶⁰ U.S. House of Representatives, Committee on Appropriations, Subcommittee on the Treasury, Postal Service and General Government Appropriations, FY 1999 2.

⁶¹ Interview with the author, Washington D.C. 18.10.01.

⁶² Keller A (2001) 'FEC, Congress Enjoy 'Calmer' Relations As Agency Streamlines, Adds Programmes: *Roll Call*, September 10, 32.

⁶³ U.S. House of Representatives, Committee on Appropriations, Subcommittee on the Treasury, Postal

uncover the extent of potential violations.⁶³ Larry Noble commented that 'computers don't take depositions and computers don't write interrogatories and computers don't write reports.'⁶⁴ As staffing levels in OGC necessarily affect enforcement performance, keeping the department under-staffed can be a useful tool in hobbling enforcement. Trevor Potter noted that when the number of complaints coming into the OGC outstrips capacity they are then 'put it in Siberia, left on the enforcement docket to be worked when an attorney becomes available.'⁶⁵ The agency then attracts criticism because, as more cases remain on the enforcement docket unworked, higher numbers are dismissed as 'stale' under the Enforcement Priority System (EPS). As was alluded to in chapter 2, it tends to be the 'stale dismissals' that generate more criticism than the 'low priority' ones. Ironically, Livingston's Appropriation Committee staff criticised the OGC for unnecessary increases in personnel, criticised the agency for concentrating its resources on enforcement when its priority should have been disclosure and for operating an enforcement priority system that dismisses too many cases without investigation. The logic of such criticism was difficult to justify in light of Livingston's fiscal and staffing policy towards the Commission. Jackie Koszczuk commented in *Congressional Quarterly Weekly Report* how Livingston 'had been key in denying FEC requests for more attorneys and investigators' quoting the Congressman as saying:

I see no reason to increase their revenue, I think they have become a political organisation, they perpetuate their own base and they don't do the job they were

Service and General Government Appropriations. Fiscal Year 1998. 10.

⁶⁴ *Democracy* 21 (2002) 76.

⁶⁵ Interview with the author, Washington D.C. 24.10.01.

⁶⁶ Koszczuk J (1998) 'Money Woes Leave FEC Watchdog with more Bark than Bite': *Congressional*

intended to do. I just don't believe in these guys.⁶⁶

Chairman Livingston (R-LA) Authorises the 1995 Audit of the Commission

Hoping to generate more evidence to support of his views, Chairman Livingston dispatched Appropriations Committee staffers to investigate the FEC in February 1995.⁶⁷ The investigation focused on enforcement, disclosure and public records. The investigation was carried out by six full-time staff and took three months to complete. The rather brief 28-page report that followed concluded that the FEC had effective internal budget controls and that its disclosure and audit programmes were well managed. It also praised the establishment of an 'Inspector General's Office' that conducted various audits of agency performance.

However, the report made three main criticisms. Firstly, it argued that the agency's enforcement priority system allowed the agency to adjust its workload through the manipulation of prosecutorial thresholds. The criticism was that the agency increased its workload by lowering compliance and audit-for-cause thresholds. The agency would therefore simply create more violations thereby helping to justify its 'unwarranted' budget increases.⁶⁸ Conversely, should the agency become overwhelmed with allegations, it

Quarterly Weekly Report, 56 (9) 469-71.

⁶⁷ U.S. House of Representatives, Committee on Appropriations, Subcommittee on the Treasury, Postal Service and General Government Appropriations, 'Management and Operations of the Federal Election Commission,' June 20, 1995.

⁶⁸ Curran T (1995) 1 & 13. As the agency is proscribed from randomly auditing committees, it may only audit for cause. A committee may only be audited if its reports break certain internal FEC thresholds relating to errors and inaccuracies, thereby triggering an 'audit for cause.' However, like all substantive action carried out by the FEC, an audit for cause must be authorized by an affirmative mixed majority vote by Commissioners. The trend in recent years has been for the FEC to relax the audit for cause thresholds' making it less likely committees will be scrutinised. Consequently the political novice is far more likely to be audited than an experienced actor is because the latter often employs a professional to manage his/her campaign accounts and file the requisite disclosure reports.

merely reduced that workload by case dumping of low rated and stale MURs or by the manipulation of compliance thresholds. Consequently the report described the Commission as a 'self-licking ice-cream cone.'⁶⁹ This criticism was somewhat puzzling, as the EPS had been introduced because the agency had previously failed to differentiate between the serious and less serious violations on its central enforcement docket (CED). The lack of prioritisation coupled with resource constraints and limited staff in the OGC meant that timeliness was invariably poor. As this poor timeliness was often criticised in Congressional hearings, the EPS was universally welcomed when it was introduced in 1993.

The report's second criticism was that the FEC was too slow in modernising. The report said that plans to modernise tended to be general in nature, summarised problem areas and failed to provide details, milestones, or alternatives. The report asserted that the Commission had been unwilling to expend sufficient resources from its budget on computers, ADP and electronic filing. In a letter to *Roll Call* Livingston quotes from the report:

The FEC's defiant approach demonstrates an attitude which says, give us the money first and then we (the bureaucrats) will tell you (the elected Representatives) how we are going to spend it. Such practices are the exact opposite of how government is designed to work, and the very definition of tyranny.⁷⁰

Although these views served Livingston's political objectives, the evidence failed to support them. The independent PWC audit concluded that 'the FEC appears to have

⁶⁹ Democracy 21 (2002) 79.

⁷⁰ Letter written by Representative Bob Livingston (R-LA), published as, 'Ice Cream Tyranny': *Roll Call*, 41 (6) 17.7.96

adhered to Congressional appropriations report language instructions and 'category B, earmarks.'⁷¹ However, these criticisms were motivated by Livingston's frustration at the Commission's refusal to divulge EPS weighting criteria.⁷² As these factors determined whether a violation was likely to justify the expenditure of enforcement resources, the criteria remained confidential in order to prevent the regulated community 'playing the system' and rationalising their behaviour. Tina VanBrakle explained:

Tina VanBrakle: I think they thought we were inefficient, particularly the Republicans, at this point in time, Bob Livingston, and Newt Gingrich, they thought we were inefficient, they thought we were just a typical bureaucracy. We kept on asking them for more money, more resources, particularly for OGC for enforcement. But because our EPS system, the way it's set up, and the criteria that's used, it's somewhat sensitive, Congress kept on asking us for more of that, we kept telling them 'no, we can't give that to you,' they just didn't know what else to do. So they sent over the personal investigators to investigate the agency.⁷³

Trevor Potter argued that the politicisation and uncertainty surrounding the agency's budget made it difficult to plan for the future. He advocated the introduction of biennial budget authority, something the FEC had favoured for many years. Although this would have reduced budgetary uncertainty, Congress has argued that it creates 'lame-duck' committees in the second year.⁷⁴ A *Roll Call* editorial referred to the two-year budget cycle and opined

⁷¹ PWC (1999) Financial and Cost Management 3.3.8.2. Category B earmarks are the financial apportionments directed by the OMB.

⁷² For example in May 1993, Senator Wendell Ford (D-KY), Chairman of the Committee on Rules and Administration, asked about the specific standards contained in the EPS. In a written answer the Commission informed him that 'the effectiveness of such a system is dependent, in part, on being able to keep the specific criteria and details confidential.' He was, however, given the broad criteria already set out and discussed in chapter two. Letter by FEC Chairman Scott Thomas to Wendell H. Ford (D-KY) May 14, 1993.

⁷³ Interview with the author, Washington D.C. 18.10.01. Trevor Potter commented that the confidentiality of EPS criteria was 'to keep them guessing. Because if we actually told them we were enforcing X and Y, they'd know that we were not enforcing A, B, C, and D.' Author: 'So it's to stop the regulated community from rationalising the process, isn't it?' Trevor Potter: 'Yes, it's intended to hide what the Commission is doing, so the community won't know where the resources are going.' Interview with the author, Washington D.C. 24.10.01.

⁷⁴ www.house.gov/rules 5.9.02.

that it would prevent Hill appropriators from having 'their annual chance to bash the watchdog agency.'⁷⁵ Although the report cited the agency's apparent unwillingness or inability to modernise, the FEC's 1995 management plan allocated \$972,000 for computerisation, a figure that was expended despite the fiscal problems caused by the \$1,458,000 FY 1995 appropriation rescission.⁷⁶

The third criticism was directed at the agency's role in collating and summarising campaign finance data. The agency was said to have assumed a role of 'proactive disclosure that enabled it to make a selective analysis of the American political process.'⁷⁷ The report expressed concern that the Commission had an 'immense responsibility to insure that each release was carried out in an unbiased and even-handed manner.'⁷⁸ Livingston's hostility towards the Commission again became manifest when in 1996 he attempted to cut staffing in the Press Office from 5 to 2.⁷⁹ FY 1996 appropriation report language read:

'While FEC has a statutory responsibility to respond to press enquiries, the Committee feels 5 full-time employees for an organisation the FEC's size is excessive.'⁸⁰

The appropriation report opined that as the FEC had failed to measure 'voluntary

⁷⁵ Comment (1995) 'Potter's Clay': *Roll Call*, 2.10.95.

⁷⁶ U.S. Senate, Appropriations Committee, Subcommittee on Treasury, Postal Service and General Government Appropriations FY 1996 949.

⁷⁷ *Democracy* 21 (2002) 79.

⁷⁸ *Democracy* 21 (2002) 79.

⁷⁹ Keller A (2001) 32.

⁸⁰ U.S. House of Representatives, Committee on Appropriations, Subcommittee on Treasury, Postal Service and General Government Appropriations FY 1997 58-59.

compliance,' it was unable to measure the Press Office's impact of that objective, therefore the cut was justified. Finally, the report suggested that Press Office staff were no longer required because of the launch of the FEC's World Wide Web 'home page.'⁸¹ Although this action was simply part of a wider attack on the FEC, it was a little surprising that Livingston and his auditors had turned their attention to the Press Office. Firstly, the Press Office reports facts and does not 'editorialise' or use value-laden or emotive language. Secondly, as Press Officer Ron Harris noted, the Press Office is not a 'flak office,' designed to generate positive copy about the Commission or to rebut Congressional or media criticism. Commissioner Elliott supported this view when she commented 'our Press Office primarily responds to questions.' 'They don't run a PR programme.'⁸² One might argue that as Livingston believed the Commission to be partisan and populated by liberals, he objected to using taxpayers' dollars to propagate anti-conservative views. Additionally, as the Press Office turns raw campaign finance data into meaningful, easily understandable information, it has a role in transforming disclosure theory into reality. One might argue that some incumbents preferred the American public to analyse the data for themselves, something that even the professional can find difficult and time consuming.

The release of the Appropriations Committee report was never officially sanctioned, though a few copies were circulated in Washington much to Livingston's annoyance. Tina VanBrakle commented:

Tina VanBrakle: 'Everyone at this agency was very accommodating, gave them records, everything that we

⁸¹ U.S. House of Representatives, Committee on Appropriations, Subcommittee on Treasury, Postal Service and General Government Appropriations FY 1997 59.

⁸² U.S. House of Representatives, Committee on Appropriations, Subcommittee on Treasury, Postal Service and General Government Appropriations FY 1997 66.

could possibly have and that report, I don't think it gave them the ammunition they were looking for.⁸³

Livingston hoped that his staffers would discover evidence of partisanship. When no such evidence emerged, appropriations staffers chose to describe the report findings as merely a 'survey' and not an 'investigation.'⁸⁴ As a Congressional committee and not the GAO had conducted the investigation, the FEC had no opportunity for meaningful input and was not entitled to respond to its conclusions. The investigation's *ad hoc* mandate and the auditors' ignorance of the agency, its processes and the law, led one FEC source to comment 'this is a private plumbers' unit doing work that the GAO should be doing out in the open.' Commenting further, 'It's an abuse of power and a clear conflict of interest.'⁸⁵ The investigation was another symptom of Livingston's desire to hobble the agency. Democracy 21 noted how Livingston and his supporters used the report as ammunition in their attempts to reduce and micro-manage the FEC budget.⁸⁶ The report was political, not rational or managerial. One *Roll Call* headline read, "Appropriations Staff Probe of FEC Mirrors Livingston's Case Against Election Agency."⁸⁷ The report has been remembered more for the 'self-licking ice-cream cone' metaphor and less for its content.

Livingston Authorises the Return of the Auditors 1998

In a further attempt to undermine the Commission, Chairman Livingston authorised a GAO audit in 1997. Unlike the 'survey' conducted by Livingston's staffers, this audit was awarded on the basis of a competitive bid. This resulted in the GAO granting the \$750,000

⁸³ Interview with the author, Washington D.C. 18.10.01.

⁸⁴ Curran T (1995) 13.

⁸⁵ Kemper V (1995) 23.

⁸⁶ Democracy 21 (2002) 79.

⁸⁷ Curran T (1995) 13.

contract to PricewaterhouseCoopers LLP. PWC began their work in June 1998 and submitted their 186-page report to Congress, the GAO and the Commission January 15 1999. PWC conducted a comprehensive and professional investigation that avoided the crude political criticisms contained in the 1995 report. The PWC audit focused on process performance and management practices. After consideration of the report, the Commission responded by saying 'the FEC commends PWC for conducting a fair audit/management review and for attempting to understand the complex nature of the Commission's purpose and work.'⁸⁸ Alluding to the report, Commissioners Wold and Thomas filed a joint statement saying:

'The FEC is a competently managed organisation with a skilled and motivated staff, that executes disclosure and compliance without partisan bias and that has a high degree of customer satisfaction with our products and services.'⁸⁹

The report found a number of agency 'strengths' and 'shortcomings.' The strengths included:

1. A strong organisational focus on facilitating voluntary compliance within the filing community to create an accurate public record of campaign finances.
2. The filing community was generally satisfied with FEC products and services.
3. Productivity had increased in the processing review and dissemination of campaign finance data in the face of increasing workloads.

⁸⁸ FEC letter to Mr. Kevin Bacon, Project Partner Management Consulting Services PWC, January 21 1999, 1.

⁸⁹ www.fec.gov Press Release 29.1.99.

4. Confidentiality of potential and existing compliance matters are maintained throughout report review, referral, audit and enforcement processes.
5. Disclosure and enforcement activities are executed without partisan bias.⁹⁰

Shortcomings included:

1. Campaign finance report disclosure and review relies on an antiquated paper-based and manual coding, entry, verification, and clarification process.⁹¹
2. FEC organisational units are compartmentalised, which leads to diminished communication, collaboration and innovation.⁹²
3. Because of limited staff resources and increasing case complexity, current volumes of enforcement cases appear to exceed FEC disposition capacity.
4. The lack of a Case Management System.⁹³

The PWC audit was universally seen as unbiased and provided an invaluable template for positive change. Commissioner Thomas also thought that the audit had aided the FEC/Congressional relationship as PWC concluded that the agency exercised its disclosure and compliance duties without partisan bias.⁹⁴ However, the report was the product of a disingenuous motivation. Congressman Maloney (D-CT) commented:

The Majority asked for this audit because they thought
it would embarrass the FEC. Instead, it embarrasses the

⁹⁰ PWC (1999) E-S 2.

⁹¹ The report also opined that 'since 1996, the FEC has made substantial progress in enhancing and upgrading its computing capabilities, PWC E-S 7.

⁹² The FEC remains compartmentalised with little cross fertilisation of knowledge and experience between functional units.

⁹³ PWC (1999) E-S 3.

⁹⁴ Keller A (2001) 33.

Republican leadership by exposing as groundless their continued attacks on the agency's integrity.⁹⁵

Congressional attacks did little to reduce the 'siege mentality' present in FEC organisational culture.⁹⁶ Furthermore the FEC's appropriation committee ensured that the \$750,000 PWC fee was funded from the Commission's FY 1998 budget.⁹⁷ In addition to this financial burden, the agency experienced disruption for a number of months as staff explained institutional processes, legal issues and assisted the auditors in other ways. The audit has also had macro, long-term consequences for the Commission's workload. The FEC keep Congress regularly apprised of its progress in implementing the 21 recommendations and the numerous 'improvement opportunities' made by PWC.⁹⁸

Although some recommendations involve significant resource issues, Congress may respond positively to these needs as none of the recommendations advocate politically unpopular changes like OGC staff increases or the awarding of substantive new powers.⁹⁹ Not only has the audit increased the work required in preparation for budget and oversight hearings, the Commission also has to draft responses to questions submitted by Congressmen on the minutiae of the report's implementation. Answering such 'questions for the record' has involved a considerable amount of technical research. On a more practical level, the report has affected the organisation, deployment and workload of other

⁹⁵ Democracy 21 (2002) 80.

⁹⁶ PWC (1999) 3.3.7.

⁹⁷ Democracy 21 (2002) 80.

⁹⁸ PWC (1999) 5.0 Exhibit 5-1.

⁹⁹ The PWC (1999) audit did recommend the introduction of the administrative fines system but this was not a significant new power, though a useful one. The fines have been likened to the political equivalent of a 'parking ticket.' Smith B & Hoerstring S (2001) 'A Toothless Anaconda: Innovation, Impotence, and Overenforcement (Sic) at the Federal Election Commission': *Election Law Journal*, 1 (2) 147.

staff. Commissioner Wold explained how nine task forces and working groups had been formed in order to implement the PWC recommendations and other initiatives (administrative fines and ADR). Commissioner McDonald testified how the PWC recommendations had resulted in the need for an additional executive assistant in Commissioner Offices:

The amount of time it is taking each one of the executive assistants out of our Offices to work in each of these areas, just the activities in Pricewaterhouse alone, is unbelievable.¹⁰⁰

Despite the added workload, Congress and the OMB refused to grant Commissioners the necessary staff required to administer the PWC changes. Chairman Kolbe (R-AZ) asked Commissioner McDonald why the OMB had not supported his request for an additional executive assistant.¹⁰¹ Commissioner McDonald replied:

'Well, I think the primary reason was that they felt like they would okay the positions, but they would not okay the money which, in essence, kind of puts us in a blind, needless to say.' (Clerk's note.-The witness later clarified this to read: 'OMB did not approve of either the positions or the money but agreed the Commission could ask Congress for them. OMB did not give any rationale beyond disagreeing that the Commissioners need an additional executive assistant to properly manage the agency.'¹⁰²

¹⁰⁰ U.S. House of Representatives, Committee on Appropriations, Subcommittee on the Treasury, Postal Service and General Government Appropriations, FY 2001 19.

¹⁰¹ Each Commissioner has one executive assistant unless they are serving as FEC Chairman or Vice-Chairman, in which case they are supported by one additional EA.

¹⁰² U.S. House of Representatives, Committee on Appropriations, Subcommittee on the Treasury, Postal Service and General Government Appropriations, FY 2001 19.

One might conclude that whilst the PWC (1999) audit was a success in terms of its managerialist remit, it was a report that deliberately avoided discussing the political realities and controversies that impact on agency performance. The apolitical nature of the report meant that it was well received by both Parties in Congress and was equally well received by the FEC, who saw it as an opportunity to validate their long held claims of impartiality and confidentiality. However, this should not negate the report's validity in supporting an argument which asserts that audits have been used to prove political points and that the PWC audit should be seen in the wider context of the Congressional desire to control, micro-manage and bully the agency.

The final control strategy employed by Congress during the mid 1990s was to target the FEC's statutory officers for removal. This measure was aimed at the general counsel, Larry Noble, but was equally applicable to Staff Director, John Surina. Under existing arrangements, both Officers enjoyed indefinite tenure and could only be removed by four affirmative Commissioner votes. However, in 1998 legislative attempts were made in the House and Senate to place term limits on the agency's most senior bureaucrats through a clause contained in the FY 1999 Treasury and General Government spending bill. Both officers would serve four-year terms and four affirmative Commissioner votes would be required to secure reappointment for each additional term. If enacted, this measure would have become effective in 1999. In the House, the rider was suggested by conservative Bill Thomas (R-CA) and introduced by Bob Livingston (R-LA). The measure was introduced in the Senate by Mitch McConnell (R-KY), another conservative and staunch critic of the FEC. Although the provision contained in the House bill was removed because it broke rules prohibiting legislating on an appropriations bill, the Senate voted 45-54 against

tabling (killing) the McConnell amendment.¹⁰³ Senator Carl Levin (D-MI) objected to the McConnell rider and threatened to delay the bill with a number of lengthy amendments of his own.¹⁰⁴ Majority Leader Trent Lott (R-MS) allegedly commented 'if the Democrats don't want the Treasury Department and the White House funded, what do I care?'¹⁰⁵ Democrats argued that the McConnell amendment was politically motivated, was an effort to influence the actions of the FEC, was designed to make officials fearful of losing their jobs and was specifically directed at the current general counsel, Larry Noble. Bill Thomas denied this, saying 'this is basically a good government measure.' Similarly Livingston said 'this is not about that guy raising so much hell at the FEC, I forget his name, starts with an N.'¹⁰⁶ McConnell was somewhat more candid when he said of Noble, 'he had not demonstrated great bipartisanship in the past.'¹⁰⁷ However, the amendment was a crude attempt to remove a bureaucrat who was unpopular with the Republican leadership. Fred Wertheimer described the attempted removal of Larry Noble, 'as intimidation and bullying tactics.'¹⁰⁸ Larry Noble was asked about the Congressional attempts to remove him.

'Sure it concerns me, and not just personally. I'm concerned about Congress changing the nature of this job. They are trying to send a message that if they don't like the advice the general counsel gives, they'll get rid of him. I don't think anyone could function effectively

¹⁰³ Gruenwald J (1998) 'Action on Treasury-Postal Bill Is Suddenly Halted After Dispute Over Term Limits at FEC: *Congressional Quarterly Weekly Report*, 1.8.98, 2111.

¹⁰⁴ Gruenwald J (1998) 5.9.98 2345.

¹⁰⁵ Gruenwald J (1998) 1.8.98 2111.

¹⁰⁶ Aizenman N (1998) 'Noble's Cause': *The New Republic*, 20.7.98 & 27.7.98, 13.

¹⁰⁷ Gruenwald J (1998) 1.8.98 2111. Aizenman described Larry Noble as having a distinctly liberal pedigree. She referred to him as a native of Queens N.Y. who had gone to college in the 60's and 70's and had even worked for Ralph Nader. Tina VanBrakle said that Larry Noble had been described by Bob Livingston as 'the Ralph Nader Regulator.' Interview with the author, Washington D.C. 18.10.01. Yet Larry Noble has also been equally unpopular with Democrats. He commented, 'the joke around here is that there have always been three votes to remove me, but they haven't been the same three votes.' Aizenman N (1998) 20.7.98 & 27.7.98 13. On July 31 1998 Noble commented 'my office has acted in a totally non-partisan way. It is important to keep in mind that all I do is make recommendations.' Referring to the McConnell amendment he said 'the message it sends to the General Counsel and the Staff Director is, if you anger either side, you're going to be in trouble.' Gruenwald J (1998) 1.7.98, 2111.

Additionally, one might reiterate the findings of the PWC (1999) audit alluded to earlier, which found the FEC had exercised its enforcement responsibilities in an impartial manner.

¹⁰⁸ Interview with the author, Washington D.C. 25.10.01.

under those circumstances.¹⁰⁹

Despite being reintroduced on a number of occasions throughout 1998, the measure failed to be enacted for a number of reasons. Firstly, most Democrats opposed it and President Clinton wrote to Senate Minority Leader Tom Daschle (D-SD) saying that the McConnell amendment was an 'indefensible step to weaken our nation's election laws.'¹¹⁰ Secondly, continued partisan squabbles over the amendment would have further delayed the passage of legislation. Katherine Seelye opined in the *New York Times* that with only five weeks remaining before the adjournment, the House and Senate had only sent one of thirteen bills to the President for his signature. Thirdly, there was concern that if McConnell persisted with his attempts to remove Noble it would have exacerbated tensions between the Republican Party's conservative and moderate wings. Finally, attempting to weaken the Commission might have undermined Republican efforts in appointing an independent counsel to investigate Vice President Gore's 1996 campaign finance practices.¹¹¹ The long-term interests of the Republican Party were served by encouraging ethical investigations not by discouraging them. However, despite the measure's failure, the attempt was a *de facto* success in that it sent a powerful message to both statutory officers. Should the General Counsel or Staff Director anger Congress in the future, the attacks on their security of tenure might resume.¹¹² Consequently, Staff Director John Surina left to join the Department of Agriculture in July 1998 and Larry Noble, General Counsel since 1987, resigned eighteen months later to become Executive Director of the Center for Responsive Politics. Tina VanBrakle supported the assertion that the McConnell amendment was

¹⁰⁹ Rubenstein B (1998) 'FEC General Counsel's Job is threatened by Congress': *Corporate Legal Times*, 8 (84) 4.

¹¹⁰ Gruenwald J (1998) 1.8.02, 2111.

¹¹¹ Seelye K (1998) 'G.O.P. Drops Effort to Remove Election Counsel': *New York Times*, 4.8.98, 20.

¹¹² An editorial in the *Corporate Legal Times* opined that 'Congressional insiders say the issue will keep coming back as long as Noble continues investigating the majority party.' Comment (1998) 'FEC General Counsel Keeps His Job For Another Year': *Corporate Legal Times*, 8 (85) 14.

pivotal in affecting the decisions of both Statutory Officers to resign from the Commission.

She commented:

Tina VanBrakle: 'We lost a very good Staff Director at the time because he too was a Statutory Officer, like Larry and he too saw the writing on the wall. And he thought, well, I'm not going to be term limited, I'm going to get out of here. He ended up leaving and he made more money, he's happy, but err, we lost a lot of key people over the past few years.'¹¹³

Historically, Congress has used fiscal strategies to exert its power over FEC enforcement. The modesty of FEC budget, ring-fencing of appropriations and restricting the recruitment of OGC staff have all limited enforcement capacity.¹¹⁴ However, budget cutting, dispatching auditors to 'investigate' the agency, and targeting particular individuals for removal was something unique to the mid and late 1990s. These more assertive methods of Congressional control were something designed to punish the agency for becoming a more vigorous and effective enforcer of the law. The FEC, public interest advocates and journalists have also supported this view.¹¹⁵ For example, the implementation of the Enforcement Priority System (EPS) in 1993 led to an increased level of financial penalties for those violating the statute.

¹¹³ Interview with the author, Washington D.C. 18.10.01.

¹¹⁴ Joan Claybrook, the President of Public Citizen opined that 'the public believes it (FEC) is an enforcement agency. Still, some Republicans want to starve it to death and make it a eunuch.' Stone P (1995) 1365.

¹¹⁵ The FEC responded to the fiscal year 1995 budget rescission by commenting, 'the House of Representatives is targeting the FEC for budget reductions that appear punitive rather than fiscal in nature. In fact, the cuts appear caused precisely by the fact that the FEC has become more effective and efficient in meeting its responsibilities, not the reverse.'

Table 4.3: Civil Penalties Levied by FEC

Calendar Year	Matters Conciliated	Total Civil Penalties
1986	174	\$289,485.00
1987	171	\$249,710.00
1988	142	\$332,383.00
1989	177	\$362,746.94
1990	138	\$274,752.00
1991	262	\$534,110.00
1992	99	\$255,128.00
1993	86	\$596,099.00
1994	113	\$1,733,754.00

Source: FEC Press Release December 30, 1994

Larry Noble opined in *The Hill* that fines would grow as the Commission continued to dispose of minor cases through EPS and focus its resources on more serious violations.¹¹⁶

This rise was symptomatic of a more assertive Commission and coincided with the 1994 Republican take-over of the House and Senate. Yet as Bob Livingston and the Republican leadership continued to believe that the Commission was biased against conservative causes, the Republican leadership remained unenthusiastic about increased financial penalties. Livingston's attitude was alluded to in *The Hill* when it opined that 'he had not examined the fines assessed this year, but indicated that a record amount would not necessarily temper his criticism.¹¹⁷ Livingston elaborated by saying:

I don't think the total amount of fines is a factor one way or the other. The question is whether the FEC is being expedient and fair. Those are the important

¹¹⁶ Karmin C (1995) FEC penalties set record as Gephardt committee is fined: *The Hill*, 12.7.95.

¹¹⁷ Karmin C (1995) *The Hill*, 12.7.95.

¹¹⁸ Karmin C (1995) *The Hill*, 12.7.95.

issues.¹¹⁸

Two of Livingston's most frequent criticisms of the FEC were its inability to modernise and its inability to punish violators of the law. Yet the EPS was a modernisation, in that it allocated scarce resources to the most serious cases and did so in a non-partisan way. Additionally, the increased level of fines demonstrated that the Commission was attempting to increase the credibility of deterrence. Although the Commission was not admonished for rise in civil penalties, it was not praised for it either. However other facets of the Commission's regulatory behaviour particularly angered Congress.

Perhaps the most unpopular action by the Commission was the 1994 drafting of new rules prohibiting incumbents from converting excess campaign contributions to 'personal use.' Although Congress had prohibited the conversion of campaign contributions to personal use in 1979, 'personal use' was not defined and the prohibition did not to apply to incumbents who held office on, or before, January 8 1980. This was the so-called grandfather clause, which meant that the Commission was rarely asked to rule on the issue. After criticism from the press and public interest advocates, the 1989 Ethics Reform Act was passed and the grandfather clause was repealed. Although this extended the personal use prohibition to House and Senate members, 'personal use' was still not defined under the Act.¹¹⁹ Larry Noble described how historically the Commission had taken a broad view on what might be defined as 'campaign-related expenditure.' He alluded to the fact that the Commission wished to avoid substituting its judgement for the judgement of the candidate.¹²⁰ There was a lack of consensus on what politicians should and should not

¹¹⁸ Karmin C (1995) *The Hill*, 12.7.95.

¹¹⁹ www.fec.gov 25.9.02.

¹²⁰ Colloquay (1994) 'Federal Election Commission Panel Discussion: Problems and Possibilities': *The Administrative Law Journal*, 8 229-230.

spend political donations on. Some had advocated a *laissez-faire* approach by allowing candidates to spend contributions as they wished as long as it was disclosed. Others, who favoured the use of regulatory power, suggested that those campaigning for office should only spend political contributions on narrowly defined electioneering activities. Many Washington journalists described how Congressmen had used campaign contributions to pay for country club memberships, pleasure trips, theatre outings, sporting events and vacations, rent, family members' hotel rooms, leasing or buying cars, clothes, salaries and meals.¹²¹ One might find it difficult to accept that these expenditures were within boundaries of legitimate electioneering costs. Kemper argued that politicians were funding lavish personal lifestyles through the use of campaign contributions¹²² and Democracy 21 described the practice 'as ingrained in Congressional culture.'¹²³ However, Larry Noble alluded to the difficulty in drafting a 'personal use' rule that encompassed every eventuality. He opined that there were 'innumerable hypotheticals.' For example, in a panel discussion he referred to the type of questions that were raised by the regulated community concerning personal use. Might political donations be used to purchase a modest car but not a luxury one, a Yugo but not a Lincoln Continental? Another asked, if after a stressful campaign, the candidate needed psychiatric treatment, might this be paid for by political contributions?¹²⁴ Undeterred by the hypothetical, the Commission drafted new personal use rules that became effective April 5 1995.¹²⁵ Whilst the Commission failed to agree whether

¹²¹ Broder D (1995) *Washington Post*, May 21. Kemper V (1995) 21. Stone P (1995) 1365. Comment (1995) 'Licking the FEC: Roll Call, 41 (4) Monday July 10, 4. Comment (1995) 'The Electoral Watchdog': *Christian Science Monitor*, Thursday June 1, 20.

¹²² Kemper V (1995) 22.

¹²³ Democracy 21 (2002) 74.

¹²⁴ Colloquay (1994) 230.

¹²⁵ Once promulgated, Livingston continued to oppose the personal use regulations. For example, in 1997 he criticised the FEC for its 'picayunish efforts to micromanage the lives of every candidate and/or incumbent.' U.S. House of Representatives, Committee on Appropriations, Subcommittee on the Treasury, Postal Service, and General Government Appropriations, FY 1998 3.

a salary might be paid to candidates, the Commission promulgated the following rules:

'Expenses that would exist regardless of an individual's campaign for Federal office or duties as a Federal officeholder are deemed personal. Examples of such personal expenditures might include: household expenses, funeral expenses, tuition payments, entertainment expenses and membership dues at clubs.'¹²⁶

Joshua Shenk described how Congress was outraged by the personal use rules promulgated by the Commission.¹²⁷ Trevor Potter, like many others, opined that the FY 1995 budget rescission was a direct punishment for proceeding with the new personal use rules.¹²⁸ Congressman Barney Frank (D-MA) referred to the 'attacks' on the Commission over personal use, describing them as 'entirely political' and saying that the Commission 'pisses off a lot of people.'¹²⁹ Bob Livingston (R-LA) opposed the FEC rules governing personal use. Livingston commented:

The FEC currently has proposed microscopic rules on the use of campaign funds. Every Congressman and every Senator is concerned about that. We don't think the FEC should be micro-managing our campaigns.

Broad parameters are sufficient.¹³⁰

Livingston clearly advocated Cain and Lochner's democratic model of regulation on the personal use issue. He suggested that the FEC should disclose campaign-spending records and 'let the voting electorate determine whether or not that was wise or just or proper.'¹³¹

Livingston also argued that the Commission had continued to resist computer

¹²⁶ www.fec.gov/pages/ch3.htm 26.9.02.

¹²⁷ Shenk J (1997) 40.

¹²⁸ Democracy 21 (2002) 74.

¹²⁹ Stone P (1995) 1365.

¹³⁰ Ortiz D (1994) 'Symposium on the Federal Election Commission': *Journal of Law & Politics*, 10 (3) 380.

¹³¹ Kemper V (1995) 23.

modernisation, was not adequately enforcing the law against egregious violators¹³² and was 'unable to address the agenda currently on its plate.'¹³³ Despite denying that the FY 1995 funding rescission was anything to do with personal-use rules, Livingston inferred a connection between the two on several occasions.¹³⁴ He commented:

'Instead of micro-managed campaigns, the FEC should prosecute violators. And given that the FEC doesn't have the resources to do that, it's ridiculous to expect that they would. Thus, there should be full disclosure with penalties for perjury.'¹³⁵

In the FY 1995 FEC authorization hearing Livingston commented:

'While the Federal Election Commission complains about not having enough resources to handle its workload, and I think they can make a good case in many areas, it has initiated a rule-making on how Federal candidates can spend campaign funds. It would appear that the FEC is actively searching for more

¹³² It has been common for politicians to develop a long-standing attitude towards the Commission based on one or two personal experiences. For example, some of the antagonism Livingston felt towards the FEC arose from a complaint he filed on 28 December 1988. Livingston's complaint was directed at his Democratic Party opponent, the Mustakas for Congress Committee. Mustakas, who became the subject of MUR 2705, had failed to file a 12-day pre-primary report. Although Mustakas had received \$102,880 into his campaign coffers, most of this sum originated from a secured loan made by his parents. The Commission found 'reason to believe' Mustakas had violated the FECA and authorized an investigation. After Mustakas failed to respond to FEC subpoenas, the Commission filed suit in the U.S. District Court. However, the MUR was eventually dismissed under the EPS because it had become stale and there was little prospect of substantive action as Mustakas had left the country and moved to Scotland after the election. FEC Release, MUR 2705 Mustakas for Congress.

¹³³ Broder S (1995) *Washington Post*, May 21.

¹³⁴ A letter written by Bob Livingston was published in *Roll Call*, in which he denied that personal-use regulations had anything to do with his 'focus' on the agency. Instead, he criticised the Commission for 'gross inefficiency and bureaucratic hubris.' Letters Section, *Roll Call*, July 17 1995.

¹³⁵ Ortiz D (1994) 380.

things to go out and regulate.¹¹³⁶

Livingston continued to associate budgetary issues with the personal use rules. For example, in a 1994 panel discussion he commented:

Frankly there is a strong justification for the budget increase, provided the FEC maintains its autonomy. They need the resources-not to run campaigns, not to administer debates, but to ensure the fairness of elections.¹¹³⁷

As he viewed the personal use rules as 'running campaigns,' the message was clear, the promulgation of new regulations governing 'personal use' was to be discouraged as an undesirable regulatory interference. Should the Commission choose to proceed with the new rules, fiscal consequences might follow. FEC Director of Congressional Affairs commented:

Tina VanBrakle: He thought we were too vigorous in enforcing the law, we had promulgated new regulations dealing with the personal use of campaign funds. He said that was not the reason why he wanted to cut our budget

¹³⁶ U.S. House of Representatives, Committee on Administration, Subcommittee on Elections, FEC Authorization FY 1995 3.

¹³⁷ Ortiz D (1994) 378.

¹³⁸ Interview with the author, Washington D.C. After Congressman Livingston continued to criticize the personal-use regulations during the FY 1996 appropriations hearing, Commissioner McDonald fiercely defended the FEC. He opined that all rules have to gain the support of a majority of Commissioners and that Congress had the authority to take action on and oppose FEC regulations. Commissioner McDonald commented: 'I want to point out something else. Regulations are not new laws. One of the things that the Commission has always had trouble with, and we have heard it from the Congress for years, is we don't really

but basically he thought we went too far.¹³⁸

Whilst the new personal use rules damaged FEC/Congressional relations, the Commission's litigation against the Christian Coalition, Christian Action Network and GOPAC also proved equally unpopular with the Republican leadership. The FEC filed suit against GOPAC in 1994 as it had not registered as a political committee, had failed to disclose its aid to political candidates and had refused to pay a \$150,000 fine.¹³⁹ Despite taking similar action against socially liberal groups in the past, the Republican leadership viewed the decision to file suit against these groups as unjustified and biased. Chairman of GOPAC, Rep. Newt Gingrich (R-GA), the minority whip in 1994, referred to the FEC at the time as, 'nuts...mindlessly bureaucratic....an agency that's irrelevant and dangerous.'¹⁴⁰ Gingrich also described the FEC lawsuit against GOPAC as 'an outrageous power grab.'¹⁴¹ Republican criticism of FEC litigation against conservative groups continued during 1997. Congressman Robert B. Alderholt (R-AL) criticised FEC litigation against the Christian Coalition when he commented:

'On July 30th of this past year, of course, which was an election year, the FEC filed a lawsuit in the U.S. District Court in the District of Columbia against the Christian Coalition. The charges were that the Christian Coalition engaged in expressed advocacy through their voter guides. At the same time, the FEC did not target other groups that tended to support Democrat

understand what it is you want us to do. So it is really difficult. The question is, do you want us to put out regulations or not? As I have indicated, I have asked that we put a freeze on them, and take care of the ones we have. But, as a practical matter, you can't have it both ways. Either you want the law clarified or you don't. I don't care if we don't. I am just saying that for years people have said the law is complex, we don't understand it, can't you do something to make the law clearer?' U.S. House of Representatives, Committee on Appropriations, Subcommittee on the Treasury, Postal Service and General Government Appropriations FY 1996 332-333. One might argue that whilst opponents of the personal-use rules were well aware that they could prevent the implementation of rules they opposed, to do so might prove politically costly. One might also note that members rarely referred directly to the personal-use regulations in testimony and would have preferred it if the FEC had dealt with the issue through self-censorship, voluntarily dropping the proposal.

¹³⁹ Broder D (1995) *Washington Post*, May 21. Kemper V (1995) 21.

¹⁴⁰ Broder D (1995) *Washington Post*, May 21.

¹⁴¹ Kemper V (1995) 23.

candidates and which have had similar voter guides and engaged in identical activities. If anything, there were some other groups that could be argued went further than the Christian Coalition. I think the effect of singling out one group that happened to be socially conservative in a sea of more socially liberal groups engaged in the same activity had a very chilling effect.¹⁴²

Commissioner Thomas immediately rebutted this criticism when he alluded to FEC litigation against socially liberal groups like Survival Education Fund, the National Organisation for Woman and the American-AFSCME union.¹⁴³ However the Republican leadership viewed their treatment by the FEC as unjust though not entirely surprising given that they viewed the agency to be populated by liberals.

This discussion has demonstrated that that Congress has attempted to micro-manage FEC enforcement in a number of ways. Yet Congress has a legitimate right through its oversight role to exercise direction and control. However, what might be difficult to justify was the overly political nature of that micro-management in a policy area that directly affected incumbents. President of Democracy 21 commented:

Fred Wertheimer: They only understand one thing, that's if someone is bothering them. As long as they are not being bothered and their friends are not being bothered, they are not going to pay any attention. They just won't.¹⁴⁴

¹⁴² U.S. House of Representatives, Committee on Appropriations, Subcommittee on the Treasury, Postal Service, and General Government Appropriations FY 1998 36-37.

¹⁴³ U.S. House of Representatives, Committee on Appropriations, Subcommittee on the Treasury, Postal Service and General Government Appropriations, FY 1998 37.

¹⁴⁴ Interview with the author, Washington D.C. 25.10.01.

Congress sought to bully and punish the agency and its key staffers for enforcing the law. The personal use rules and the litigation against high-profile conservative groups brought FEC/Congressional relations to an all-time low. In a 'budget crisis backgrounder' written by the FEC in FY 1995, the Commission referred to the punitive action taken by Congress against the Commission and noted how this was brought about by more vigorous enforcement and the introduction of personal use rules. When referring to the FY 1995 budget rescission the FEC statement opined:

'More specifically, this appears to be retribution for a more aggressive enforcement programme and a reaction to our rules defining that which constitutes illegal personal use of campaign funds. Those who would prefer a law that is essentially disclosure-based without limitations on the sources and amounts of campaign money can make a reasoned argument for that approach. However, the proper forum for any such debate is to propose substantive amendment to the law, not to intimidate the agency away from enforcement behind the veil of budget cuts to combat alleged bureaucratic inefficiencies.'¹⁴⁵

More recently, FEC/Congressional relations have improved significantly. Keller opined in *Roll Call* that 'everyone at the FEC's downtown headquarters seems to be enjoying the Commission's cozier relationship with Congress.'¹⁴⁶ Although part of the reason for that improvement is that key Congressional opponents of the FEC are no longer in office, the main reason is that the Commission has become less adversarial in its enforcement ethos and has become more acquiescent towards Congress. Congress has in fact been successful in changing enforcement policy without amending the FECA. A number of interviewees expressed their concern about the congenial relationship between regulator and regulated

¹⁴⁵ 'FEC Budget Crisis Backgrounder' appended to FEC Press Release 30.12.94.

¹⁴⁶ Keller A (2001) 32.

and alluded to the more deregulatory attitude at the Commission. Larry Noble was asked about the Congressional efforts to remove him:

Author: 'Were these attempts by Mitch McConnell, and Bob Livingston an aberration, or has the nature of Congressional relations with the FEC always been adversarial?'

Larry Noble: 'It was an aberration to the extent of how personal it got. That was very unusual, that they focused on me as the root of all evil at the FEC. But it was not an aberration in terms of an adversarial relationship. The FEC has always had an adversarial relationship to some extent with Congress. And I think the greater the adversarial relationship was a reflection that the FEC was trying to do its job. Now that the relationship is not that adversarial, is what I'm worried about. As a matter of fact there was an article in *Roll Call*, the Capitol Hill magazine, in one of the two, last couple of weeks, that talked about how well the FEC is getting along with Congress. My reaction to that was it's not doing its job. You don't want the people you regulate...you want them to respect you. You want them to think that you're fair, but you don't necessarily want them to think that you're doing a wonderful job. Doing a wonderful job to anybody in the regulated community means that you're leaving me alone.'¹⁴⁷

Tina VanBrakle was asked about the concern alluded to by Larry Noble:

Author: 'How would you respond to people who would say that it is a bad thing when the FEC starts to get a good relationship with Congress, or a harmonious.....someone told me today that it's almost like a 'love-fest' at the moment.'

Tina VanBrakle: 'There have been...I'd like to know who said that! There have been occasions that have been like a 'love-fest.' I think that maybe they would say, oh, maybe they've been captured, they're a captured organisation, they're captured by the very group that created them. You know, the regulators, because they control our budget, because they control the nomination process of Commissioners.'¹⁴⁸

¹⁴⁷ Interview with the author, Washington D.C. 17.10.01.

¹⁴⁸ Interview with the author, Washington D.C. 18.10.01.

When Commissioner Thomas was asked about FEC/Congressional relations and the change in enforcement ethos he commented:

Commissioner Thomas: 'But there was no doubt, that that was a bit of pressure on our General Council to stop pushing enforcing the law against groups like Christian Coalition, Christian Action Network, so that's how I would paint the time frame of FEC conflict with Congress. Now, because we have new Commissioners in place, and we have basically, in many respects issues where there will not be enforcement, relations with the Republican-controlled Congress, surprise, surprise are better. And I think that the folks who don't want much the agency to have a vigorous enforcement role, much like the statute as it is written, are probably fairly content right now. They've now got an FEC that has a disinclination to get four votes on the big issues.'¹⁴⁹

Trevor Potter was asked:

Author: 'Why do you think we have now got this much better relationship between the FEC and Congress? For example, historically you could argue that it's good when the FEC doesn't have a good relationship with Congress because it means they are doing their job.'

Trevor Potter: 'You could make that argument, yes.'

Author: 'And now I seem to see the position with the Commission changing, perhaps away from enforcement and more towards enforcing disclosure, rather than a different kind of...'

Trevor Potter: 'I think that is correct. I think the Commission is more conciliatory towards Congress. Congress has taken a greater interest in the Commission and has people on it who are there precisely because their Congressional sponsors worked hard to put them there. It's all a matter of public record. So I think the Commission is being less adversarial, and Congress has greater comfort in the Commission because they came through a process that had more Congressional involvement. Also, there are some specific personality changes, Congressman Livingston, who developed a great dislike for the Commission and was the point

¹⁴⁹ Interview with the author, Washington D.C. 18.10.01.

¹⁵⁰ Interview with the author, Washington D.C. 24.10.01.

person against the Commission, is not in Congress.¹⁵⁰

As one of the new appointees, Commissioner Mason viewed the more cautionary enforcement ethos as a positive thing:

Author: 'How would you explain the new more harmonious relationship between the FEC and Congress?'

Commissioner Mason: 'How would I explain it? Part of it is just the change in personnel because of this heavy Congressional role I talk about..it characterised, particularly the more recent appointments, the people on Capitol Hill have a higher degree of confidence in the individual Commissioners to make reasonable decisions. Part of it has to do with the determination of several of us to do all we can to foster good relations with Congress. I was a Congressional staffer, Commissioner Sandstrom was, Commissioner Wold was a legislative staffer in the California state legislature, not immediately preceding his appointment but was an experience that shaped his understanding of how it operates and so on. And so we understand what it is that motivates members and staff and we try to what extent we can to anticipate issues and address them. So part of it is attentiveness to the problem and not pound away at unproductive approaches and part of it is frankly change in enforcement policy. If the Commission had continued to pursue cases like Christian Coalition in a vigorous way, people on the floor would continue to be upset.'¹⁵¹

In *Roll Call*, Commissioner Mason alluded to the inherent tension between the FEC and Congress. He said 'it's always going to be difficult because we regulate Members of Congress and their campaigns.' However, he continued by saying that for that reason it is especially important to be 'sensitive to the realities of practising politics and that Congress understands that we are trying to be sensitive in that regard.'¹⁵² This comment was clearly

¹⁵⁰ Interview with the author, Washington D.C. 24.10.01.

¹⁵¹ Interview with the author, Washington D.C. 22.10.01.

¹⁵² Keller A (2001) 33.

suggestive of a particular kind of enforcement ethos. As was discussed in chapter 3, litigation policy has changed under the guidance of more recent appointees, and the Commission appears determined not to pursue action likely to bring about Congressional sanctions. Congress has generally been receptive to the administrative fines programme and ADR, yet both only deal with *malum prohibitum* violations and neither seriously challenge Congressional interests. Joan Claybrook, president of Public Citizen Inc, opined that the 'public thinks the FEC is an enforcement agency and therefore it provides Congress with great cover by its existence.'¹⁵³ Additionally, a *Christian Science Monitor* editorial commented:

The FEC is a good government tool that reassures voters that somebody's keeping an eye out for funny business.¹⁵⁴

Congress wishes the FEC to regulate and to continue to exist. Yet when that regulation becomes too vigorous, expansive or detrimental to their interests, Congress reins in the agency in the ways described.

Office of Management and Budget (OMB)

Although Congress has been the most active participant in micro-managing enforcement, the executive, through the Office of Management and Budget (OMB), has also played a significant part in undermining agency performance. Despite the small size of the FEC

¹⁵³ Stone P (1995) 1365.

¹⁵⁴ Comment (1995) 'The Electoral Watchdog': *Christian Science Monitor*, Thursday June 1, 20.

budget and the conservative nature of its budget requests, the OMB has rarely supported its financial requirements. FEC budget negotiations occur in the following way. Firstly, the agency assesses its budgetary needs. In order to make a valid assessment, the agency considers the level of financial activity that occurred in the previous election cycle and also whether it is a presidential election year. Additionally, they consider historical data contained in their Management Information System (MIS) which aids them in making a more accurate projection of their fiscal requirements.¹⁵⁵ When a figure has been established, the budget request is submitted to the OMB. Once this has been considered, the OMB will issue a 'passback.' This passback is the amount the executive is willing to support prior to the agency's budget submission to Congress. If the FEC budget committee view the OMB passback as unrealistic, they negotiate with an official at the OMB called the Programme Associate Director or PAD. In order to support these negotiations, the FEC Chairman may write to the Director of OMB setting out the justification for a higher passback. Whilst the Commission has preferred to secure agreement with the OMB because Congress tends to be more amenable to granting the full request when a consensus prevails, the FEC is not mandated to defer to the OMB. As the FEC is an independent regulatory Commission, it has concurrent submission authority.¹⁵⁶ Therefore, if agreement cannot be reached with OMB and the passback remains too low, the FEC may submit its own figure and appeal directly to Congress. On occasions, despite the lack of support from OMB, Congress has been willing to appropriate funds in excess of the OMB passback. This scenario is more likely when the administration makes uniform budget policies, awarding across the board figures without considering the nature and workload of particular agencies. Tina VanBrakle was interviewed about budgetary negotiations and the

¹⁵⁵ Letter written by FEC Chairman Scott Thomas, May 14 (1993) 1. Held by author.

¹⁵⁶ FECA Title 2 437d. (d).

interplay between agency, OMB and Congress:

Author: 'Going back to your earlier point about the administration, I have noted that the Center for Responsive Politics, and Elizabeth Hedlund have also kind of commented that the administration have not always been supportive of the FEC in terms of their budget. For example in 1993 and 1995 the FEC were encouraged to cut their budget request in return for administration support.'

Tina VanBrakle: 'I'll tell you the way it works. We submit a budget for 40 million dollars, they come back and say we can't give you 40 million dollars, we can give you 38 million dollars. It's called an OMB passback figure. The Congress, we strive to come to an agreement with OMB. It's better if you can go to Congress and say we are all in agreement here, this is a figure the OMB agreed on. We can live with this, and so on, and so forth. We did that over the years, but often we asked for a larger amount and through negotiation with OMB we'd drop it back, we appealed, and we would come out with a lesser passback figure. Congress would sometimes give us more than that because we would argue, and so on and so forth. But Congress doesn't like to give you more than the administration sets out for you. They like to start out with the administration's figure. Sometimes in the past, even when the Republicans didn't like us for the past few years, we managed to convince Congress to give us a little bit more. But it's a battle, an uphill struggle when the administration doesn't give you an adequate figure. This year, 2002, 2003, they didn't even give us current services level. The administration gave us flat figure, certain percentage increase for agencies, not looking at what they did. So the OMB did not even recognise and give us current services level. We successfully at this point, we are still working on the appropriations for 2002, but I think we have convinced our appropriators, particularly the House, to give us a decent figure. Now the Senate of course gave us a decent figure, but Mr. McConnell had a two million-dollar-earmark. He wanted the earmark for 2002, 2003, for election administration. But that's another story and I think we are going to be able to work it out.'

Author: 'It's just that most of the literature seems to be focused on Congress and they don't seem to adequately

cover the relationship between the FEC and the administration. Especially, in the light of. you are kind of starting at a disadvantage straight away in your relationship with Congress in negotiating the budget if you're not getting the support from the administration...they are cutting you at the knees before you start!

Tina VanBrakle: 'Exactly! And then it's more of a struggle to convince Congress and we have...I think you'll see by looking at this chart, with all the figures. We have been able to convince Congress to give us a better figure in many situations, but it is a struggle when it comes to our budget. Particularly if the administration cuts us back early.'¹⁵⁷

The Center for Responsive Politics (CRP) have criticised the lack of budgetary support afforded to the Commission by the administration in FY 1993 and 1995.¹⁵⁸ Elizabeth Hedlund of CRP's *FEC Watch* alluded to the fact that the Commission had reduced its budget requests in those years in order to secure agreement with the OMB. One might argue that this was a fair criticism because, as already noted, the FEC has a small budget and it has avoided the 'padding' characteristic in some other agencies. Therefore, in circumstances where the final appropriation received is substantially below the FEC's original budget request, core programmes such as disclosure and enforcement become degraded. However, in keeping with much of the debate that surrounds political finance regulation, the issue of budgetary politics is a normative one. Those advocating more expansive enforcement see the *quid pro quo* arrangement where the budget request is reduced in return for securing OMB approval as highly undesirable. Yet those who view the regulations as stifling and vigorous enforcement as undesirable argue that the budgetary negotiations described above have been, and continue to be the common practice. For

¹⁵⁷ Interview with the author, Washington D.C. 18.10.01.

¹⁵⁸ www.opensecrets.org/pubs/law-justice 3.3.01. Colloquay (1994) 237.

example, when Commissioner Mason was asked about the CRP criticisms he opined that the legitimate role of the OMB was to control expenditure and that, unlike many other agencies, the concurrent submission status of the FEC afforded it more leverage than other agencies in OMB negotiations.

Commissioner Mason: 'This agency is in better shape in that regard than virtually any other agency in the government. It is a normal part of the administrative process to request resources and submit them to the OMB, and have the OMB cut them. And from the point of view of an administrator of an individual agency, I view that as normal. If I were to submit a budget to the OMB, and have it entirely approved, I would wonder what was wrong. What else should I have asked for? In other words, OMB's function is in part to match resources and goals, you would expect them to play a role in eliminating marginal efforts, projects. Now obviously there could be very vigorous disputes as to what's marginal or of low value but that's their job. So the fact that they've done it is of no surprise. There's many unique issues that this agency faces and that just isn't one of them.'

'The reason why we are in better shape than almost any other agency is that we do have what we call concurrent submissional, or bypass authority. Where if we are not satisfied with what the OMB give us, we can go straight to Congress. And the Commission has done that in the past and at least in one occasion, we were successful as a result of that. So, other agencies do that, but they do it in a much less formal way. So, what has happened in 93 and 95, because I wasn't here but at least what has happened a couple of years of the several I have been here is that we will submit a request to OMB, and OMB come back and say it needs to be cut, and we will negotiate. And even though we know we can go straight to Congress, we know we are much better off reaching agreement with OMB. And so we will try to exercise the leverage we have in essence of the bypass authority. You know, if we get this much then we'll agree, if we can't, we just have to agree to disagree, and go make our case to Congress. That gives us a little more leverage that some other agencies have. And if the accusation is that's the process that went on in 93, and

¹⁹⁹ Interview with the author, Washington D.C. 22.10.01.

95, I say so much better for the agency.¹⁵⁹

When Commissioner Thomas was asked about FEC/OMB budget negotiations and the lack of support alluded to by the CRP he commented:

Commissioner Thomas: There has always been a tension there, on the one hand, we don't want to view ourselves as needing OMB approval to take our budget request on to Congress. By the same token we realise realities. If you can get agreement with OMB on a budget dollar amount and they're willing to argue in support of that, with Congressional folks, it does help you because whichever side the administration falls on, that side of the Congressional leadership will in theory be receptive to an argument from OMB, yea give the FEC that amount, we agree that they should get this amount. But that tension is always there. Some years we have been able to get an agreement with OMB by going down a tiny bit on the amount we had originally wanted to get, and we've been willing to accept that slight reduction in exchange for getting OMB's support. In other years though, we've said, 'sorry OMB we can't go down as low as you think we should go, we are going to go right straight to Congress and ask for it directly.' And in that sense, the agency has a pretty good track record and of breaking out and seeking money from Congress independently when OMB has not been willing to go along with what we want. The real crunch time ends up coming up on the Hill anyway, our battles with Congress that determine where we're going to come out on the process. What is interesting to me, is to take the dollar amount that we are seeking from Congress after we have had our negotiation with OMB and compare what we end up with after Congress has finally gone through the appropriation process. And in some of those tough years, 95, 96, 97, and 98 time-frame, you can see the amount we were requesting was always being chopped by Congress, and on top of that, they were earmarking money they would give us, for computers, instead of for staffing. In recent years, we've seen Congress pretty much give us the dollar amount that we're asking for, so the only battle we faced is whether Congress is earmarking so much of it, so much of it for computers that it was going to force us to cut our staffing.¹⁶⁰

¹⁶⁰ Interview with the author, Washington D.C. 18.10.01.

Despite the fact that the OMB has only supported the Commission's full budget request on two occasions, FY 1976 and FY 1998, without the bypass authority alluded to by Tina VanBrakle and Commissioners Mason and Thomas, the passback figure received by the Commission might have been even lower. For example, although appendix E illustrates the OMB passback from FY 1976 to FY 2002, these figures were final determinations after the negotiation process occurred. Upon examination of the correspondence between the Commission and the OMB, many initial determinations made by the OMB were below post-negotiation levels. For example, the FY 1993 passback of \$19,085,000 was successfully appealed and increased to \$21,310,000. The FY 1994 passback of \$20,896,000 was increased to \$21,151,000, though Congress eventually appropriated a higher figure of \$23,564,000 that year. In October 1993 President Clinton issued a memorandum entitled an 'Agency Streamlining Plan.' This sought to reduce the executive branch civilian workforce by 12%. Although the directive requested all independent regulatory commissions to comply with the memorandum, Chairman Thomas wrote to the OMB noting that such a directive was not legally binding on the FEC and that 'the Administration had called for strengthening the Commission, not its diminution.'⁶¹ The following year Chairman Thomas wrote to urge the OMB to support the FEC's FY 1995 budget request of \$29,828,000. However, the passback received was approximately \$2.75 million below that figure. Again this hindered budgetary negotiations with Congress, which eventually appropriated \$25,648,000 that year. The next year, FEC Chairman Trevor Potter wrote to the OMB justifying his FY 1996 request of \$31,820,500. Although the OMB only supported a passback of \$29,021,000, they did write to Bob Livingston (R-LA) objecting to

⁶¹ Letter held by the author, 1.11.93.

the appropriation subcommittee mark of \$26,521,000 that was eventually appropriated by Congress.¹⁶² The appeal process was more successful in 1996, when the Commission urged the OMB to reconsider its FY 1997 \$29,000,000 passback. Although the passback was increased to \$31,080,000, Congress appropriated \$28,165,000, a figure even lower than the original passback. The administration was surprisingly supportive of the Commission's FY 1998 budget request, given the controversy surrounding the campaign finance practices of Clinton/Gore and the DNC. Not only did the OMB provide a passback equal to the amount requested by the Commission (\$34,216,000), it also urged Congress to appropriate the supplemental funding required to investigate the allegations surrounding the 1996 election cycle. President Clinton wrote to Speaker Gingrich saying that:

'More money for the agency should be part of a bipartisan effort to restore the public trust in the way we finance elections to the Congress and the Presidency.'¹⁶³

President Clinton's support for the FEC was also reported in various newspapers at the time, including *USA Today* and was also set out in a September 17 *Statement of Administration Policy*.¹⁶⁴ However, despite the uncharacteristic support lent by the administration, Congress appropriated almost \$3 million less than the OMB had requested and also denied the \$6.6 million supplemental funding to investigate the 1996 elections. The Commission was unable to reach budget agreement with the OMB during FY 2000,

¹⁶² Letter held by the author, 10.7.95.

¹⁶³ Mitchell A (1997) 'Clinton Requests More Money for Election Panel': *New York Times*, 8.4.97. The letter also stated that 'over the past two years, Congress has appropriated for the FEC substantially less than I requested. Today, commissioners of both parties have testified that the FEC is overworked, under-funded, and unable to address the many issues raised in recent elections.' Press Release issued by White House Briefing Room, 7.4.97.

¹⁶⁴ Comment (1997) 'Campaign Finance': *USA Today*, 4.8.97. Executive Office of the President, OMB, *Statement of Administration Policy*, 17.9.97.

FY 2001 and FY 2002. Formal appeals have been regularly submitted to the OMB by the FEC and, as appendix E shows, the disparity between the FEC request and the OMB passback appears to be widening. One might argue that a lack of support from the OMB and the submission of a formal appeal against passback determinations have become the norm. Formal appeals are written by the FEC Chairman and may be co-signed by the Vice-Chairman. The FEC Staff Director and certain members of Congress might also make representations on behalf of the Commission to the OMB.¹⁶⁵ FEC appeals against OMB passback determinations often set out the importance of working with the OMB and the desire to reach agreement, yet all written appeals also allude to the agency's bypass authority under 2 U.S.C 437d (d) of the FECA. The Commission makes its case against passback determinations by explaining the consequences for agency performance if Congress is guided by, and comes to accept the OMB figure. Appeals invariably refer to staff cuts and reduced or degraded disclosure and enforcement capacity. One might argue that whilst the appeals process has yielded some positive results for the Commission, a significantly higher passback has rarely been negotiated. Therefore, now that FEC/Congressional relations have improved, FEC budget negotiators might be more successful by employing their bypass authority and trying to make the most persuasive case that they can directly to Congress. One might argue that since many of the controversial issues have been taken 'off the enforcement agenda,' Congress might prove to be more responsive to the Commission's budgetary needs. For example, in FY 2002 the FEC budget

¹⁶⁵ For example, House Elections Subcommittee Chairman Al Swift (D-WA) wrote to Leon Panetta asking the OMB to support the Commission's FY 1995 budget request of \$31,793,000. Letter held by the author, 1.2.94. FEC Chairman Scott Thomas wrote the formal appeal that year and commented that the passback determination of \$27,106,000 'would seriously undermine the Commission's ability to administer and enforce the federal campaign finance laws.' Despite these representations, Barnes noted how the 'OMB didn't budge.' Barnes J (1994) 'Wobbly Watchdog': *National Journal*, 2.4.97, 778. John Surina, FEC Staff Director wrote to Isabel Sawhill, the OMB PAD on April 30 1993. There, he set out the increased workload the agency faced, the inadequacy of the passback and the fact that the OMB had failed to respond to previous written appeals and 'telephonic contacts.' Letter held by the author, 30.4.93.

request stood at \$47,671,000, yet despite an OMB passback of \$41,411,000, Congress finally appropriated \$43,689,000. However, the lack of OMB support for FEC budget requests has undermined the agency's negotiating position with Congress.

Conclusion

In conclusion, Congress and the administration have shaped the nature and effectiveness of FEC enforcement. Although the FEC budget has grown quite significantly over the years, the demands on the agency have outpaced that growth. Spending by the Department of Justice and Congressional committees investigating the 1996 elections demonstrated the relative modesty of the FEC budget. This small size has made FEC enforcement

particularly vulnerable to Congressional micro-management strategies. Ring-fencing of appropriations away from enforcement, restricting the agency's authority to recruit staff, despatching investigators and auditors to scrutinise the agency, and attempting to undermine the General Counsel and Staff Director's security of tenure were all designed to micro-manage FEC enforcement. As the FEC became more vigorous in its enforcement efforts, increasing financial penalties, promulgating new personal use rules and initiating unpopular litigation against conservative groups, so the nature of FEC/Congressional relations deteriorated. The combination of Congressional pressure and new Commissioner appointments has resulted in a change in enforcement ethos. One might argue that the agency has attempted to de-politicise enforcement. Bill Allison commented on this:

Bill Allison: 'It seems like, there's nothing wrong with disclosure,.....it almost seems like there should be two separate agencies involved.'¹⁶⁶

The agency has moved away from its previous attempts at enforcing the controversial areas of law, the issues that might have the most substantive impact on the regulated community and has embraced an ethos that stresses bright line, less combative, low-impact programmes. FEC/Congressional relations have improved since these changes and the regulated now appear content with the regulators. One might argue that the 'love-fest' alluded to earlier will continue as long as enforcement remains in line with the Congressionally preferred model. The agency is likely to stress the supremacy of voluntary compliance, of education and outreach, administrative fines and ADR. It is also likely to

¹⁶⁶ Interview with the author, Washington D.C. 22.10.01.

continue the process of modernisation through the application of information technology and develop the more efficient management practices recommended by the PWC audit. The dominant enforcement model has become the one most commonly associated with First Amendment Republicans. The FEC will become increasingly disclosure-based, with the most significant campaign finance investigations carried out by Congressional committees and the Department of Justice Public Integrity Section. Whilst Commissioner Mason asserted that the role of the OMB was to control expenditure, the Administrations consistent lack support for the FEC cannot be justified as merely 'the normal way of doing business.' The fact that the OMB has endorsed the agency's budget request twice in twenty-seven years indicates an enduring attitude about the importance of enforcing the nation's campaign finance laws. Administrations representing both political hues have failed to support the Commission adequately. When the Administration fails to lend its support, Congress finds it more difficult to justify appropriating the amount requested by the agency.

Conclusion

U.S. political finance law is unique in that academics, politicians, lawyers and even those charged with its enforcement have often asserted that it is undesirable, often unworkable and, by its very nature, infringes First Amendment free speech protections. The opposition to political finance law may stem from an apolitical rationalism, from philosophical beliefs, or from partisan self-interest. Yet others are equally convinced about the desirability of those laws and advocate their vigorous enforcement. Notions of political equality, ethical concerns about *quid pro quo* relationships, and the need for financial transparency and effective deterrence usually inform this view. Jan Baran employed the Kabuki theatre metaphor whereby government decision-makers (the FEC in this case) attempt to reconcile these two diametrically opposed positions by erring towards the centre ground.¹ However, this thesis has shown that the courts, the executive and Congress have either hobbled the enforcement process, or have shaped it into a largely benign form tolerated by the regulated community.

The Courts

The courts have played a significant role in weakening the enforcement of campaign finance law. Larry Noble commented:

Larry Noble: 'I teach at George Washington University, teach campaign finance law, and I start by telling the students in a large part this is a constitutional law class,

¹ Interview with the author, Washington D.C. 17.10.01.

every case you read is going to deal with First Amendment.²

In *U.S. v United States Brewers' Association* (1916) the court failed to resolve the constitutional issues involved in the case, thereby contributing to a cultural timidity towards enforcement. The *U.S. v Newberry* (1921) case dealt a serious blow to enforcement when it declared that Congress did not have the authority to regulate primary elections or the nomination process. Although the *U.S. v Classic* (1941) decision reversed *Newberry*, its significance endured until 1971 when the FECA was enacted. In 1973 Congressional attempts to place limits on media expenditures were deemed unconstitutional and mandatory spending limits were also outlawed in *Buckley v Valeo* (1976). The effectiveness of regulation was also limited by the narrow way in which express advocacy was defined in *FEC v CLITRIM* (1980), *Faucher v FEC* (1991) and *FEC v Christian Action Network* (1995). Additionally, the Commission's own express advocacy regulations were deemed unconstitutional in *Maine Right to Life Committee* (1996) and *Virginia Society for Human Life v FEC* (2001). The courts have also ruled against the Commission's regulations on coordination in *FEC v Public Citizen* (1999) and *FEC v Christian Coalition* (1998). Whilst the legitimate role of the courts is to uphold constitutional protections and to check the over zealous use of regulatory power, many court cases have seriously eroded the efficacy of the law.

The Executive

Presidents, the Department of Justice and the Office of Management and Budget have also

² Interview with the author, Washington D.C. 17.10.01.

contributed to weak enforcement. Theodore Roosevelt was completely reliant on corporate money in his 1904 election and Harding, Nixon and Clinton/Gore have all broken either the letter of the law, or the spirit of it. Since the establishment of the FEC, many Presidents have talked tough on campaign finance issues, yet none have been willing to appoint independent minded pro-enforcement Commissioners. Despite the *Buckley* ruling, the White House has allowed Congress to make four *de facto* appointments to the Commission. The independent, blue-ribbon panel advocated by the reform community, is a model alien to the American political system and one that is unlikely ever to be established. However, the Department of Justice and the OMB have hobbled enforcement more directly. No prosecutions were attempted under the 1907 Act and only one was attempted under the 1910 and 1911 Acts. The Department of Justice also failed to enforce either the 1925 FCPA or the 1971 FECA. In order to avoid the controversy that often surrounds partisan campaign finance cases, the Department of Justice either deflected criticism of their failure to act by blaming others, usually the statutory officers under the 1971 Act, or argued that enforcement was unjustified because of a lack of historical precedent. Since the FEC was created, the OMB has only approved the Commission's full budget request on two occasions. Despite being one of the smallest agencies in the Federal Government, the OMB passback has often been significantly below the figure determined by the agency. Whilst the agency has been conservative in assessing its budgetary needs due to the sensitive nature of its mandate, budget negotiations and the appeals process have rarely led to significant increases in the original OMB passback. Although the agency has concurrent submission authority, the consistent lack of support from the OMB has undermined the Commission's bargaining position with Congress.

Congress

Congress has been the most significant force in ensuring a permissive regulatory environment. Prior to the passage of the FECA 1974, enforcement was either ignored or Congress instituted parochial, largely illusory arrangements. Those responsible for enforcement actively discouraged the scrutiny of disclosure reports. Access to the index log was arbitrarily denied, short office hours were kept, and the disclosures that were made were often incomplete or inaccurate. Additionally, Congress enacted law that was narrow in remit and contained numerous loopholes. President Johnson described the 1925 FCPA as 'more loophole than law, inviting evasion and circumvention.'³ The Congressional attitude towards enforcement was illustrated by the *U.S. v Classic* (1941) decision. Although the court ruled that Congress was entitled to regulate primary elections, it failed to do so until 1971. The failure to regulate primary elections meant that the law had only nominal utility as the outcome of the general election was often determined at this stage. Additionally, when Congress created the FEC, the bipartisan structure, the diffused leadership and weak powers, all undermined its ability to enforce the statute effectively. The due process protections built into the law also meant that enforcement timeliness was poor, something that has undermined the practical application the democratic or disclosure model of regulation. More recently, Congress has sought to control and micro manage enforcement by introducing term limits for Commissioners, cutting the FEC budget, ring-fencing appropriations, dispatching auditors to investigate the agency and targeting its senior staffers for removal. Investigations of high-profile groups and litigating unsettled areas of law have been discouraged by Congress, whilst electronic filing, ADP, administrative fines and ADR have been praised and encouraged. The Congressionally preferred model of enforcement embraces non-controversial low impact programmes and

³ www.campaignfinancesite.org/history/reform 4.3.01.

disclosure, whilst controversial, substantive and traditionally more adversarial enforcement is discouraged.

FEC

One of the most enduring criticisms of the Commission has been the lack of timely enforcement. Some have blamed the FEC for this slowness. Trevor Potter described how enforcement cases were not immediately allocated to a lawyer and worked, but were put in 'Siberia.'⁴ Donald McGahn also criticised the bureaucracy for its slowness, saying that he often had to reacquaint himself with cases after hearing nothing from the Commission for several months.⁵ Although many others referred to the agency's lack of timeliness, a range of variables contributed to the Commission's poor performance. Due process protections contained in the law has meant that enforcement is invariably a lengthy and multi-staged affair. Some in the regulated community have sought to take advantage of the Commission's weak legal powers by dragging out the conciliation process. Stale cases become less salient to the electorate and the Commission. Cain and Lochner opined that the electorate were less likely to change their voting behaviour as a consequence of old violations and the Commission actively disposes of stale cases under the EPS.⁶ Additionally, the significant rise in campaign spending has resulted in a workload that has outpaced enforcement capacity. Furthermore, case complexity and a dramatic rise in the number of respondents involved in each MUR has also reduced timely enforcement.

⁴ Interview with the author, Washington D.C. 24.10.01.

⁵ Interview with the author, Washington D.C. 16.10.01.

⁶ Cain B & Lochner T (1999) 1919.

The administrative fines programme has generally been welcomed by the regulated community, and public interest advocates. As the FEC has been criticised for the complexity of the law and its regulations, the fines programme was seen as an example of bright line regulation and best practice. However, its utility as a deterrent against non-compliance should not be overestimated. Treasurers are responsible for filing disclosure reports in a timely and accurate fashion, not candidates. Fines can also be paid from political donations and a Notice of Proposed Rule Making (NPRM) published April 25 2002 sought to reduce the level of penalties imposed. Finally, it is also unclear if the programme will 'free up' resources in the OGC by removing low-level violations from their enforcement profile.

The regulated community was often ignorant about ADR or expressed a lack of enthusiasm for the programme. However, whilst its shortcomings have been described at length in chapter 2, it is a useful programme for inexperienced, first-time players and those who wish to resolve a low-level violation quickly and cheaply.

The Commission was found to enforce the law in a non-partisan way. The bipartisan structure and the mixed-majority voting requirement ensure that one Party cannot use the agency as a political weapon against the other. Empirical research by PWC also found the agency to enforce the law without partisan bias.⁷ Under the EPS, the OGC dedicates more resources to enforcing the law against high-profile repeat players than it does to the political amateur. However, whether this results in substantive enforcement depends on the Commission, not the bureaucracy. If a MUR involves a high profile actor and an unsettled

⁷ PWC (1999) E-S 2.

or controversial area of law, the Commission may have difficulty in attracting the necessary four votes in order to proceed. Conversely, although first-time players are not rated as highly as repeat players are under the EPS, their inexperience and lack of professional legal and accounting services lead them to commit higher numbers of violations which also tend to be the most easily detectable. Therefore, the amateur does attract the attention of the RAD and the OGC. Furthermore, these *malum prohibitum* cases benefit the agency as they 'get the numbers up,' and thereby contribute positively to agency performance indicators. Whether one views this scenario as fair enforcement, becomes a normative judgement.

Finally, this thesis challenged the traditional orthodoxy, most often espoused by the reform community, that enforcement is weak because of partisan deadlock between Republican and Democratic Party appointees. Whilst partisanship was an issue that fed into the Commission's decision-making process, it was not the only factor. Commissioners tended to agree more often than disagree and most cases were clear, routine and devoid of controversy. Legal interpretation also influenced the way Commissioners voted. This has been especially important in controversial or unsettled areas of law, like express advocacy and coordination. Evidentiary also impacts on the decision-making process. However, Jan Baran noted that evidence is not actually presented to and scrutinised by the Commissioners, they merely rely on the facts contained in the General Counsel's report. Finally, the individual Commissioners' philosophy towards regulating politics also effects the outcome of deliberations. Enforcement has been weak and whilst agency performance has contributed to that weakness, the courts, the executive, and most significantly Congress, have all played their part in undermining the efficacy of enforcement.

Appendix A

Federal Election Campaign Act 1971

1. Limits the amount that candidates for Federal office can spend on a range of media: television, radio, newspapers, magazines, etc., in any primary, special, runoff, or general election. The expenditure limit is calculated by applying a formula of ten cents multiplied by the number of voting age population within the geographical unit covered by the election.
2. No candidate may spend more than 60% of his/her media expenditure on broadcasting.
3. Limits are placed on the amounts broadcast media may charge candidates 45 days before a primary election, and up to sixty days, before a general election.
4. Each supplier of advertising space must have written certification from the candidate, or person specifically authorized by the candidate, that the expenditure is within the permitted limits of the law.
5. The ten cent formula, is periodically reviewed in conjunction with rises in the Federal governments price index. By the time the FECA 1971 was enacted, this had risen to 10.43 cents.
6. The definition of election was broadened, encompassing; general, special, primary, runoff, election, nominating convention or caucus, delegate selection primary, presidential preference primary, or constitutional convention.
7. Definitions of 'contribution,' and 'expenditure' are broadened under the Act.
8. A candidate, and the candidates immediate family, may not contribute to his/her own campaign, more than; \$50,000 for Presidential, and Vice Presidential races, \$35,000 for Senatorial races, and \$25,000 for Representative, delegate, or resident commissioner.
9. That the appropriate supervisory officers to oversee administration of the Act shall be; the Clerk of the House, for House candidates, Secretary of the Senate, for Senate candidates, and the Comptroller General for Presidential candidates, and other miscellaneous committees. Supervisory officers are to compile annual reports on each committee which are to be offered for sale to the public.
10. All political committees who receive in excess of \$1,000 per calendar year must register with the appropriate supervisory officer/s.
11. All disclosure reports made, must also be filed at state level with the Secretary of State for local inspection.
12. Political committees and candidates must report total cash on hand, and total receipts by category. Each contribution over \$100 must be recorded. Information mandated includes the name of the contributor; address, occupation, place of work, and date the contribution was received. Similar requirements are mandated for expenditures, and all debts, and other financial obligations.
13. Disclosure reports are to be made by candidates, and committees on; the 10th day of March, June, and September, and on the 15th and 5th day preceding an election, and the 31st of January. If contributions are received after the last pre-election report and amount to over \$5,000, a report must be made within 48 hours of receipt.
14. The costs of presidential nominating conventions must be disclosed within sixty days.
15. Prohibits any contribution to a candidate, or committee by one person in the name of another (so called ghost contributions).
16. Explicitly defines and codifies the role that corporations, and labor unions can play in

political campaigns, voter registration, and get-out-the-vote drives.
17. Authorises the Comptroller General to act as a national clearing-house for election information concerning the administration of the Act.

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Appendix B

General Accounting Office Interpretation of Federal Election Campaign Act 1971

Violation Profiles

Administrative. Disclosure Violations (*Malum prohibitum*)

1. Failure to register with the GAO.
2. Failure to disclose the name, address, occupation, business location, and date of contribution. Any omissions of the above data would constitute a violation.
3. Failure to disclose contributions in excess of \$100.
4. Failure to include legal information in literature seeking contributions.
5. Failure to list depositories.
6. Inaccurate reporting of cash on hand.
7. Incomplete, or inaccurate disclosure of contribution transfers between committees.
8. Failure to report contributions of \$5,000, or more, within 48 hours, if received after the last pre-election disclosure date. This mandate, also applied to such contributions made in the immediate post election period.
9. Failure to report, and inaccurate reporting of loans; debts, shares, and in-kind contributions.
10. Late reporting.
11. Incorrectly reported transfers, payments, and administrative errors, like using the incorrect disclosure form.

These offences may involve attempts to limit or misrepresent, information required by the Act.

Substantive Violations (*Malum in se*)

1. Improper handling of cash contributions.
2. Failure of mass media institutions to obtain the necessary certification, stating that a candidates expenditures are within the legal limits.
3. Failure to keep accurate, and detailed records, especially when related to large sums.
4. Over-reporting of contributions, and expenditures by large amounts. This strategy is often motivated by those wishing to mislead the electorate, making them think that campaigns, are more successful than they are.
5. Attempts at 'creative accounting' by reporting fictitious expenditures in order to make balances appear accurate.
6. The use of altered or duplicate invoices.
7. Knowing, and wilful, false declarations.
8. Patronage contributions by state employees who receive a benefit.

These offences, if identified, would warrant a criminal referral to the Department of Justice.

Alexander H (1976) 15-17.
Cain B & Lochner T (1999) 1914.

Appendix C

Breakdown of GAO audits finding violations in the political finance activities of the Nixon, and McGovern campaigns.

President Richard M. Nixon:

August 26th 1972: failure of the main finance committee to re-elect the President to;

1. Failure to report and record \$25,000 contribution from Kenneth Dahlberg.
2. Failure to record records relating to four Mexican bank cheques, totalling \$89,000.
3. Failure to maintain records relating to a currency deposit of \$350,000.

February 13th 1973:

1. Failure of the committee to report large contributions immediately before the November 7th general election.

March 12 1973:

1. The committee failed to keep proper records regarding cash contribution by Robert L. Vesco, and failure to report said contribution.

April 27 1973

1. Failure of the committee to report payments to Theodore Brill; Robert Odle, and Phillip Joanou. The report also stated concern about large amounts of unaccounted for cash that the committee had control over.

May 3 1973:

1. Concealment of a payment made to fund a New York Times advertisement supporting President Nixon's decision to mine Haiphong harbour.

May 20 1973:

1. Failure to report a number of payments made by the finance committee to re-elect the President. Some of these payments, involved payments to the 'Watergate defendants.'

George McGovern:

McGovern's finances were much more decentralised, and therefore, far more difficult to monitor, and account for. For example, 750 committees registered with the Office of Federal Elections as supporting McGovern.

October 6th 1972:

1. Inadequate record keeping in the campaign generally and a large number of errors were contained in the disclosures made.

October 31st 1972:

1. Transfer discrepancies, difficulty in identifying committee treasurers, and failure to provide contributor information.

August 13th 1973:

1. Report recommending the referral of the Wisconsin McGovern for President Committee, for failing to keep adequate records, and failing to control, and account for, expenditures, and disclosures.

October 17th 1973:

1. Report recommending the referral of the Massachusetts McGovern for President Committee. They failed to correct incorrect reports, and failed to account for expenditures, and contributions.

Source

McCoy L (1974) 248-250.

Appendix D

Enforcement statistics that set out the ability of the OGC to process MUR's.

YEAR	TOTAL CASE-LOAD	CLOSED DURING YEAR	PERCENT CLOSED	PENDING AT END OF YEAR
1977	211	118	55.9	93
1978	574	401	69.9	173
1979	441	288	65.3	153
1980	407	193	47.4	214
1981	280	167	59.6	113
1982	226	133	58.8	93
1983	196	118	60.2	78
1984	361	189	52.4	172
1985	429	292	68.1	137
1986	328	185	56.4	143
1987	404	233	57.7	171
1988	407	187	45.9	220
1989	438	237	54.1	201
1990	396	159	40.2	237

Source

www.opensecrets.org 3.3.01.

Appendix E

Detailed Budget History

FEC determinations include any supplemental budget requests made that year. The OMB passback is the figure the administration is willing to agree to. The legal mechanics and politics of OMB budget negotiations are described in the main discussion.

In order to aid the validity of the table the OMB passback figures include the administration's response to any supplemental requests made. Some requests may have been revised down at a later date in order to reach agreement with OMB or revised up in light of an increased workload or unforeseen additional costs. However, the table is still useful in showing what sums the FEC considered necessary for it to perform its mandate and the responses of the executive and Congress.

The table shows that the OMB only supported the agency's budget request in full on two occasions, 1976 and 1998. The data also shows that whilst Congress has been willing to appropriate funds in excess of the OMB passback, this figure has often been significantly below that requested by the agency.

KEY

- (A) Congress authorised a \$1,458,000 rescission on funds appropriated.
- (B) \$1,500,000 earmarked for automated data processing (ADP) upgrade.
- (C) \$1,700,000 supplemental request included in that years budget was sought to address the complaints surrounding the 1996 election cycle: request denied.
- (D) \$2,500,000 earmarked for internal ADP upgrade.
- (E) \$3,800,000 earmarked for computerisation; \$750,000 transferred to the GAO to pay for PWC Audit (1999), \$300,000 earmark to place reports on the Internet.
- (F) \$4,400,000 earmarked for computerisation; \$1,120,000 earmark to improve enforcement procedures and \$59,000 reduction in travel and administration costs for FEC.

FISCAL YEAR	FEC REQUEST	OMB PASSBACK	APPROPRIATION
1976	\$6,605,000	\$6,605,000	\$5,000,000
1976 Transitional Quarter	\$1,589,000	\$1,089,000	\$1,250,000
1977	\$6,950,000	\$6,180,000	\$6,180,000
1978	\$8,433,000	\$7,143,000	\$7,610,000
1979	\$8,917,000	\$8,517,000	\$8,293,000
1980	\$11,107,620	\$9,039,000	\$8,946,000
1981	\$12,142,690	\$9,662,000	\$9,662,000
1982	\$13,435,119	\$8,759,907	\$9,174,400
1983	\$10,707,354	\$10,077,000	\$9,897,000
1984	\$10,438,139	\$10,095,000	\$10,744,000
1985	\$13,763,760	\$10,245,760	\$13,016,000
1986	\$13,421,000	\$12,756,000	\$11,898,000
1987	\$14,140,000	\$12,883,000	\$12,883,000
1988	\$14,322,500	\$14,174,000	\$14,174,000
1989	\$16,298,000	\$15,683,000	\$15,683,000
1990	\$15,522,000	\$14,257,000	\$15,330,000
1991	\$18,674,000	\$17,150,000	\$17,150,000
1992	\$20,611,000	\$18,808,000	\$18,808,000
1993	\$22,430,000	\$21,310,000	\$21,143,000
1994	\$23,964,000	\$21,151,000	\$23,564,000
1995 (A)	\$29,828,000	\$27,106,000	\$25,648,000
1996 (B)	\$31,820,000	\$29,021,000	\$26,521,000
1997 (C) (D)	\$35,341,000	\$31,080,000	\$28,165,000
1998 (E)	\$34,216,000	\$34,216,000	\$31,650,000
1999 (F)	\$37,653,000	\$36,504,000	\$36,791,000
2000	\$38,580,000	\$38,516,000	\$38,278,000
2001	\$44,323,000	\$40,500,000	\$40,410,000
2002	\$47,671,000	\$41,411,000	\$43,689,000

Source: Federal Election Commission, Congressional Affairs Office, Detailed Budget History Revised July 2001.

Appendix F

Introduction

Bipartisan Campaign Finance Act (BCRA) 2002

The BCRA (2002) is a significant reform to the law passed in the post Watergate era. It attempts to proscribe the raising and spending of non-federal funds, so called soft money, clarify certain legal definitions and close a number of loopholes that have been exploited by the regulated community. The law also promotes certain egalitarian ideals by allowing candidates to raise money in excess of the revised contribution limits if they are faced with a particularly wealthy opponent, the so called 'millionaires amendment.'

However, it remains unclear how the BCRA will shape the conduct of the political process as it is being challenged in the courts. Supporters and defenders of the law have filed suit in U.S. District Court against the Federal Election Commission. Those who seek to defend the BCRA argue that the FEC has weakened the original statutory intent by promulgating new rules that implement the law in a permissive way. For example, on 8 October 2002, Christopher Shays (R-CT) and Martin Meehan (D-MA) filed suit arguing that the FEC had acted in an arbitrary and capricious manner, had abused their discretion and had acted in excess of their statutory jurisdiction. All these charges related to FEC rule making. The law aimed to stop the 'solicitation' (asking for) and the 'directing' (spending) of soft money. However, in a 4-2 Commissioner vote tally that rejected the General Counsel's stricter draft regulations, 'solicit' or 'direct' did not include the words 'recommend' or 'suggest.' Therefore, Shays/Meehan *et al* asserted that a loophole has been contrived to allow the raising and spending of soft money that eludes the statutory intent of the BCRA. Conversely, Senator Mitch McConnell (R-KY) filed suit against the FEC charging that the BCRA is unconstitutional. He described the reform as 'the most threatening frontal assault on core First Amendment values in a generation, that it is the modern-day Alien and Sedition Acts and that it will fundamentally undermine the political Parties.'¹ Those defending the Act argue that the BCRA is a modest reform that merely attempts to close the loopholes present in the Federal Election Campaign Act 1971². Again, conversely, those who challenge the law claim that is an epochal change that will have devastating consequences on democratic politics and destroy First Amendment freedoms. Each side caricature's the Act as they attempt to support or challenge it. However, a clearer picture of the BCRA is likely to emerge in the summer of 2003 when the U.S. Supreme Court reviews its constitutionality.

¹ In the United States District Court For the District of Columbia: *Senator Mitch McConnell et al v Federal Election Commission et al. Joint Government and Intervenor's* (Sic) Introduction I-1.

² FECA 1971 as amended 1974, 1976 and 1979.

The main provisions of the BCRA (2002) are set out below

Reduction of Special Interest Influence

Prohibition of Soft Money or Non Federal Funds

'A national committee of a political party may not solicit, receive, or direct to another person a contribution, donation, or transfer of funds or any other thing of value, or spend any funds, that are not subject to the limitations, prohibitions, and reporting requirements of this Act.'

'Applicability: The prohibition established by paragraph 1 applies to any such national committee, any officer or agent acting on behalf of such a national committee, and any entity that is directly or indirectly established, financed, maintained, or controlled by such a national committee.'

In addition to the 'solicit' and 'direct' loophole alluded to in the introduction, a further controversy has surrounded the term 'officer' or 'agent.' Those who seek to defend the law argue that an individual or employee may not have authority to raise or spend soft money, because he/she is not being an officer or agent. However, the concern has been that persons not reaching the status of 'officer' or 'agent' might engage in activity that the BCRA 2002 was designed to prohibit. Implicit understandings with informal contacts are notoriously difficult to regulate.

Members of Congress, Federal Officeholders and Federal candidates are banned from raising soft money in connection with any Federal election.

State, district and local party committees must fund all their Federal election activity from hard money, that which complies with the contribution limits and prohibitions on funding sources contained in the law.

The Levin Amendment allows for certain soft money expenditures by state and local party committees for 'generic get out the vote drives' and voter registration.

All political committees are proscribed from soliciting funds or directing the expenditure of funds to non-partisan, not-for-profit tax-exempt organisations in connection with an election to Federal office. These entities are usually referred under their Internal Revenue Code and are commonly known as 501 or 527 groups.

Issue Advertisements/Electioneering

In the past, Parties have evaded the law on contribution limits by thinly disguising their electioneering broadcast advertisements as 'issue discussion' protected under the First Amendment. Public interest advocates commonly argue that candidates have significant influence over the content of these 'issue ads' and engage in the illegal 'co-ordination' of these activities with political Parties. The BCRA 2002 aims to stop this practice and sets out strict rules for media purchases that include an 'electioneering communication.' An electioneering communication is a new term that possesses an expansive character. For

example, prior to the enactment of the BCRA 2002, messages were only strictly regulated if they 'expressly advocated' the election or defeat of a clearly identified candidate for Federal office. However, the 'electioneering communication' at 1 moves beyond that standard because it does not involve subjective interpretation about whether the message is designed to influence voting behaviour in a Federal election. The broadcast simply has to be close to an election and a candidate is identified in the advertisement.

The law states that an electioneering communication is:

1. 'Any broadcast, cable, or satellite communication which refers to a clearly identified candidate for Federal Office that is made 60 days before a general, special, or runoff election, or 30 days before a primary or preference election, or a convention, caucus of a political Party that has authority to nominate a candidate, for the office sought by the candidate.'³

If the communication refers to a candidate for an office other than President or Vice President, it must be 'targeted' to meet the electioneering standard. Targeting means that 50,000 or more people in a particular Congressional District are able to receive the broadcast message.⁴

The law also set out that if this 'electioneering communication' standard is deemed insufficient by final judicial decision to uphold the regulation, then an electioneering communication will be defined as follows.

2. 'Electioneering communication' means any broadcast, cable, or satellite communication which promotes or supports a candidate for that office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate) and which also is suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate.'⁵

This electioneering standard is a much narrower definition that has much in common with the old 'express advocacy' standard. One might argue that when the U.S. Supreme Court reviews the constitutionality of the Act, this narrower interpretation is likely to be adopted, as it is less of an encroachment on First Amendment free speech protections.

Contribution Limits

Prior to the enactment of the BCRA 2002, contribution limits were set at \$25,000 aggregate in hard money per year (\$50,000 per two-year election cycle), with a \$1,000 limit to individual candidates per election, with primary and general elections defined separately. The reform liberalises contribution ceilings, with a \$95,000 aggregate per election cycle and a \$2,000 contribution limit per election to individual candidates. Individual contribution limits to Parties have been raised in line with the general trend but the \$5,000 Political Action Committee donation to candidates remains unchanged. Finally the

³ www.fwebgate.access.gpo.gov BCRA (2002) 116 Stat.89 Subsection (3) (A) (I) (II)

⁴ www.fwebgate.access.gpo.gov BCRA (2002) 116 Stat.89 Subsection (3) (A) (III)

⁵ www.fwebgate.access.gpo.gov BCRA (2002) 116 Stat.89 Subsection (3) (A) (ii)

millionaires amendment introduces a fairly complex set of arrangements to calculate 'variable contribution limits' to benefit those facing particularly wealthy candidates. The more personal wealth these individuals spend on their election campaigns, the higher the contribution limits rise.⁶

Miscellaneous

Prohibitions on fundraising on Federal property are strengthened, the statute of limitations is increased from 3 to 5 years and penalties for those violating the Act are made more punitive.

⁶ www.cfinsl.org 16.2.03

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U.S. Campaign Finance Regulation: An Examination of the
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Abstract of the Dissertation

This thesis examines the U.S. Federal Election Commission (FEC) enforcement process. The Commission is unique in that whilst some view campaign finance laws as necessary, others view them as an onerous infringement of constitutionally protected free speech. The first chapter sets this controversy in context and establishes a history of enforcement. It concludes that the courts, Congress and the executive have all contributed to weak enforcement. The second chapter assesses agency performance and focuses on the equity and efficacy of enforcement. Whilst disclosure and public funding programmes are found to be administered well, enforcement is found wanting. The third chapter deals with the appointment of Commissioners and examines the agency's decision-making process. Although those at the apex of the structure are appointed as Democratic or Republican Party affiliates, partisanship is only one factor that informs Commissioner deliberations. Agreement, legal interpretation, evidentiary and regulatory philosophy also affect the nature of enforcement and the outcome of individual cases. The final chapter explains how the executive and Congress undermine enforcement. Presidents have not sought to appoint vigorous enforcers of the law and the Office of Management and Budget (OMB) have rarely supported the agency's budget requests. However, Congress is particularly active in weakening enforcement through a range of micro-management strategies. Therefore, in order to understand enforcement one needs to consider how all three branches of government affect the process.

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