

---

---

## NOTES

# WAITING FOR WATERGATE: THE LONG ROAD TO FEC REFORM

LAUREN EBER\*

### I. INTRODUCTION

In a February 2005 press conference about his proposed 527 Reform Act of 2005, Senator John McCain (R-AZ) vehemently expressed his views about the Federal Election Commission: “the Federal Election Commission has failed to do their duty. . . . This is a corrupt organization. And I don’t use the word lightly. We need to reform the Federal Election Commission.”<sup>1</sup> This was not McCain’s first public contribution to the litany of derogatory rhetoric about the FEC, which has been called the “Failure to Enforce Commission,”<sup>2</sup> a “toothless tiger,”<sup>3</sup> “FEC-less,”<sup>4</sup> a

---

\* Class of 2006, University of Southern California Gould School of Law; B.A. 2002, University of California Los Angeles. Special thanks to Beth Garrett for her invaluable guidance throughout the research and writing of this Note. Thanks to Martin Spottl, Martin Eber, and Andrew Silverman for reading drafts and assisting with the writing process. Finally, thanks to my family for their love and encouragement and for always pushing me to reach my goals.

1. Senator John McCain, News Conference: U.S. Senators Trent Lott, John McCain, Russ Feingold and Charles Schumer, and U.S. Representatives Chris Shays and Marty Meehan Hold a News Conference on the 527 Reform Act of 2005, *in* CONG. Q., Feb. 2, 2005 [hereinafter News Conference on the 527 Reform Act of 2005].

2. 149 CONG. REC. S9248 (daily ed. July 10, 2003) (statement of Sen. Feingold).

3. 135 CONG. REC. S11687 (daily ed. Sept. 13, 1989) (statement of Sen. Reid).

4. Charles R. Babcock, *FEC-less . . . ; Real Campaign Reform Will Give the Watchdog Agency New Teeth*, WASH. POST, Dec. 6, 1992, at C5.

“muzzled watchdog,”<sup>5</sup> and “The Little Agency That Can’t.”<sup>6</sup> McCain has previously called the FEC a “rogue agency”<sup>7</sup> and “weak and failing.”<sup>8</sup> But in a comment that is more than just name-calling, McCain gets to the heart of what is really wrong with the FEC: it is “structured by Congress to be slow and ineffective.”<sup>9</sup>

Legislators have a vested interest in keeping the FEC weak and inefficient because they are among the potential targets of enforcement actions.<sup>10</sup> Because reelection is the “dominant goal”<sup>11</sup> of most legislators, they are unlikely to enact legislation contrary to their self-interest unless they perceive that failure to do so would cost them votes. Consequently, a substantial increase in the FEC’s power is unlikely until legislators feel pressure from the public to strengthen campaign finance enforcement.<sup>12</sup> But FEC reform is currently too low on the public’s political agenda to

---

5. PROJECT FEC, NO BARK, NO BITE, NO POINT: THE CASE FOR CLOSING THE FEDERAL ELECTION COMMISSION AND ESTABLISHING A NEW SYSTEM FOR ENFORCING THE NATION’S CAMPAIGN FINANCE LAWS 5 (2002), available at <http://www.democracy21.org/vertical/Sites/{3D66FAFE-2697-446F-BB39-85FBBBA57812}/uploads/{B4BE5C24-65EA-4910-974C-759644EC0901}.pdf>.

6. Benjamin Weiser & Bill McAllister, *The Little Agency that Can’t: Election-law Enforcer Is Weak by Design, Paralyzed by Division*, WASH. POST, Feb. 12, 1997, at A1.

7. Suzanne Nelson, *Bill on 527s May Be on Fast Track*, ROLL CALL, Feb. 3, 2005.

8. 149 CONG. REC. S9246 (daily ed. July 10, 2003) (statement of Sen. McCain).

9. *Id.*

10. See CAROL MALLORY & ELIZABETH HEDLUND, CENTER FOR RESPONSIVE POLITICS, ENFORCING THE CAMPAIGN FINANCE LAWS: AN AGENCY MODEL Part III.A (1993), available at [http://www.opensecrets.org/pubs/law\\_enforce/enforceindex.html](http://www.opensecrets.org/pubs/law_enforce/enforceindex.html). “In no other area of government oversight does the regulated community itself have such direct control over the regulators. It is a problem which not only compromises the agency’s ability to rigorously and impartially carry out its responsibilities but which also undermines public confidence in the agency.” *Id.* See also Elizabeth Garrett, *The William J. Brennan Lecture in Constitutional Law: The Future of Campaign Finance Reform Laws in the Courts and in Congress*, 27 OKLA. CITY U. L. REV. 665, 665 (2002). Elizabeth Garrett explains,

Although legislators have expertise in campaigns and should have the ability to solve the problems posed by campaign finance, they suffer from a conflict of interest. Effective reform of campaign finance laws would inevitably threaten the power of incumbents to retain their seats for as long as they want to remain in politics. We should not be surprised, given this self interest, that lawmakers are slow to act, pass largely symbolic laws, and devise regulatory systems that work to the advantage of incumbents who have name recognition and access to the franking privilege, the media, casework, and other tools providing them advantages in the electoral realm.

*Id.*

11. R. DOUGLAS ARNOLD, *THE LOGIC OF CONGRESSIONAL ACTION* 5 (1990).

12. Cf. ROBERT S. ERIKSON & KENT L. TEDIN, *AMERICAN PUBLIC OPINION: ITS ORIGINS, CONTENT, AND IMPACT* 284, 286–87 (5th ed. 1994) (discussing legislative responsiveness to public opinion).

capture politicians' attention.<sup>13</sup> Not even a major political scandal, like lobbyist Jack Abramoff's admission that he bribed Republican members of Congress, was enough to alter the public's apathy toward campaign finance. In fact, a January 2006 Pew Research Center survey found that "[t]he public has been hardly stirred" by the scandal and that "Jack Abramoff's admission that he bribed members of Congress has sparked little interest."<sup>14</sup>

While Congress has enacted sweeping reforms to the *substance* of campaign finance laws, such as the Bipartisan Campaign Finance Reform Act of 2002 ("BCRA" or "McCain/Feingold"),<sup>15</sup> there has been no significant legislation to strengthen the *enforcement* of the laws since the FEC was created in 1974.<sup>16</sup> On the contrary, since that time, Congress has slowly been chipping away at the FEC's enforcement authority, despite numerous campaign finance scandals.<sup>17</sup> So long as the FEC remains unable to effectively enforce campaign finance laws, high-profile battles over their

---

13. Although half of Americans say they are dissatisfied with the nation's campaign finance laws, the public ranks campaign finance reform low as an election issue and does not see it as a priority for Congress. Public Agenda, Campaign Reform: Red Flags, [http://www.publicagenda.org/issues/red\\_flags.cfm?issue\\_type=campaign\\_finance](http://www.publicagenda.org/issues/red_flags.cfm?issue_type=campaign_finance) (last visited July 3, 2006). Several public opinion polls support this conclusion. In a January 2004 Gallup Poll, 51% of people polled said that they were either very dissatisfied or somewhat dissatisfied with the nation's campaign finance laws, while 18% said they did not know enough to have an opinion. In a January 2004 Pew Research Center survey, respondents ranked campaign finance reform the third lowest priority out of twenty-two policy issues. In a September 2003 ABC News/Washington Post survey, respondents ranked campaign finance reform the lowest priority out of eighteen policy issues. *Id.* An ABC/Washington Post survey conducted in October 1997 found that 44% of people polled thought reforming campaign finance laws should be a major goal, 39% thought it should be a minor goal, and 14% thought that it should not be a goal at all. William G. Mayer, *Public Attitudes on Campaign Finance*, in A USER'S GUIDE TO CAMPAIGN FINANCE REFORM 47, 62 (Gerald C. Lubenow ed., 2001) [hereinafter USER'S GUIDE].

14. Press Release, Pew Research Ctr. for the People & the Press, Democrats Hold Huge Issue Advantage: Americans Taking Abramoff, Alito and Domestic Spying in Stride (Jan. 11, 2006), available at [http://www.pewtrusts.com/pdf/PRC\\_news\\_01106.pdf](http://www.pewtrusts.com/pdf/PRC_news_01106.pdf) [hereinafter Americans Taking Abramoff in Stride]. The Pew Research Center survey found that only 18% of people surveyed said they were paying very close attention to news about the incident. *Id.* Furthermore, the survey found, "[a]n overwhelming majority of Americans (81%) say that lobbyists bribing lawmakers is common behavior in Congress, compared with just 11% who see it as isolated incidents." *Id.* A CNN/USA Today/Gallup survey found that only 17% of people polled "were following the Abramoff case very closely," even though a majority considered the influence-peddling inquiry surrounding Abramoff "a major scandal." *Poll Finds Anti-incumbent Mood*, CNN.COM, Jan. 10, 2006, <http://www.cnn.com/2006/POLITICS/01/09/corruption.poll/>.

15. Bipartisan Campaign Reform Act of 2002 (McCain/Feingold), Pub. L. No. 107-155, 116 Stat. 81 (codified as amended in scattered sections of 2 U.S.C.).

16. See Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (codified as amended in titles 2, 5, 18, & 26 U.S.C.).

17. See, e.g., Kenneth R. Mayer, *Hey, Wait a Minute: The Assumptions Behind the Case for Campaign Finance Reform*, in USER'S GUIDE, *supra* note 13, at 71-72.

substance are merely “sham reform.”<sup>18</sup>

This Note does not look into the substance of campaign finance laws,<sup>19</sup> or ask whether campaign finance laws are desirable. Rather, this Note assumes, for the sake of argument, that if the United States has chosen to enact campaign finance laws, then those laws ought to be enforced in a meaningful way.<sup>20</sup> Public opinion does suggest that the public currently views campaign finance laws as desirable, even if reform is not on the forefront of the people’s consciousness.<sup>21</sup> Unfortunately, the regulatory structure for enforcing campaign finance laws falls short—the regulated community regards the current enforcement mechanism as “a joke.”<sup>22</sup>

There are three overarching complaints about the FEC’s performance. First, the Commission is highly partisan and political, which sabotages its ability to curb quid pro quo corruption.<sup>23</sup> High profile violations are often dealt with in such a politicized way that the regulation actually contributes to public mistrust of the government and increases the appearance of corruption.<sup>24</sup> Second, the enforcement process is slow and inefficient. Violations of campaign finance law are not determined or disclosed until

---

18. BROOKS JACKSON, *BROKEN PROMISE 2* (1990). In response to Congress’s passage of a lobbying reform bill, Senator McCain stated, “We can pass all of the Rules changes we want in this body, but they are useless unless we back it up with a tough enforcement mechanism.” Press Release, Senator John McCain, McCain Statement on Passage of Lobbying Reform Bill (Mar. 30, 2006), available at [http://www.mccain.senate.gov/index.cfm?fuseaction=NewsCenter.ViewPressRelease&Content\\_id=1688](http://www.mccain.senate.gov/index.cfm?fuseaction=NewsCenter.ViewPressRelease&Content_id=1688) [hereinafter McCain Statement on Lobbying Reform Bill].

19. The substance of campaign finance laws includes, for example, what is and is not permissible, contribution limits, and electioneering communication. This is distinct from the main subject of this Note, reforming the enforcement agency for those campaign finance laws, the FEC.

20. The optimal level of enforcement may be something short of rigorous enforcement due to the financial cost of rigorous enforcement and countervailing considerations such as encouraging citizens to run for office without fear of punishment for violating campaign finance laws. But enforcement is currently so deficient that if advocates of campaign finance reform are serious about change and are not merely using reform advocacy as a political strategy, then the current level is surely suboptimal.

21. See discussion *supra* note 13.

22. Weiser & McAllister, *supra* note 6, at A1 (quoting former Rep. Tony Coelho).

23. The Commission’s partisanship has not interfered with all of its duties. Recently implemented programs deal relatively efficiently with routine disclosure obligations and with minor breaches of campaign finance regulations. See FEC, *FEDERAL ELECTION COMMISSION ANNUAL REPORT 2003 13–14* (2004), available at <http://www.fec.gov/pdf/ar03.pdf> [hereinafter *FEC ANNUAL REPORT 2003*].

24. See Todd Lochner & Bruce E. Cain, *Equity and Efficacy in the Enforcement of Campaign Finance Laws*, 77 *TEX. L. REV.* 1891, 1928 (1999). Cf. Colloquia, *Federal Election Commission Panel Discussion: Problems and Possibilities*, 8 *ADMIN. L.J. AM. U.* 223, 252–53 (1994) [hereinafter *Panel Discussion*] (comments of Lawrence Noble and Elizabeth Hedlund) (noting that when deadlock occurs, it often involves high profile cases).

long after an election is over.<sup>25</sup> And third, the penalties the FEC can levy are too weak to serve as a serious deterrent to violating the law. Much of the regulated community regards FEC fines as merely a cost of doing business.<sup>26</sup> Scholarly literature provides numerous proposals for modifying aspects of the FEC's structure and authority. While none of the solutions seems completely satisfying on its face, a combination of existing proposals, with some modifications, could likely improve the FEC's enforcement ability to a great degree. The problems with the Commission are well recognized, and the proposed improvements are plentiful. What remains to be addressed is how to make the issue of enforcement sufficiently salient that reform will actually take place.

This Note suggests that the Watergate scandal of the 1970s demonstrated three necessary elements for propelling a low visibility issue like adequate enforcement of campaign finance laws to the top of the policy agenda: a focusing event, sustained media attention, and strong advocacy by political entrepreneurs both inside and outside of Congress. Following Watergate, these three elements worked together to push legislation creating the FEC through Congress. It is likely that all three components will again be needed to carry out the extensive FEC reform that scholars, politicians, and government reform groups propose. Part II of this Note gives a brief history of campaign finance enforcement mechanisms, describes the repeated challenges the FEC has faced in court and in Congress, and explains generally how FEC enforcement works. Part III sets out the problems with the FEC and what should be done to improve it. Part IV discusses the challenge of increasing the salience of FEC reform on the policy agenda and calls on the reform community to ratchet up its advocacy efforts to match the intensity of pre-BCRA lobbying—so that when a focusing event occurs, these groups and their leaders are prepared to capitalize on it.

## II. A BRIEF HISTORY OF THE ENFORCEMENT OF CAMPAIGN FINANCE LAW

Campaign finance law enforcement has had at best a tumultuous history in the United States. Despite decades of efforts on the part of reformers in the twentieth century to implement a system of independent enforcement for campaign finance laws, it was not until Watergate that

---

25. Scott E. Thomas & Jeffrey H. Bowman, *Obstacles to Effective Enforcement of the Federal Election Campaign Act*, 52 ADMIN. L. REV. 575, 584 (2000).

26. See Joyce Price, *Kerrey Backs Crackdown on Candidates Using Illegal Funds*, WASH. TIMES, Nov. 3, 1996, at A5.

Congress was compelled to create an independent regulatory agency. The Federal Election Commission that Congress created in 1974 was hamstrung from infancy and has been steadily under attack since its inception. The few Congressional attempts to strengthen the FEC have been unsuccessful, and, somewhat surprisingly, attempts to scrap the Commission altogether have failed as well. For the most part, proposed FEC reforms have simply come and gone without receiving much attention.

#### A. THE LONG ROAD TO INDEPENDENT ENFORCEMENT

Concern about corruption in American elections is older than the U.S. Constitution.<sup>27</sup> And yet, in a pattern that has become the all too familiar routine for campaign finance law, it was not until a campaign finance scandal inspired public outrage in the early twentieth century that the first federal campaign finance law was passed.<sup>28</sup> Theodore Roosevelt's 1904 Republican presidential campaign was embroiled in scandal when New York Democratic newspapers publicized accusations that the campaign engaged in extortion and bribery involving the "big-three" insurance companies.<sup>29</sup> The public was distressed to learn that corporate donations accounted for more than seventy percent of Roosevelt's 1904 presidential campaign funds.<sup>30</sup>

After his election, President Roosevelt called for a ban on corporate contributions to political committees.<sup>31</sup> Congress knew that it needed to appease the public, and in 1907, enacted the nation's first federal campaign finance law, a ban on corporate contributions.<sup>32</sup> Like so many campaign finance reform proposals, the bill had actually been introduced more than five years earlier, but had been ignored by both Congress and the press until the scandal broke and forced Congress to pay attention.<sup>33</sup>

Although the ban on corporate contributions was a large step forward for campaign finance reform, the bill contained no enforcement

---

27. As early as 1699, the Virginia House of Burgesses passed a prohibition against bribing voters that was intended to curb the fraud, bribery, and intimidation involved in vote manipulation. Robert E. Mutch, *Three Centuries of Campaign Finance Law*, in USER'S GUIDE, *supra* note 13, at 1.

28. See ROBERT E. MUTCH, CAMPAIGNS, CONGRESS AND COURTS: THE MAKING OF FEDERAL CAMPAIGN FINANCE LAW 2-4 (1988); MELVIN I. UROFSKY, MONEY AND FREE SPEECH: CAMPAIGN FINANCE REFORM AND THE COURTS 26-27 (2005); Mutch, *supra* note 27, at 23.

29. MUTCH, *supra* note 28, at 2.

30. A congressional committee's investigation uncovered this fact. *Id.* at 3.

31. *Id.* at 4; UROFSKY, *supra* note 28, at 14.

32. MUTCH, *supra* note 28, at 7.

33. UROFSKY, *supra* note 28, at 13-14. See MUTCH, *supra* note 28, at 4.

mechanism.<sup>34</sup> It was not until the next major political scandal occurred that steps were taken toward implementing enforcement of any kind.<sup>35</sup> In the early 1920s, the Teapot Dome affair broke, a scandal involving “old-fashioned bribery of public officials.”<sup>36</sup> Secretary of the Interior Albert B. Fall illegally awarded Harry F. Sinclair, head of Mammoth Oil Company, an oil lease worth hundreds of millions of dollars on a plot of federal land (called the Teapot Dome) in return for large cash kickbacks and expensive gifts.<sup>37</sup> The Senate launched hearings to investigate the lease in October 1923, and the public watched the scandal unfold for several years.<sup>38</sup> The scandal was so monumental (a Senate Report called it a “criminal conspiracy . . . unparalleled in the history of this or any other civilized nation”<sup>39</sup>) that it prompted Congress to enact the Federal Corrupt Practices Act of 1925, which increased disclosure requirements and placed the House Clerk and Senate Secretary in charge of monitoring disclosure reports.<sup>40</sup>

Unfortunately, the 1925 Corrupt Practices Act was widely recognized as ineffective and has been characterized as “little more than a suggestion for voluntary disclosure.”<sup>41</sup> Putting the House Clerk and Senate Secretary in charge of enforcement was akin to having no enforcement at all, as the officers “weren’t in a position to quarrel with their bosses.”<sup>42</sup> Despite its widely recognized ineffectiveness, the Corrupt Practices Act remained the nation’s method of campaign finance regulation for more than forty-five years. Under the Act, “[c]ampaigns were financed in part with unreported cash that lobbyists handed over in white envelopes and brown paper bags. Blatantly illegal donations from corporations and labor unions were

---

34. S. 4563, 59th Cong. (2d Sess. 1907). The bill simply made it illegal for all national banks and corporations “to make a money contribution in connection with any election to any political office.” *Id.* Violations by corporations were “subject to a fine not exceeding five thousand dollars,” and officers or directors who consented to corporate contributions were punishable “by a fine of not exceeding one thousand and not less than two hundred and fifty dollars, or by imprisonment for a term of not more than one year, or both such fine and imprisonment in the discretion of the court.” *Id.*

35. See UROFSKY, *supra* note 28, at 16–17.

36. *Id.*

37. See LESLIE E. BENNETT, BROOKINGS INST., ONE LESSON FROM HISTORY: APPOINTMENT OF SPECIAL COUNSEL AND THE INVESTIGATION OF THE TEAPOT DOME SCANDAL (1999), available at <http://www.brookings.edu/gs/research/projects/ic/teapotdome/teapotdome.htm#II>. The Supreme Court held that Fall’s lease and agreement with Sinclair “were made fraudulently by means of collusion and conspiracy.” *Mammoth Oil Co. v. United States*, 275 U.S. 13, 53 (1927).

38. See BENNETT, *supra* note 37.

39. S. REP. NO. 70-1326, pt. 2 (1928).

40. Federal Corrupt Practices Act of 1925, Pub. L. No. 68-506, 43 Stat. 1053, 1070–74 (1925) (repealed 1948, 1972). See UROFSKY, *supra* note 28, at 17.

41. PROJECT FEC, *supra* note 5, at 7.

42. JACKSON, *supra* note 18, at 24.

commonplace.”<sup>43</sup> It was in this atmosphere, fraught with corruption, that Watergate would later take place.

Reformers, recognizing the need for an enforcement mechanism, made numerous attempts to create an enforcement agency before the FEC was finally created in 1974. Bills to establish a commission to enforce campaign finance laws were introduced as early as 1928.<sup>44</sup> The need for better enforcement was more formally recognized in 1931, when several political scientists were appointed by the Senate to examine the previous year’s senatorial elections, and recommended that Congress “‘set up a permanent agency of scrutiny’” with a full-time staff, whose findings would be made available to the press and reported to the Attorney General.<sup>45</sup> Numerous proposals for such independent enforcement agencies were made over the years.<sup>46</sup> In addition to independent agencies, the varied proposals for enforcement procedures included: creating standing committees to systematically investigate election expenditures;<sup>47</sup> keeping the House Clerk and Senate Secretary in charge of enforcement, but increasing their administrative responsibility and transferring them to serve under the comptroller general of the congressional General Accounting Office (“GAO”);<sup>48</sup> and creating a national depository office to examine reports and publish data.<sup>49</sup> None of these proposals received serious consideration from Congress. Despite their efforts, reformers recognized that Congress was not likely to implement an effective enforcement

---

43. *Id.*

44. See MUTCH, *supra* note 28, at 41 (discussing S. 4422, 70th Cong. (1928), a bill introduced by Senator Bronson M. Cutting (R-NM), who served only one year in the Senate to fill a vacancy, and noting that the bill died without much attention).

45. See MUTCH, *supra* note 28, at 40–41 (quoting *Hearing on Remedial Legislation Before the Select Comm. Investigating S. Campaign Expenditures*, 72d Cong. 59 (1931) (statement of James K. Pollock)).

46. For example, in 1951, President Truman’s attorney general recommended creating an independent commission to enforce the law, analyze reports, and investigate violations; in 1962, Alexander Heard, while serving as the chairman of President Kennedy’s Commission on Campaign Costs, recommended creating a bipartisan independent agency with a staff that would be “insulated from the harsher political pressures”; and from the nonprofit community, in 1970, a Twentieth Century Fund taskforce recommended creating an independent enforcement agency. *Id.* at 41–42; JACKSON, *supra* note 18, at 24.

47. A Senate select committee proposed that the standing committees be incorporated into the Legislative Reorganization Act of 1946, but the proposal was rejected. MUTCH, *supra* note 28, at 41.

48. Senator Thomas Hennings made this proposal in 1957 as a middle ground between simply establishing a joint congressional committee and the formidable task of creating an independent agency. See *id.* at 41–42.

49. A House special committee made the recommendation for a national depository office in 1951. The office would establish uniform reporting methods, examine reports to look for violations, and publish disclosed financial data. *Id.* at 41.

mechanism ““unless some startling scandal appear[ed] as a catalyst.””<sup>50</sup>

The social unrest of the mid to late 1960s, due in large part to the escalation of the Vietnam War, had a dramatic effect on the political landscape.<sup>51</sup> The years from 1964 to 1970 saw “a virtual explosion of anti-government feeling,” and “a steady decline in the public’s confidence in the country’s institutions and in the people running them.”<sup>52</sup> The percentage of people who felt that “the government is pretty much run by a few big interests looking out for themselves” rather than “for the benefit of all people” increased from twenty-nine percent to fifty percent.<sup>53</sup> Acting on the public’s mistrust of the government, in 1970, John Gardner founded Common Cause, an influential nonprofit advocacy group designed to “[e]nsure that government and political process serve the general interest, rather than special interests,” and to “curb the excessive influence of money on government decisions and elections.”<sup>54</sup> Pressured in large part by Common Cause’s advocacy, Congress responded to public sentiment and in 1971 enacted the Federal Election Campaign Act (“FECA”), the most sweeping campaign finance reform bill the country had ever seen. Despite FECA’s dramatic increase in the strength of substantive campaign finance reforms, the new law still failed to impose significant changes to enforcement procedures.<sup>55</sup>

In light of FECA’s failure to implement an enforcement mechanism, in 1971, Senate Minority Leader Hugh Scott (R-PA), supported by the Republican Party, advocated for an independent federal election commission, a “small, lean agency that would investigate disclosure violations and send them to the Justice Department for disposition.”<sup>56</sup> Scott proposed an agency with five part-time commissioners, a full-time executive director, and staff “borrowed” from the Justice Department and the congressional GAO.<sup>57</sup> After being amended to include a sixth commissioner, dividing the panel evenly between Republicans and

---

50. *Id.* at 42 (quoting Alexander Heard, chairman of President Kennedy’s Commission on Campaign Costs, from ALEXANDER HEARD, *THE COSTS OF DEMOCRACY* 465 (1960)).

51. *See, e.g.*, Seymour Martin Lipset & William Schneider, *The Decline of Confidence in American Institutions*, 98 *POL. SCI. Q.* 379, 379–80 (1983).

52. *Id.* at 380, 382.

53. WARREN E. MILLER & SANTA TRAUOGOTT, *AMERICAN NATIONAL ELECTION STUDIES DATA SOURCEBOOK, 1952–1986*, at 262 (1989).

54. Common Cause, *About Us*, <http://www.commoncause.org/site/pp.asp?c=dkLNK1MQIwG&b=189955#mission> (last visited July 15, 2006).

55. MUTCH, *supra* note 28, at 45; PROJECT FEC, *supra* note 5, at 9–10.

56. JACKSON, *supra* note 18, at 24.

57. *Id.*

Democrats, the bill passed overwhelmingly in the Senate.<sup>58</sup> The bill had a powerful enemy in the House, however. Representative Wayne Hays (D-OH), who served as the chief fundraiser for the House Democrats, chairman of the Democratic Congressional Campaign Committee, and chairman of the House Administration Committee, made it his mission to defeat the bill, which he believed was “very dangerous.”<sup>59</sup> Hays persuaded his colleagues and secured a 79-52 vote on the House floor to reject the bill and instead accept his own amendment, which assigned administration of disclosure requirements to the House Clerk, Senate Secretary, and comptroller general of the GAO—essentially maintaining the status quo.<sup>60</sup>

Then came Watergate. The June 17, 1972 arrest of five burglars in the Democratic National Committee headquarters at the Watergate Hotel set into motion an investigation that uncovered illegal campaign financing on the part of President Nixon’s Committee to Reelect the President, as well as the campaigns of democratic primary candidates Hubert Humphrey and Wilbur Mills.<sup>61</sup> Televised coverage of the Watergate trial, political resignations, and the Senate Watergate hearings in 1973 had tremendous public impact—and Common Cause membership grew quickly throughout 1973 and 1974.<sup>62</sup> In its recommendations to Congress, the Senate Watergate Committee stated that creation of an independent nonpartisan agency to enforce the campaign finance laws would be “the most significant reform that could emerge from the Watergate scandal.”<sup>63</sup> Legislators could not put off real reform in the face of the public outrage

---

58. *Id.* at 25.

59. *Id.*

60. *See* MUTCH, *supra* note 28, at 83–84.

61. JACKSON, *supra* note 18, at 26; MUTCH, *supra* note 28, at 47.

62. MUTCH, *supra* note 28, at 46–48.

63. S. REP. NO. 93-981, at 564 (1973). The Committee envisioned an agency with “substantial investigatory and enforcement powers” to help insure that “investigations of alleged wrongdoing would be vigorous and conducted with the confidence of the public.” *Id.*

The Committee adopted, with some suggested modifications, the proposal for a Federal Election Commission contained in S. 3044, the bill that would become the 1974 FECA Amendments. *See id.* at 565–67; MUTCH *supra* note 28, at 87. At the time of the Committee’s report in June 1974, S. 3044 proposed a seven member Commission with not more than four members from the same political party. *See* S. REP. NO. 93-981, at 565. Each commissioner would be appointed to a seven-year term by the president, with the advice and consent of the Senate. *Id.* at 565. The Commission would elect a chair and vice chair (not from the same political party) from among its members to serve two-year terms. *Id.* The Committee rejected a proposal (contained in a different bill, H.R. 7612 (1974)) that the president appoint the chair and vice chair. The Committee stated that its recommendations were “designed to promote and insure the independence and nonpartisan character of the Commission.” *Id.* The version of S. 3044 that was enacted in October 1974 created a Federal Election Commission with a much weaker structure than the version the Select Committee had adopted in its report. *See* Pub. L. No. 93-443, § 310, 88 Stat. 1263 (1974).

toward the corrupt fundraising practices that Watergate exposed. At long last, the Senate amended FECA to create an independent regulatory campaign finance agency.<sup>64</sup> President Ford “reluctantly signed into law the 1974 FECA amendments” that created the FEC.<sup>65</sup>

#### B. THE FAILURE TO ENFORCE COMMISSION: A HISTORY OF RIDICULE

The FEC’s history clearly indicates that the public, reformers, and legislators have not been satisfied with the Commission’s performance. Many attempts have been made both to weaken and to strengthen the FEC’s structure and authority; yet since 1976, it has remained largely the same despite vociferous criticism.

##### 1. The New Commission

The FEC that the 1974 FECA amendments created was a relatively weak agency subject to much congressional control. The Commission’s structure was a compromise between the Senate’s vision of a strong independent agency and the House’s vision of a weak agency that would continue to place the House Clerk, Senate Secretary, and comptroller general of the GAO in charge of enforcement.<sup>66</sup> The FEC was composed of six commissioners, no more than three of whom could be from a single party or, in essence, three Democrats and three Republicans, prone to deadlocking in party-line votes. Either house of Congress could (and did) veto FEC regulations.<sup>67</sup> The Speaker of the House, Senate Majority Leader, and House and Senate minority leaders were each assigned to appoint one commissioner, and the president was assigned to appoint two; all appointees were subject to confirmation by both houses of Congress.<sup>68</sup> This structure, which gave Congress significant control over the Commission, was Congress’s way of “stacking the deck” to get the policy outcome it wanted: an agency without runaway authority to enforce FECA against the

---

64. MUTCH, *supra* note 28, at 49.

65. *Id.*

66. *See id.* at 87–88; PROJECT FEC, *supra* note 5, at 11.

67. PROJECT FEC, *supra* note 5, at 12. The Supreme Court later declared the legislative veto an unconstitutional violation of separation of powers. *INS v. Chadha*, 462 U.S. 919, 956–59 (1983).

68. Pub. L. No. 93-443, § 310, 88 Stat. 1263 (1974). *See JACKSON, supra* note 18, at 27.

elected officials who created it.<sup>69</sup>

## 2. Challenges and Changes

As soon as the FEC was created, the landmark case *Buckley v. Valeo* challenged it.<sup>70</sup> Recognizing that the Justice Department, charged with defending the Act, would not mount a vigorous defense, and in fact wanted to oppose parts of the Act, Common Cause, the Center for the Public Financing of Elections, and the League of Women Voters stepped in to help defend the challenged FECA provisions.<sup>71</sup> The Supreme Court's decision in *Buckley*, famous for holding that contribution limits are constitutional while expenditure limits are not, also struck down FECA's original appointment process for FEC commissioners.<sup>72</sup> The Court held that the Congressional nominations violated the Constitution's Appointments Clause;<sup>73</sup> FEC commissioners, as officers of the United States, had to be nominated by the president and confirmed by the Senate.<sup>74</sup> The Court left open the possibility that a commission with properly appointed commissioners could exercise the powers originally granted to the FEC.<sup>75</sup>

Congress, although reluctant to revive the Commission, was under pressure to do so.<sup>76</sup> The 1976 presidential primary campaigns were already

---

69. See Matthew D. McCubbins, Roger G. Noll, & Barry R. Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243, 261–63 (1987). “[P]olitical actors stack the deck in favor of constituents who are the intended beneficiaries of the bargain struck by the coalition which created the agency.” *Id.* at 261 (italics omitted). In the case of the FEC, elected officials are both the intended beneficiaries of the Commission's action, and the coalition that created the Commission, meaning that they can stack the deck in their own favor.

70. *Buckley v. Valeo*, 424 U.S. 1 (1976).

71. MUTCH, *supra* note 28, at 50–51. The reform groups successfully petitioned the court for permission to intervene as defendants on the ground that their intervention would serve “both the fact and appearance of justice.” *Id.* at 50.

72. *Buckley*, 424 U.S. at 19–21, 120–28. *Buckley* famously held:

A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. . . . By contrast with a limitation upon expenditures for political expression, a limitation upon the amount that any one person or group may contribute to a candidate or political committee entails only a marginal restriction upon the contributor's ability to engage in free communication.

*Id.* at 19–21.

73. U.S. CONST. art. II, § 2, cl. 2.

74. *Buckley*, 424 U.S. at 120–28. The Court said, “We think [the term ‘Officers of the United States’] fair import is that any appointee exercising significant authority pursuant to the laws of the United States is an ‘Officer of the United States,’ and must, therefore, be appointed in the manner prescribed by § 2, cl. 2, of that Article.” *Id.* at 126. See also PROJECT FEC, *supra* note 5, at 12–13.

75. See *Buckley*, 424 U.S. at 137 & n.175.

76. JACKSON, *supra* note 18, at 28.

in progress and the candidates could not receive subsidy disbursements under a new public financing program without the FEC.<sup>77</sup> Congress reconstituted the Commission in 1976 with six presidentially appointed commissioners, still with no more than three from the same party. Despite the constitutionally mandated change in appointment procedure, in reality, “an informal understanding gives Congress control over who is nominated.”<sup>78</sup> The 1976 FECA amendments maintained the 1974 provision granting either house of Congress the power to veto any FEC regulation and added several new provisions that limited the FEC’s powers. The new provisions required affirmative votes from four commissioners prior to any action (preventing any action based on a party-line vote), denied the Commission authority to investigate anonymous complaints, and required the Commission to attempt negotiated settlement agreements before filing a civil action against an alleged violator.<sup>79</sup> With the exception of the legislative veto, which the Court struck down several years after *Buckley* in *Immigration & Naturalization Service v. Chadha*,<sup>80</sup> this structure remains in place today.<sup>81</sup>

In its first few years of existence, the FEC engaged in enforcement actions that made it unpopular among the regulated community. The FEC “earn[ed] a reputation as a fusspot by among other things bringing lawsuits against dozens of fringe candidates who failed to file disclosure reports after losing with only a handful of votes.”<sup>82</sup> Representative Bill Frenzel (R-MN), who had been one of the FEC’s strongest champions in 1971,<sup>83</sup> warned that if the FEC “continues to be so picky, it might find itself with a good deal less authority.”<sup>84</sup> The FEC’s exercise of its random audit

---

77. *Id.*

78. Jackie Koszczuk, *Money Woes Leave FEC Watchdog with More Bark than Bite*, CQ NEWS, Feb. 28, 1998, available at <http://www.cnn.com/ALLPOLITICS/1998/03/02/cq/fec.html>. Tim Curran of *Roll Call* notes matter-of-factly, “[n]ominees to the FEC are usually selected by party leaders in Congress and made official by the White House . . . .” Tim Curran, *Secretary of Senate Gets Official Nod by the President to Become Member of the Federal Election Commission*, ROLL CALL, Sept. 30, 1996. See JACKSON, *supra* note 18, at 29 (recounting the story of several unsuccessful attempts of President Carter to appoint commissioners who were not on Congress’s short-list of suggested appointees); PROJECT FEC, *supra* note 5, at 17 (describing how after months of trying to fill a vacant seat with a commissioner of his own choosing, President Clinton was forced to appoint a commissioner chosen by the Senate).

79. JACKSON, *supra* note 18, at 28–29.

80. *INS v. Chadha*, 462 U.S. 919 (1983).

81. PROJECT FEC, *supra* note 5, at 13.

82. JACKSON, *supra* note 18, at 29.

83. *Id.* at 25–26.

84. *Id.* at 30 (quoting *Reform-spawned Agency Stirs Discontent*, CONG. Q. WKLY. REP., Apr. 19, 1980).

authority also bred contempt among legislators. Following the 1976 elections, the Commission performed random audits of ten percent of the candidates' campaigns.<sup>85</sup> More than half of the audited reports had problems of some kind, and close to a third of incumbents' reports showed small contributions from corporations or unions.<sup>86</sup> Embarrassed by the findings, Congress denied funding for random audits in 1978 and banned them altogether in the 1979 FECA amendments.<sup>87</sup> From that point forward, the FEC could audit a report only if the report did not substantially comply with the law or if the FEC had reason to believe that a violation was committed.<sup>88</sup> This change has limited the FEC's annual number of audits significantly.<sup>89</sup>

Over time, numerous bills were introduced that attacked, in dramatic fashion, the Commission's performance as either too rigorous or not rigorous enough. In 1981, Senate Republicans tried to abolish the Commission with the support of President Reagan, who said that the FEC was "just the kind of intrusive bureaucracy he was committed to abolishing."<sup>90</sup> In 1989, Senators Mitch McConnell (R-KY) and Harry Reid (D-NV) introduced a bill to strengthen the Commission.<sup>91</sup> Senator Reid explained that the legislation would help the FEC "become something other than the toothless tiger that it now is."<sup>92</sup> In support of a 1993 bill to strengthen the FEC,<sup>93</sup> Senator John Kerry (D-MA) introduced into the record during floor debate more than 250 newspaper articles and editorials that called for campaign finance reform. He stated, "today we have every right in the world to declare as an institution that we believe that appearance of a problem does exist."<sup>94</sup> In 2003, Senator McCain and Senator Feingold introduced a proposal to replace the FEC with a new agency altogether.<sup>95</sup> Their proposal never received significant support from

---

85. *Id.*

86. *Id.*

87. *Id.*

88. 2 U.S.C. §§ 437g(a)(2), 438(b) (2000).

89. From 1978 to 1980 (before the ban on random audits went into effect), the FEC reported an average of approximately eighty-four audits per year, while from 1981 to 2003 the FEC reported an average of only approximately seventeen audits per year. *See* FEC ANNUAL REPORT 2003, *supra* note 23, at 79 (Appendix 5).

90. MUTCH, *supra* note 28, at 91.

91. S. 1655, 101st Cong. (1989).

92. 135 CONG. REC. S11687 (daily ed. Sept. 13, 1989) (statement of Sen. Reid).

93. S. 3, 103d Cong. (1993).

94. 139 CONG. REC. S6531-01 (daily ed. May 26, 1993) (statement of Sen. Kerry).

95. S. 1388, 108th Cong. (2003).

either side of the aisle.<sup>96</sup>

### C. HOW FEC ENFORCEMENT WORKS

The FEC's enforcement process for alleged violations of FECA is intricate and involved, making it "difficult—if not impossible—for the Commission to resolve a complaint in the same election cycle in which it is brought."<sup>97</sup> Former commissioner Scott E. Thomas characterizes the enforcement procedures as "designed to offer procedural protections to respondents and allay congressional fears that the Commission would turn into 'a bunch of headhunters.'"<sup>98</sup> Various procedural and statutory requirements limit the speed of enforcement and thereby dictate a minimum amount of time needed to process a complaint.

The FEC handles complaints in four main procedural stages. Proceeding from one stage to the next requires an affirmative vote of four commissioners or, in effect, a vote of commissioners from more than one party.<sup>99</sup> A deadlocked party-line vote can hold up a complaint indefinitely or until the Commission votes to dismiss it as stale. Each stage also involves protracted communication between the Office of General Counsel ("OGC") and the respondents, in the form of letters, briefs, and responses to briefs.<sup>100</sup> Although there are statutory guidelines for the timing of each enforcement stage, extensions are frequently granted, and a matter can be shelved indefinitely at various points throughout the process.<sup>101</sup>

In the first procedural stage, the OGC receives a complaint (called a Matter Under Review, or MUR), evaluates its priority, and eventually assigns a staff member to the case.<sup>102</sup> The first Commission vote is then held to determine whether the Commission should find "reason to believe" that a violation has occurred or is about to occur, assuming that all the facts

---

96. The bill died in committee shortly after its introduction and did not have any additional cosponsors. See S. 1388 Bill Summary, The Library of Congress, Thomas, <http://thomas.loc.gov/> (last visited Aug. 8, 2006).

97. Thomas & Bowman, *supra* note 25, at 584. For an excellent step-by-step description of how the enforcement process works, see *id.* Part I.B, "Cumbersome Enforcement Procedures."

98. *Id.* at 584 (quoting the remarks of Rep. Mathis, 120 CONG. REC. 27,473 (Aug. 8, 1974)).

99. 2 U.S.C. § 437g(a)(2) (2000) (requiring four affirmative commissioner votes for a "reason to believe" finding); 2 U.S.C. § 437g(a)(4)(A)(i) (2000) (requiring four affirmative commissioner votes for a "probable cause" finding); 2 U.S.C. § 434g(a)(6)(A) (2000) (requiring four affirmative commissioner votes to institute a civil action for relief).

100. Thomas & Bowman, *supra* note 25, at 584–90.

101. See *id.* at 585.

102. *Id.* Former commissioner Scott Thomas laments that "[d]ue to lack of staff and resources . . . MURs eligible for activation often must 'wait their turn' for assignment behind complaints filed earlier with the Commission." *Id.*

alleged in the complaint are true.<sup>103</sup> If the Commission votes to find “reason to believe,” the second phase begins, in which the OGC conducts an investigation and makes a recommendation to the Commission as to whether it should find “probable cause to believe that a violation has occurred or is about to occur.”<sup>104</sup> Before the OGC’s recommendation goes to the Commission for a vote on probable cause, a respondent may avoid the vote by requesting to enter into negotiations to reach a conciliation agreement.<sup>105</sup> Absent this request, the second Commission vote is held.<sup>106</sup> If the Commission votes to find probable cause, the third procedural stage begins, in which the OGC negotiates with the respondents and attempts to “correct or prevent such violation by informal methods of conference, conciliation, and persuasion, and to enter into a conciliation agreement.”<sup>107</sup> If attempts to reach an agreement are unsuccessful, the Commission can vote to authorize a civil suit in district court.<sup>108</sup> If the Commission’s vote authorizes suit, the matter moves into the fourth stage, civil court proceedings, and out of the FEC’s exclusive domain.

Given the FEC’s cumbersome enforcement procedure, it can easily take more than a year for a “fairly routine matter” to be resolved.<sup>109</sup> Any matter that is factually complex or requires an extensive investigation can take much longer than a year to resolve.<sup>110</sup> Opportunities for further delay exist in every procedural phase, including waiting for responses to requests during the investigation stage, “seeking judicial assistance to enforce Commission subpoenas when respondents fail to comply voluntarily,” and pursuing investigative audits.<sup>111</sup> Resolving a complaint during the election cycle in which it is filed is nearly impossible.

---

103. 2 U.S.C. § 437g(a)(2). See Thomas & Bowman, *supra* note 25, at 585.

104. 11 C.F.R. § 111.16 (2006); Thomas & Bowman, *supra* note 25, at 586.

105. 11 C.F.R. § 111.18(d) (2006). But note that “the Commission is not required to enter into any negotiations directed towards reaching a conciliation agreement unless and until it makes a finding of probable cause to believe.” *Id.*

106. 2 U.S.C. § 437g(a)(4)(A)(i) (2000).

107. *Id.* The conciliation attempt can last for up to ninety days. *Id.* If the finding occurs within the forty-five days prior to an election, then the Commission must attempt to correct or prevent the violation for at least fifteen days. 2 U.S.C. § 437g(a)(4)(A)(ii) (2000).

108. 2 U.S.C. § 434g(a)(6)(A) (2000).

109. Thomas & Bowman, *supra* note 25, at 588–89.

110. *Id.* at 589.

111. *Id.* at 588–89. Thomas and Bowman go on to describe a subpoena enforcement case that lasted three and a half years. *Id.* at 589. For a chart showing the timeline for a typical enforcement matter, see *id.* at 588.

### III. WHAT IS WRONG WITH THE FEC?

Legislators spend countless hours advocating new campaign finance reform proposals and condemning the FEC for not doing its job, yet those very legislators have failed to give the FEC the power it needs to be successful.<sup>112</sup> This contradiction can be explained by lawmakers' conflict of interest in this realm. Many members of Congress do not want to surrender the power to ensure that they can, with relative impunity, raise all the money they need to get elected, yet they want to appear to be responsive to the public's desire for reform. Thus, they support reform proposals that do not actually strengthen the enforcement agency.<sup>113</sup> Congress has imposed a structure on the FEC that will ensure that the Agency remains weak, ineffective, and subject to congressional control.<sup>114</sup>

The FEC is not completely toothless. Minor reporting violations are now dealt with swiftly, thanks to the recent implementation of the Administrative Fine Program<sup>115</sup> and the Alternative Dispute Resolution Program.<sup>116</sup> Routine disclosure is also carried out efficiently. The FEC immediately disseminates reports and decisions electronically, making the information readily available to the press.<sup>117</sup> But substantial acts of alleged corruption and abuse frequently go unpunished due to the problems riddling the FEC.<sup>118</sup> Deficiencies both in the FEC's structure and in the tools the Commission has to carry out enforcement interfere with its performance.

---

112. See JACKSON, *supra* note 18, at 2.

113. Bruce Ackerman acknowledges this conflict of interest, stating, "politicians will be profoundly reluctant to cede control over the electoral process to truly independent authorities. . . . In the aftermath of Watergate, Congress created the Federal Election Commission as an 'independent' agency but provided it with a structure that virtually guaranteed administrative failure." Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633, 717 (2000).

114. Some authors claim that legislators intentionally impose certain structures and procedures on administrative agencies in order to achieve their desired policy outcomes, which in the case of the FEC, means creating a toothless agency. See McCubbins, Noll, & Weingast, *supra* note 69, at 261-63.

115. See Press Release, FEC, Committees Fined for Filing Reports Late (Mar. 24, 2005), available at <http://www.fec.gov/press/press2005/20050324af.html>.

116. See Press Release, FEC, ADR Program Resolves Cases (Mar. 28, 2005), available at <http://www.fec.gov/press/press2005/20050328adr.html>.

117. "By reading reports at the FEC, an investigator can unearth a tremendous amount of useful information." STEVE WEINBERG, *TRADE SECRETS OF WASHINGTON JOURNALISTS* 49 (1981).

118. See Lochner & Cain, *supra* note 24, at 1928; *Panel Discussion*, *supra* note 24, at 254 (comments of Elizabeth Hedlund); Thomas & Bowman, *supra* note 25, at 589.

### A. STRUCTURAL PROBLEMS

The three most significant problems with the FEC's structure are: the three-Democrat, three-Republican composition of the Commission; the unabashed partisanship of the appointment process; and the lack of a strong chair.

#### 1. A Commission of Three Democrats and Three Republicans

FECA requires the FEC to be composed of six commissioners, with no more than three from the same political party or, in effect, three Democrats and three Republicans.<sup>119</sup> This evenly partisan structure may be the most glaring problem with the FEC.<sup>120</sup> Because FECA requires four votes for the Commission to act,<sup>121</sup> the Commission can easily deadlock in a tie vote and become paralyzed.<sup>122</sup> The *Washington Post* has commented that “[t]ime and again partisan standoffs have prevented the commission from pursuing enforcement actions against major politicians and powerful interest groups, even when the FEC’s general counsel recommends going forward.”<sup>123</sup> In reality, the Commission does not reach deadlock very frequently, but “the high profile of the small number of cases that do deadlock makes the problem highly salient.”<sup>124</sup>

Changing the number of commissioners from six to either five or

---

119. 2 U.S.C. § 437c(a)(1) (2000). The statute states:

The Commission is composed of the Secretary of the Senate and the Clerk of the House of Representatives or their designees, ex officio and without the right to vote, and 6 members appointed by the President, by and with the advice and consent of the Senate. No more than 3 members of the Commission appointed under this paragraph may be affiliated with the same political party.

*Id.*

120. For a variety of critical discussions of the FEC, including its partisan structure, see Harold E. Ford Jr. & Jason M. Levien, *A New Horizon for Campaign Finance Reform*, 37 HARV. J. ON LEGIS. 307, 322 (2000); *Panel Discussion*, *supra* note 24, at 252–53 (comments of Elizabeth Hedlund); Bradley A. Smith & Stephen M. Hoersting, *A Toothless Anaconda: Innovation, Impotence and Overenforcement at the Federal Election Commission*, 1 ELECTION L.J. 145, 158 (2002); Thomas & Bowman, *supra* note 25, at 591; Amanda S. La Forge, Note & Comment, *The Toothless Tiger—Structural, Political and Legal Barriers to Effective FEC Enforcement: An Overview and Recommendations*, 10 ADMIN. L.J. AM. U. 351, 359 (1996); David J. Weidman, Comment, *The Real Truth About Federal Campaign Finance: Rejecting the Hysterical Call for Publicly Financed Congressional Campaigns*, 63 TENN. L. REV. 775, 788–89 and accompanying notes (1996).

121. 2 U.S.C. § 437c(c) (2000).

122. See, e.g., PROJECT FEC, *supra* note 5, at 9–11; Lochner & Cain, *supra* note 24, at 1928.

123. Weiser & McAllister, *supra* note 6, at A1.

124. Lochner & Cain, *supra* note 24, at 1928. See *Panel Discussion*, *supra* note 24, at 252–53 (comments of Lawrence Noble and Elizabeth Hedlund).

seven has been suggested repeatedly.<sup>125</sup> There has not yet been a satisfactory proposal, however, as to who should fill the tiebreaker's spot. Some have suggested that the odd-numbered spot be filled by an independent.<sup>126</sup> This would not reduce the likelihood that decisions would be made based on political considerations, however. Most independents tend to lean one way or another politically, so an independent member would likely function as a de facto member of one of the parties.<sup>127</sup> One proposal for adding an independent member to the Commission, the Public Voice Campaign Finance Reform Act of 1997, would have required the President to appoint a seventh commissioner to serve as the Commission's chairperson, who would be "nominated for appointment" by the existing six commissioners.<sup>128</sup> While, in theory, the six commissioners could resolve the issue of who would serve as their chairperson and tiebreaking member fairly, it is possible that they would be unable to reach consensus, given that the need for the seventh commissioner is caused by the Commission's inability to break deadlock.<sup>129</sup>

Senators McCain and Feingold recommend creating an agency with only three commissioners: one chairperson with a ten-year term and two other members, not from the same party as each other, serving staggered six-year terms.<sup>130</sup> Commentators, including those associated with Project FEC,<sup>131</sup> have considered the structure of the FBI, which vests significant control in a single director, as a potential model for the FEC.<sup>132</sup> The *Washington Post* has stated that "[a] far better model would put civil enforcement under the direction of one person, who—like the FBI director—would serve a term of years not corresponding to that of the president who appoints him or the senators who confirm him."<sup>133</sup> This type

125. See, e.g., JACKSON, *supra* note 18, at 64–65; Ford & Levien, *supra* note 120, at 322; Weidman, *supra* note 120, at 788.

126. See H.R. 2051, 105th Cong. § 6 (1997), at 788; Ford & Levien, *supra* note 120, at 322; Weidman, *supra* note 120, at 788.

127. See Smith & Hoersting, *supra* note 120, at 158.

128. H.R. 2051, 105th Cong. § 6 (1997). For a discussion of the Public Voice Campaign Finance Reform Act of 1997, see Ford & Levien, *supra* note 120, at 322.

129. Independent redistricting commissions frequently face the problem of finding a neutral tiebreaker to deal with a highly partisan issue. See Michael P. McDonald, *A Comparative Analysis of Redistricting Institutions in the United States, 2001–02*, 4 ST. POL. & POL'Y Q. 371, 380–84 (2004), available at <http://sppq.press.uiuc.edu/4/4/mcdonald.pdf>.

130. See S. 1388, 108th Cong. (2003).

131. PROJECT FEC, *supra* note 5, at 36–38.

132. See, e.g., Editorial, *Rethinking the FEC*, WASH. POST, Mar. 5, 1999, at A32.

133. *Id.* The article goes on to state:

of post has been derisively referred to as a “Campaign Czar.”<sup>134</sup> Congress would not likely accept a single director, who would be far more difficult to monitor and control than the current Commission.

Furthermore, while proposals to have an odd number of commissioners, whether seven, three, or even one, deal with the problem of deadlock, they do not address the concern of a single party dominating the Agency at the expense of the other party. The issue of who breaks the tie is contentious. Having a partisan majority in control of regulating campaign violations implicates the very concerns about quid pro quo corruption and the appearance of corruption that the FEC was designed to prevent. Having a party majority on the Commission would provide the party in power an opportunity to manipulate elections and thus create a dynasty for that party.<sup>135</sup> Certainly, the mere structure would lead to the appearance of corruption even if not actually used by the party in power to entrench itself. Todd Lochner and Bruce Cain note that “FEC actions would begin to look like victor’s justice, further undermining the perceived legitimacy of the Commission’s actions.”<sup>136</sup> Even worse than inaction, there is the possibility of selective partisan regulation enforced only against the minority party.<sup>137</sup>

---

This person would not be nearly so answerable to the regulated community as are the current commissioners. And while he would be a part of the president’s administration, his independence would ideally be respected in much the same manner that the FBI is expected across the political spectrum to be left alone politically.

*Id.*

134. Smith & Hoersting, *supra* note 120, at 158.

135. Samuel Issacharoff and Richard Pildes point out that “[i]n political markets, anticompetitive entities alter the rules of engagement to protect established powers from the risk of successful challenge.” Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 646 (1998). Bruce Ackerman similarly notes that “[h]aving won an election, the lawmaking majority may notoriously seek to insulate itself from further electoral tests.” Ackerman, *supra* note 113, at 716.

136. Lochner & Cain, *supra* note 24, at 1929.

137. The self-propelling cycle of partisan control might work as follows: Because Congress essentially tells the president who to appoint as commissioners and the Senate confirms the nominees, the majority party has final say on commission appointments. Once a partisan panel of commissioners is in place, it could choose to go forward with all complaints that would hurt the opposing party and fail to prosecute complaints that would hurt their own party. This would dramatically help the campaigns of the majority party candidates; they would know that they could engage in prohibited campaign activity more or less with impunity. Freedom from prosecution could easily provide the slight edge candidates would need in close elections and would stack federal elections with a disproportionate number of majority party victories. It may seem far fetched to believe that FEC commissioners would engage in such blatantly partisan activity, but there are numerous instances of commissioners acting more like party representatives than members of an executive regulatory body. *See, e.g.*, JACKSON, *supra* note 18, at 10–11 (detailing the scandal of an FEC commissioner leaking information just eight days before the election about a commission vote to subpoena a Senate candidate’s bank records); Weiser & McAllister, *supra* note 6, at A1 (quoting Rep. Bob Livingston (R-LA) stating that the FEC commissioners have “lost their credibility” largely due to their unabashed partisanship).

In other words, when dealing with the election of representatives, so crucial to the healthy functioning of a democracy, the cost of the potential for partisan manipulation outweighs the benefit of fewer deadlocks.

While the analogy to the FBI does not present an ideal solution to the FEC's problem of frequent deadlock, looking outward to other models of effective decisionmaking can be instructive nevertheless. Perhaps models used in private industry are a better fit. A statutorily designated nonpartisan tiebreaker, along the lines of designated tiebreakers used in even-numbered partnerships, could help the Agency avoid deadlock.<sup>138</sup> If the challenge of finding a single neutral tiebreaker that both parties can agree on is insurmountable or unduly difficult, the tiebreaker could be a rotating position, as is often done in the private sector. A rotating panel of judges serving as tiebreakers in the rare instances when the Commission deadlocks could help allay fears of non-neutrality.<sup>139</sup> Judges could be appointed on a rotating, as-needed basis. When the Commission reaches a tie vote, a judge could be assigned to the tiebreaking spot according to a lottery. Even if one particular judge was believed to have partisan leanings that interfered with the judge's impartiality, chances are slim that there would be an institutional bias among all of the judges that would favor one party over the other.

Commentators have suggested that the FEC sidestep the problem of deadlock by allowing certain actions to proceed on a tie vote. The International Trade Commission, for example, which is also composed of six commissioners with no more than three from the same party, uses such a system.<sup>140</sup> While the crucial finding of probable cause to believe that a violation has occurred should continue to require four votes, so that one party cannot on its own find that an opponent has committed a violation, allowing action with only three votes at other stages would expedite decisionmaking without undue partisan influence affecting the final decision.

---

138. Use of a tiebreaker on an as-needed basis is a common practice among redistricting commissions as well. Some commissions select a tiebreaker prior to beginning redistricting negotiations, while others negotiate to select a tiebreaker after reaching a stalemate. McDonald, *supra* note 129, at 382–83. It seems unlikely, however, that in the case of the FEC, allowing the Commission itself to select the tiebreaker would be a successful solution. Random assignment from a panel of neutral judges is likely to be far more efficient than giving the Commission yet another issue to decide.

139. The panel of judges could be composed of administrative law judges (“ALJs”), or retired district court or appellate court judges if using sitting judges would create a separation of powers problem. Because deadlock happens infrequently, the panel would not need to be very large and the demands on its members would likely be minimal and intermittent.

140. 19 U.S.C. § 1330(a), (d) (2000).

First, the relatively low standard for finding reason to believe, a necessary threshold to proceed with an investigation, should require only three affirmative votes.<sup>141</sup> But, in order to balance out the increased ease of proceeding with investigations, the accusatory “reason to believe” language should be changed. The Commission has pointed out that the phrase “reason to believe” is misleading and politically charged because it implies that there has been a finding of wrongdoing, when in fact the finding simply “permits the Commission to evaluate the validity of the facts as alleged.”<sup>142</sup> When the Commission deadlocks at the reason to believe inquiry, it “will not even ask questions and may not get to the bottom of some very serious allegations.”<sup>143</sup> Consequently, in order to lessen the disproportionate political stigma associated with a reason to believe finding, the terminology should be changed to reflect the preliminary nature of the finding. The Commission has repeatedly requested that Congress change the “reason to believe” language to “reason to open an investigation.”<sup>144</sup> Little reason exists not to implement this sensible semantic change.<sup>145</sup>

Some commentators believe that “the notion that an investigation could go forward without majority support on the Commission is not likely

---

141. See Thomas & Bowman, *supra* note 25, at 591–92 (proposing that only three votes should be required for the FEC to proceed with an investigation).

142. FEC ANNUAL REPORT 2003, *supra* note 23, at 42–43; FEC, FEDERAL ELECTION COMMISSION ANNUAL REPORT 1997, at 62, available at <http://www.fec.gov/pdf/ar97.pdf> [hereinafter FEC ANNUAL REPORT 1997]; FEC, FEDERAL ELECTION COMMISSION LEGISLATIVE RECOMMENDATIONS 2004 Part I, available at [http://www.fec.gov/pages/legislative\\_recommendations\\_2004.htm](http://www.fec.gov/pages/legislative_recommendations_2004.htm) [hereinafter FEC 2004 LEGISLATIVE RECOMMENDATIONS]. In all three of these reports, the 2004 Legislative Recommendations (the most recent set of recommendations released), the 2003 Annual Report, and the 1997 Annual Report, the Commission requested that Congress change the misleading “reason to believe” language to “reason to open an investigation.” The 2004 and 2003 reports listed the recommendation in their respective “Priority Recommendations” sections. For further discussion of the recommendation, see Thomas & Bowman, *supra* note 25, at 592.

143. Thomas & Bowman, *supra* note 25, at 592.

144. FEC 2004 LEGISLATIVE RECOMMENDATIONS, *supra* note 142, Part I; FEC ANNUAL REPORT 2003, *supra* note 23, at 42–43; FEC ANNUAL REPORT 1997, *supra* note 142, at 62. The Commission explains:

The statutory phrase “reason to believe” is misleading and does a disservice to both the Commission and the respondent. It implies that the Commission has evaluated the evidence and concluded that the respondent has violated the Act. In fact, however, a “reason to believe” finding simply means that the Commission believes a violation may have occurred if the facts as described in the complaint or referral are true. An investigation permits the Commission to evaluate the validity of the facts as alleged. It would therefore be helpful to substitute words that sound less accusatory and that more accurately reflect what, in fact, the Commission is doing at this early phase of enforcement.

FEC ANNUAL REPORT 2003, *supra* note 23, at 42.

145. In fact, the change would likely benefit candidates and elected officials, who would avoid the harsh “reason to believe” language if an investigation did not lead to a finding of wrongdoing.

to be taken seriously by Congress.”<sup>146</sup> Opponents suggest that allowing an investigation to continue following a tie vote might have political consequences similar to allowing a party majority on the Commission. Commissioners from just one party would be able to launch investigations of candidates from the opposing party.<sup>147</sup> In this scenario, both parties would be able to harass each other equally, which would likely either create a “wholly political” system, or lead the commissioners to reach an “informal truce, effectively eviscerating all enforcement.”<sup>148</sup> But this parade of horrors overlooks the political implications of the current system. With a four-vote requirement, one party can effectively stop all inquiries into the conduct of members of its party. Allowing an investigation into alleged facts merely sheds more light on the conduct. If there has been no wrongdoing, the fact that one party acting alone called for the investigation should not significantly harm the respondent, particularly if the language of the standard is neutralized. The harm that can be done by failing to investigate at all likely outweighs the harm of investigating allegations when there has in fact been no wrongdoing.

A second situation in which a tied Commission vote should not kill a proceeding is when the Commission deadlocks on whether to pursue an action in civil court.<sup>149</sup> In order to reach a vote on whether to file a civil action, the Commission must already have voted to find probable cause that a violation occurred, a finding that requires four affirmative votes. In light of this finding, the action should be able to proceed when the Commission comes to a partisan standoff on the issue of filing a civil suit. Availability of an apolitical remedy following an FEC finding of “probable cause to believe that a violation has occurred” is crucial to the fair and effective enforcement of campaign finance laws.

---

146. Smith & Hoersting, *supra* note 120, at 158.

147. *Id.*

148. *Id.* Politically motivated harassment is prevalent in the context of congressional oversight hearings. See, e.g., Lanny J. Davis, *Spinning Out of Control: The Scandal Machine*, 60 MD. L. REV. 41, 41–44 (2001).

149. A 1989 bill tried to amend FECA to allow a complainant to file a civil action following a tied Commission vote on whether to pursue an action in civil court. While the bill did not pass, its recommendation was well founded. See S. 1655, 101st Cong. (1989). The bill states:

If, by a tie vote, the Commission does not vote to institute a civil action pursuant to subparagraph (A), the candidate involved in such election, or an individual authorized to act on behalf of such candidate, may file an action for appropriate relief in the district court for the district in which the respondent is found, resides, or transacts business.

*Id. Cf.* La Forge, *supra* note 120, at 359 & n.34 (noting that the ITC “requires only three affirmative votes to find that a U.S. industry has been harmed by unfair trade practices”); Weidman, *supra* note 120, at 779 (commenting on the structure of the ITC, which carries out investigations when it deadlocks 3-3).

## 2. Partisan Appointments

The partisanship of the appointment process has long been criticized as undermining the FEC's credibility.<sup>150</sup> Despite *Buckley's* holding that the Appointments Clause of Article II, Section 2 of the Constitution requires the president—not Congress—to appoint the commissioners, it is widely recognized that “an informal understanding gives Congress control over who is nominated,”<sup>151</sup> and that “[n]ominees to the FEC are usually selected by party leaders in Congress and made official by the White House.”<sup>152</sup> In a practice that eliminates or severely limits debate during the confirmation process and maintains the partisan balance on the Commission, FECA requires two commissioners from different parties to be appointed simultaneously for concurrent six-year terms.<sup>153</sup> This process leads to what Samuel Issacharoff and Richard Pildes term “bipartisan entrenchment,” or protection of the mutual interests of Democrats and Republicans.<sup>154</sup> Because both parties share the incentive to have weak enforcement, policies that favor partisanship over political neutrality are as much of a concern as policies that favor one party over another.<sup>155</sup>

Former FEC Commissioner Frank P. Reiche has stated, “[q]uite clearly, Congress views the FEC as a partisan body.”<sup>156</sup> Congress expects the commissioners to follow their respective party lines.<sup>157</sup> Campaign finance historian Robert Mutch has noted that “Congress wants more than the statutory balance between Republicans and Democrats on the commission—Congress wants the right kinds of Republicans and Democrats, preferably ones who are both partisan and closely tied to

---

150. See JACKSON, *supra* note 18, at 10; MUTCH, *supra* note 28, at 104–06; PROJECT FEC, *supra* note 5, at 15–19; La Forge, *supra* note 120, at 363.

151. Koszczuk, *supra* note 78.

152. Curran, *supra* note 78. See JACKSON, *supra* note 18, at 29 (telling the story of several unsuccessful attempts of President Carter to appoint commissioners who were not on Congress's short-list of suggested appointees).

153. 2 U.S.C. § 437c(a)(2)(A) (2000). See Amy Keller & Mark Preston, *FEC Recess Appointment Irks Democrats*, ROLL CALL, Apr. 1, 2002.

154. Issacharoff & Pildes, *supra* note 135, at 688.

155. See *id.* Cf. Nicholas D. Mosich, Note, *Judging the Three-judge Panel: An Evaluation of California's Proposed Redistricting Commission*, 79 S. CAL. L. REV. 165, 174–75 (2005) (discussing the political entrenchment that can occur in the context of redistricting when Democrats and Republicans cooperate to protect incumbents and explaining that bipartisan gerrymandering is as much of a concern as partisan gerrymandering).

156. JACKSON, *supra* note 18, at 34.

157. See Weiser & McAllister, *supra* note 6, at A1 (“Because many Washington politicians had become accustomed to a partisan FEC, many were stunned when Trevor Potter, a Republican lawyer appointed to the Commission in 1991 by President George Bush, began crossing party lines to endorse strong enforcement in several key cases.”).

congressional party leaders.”<sup>158</sup> The commissioners tend to be not only partisan in their registered affiliation, but also active players in the political arena. Project FEC noted, “Few FEC commissioners have come to the agency with a background in enforcing laws. Instead, most commissioners have come from the community that the FEC is responsible for overseeing—Congress, the political parties, the campaign finance defense bar, or other players in the campaign finance system.”<sup>159</sup> As of 2002, Project FEC found that only two of the twenty commissioners who had served on the FEC had strong backgrounds in enforcement, while sixteen of the twenty had strong ties to the regulated community.<sup>160</sup>

Numerous examples illustrate Congress’s control over the appointment process and its highly partisan nature. When President Carter refused to fill a vacant Republican seat on the Commission with one of three people named on a list Senate Republicans sent to him, Republicans delayed confirmation of Carter’s nominee for more than eight months, until Carter was forced to pick someone from the list.<sup>161</sup> In 2000, President Clinton was similarly forced to nominate a commissioner over his objections. Senate Republicans wanted Bradley Smith, “an avowed opponent of the federal campaign finance laws,” to fill a vacant seat.<sup>162</sup> Clinton resisted for months, but was ultimately forced to name Smith to the Commission.<sup>163</sup> Smith and Stephen Hoersting later joined with the Commission’s Chairman, David Mason, to campaign against the Shays-Meehan campaign finance reform bill by introducing a statement opposing the legislation into debate on the House floor.<sup>164</sup> This unprecedented involvement of FEC commissioners in floor debate about campaign finance legislation that they might later be called on to enforce was widely regarded as highly inappropriate.<sup>165</sup>

A comprehensive Center for Responsive Politics study found that a critical factor in the effectiveness of a campaign finance regulatory agency

---

158. MUTCH, *supra* note 28, at 105.

159. PROJECT FEC, *supra* note 5, at 16.

160. *Id.* at 60–61 (noting that the group of twenty individuals who have served as FEC commissioners includes “five commissioners who had been Members of Congress . . . , four who had served as congressional or White House staff . . . , three who came from political party positions or backgrounds . . . and four who had worked for, or represented, campaign finance players”).

161. JACKSON, *supra* note 18, at 29. Max L. Friedersdorf, the person Carter chose from the list, soon resigned to become a White House lobbyist. *Id.*

162. PROJECT FEC, *supra* note 5, at 17.

163. *Id.*

164. *Id.*

165. *See id.* at 18.

is the quality of the people appointed to oversee the agency.<sup>166</sup> Accordingly, changes to the FEC's appointment process are needed to rehabilitate the Commission's integrity. The study, which examined thirty-four campaign finance enforcement agencies, found that "[t]he appointment process is critical to determining the quality of those appointed to oversee an agency. The emphasis placed on the quality of the appointees, the exclusion of partisan considerations and the breadth of the search all contribute to . . . [the agency's] success."<sup>167</sup>

The FEC's appointment process currently falls far short of the thorough search for qualified nonpartisans that the Center for Responsive Politics recommends. If the FEC is to be composed of better-suited commissioners than have historically been appointed, the requirements FECA sets for commissioners must be changed. Currently FECA includes only the vague requirement that "[m]embers shall be chosen on the basis of their experience, integrity, impartiality, and good judgment," and sets only the lenient limitation that members are "individuals who, at the time appointed to the Commission, are not elected or appointed officers or employees in the executive, legislative, or judicial branch of the Federal Government."<sup>168</sup> Instead, FECA should require a four-year time period to elapse before people who have held highly partisan positions can be appointed to the Commission. The rule should apply not only to elected or appointed government officials, but also to lobbyists and members of campaign or party staff. The Center for Responsive Politics recommends that "[p]ersons who are, or within two years have been, under the Agency's jurisdiction should be ineligible for appointment to the Commission."<sup>169</sup> Creating a cooling-off period and expanding the definition of prohibited activities would decrease the strength of any ties to a political party or administration that an appointee might retain from a previous government or political role.

In addition to restricting the political activity of commissioners prior to their appointment, commissioners' political activity should be limited during their tenure on the Commission and for at least one election cycle after leaving the Commission.<sup>170</sup> This would decrease the pressure on commissioners to pander to elected officials or interest groups for the sake of their careers in politics after their terms are up. The political activity of

---

166. MALLORY & HEDLUND, *supra* note 10, Part III.A.2.

167. *Id.*

168. 2 U.S.C. § 437c(a)(3) (2000).

169. MALLORY & HEDLUND, *supra* note 10, Part III.A.

170. *Id.* Part III (making similar recommendations).

staff should be limited while they are employed with the Commission as well. The FEC has requested that Congress impose such a requirement.<sup>171</sup> The FEC has proposed that FECA be amended to prohibit a commissioner or an employee from publicly supporting or opposing a candidate, political party, or political committee subject to the FEC's jurisdiction.<sup>172</sup>

FECA should also be amended so that commissioners are not appointed in pairs, but instead serve staggered six-year terms with one expiring each year.<sup>173</sup> Nominating commissioners in pairs encourages appointees to be equally strong partisans, as opposed to moderates and unbiased nonpartisans. As Brooks Jackson states, it fosters a “[w]e’ll give you yours if we get ours” attitude.<sup>174</sup> The Center for Responsive Politics points out that “[t]his notion of a bi-partisan—rather than a non-partisan—Commission places the interests of the major political parties ahead of the public’s interest in vigorous enforcement of the campaign finance laws.”<sup>175</sup> As another commentator suggests, “[e]ach Commissioner should be required to face Senate confirmation alone and should be judged on his or her ability to be impartial.”<sup>176</sup> If appointees had to face the Senate alone, their level of partisan connections would have to be evaluated independently without the shield of an equally partisan appointee from the other party. This would help the Commission move toward a nonpartisan makeup rather than a balanced but highly partisan makeup. While staggering appointments would likely make the appointment process more difficult, it would favor moderates who would garner support from both parties.

### 3. Lack of a Strong Chair

The chair and vice-chair of the FEC “have little in the way of actual

---

171. FEC, FEDERAL ELECTION COMMISSION ANNUAL REPORT 2002 43, available at <http://www.fec.gov/pdf/ar02.pdf> [hereinafter FEC ANNUAL REPORT 2002]. This annual report states:

The Commission recommends that Congress amend the FECA by adding a new subsection (f)(5) to 2 U.S.C. § 437c, which would prohibit an FEC Commissioner or employee from publicly supporting or opposing a candidate, political party or political committee subject to the FEC's jurisdiction, regardless of whether the activity is performed in concert with a political party, partisan political group or a candidate for partisan public office.

*Id.*

172. *Id.* While such a policy is likely inconsistent with the First Amendment, the intention of increasing commissioner neutrality that motivates the proposal is laudable.

173. See 2 U.S.C. § 437c(a)(2)(A) (2000).

174. JACKSON, *supra* note 18, at 65.

175. MALLORY & HEDLUND, *supra* note 10, Part III.

176. La Forge, *supra* note 120, at 375.

powers.”<sup>177</sup> The position as currently structured is “largely ceremonial,”<sup>178</sup> and not the “strong chief executive enjoyed by other independent agencies such as the SEC, FCC, and FTC.”<sup>179</sup> The chair’s role is limited to carrying out minimal administrative functions such as presiding at meetings, signing documents, and influencing the agenda to a small degree.<sup>180</sup> The chair does not have authority over staff or budget, and does not have final say on agency decisions.<sup>181</sup> As currently structured, “[t]he commission decides matters of policy, administration, and enforcement by collegial processes, not generally regarded as an efficient way of making any but very broad decisions.”<sup>182</sup> Smith and Hoersting recognize that “the lack of a strong chair leaves the Commission adrift, and bogs commissioners down in mundane details.”<sup>183</sup>

In a six-member commission that can easily be reduced to inaction by tie votes, the presence of a strong chair is necessary to help prevent standstills. Other commissions have success with a chairperson appointed by the President, for a fixed term, without Senate confirmation, rather than an annually rotating position appointed by the commissioners themselves.<sup>184</sup> Smith and Hoersting suggest that “some combination of greater power over daily operations and budgets or a longer, fixed term of office” makes sense for better management of the Commission.<sup>185</sup> Brooks Jackson recommends that the president be required to nominate one of the commissioners not belonging to the president’s party to serve as the chair, which he suggests would “provide an incentive to select carefully and would lessen the danger of partisan abuse by the party in power.”<sup>186</sup> Under such an arrangement, the chair would potentially be one of the most centrist

---

177. Thomas & Bowman, *supra* note 25, at 591. FECA provides for the FEC’s chairperson as follows:

The Commission shall elect a chairman and a vice chairman from among its members (other than the Secretary of the Senate and the Clerk of the House of Representatives) 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 the vice chairman shall not be affiliated with the same political party. The vice chairman shall act as chairman in the absence or disability of the chairman or in the event of a vacancy in such office.

2 U.S.C. § 437c(a)(5) (2000).

178. JACKSON, *supra* note 18, at 63.

179. Lochner & Cain, *supra* note 24, at 1928.

180. JACKSON, *supra* note 18, at 63.

181. MUTCH, *supra* note 28, at 103.

182. *Id.*

183. *See* La Forge, *supra* note 120, at 362.

184. *See id.*

185. *Id.*

186. JACKSON, *supra* note 18, at 63.

or neutral members of the Commission.<sup>187</sup> Such provisions granting a presidentially appointed chair more control over administrative decisions would improve the logistical functioning of the Commission without compromising partisan neutrality. The increased administrative powers of the position would not affect the voting power of the members, so the chair's party would not have runaway authority to damage members of the opposing party.

## B. DEFICIENCIES IN THE TOOLS FOR ENFORCEMENT

The three most significant problems with the FEC's tools for enforcement are the majority votes required at every stage of enforcement actions, the inadequacy of fines as a deterrent to rule-breaking, and the inability to conduct random audits.<sup>188</sup>

### 1. Inability to Make Timely Decisions

The votes required between each stage of the enforcement process and the cumbersome shuffle between the OGC and the commissioners make it "virtually impossible for the Commission to resolve a complaint during the same election cycle in which it is filed."<sup>189</sup> Smith and Hoersting point out that "[i]n the context of campaign finance laws, speedy punishment would seem to be especially important to deterrence."<sup>190</sup> They recognize that "[b]ecause the value of winning an election is high . . . political actors have a strong incentive to ignore the law and deal with post-election penalties as a cost of doing business."<sup>191</sup> Both the regulated community and watchdog groups believe that the FEC is "useless" unless it can act on a complaint before the election is over.<sup>192</sup> Lawrence Noble acknowledged, while he was serving as the FEC's general counsel, that the FEC is regarded as impotent because "[t]he likelihood is that whatever we do resolve, especially if it involves an investigation, will be long after an election."<sup>193</sup> Allowing certain enforcement activities to proceed with only three votes, as discussed above, would help curtail the problem of unduly slow

---

187. The concern would be that if the President was not limited to either Democrats or Republicans, the President could choose an extremist belonging to a party on either the far right or far left, rather than a moderate. Such a candidate would likely have a hard time being confirmed, however, and such a highly political appointment might draw intense criticism.

188. See Smith & Hoersting, *supra* note 120, at 152–58.

189. Thomas & Bowman, *supra* note 25, at 589.

190. Smith & Hoersting, *supra* note 120, at 153.

191. *Id.* See *Panel Discussion*, *supra* note 24, at 232 (comments of Lawrence Noble).

192. *Panel Discussion*, *supra* note 24, at 232 (comments of Lawrence Noble).

193. Weiser & McAllister, *supra* note 6, at A1.

investigations. A variety of other reforms have been proposed as well.

The FEC has attempted to address the fact that it generally lacks the ability to respond to complaints in the election cycle in which they are filed. In its 1997 Annual Report, the Commission asked Congress to consider allowing the FEC to adopt expedited procedures for complaints filed shortly before an election, including allowing expedited enforcement, and, in certain cases, injunctive relief.<sup>194</sup> The Commission also requested that Congress authorize it to “promptly initiate a civil suit for injunctive relief in order to preserve the status quo when there is clear and convincing evidence that a substantial violation of the Act is about to occur.”<sup>195</sup> Prominent reformers have suggested that the Commission should have injunctive authority.<sup>196</sup> In response to concerns that the FEC might misuse such authority, Elizabeth Hedlund advises that “the need to use it cautiously should not be a reason to shrink from having real injunctive authority in the first place.”<sup>197</sup> Such a change would address the prevailing attitude that FEC enforcement is merely a cost of doing business because it would force campaigns to take complaints against them more seriously. As a protection against abuse of injunctive authority, sanctions for filing frivolous complaints, particularly within ninety days of an election, should be strengthened, in order to decrease a campaign’s incentive to file nuisance complaints against opponents shortly before elections.

Perhaps the most significant change that could be made to the FEC to remedy the lengthy investigation and briefing process would be to turn the FEC into an adjudicatory body with administrative law judges (“ALJs”).<sup>198</sup> This would eliminate the inefficient interplay between the OGC and the commissioners.<sup>199</sup> Instead of the OGC presenting briefs to the Commission, “[t]he ALJ would develop a factual record through an adversarial procedure in accordance with the Administrative Procedure Act, and make a final determination on guilt and a penalty.”<sup>200</sup> ALJ determinations would be appealable to the Commission and then to the

---

194. FEC ANNUAL REPORT 1997, *supra* note 142, at 58 (“The Commission recommends that Congress consider whether the Act should provide for expedited enforcement of complaints filed shortly before an election, permit injunctive relief in certain cases, and allow the Commission to adopt expedited procedures in such instances.”). See Thomas & Bowman, *supra* note 25, at 589.

195. FEC ANNUAL REPORT 1997, *supra* note 142, at 58–59.

196. See, e.g., *Panel Discussion*, *supra* note 24, at 238 (comments of Elizabeth Hedlund).

197. *Id.*

198. See, e.g., Kenneth A. Gross, *The Enforcement of Campaign Finance Rules: A System in Search of Reform*, 9 YALE L. & POL’Y REV. 279, 287–89 (1991). See also *Panel Discussion*, *supra* note 24, at 238 (comments of Elizabeth Hedlund).

199. Gross, *supra* note 198, at 287–89; Smith & Hoersting, *supra* note 120, at 155.

200. Smith & Hoersting, *supra* note 120, at 155.

courts.<sup>201</sup> Existence of the factual record developed during ALJ proceedings would also help to speed up judicial appeals.<sup>202</sup> Both Project FEC and the McCain-Feingold Federal Election Administration Act recommend using ALJs. Project FEC gives two compelling reasons: “First, ALJ adjudication provides additional insulation of the enforcement process from partisan politics. . . . Second, the process would provide the agency with the ability to find violations of the law and impose appropriately calibrated sanctions, as contrasted with the agency’s very weak current authority . . . .”<sup>203</sup>

The use of ALJs is not universally popular among reformers, however.<sup>204</sup> Many people believe that “ALJs can get very political,” and the functioning of ALJs in other agencies has received substantial criticism.<sup>205</sup> In light of these concerns, perhaps the most compelling argument in favor of using ALJs is that this change addresses the “longstanding due process concerns in the Agency’s operation.”<sup>206</sup> Commissioner Bradley Smith argues that FEC procedures are “woefully lacking in due process,”<sup>207</sup> and points out, for example, that respondents have no right to a hearing, and are denied access to evidence until after there has been a finding of probable cause.<sup>208</sup> Furthermore, if the enforcement authority and disciplinary measures available to the FEC were enhanced, in accordance with the proposals in this Note or numerous other proposals for reform, the need for stronger due process safeguards would increase as disciplinary measures became more severe.<sup>209</sup> Accordingly, ALJs could provide not only the benefits of added efficiency and expediency in the FEC, but also the necessary due process component of a regulatory agency with more teeth.

---

201. *Id.* See Gross, *supra* note 198, at 287–89. “ALJs hear cases, find the facts, and apply the law—but their opinions are only proposed. Agency heads are free to substitute their judgment for that of the ALJ on questions of fact, law and discretion.” Michael Asimow, *The Administrative Judiciary: ALJ’s in Historical Perspective*, 20 J. NAT’L ASS’N ADMIN. L. JUDGES 157, 157 (2000).

202. Smith & Hoersting, *supra* note 120, at 155.

203. PROJECT FEC, *supra* note 5, at 42.

204. See *Panel Discussion*, *supra* note 24, at 251–52 (comments of Lawrence Noble). *But see* Gross, *supra* note 198, at 288 n.41 and accompanying text (giving examples of ALJs being used successfully by other agencies).

205. *Panel Discussion*, *supra* note 24, at 251–52 (comments of Lawrence Noble).

206. Smith & Hoersting, *supra* note 120, at 157. See Gross, *supra* note 198, at 288; Todd Lochner, *Overdeterrence, Underdeterrence, and a (Half-Hearted) Call for a Scarlet Letter Approach to Deterring Campaign Finance Violations*, 2 ELECTION L.J. 23, 38 (2003).

207. Bradley A. Smith, *Campaign Finance Reform: What Congress and the FEC Should Do Next*, 1331 P.L.I. CORP 347, 356 (2002).

208. *Id.* at 357–59.

209. Lochner, *supra* note 206, at 33.

## 2. Inadequacy of Fines as a Deterrent to Rule-breaking

After the long process of determining that there is probable cause to believe that a violation has occurred or is about to occur, all the Commission has authority to do is negotiate with the respondent over a voluntary payment. If that remedy fails, the Commission can vote to file an action in civil court, where compulsory remedies are available. Former Senator Robert Kerrey (D-NE) put the FEC's ineffective punitive mechanism in perspective when he pointed out that if he won an election with the help of illegal campaign contributions,

the FEC, . . . one of the most toothless organizations I've ever come up against, might levy a \$50,000 fine on me three years after the fact . . . . You know, I can raise that in a single night in a campaign event. So that's hardly what I would call a deterrent against illegal behavior . . . .<sup>210</sup>

Other commentators have also acknowledged the inadequacy of fines as a deterrent to rule-breaking. *Lochner* states that “[i]f monetary fines are the only enforcement mechanism available to the FEC . . . it makes sense for some serious wrongdoers to conclude that they should rationally violate the law.”<sup>211</sup>

As suggested above, the FEC should be able to impose injunctive relief in addition to monetary fines. The FEC has requested that Congress grant it the authority to seek injunctive relief, particularly for violations that occur shortly before an election. But while it would improve the FEC's ability to deter violations, injunctive relief alone, requiring offenders to divest illegally obtained contributions or refrain from engaging in certain illegal types of electioneering, would probably be insufficient to deter the most serious offenders from accepting the donations or engaging in the conduct in the first place. Until the electoral costs of the punishment outweigh the electoral costs of refraining from the illegal fundraising, candidates are unlikely to be deterred.

This logic supports *Lochner*'s proposed punishment scheme, which he calls the “Scarlet Letter Approach.”<sup>212</sup> He acknowledges that “the FEC presently is incapable of deterring those actors who purposely and repeatedly flaunt federal law.”<sup>213</sup> Recognizing that effective enforcement requires stronger incentives for candidates to comply with FECA, *Lochner*

---

210. Price, *supra* note 26, at A5.

211. *Lochner*, *supra* note 206, at 31.

212. *Id.* at 23.

213. *Id.* at 23–24.

suggests that the threat of negative publicity is necessary to counteract the current problem of underdeterrence in the FEC's enforcement capability.<sup>214</sup> Thus, he proposes what he terms a "scarlet letter sanction," in which the FEC "would issue public reprimands of the most serious campaign finance violators in popular media with the expectation that electoral incentives would incline candidates and their campaign staff to expend greater efforts ensuring that they have complied with the law."<sup>215</sup> While it may suffer from several shortcomings, Lochner's proposal is one of the few suggested FEC reforms that is particularly tailored to the nature of the problem and the actors' incentives.

The most significant flaw in the theory underlying the scarlet letter sanction is an assumption that Lochner himself acknowledges: "The informal sanction of adverse publicity assumes first that the public is made aware of campaign finance violators, and second that such knowledge materially affects voters' political decision making."<sup>216</sup> The proposals in Part IV of this Note attempt to address the problem of campaign finance enforcement's low profile with voters, and would strengthen the effectiveness of a publicity-driven punishment scheme such as the Scarlet Letter Approach. If campaign finance enforcement were higher on the policy agenda and the public were more attuned to information about violations, public reprimands could directly influence voter choices and, in turn, candidate fundraising practices.

### 3. Inability to Conduct Random Audits

Commentators and reformers have long been calling for Congress to reinstate the FEC's random audit authority.<sup>217</sup> Much like the random audits the IRS conducts, random FEC audits would encourage voluntary compliance with the law.<sup>218</sup> Congress repealed the FEC's authority to audit without cause in 1979, after members of Congress were embarrassed by the

---

214. *Id.* at 24.

215. *Id.* While at first glance it may seem that a proposal to release information about campaign violations is contrary to the confidentiality provisions in 2 U.S.C. § 437g(a)(12)(A), the fact that a violation occurred would only be released after an ALJ hearing, the results of which are a matter of public record. Underlying campaign secrets would not be released, nor would the fact that an investigation occurred when that investigation did not lead to a finding of wrongdoing. *See id.* at 37.

216. *Id.* at 39.

217. *See, e.g.,* Federal Election Administration Act of 2003, S. 1388, 108th Cong. (2003); JACKSON, *supra* note 18, at 68–69; La Forge, *supra* note 120, at 375–76.

218. FEC ANNUAL REPORT 1997, *supra* note 142, at 61 ("Random audits performed by the IRS offer a good model. As a result of random tax audits, most taxpayers try to file accurate returns on time. Tax audits have also helped create the public perception that tax laws are enforced.").

inaccuracies that random audits uncovered in many of their reports.<sup>219</sup> According to Congress, random audits “took too long, sometimes embarrassed incumbents during their subsequent reelection campaigns, and didn’t turn up any major violations.”<sup>220</sup> Since the 1979 amendments to FECA, the FEC has been allowed to audit only for cause—when it finds errors or inconsistencies in filings.<sup>221</sup>

The unfortunate consequence of the current system is that it results in inequitable enforcement, or a bias that favors those with the sophistication and resources to disguise wrongdoing and avoid an audit.<sup>222</sup> Currently, the FEC is required to select audit targets based on the rate of errors in the reports filed with the Commission. Consequently, a large campaign committee “might doctor its reports so that no illegal activity, and few or no errors” appear, while a small, inexperienced committee might make “innocent reporting errors” in its attempt to follow the highly complex reporting guidelines, and thus trigger an audit.<sup>223</sup> In the words of former FEC Staff Director John Surina, this targets the “less sophisticated” and the “neophytes,” while “[t]he savvy guy will never be audited.”<sup>224</sup> Former Commissioner Smith points out that while “experienced players who hire the best lawyers and the best consultants” may regard the FEC as a toothless agency, for “average Americans trying to run their county party committee” the FEC is “a rather fearsome creature.”<sup>225</sup>

The FEC has requested that Congress reinstate its random audit authority.<sup>226</sup> In explaining its request to Congress, the FEC stated, “The Commission is concerned that [eliminating random audits] has weakened its ability to deter abuse of the election law. Random audits can be an effective tool for promoting voluntary compliance with [FECA] and, at the same time, reassuring the public that committees are complying with the law.”<sup>227</sup> There are many examples of agencies using random audits effectively. In addition to the IRS, regulatory agencies such as the EPA, OSHA, and California’s Fair Political Practices Commission use random

---

219. JACKSON, *supra* note 18, at 12–13. For an in depth discussion of the abolition of random audit authority, see MUTCH, *supra* note 28, at 95–100.

220. JACKSON, *supra* note 18, at 13.

221. *Id.* at 12–13.

222. See Lochner & Cain, *supra* note 24, at 1929–30; Smith & Hoersting, *supra* note 120, at 170; Weiser & McAllister, *supra* note 6, at A1.

223. Smith & Hoersting, *supra* note 120, at 170.

224. Weiser & McAllister, *supra* note 6, at A1.

225. Smith, *supra* note 207, at 355–56.

226. See, e.g., FEC ANNUAL REPORT 1997, *supra* note 142, at 61.

227. *Id.* (calling on Congress to amend 2 U.S.C. § 438(b) to allow random audits).

audits to encourage voluntary compliance with their regulations.<sup>228</sup> Lochner and Cain call the case for random audits “unassailable.”<sup>229</sup> But despite the fact that the case for random audits is so strong (or perhaps because random audits would so drastically improve the FEC’s enforcement ability), Congress shows no signs of granting random audit authority. The challenge with reinstating random audits is not concern about whether it will be an effective enforcement tool, but fear among the regulated community that it will be *too effective*, revealing embarrassing information that candidates can currently conceal through careful reporting.<sup>230</sup>

#### IV. PUTTING ENFORCEMENT ON THE MAP

Advocates of campaign finance reform frequently invoke public outrage as the impetus for changing the law.<sup>231</sup> But public opinion research has shown that while the public is generally in favor of campaign finance reform,<sup>232</sup> the issue consistently ranks at the bottom when compared with other policy issues.<sup>233</sup> Commentators have acknowledged the gap between the fervor of reformers and public sentiment. William Mayer points out that “despite the efforts of reformers to create the impression of a mandate for change, most Americans . . . don’t seem very concerned about campaign finance.”<sup>234</sup> Kenneth Mayer has similarly acknowledged that “there is almost no evidence . . . to suggest that any federal candidates have won or lost because of their position on reform.”<sup>235</sup>

---

228. Lochner & Cain, *supra* note 24, at 1930.

229. *Id.*

230. See JACKSON, *supra* note 18, at 30–31.

231. See, e.g., *McCain Says FEC Must Be Replaced*, FRONTRUNNER, Nov. 4, 2004; 139 CONG. REC. S6531-01 (daily ed. May 26, 1993) (statement of Sen. Kerry).

232. See polling data cited, *supra* note 13.

233. A Pew Research Center study conducted in January 2004 found that out of twenty-two issues, campaign finance reform was the third lowest priority, higher only than expanding America’s space program and passing a constitutional amendment to ban gay marriages. Campaign Reform: Red Flags, *supra* note 13. An ABC News/Washington Post survey in September 2003 found similar results, with campaign finance reform ranking last in priority out of eighteen issues. *Id.* The higher-ranked issues included prescription drug benefits for the elderly, the federal budget, health insurance, international affairs, military spending, gun control, the abortion issue, the environment, and the situation between Israel and the Palestinians. *Id.* A Gallup poll conducted in January 2000 found that out of twenty-five issues, campaign finance reform ranked second to last in priority, followed only by policy concerning gays and lesbians. W. Mayer, *supra* note 13, at 63–64. The January 2006 Jack Abramoff lobbying scandal does not appear to have significantly changed public opinion about campaign finance reform. See Americans Taking Abramoff in Stride, *supra* note 14.

234. W. Mayer, *supra* note 13, at 47.

235. K. Mayer, *supra* note 17, at 71.

The disconnect between the general public's apathy toward campaign finance reform and the reform community's attempts to increase the issue's salience received attention in March 2005 as a result of comments made by Sean Treglia, a former program officer for the Pew Charitable Trust in charge of funding for campaign finance reform research and advocacy efforts.<sup>236</sup> Treglia suggested that reform groups may have inflated the extent of public support for campaign finance reform, stating that reformers wanted to "create an impression that a mass movement was afoot—that everywhere [Congress] looked, in academic institutions, in the business community, in religious groups, in ethnic groups, everywhere, people were talking about reform."<sup>237</sup> This led one commentator to call the reform movement not grassroots, but "Astroturf."<sup>238</sup> Whether the public support behind campaign finance reform was exaggerated or not, Congress perceived that the issue was pressing, and the reform community celebrated a major policy victory with the passage of BCRA. Reforming the mechanism for the enforcement of campaign finance laws presents an even tougher public opinion challenge.

Some legislators recognize that it might be better for politicians to deal with the issue proactively rather than waiting for a scandal to force Congress's hand. Early in 2005, Senator Trent Lott (R-MS) said, "This issue, if we don't address it, is going to be a huge political calamity. . . . So we can deal with it soon and do it the right way, or we can do it later, after we've been embarrassed."<sup>239</sup> And Congress has certainly been embarrassed. Lott's comment was less than a year before former Republican House Majority Leader Tom Delay resigned from Congress amid fallout from the Jack Abramoff scandal. Nevertheless, Congress is hardly clamoring to strengthen campaign finance laws in any meaningful

---

236. Treglia's comments were first publicized in a *New York Post* article after a reporter discovered the video tape of a March 2004 conference at the University of Southern California. Ryan Sager, *Buying Reform: Media Missed Millionaires' Scam*, N.Y. POST, Mar. 17, 2005, at 33. Treglia has since retracted his comments and the Pew Charitable Trusts asserts that the comments were false and misleading. Rebecca Rimel, Editorial, *Pew: We Were Transparent*, N.Y. POST, Mar. 25, 2005, at 34 (Rimel is the President and CEO of Pew Charitable Trusts).

237. Sager, *supra* note 236.

238. Jonathan Cipriani, *Speech, Lies and Videotape*, WASH. SQUARE NEWS, Mar. 31, 2005.

239. News Conference on the 527 Reform Act of 2005, *supra* note 1 (statement of Sen. Lott).

way.<sup>240</sup> The stakes are simply too high. Elected officials want to make sure that “in a campaign’s home stretch, when eleventh-hour cash infusions can change the election’s course,” they have the latitude to raise the money they need to get elected, by any means necessary.<sup>241</sup>

#### A. CAN FEC REFORM RISE TO THE TOP OF THE POLICY AGENDA?

Legislators have many interests competing for their time, including casework, campaigning, and myriad policy issues. They do not have time to address them all. Thus, choosing to make one issue a priority means not addressing another.<sup>242</sup> The limited set of “subjects or problems to which governmental officials . . . are paying some serious attention at any given time” makes up the policy agenda.<sup>243</sup> A multitude of research addresses the question of how legislators choose to focus on one issue over another. While much uncertainty surrounds this question,<sup>244</sup> Douglas Arnold points out that one of the most important factors is “electoral calculations.”<sup>245</sup> Because “legislators worry constantly about the electoral consequences of their decisions,” they make policy choices based in large part on their anticipation of how voters will respond at the polls.<sup>246</sup> Consequently, if legislators perceive that voters feel strongly about an issue, they are likely

---

240. The scandal did create a short-lived frenzy in Washington about campaign finance reform, but the minor legislation that resulted is a small Band-Aid for a gushing wound. Many reformers consider the legislation to be a disappointment. *See, e.g.*, Jeffrey H. Birnbaum, *Senate Passes Lobbying Bill*, WASH. POST, Mar. 30, 2006, at A1 (stating that the new legislation passed in response to the Jack Abramoff scandal is “less sweeping than GOP leaders envisioned” and quoting reformers as calling the legislation “extremely weak”); Press Release, Common Cause, *Senate’s Response to Abramoff Scandal Is Mostly Window Dressing* (Mar. 29, 2006), available at <http://www.commoncause.org/site/apps/nl/content2.asp?c=dkLNK1MQIwG&b=194883&ct=2113463> (calling the new legislation a “very tepid lobbying and ethics reform bill” that “doesn’t come close to restoring the public’s faith in Congress”). Senator McCain explained why he voted against the Legislative Transparency and Accountability Act of 2006, S. 2349, 109th Cong. (2006), stating, “it simply doesn’t do enough to address the critical need for comprehensive lobbying reform. We had a golden opportunity to institute real reform and prove to the American people that we are not completely oblivious to their concerns. . . . [T]he bill lacks imperative enforcement measures.” McCain Statement on Lobbying Reform Bill, *supra* note 18.

241. Weiser & McAllister, *supra* note 6, at A1.

242. *See* JOHN W. KINGDON, *AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES* 3 (2d ed. 1995).

243. *Id.*

244. *See id.* at 2–3. *See also* Michael D. Cohen, James G. March & Johan P. Olsen, *A Garbage Can Model of Organizational Choice*, 17 ADMIN. SCI. Q. 1, 1–2 (1972) (describing the complex process of choosing problems to solve within organizations, and arguing that “one can view a choice opportunity as a garbage can into which various kinds of problems and solutions are dumped by participants as they are generated”).

245. ARNOLD, *supra* note 11, at 6.

246. *Id.* at 9–10.

to respond, even if it means acting against their personal preferences.<sup>247</sup>

Thus, the challenge for moving FEC reform onto the agenda is instilling in legislators the belief that voters will reward them at the polls for strengthening campaign finance enforcement. This requires increasing the salience of the issue among the public. Some issues have a much harder time than others gaining the attention of the public and, in turn, politicians.<sup>248</sup> Issues that are highly visible and directly affect nearly everyone, such as inflation or gas prices, move onto the policy agenda much more readily than issues that are hidden and remote, such as the plight of refugees or high-level wrongdoing in the government.<sup>249</sup> Remote issues that do not directly affect the general public can easily be ignored, particularly if they are overshadowed by more pressing issues.<sup>250</sup> Specifically, political scientists note that administrative policy tends to have difficulty holding the attention of political actors.<sup>251</sup>

FEC reform is an administrative policy issue that is not highly visible and does not directly affect the general public.<sup>252</sup> Accordingly, increasing its salience among voters and moving it to the top of the legislative policy agenda is exceedingly difficult. There is no set formula for achieving such a goal,<sup>253</sup> but there are three elements that are essential to increasing FEC reform's prominence on the policy agenda: a focusing event; media attention; and policy entrepreneurs, both inside and outside of the government. The creation of the FEC in 1974 illustrates this point. Watergate served as a focusing event for the issue of implementing an independent campaign finance enforcement agency; extensive media coverage increased the issue's visibility; and policy entrepreneurs, both highly organized interest groups like Common Cause, and legislative actors including the Senate Watergate Committee, pushed legislation through Congress. These three factors will be required to achieve FEC reform in the future.

---

247. See *id.* at 119 (noting that citizens can "force legislators to support a particular alternative, either because they would profit from it or simply because they like the sound of it").

248. KINGDON, *supra* note 242, at 95; Gladys Engel Lang & Kurt Lang, *Watergate: An Exploration of the Agenda-building Process*, in AGENDA SETTING: READINGS ON MEDIA, PUBLIC OPINION, AND POLICYMAKING 277, 282 (David L. Protess & Maxwell McCombs eds., 1991) [hereinafter AGENDA SETTING] (reprinted from 2 MASS COMMUNICATION REVIEW YEARBOOK 447 (1981)).

249. See KINGDON, *supra* note 242, at 95; Lang & Lang, *supra* note 248, at 282.

250. See Lang & Lang, *supra* note 248, at 282-83.

251. See James G. March & Johan P. Olson, *Organizing Political Life: What Administrative Reorganization Tells Us About Government*, 77 AM. POL. SCI. REV. 281, 286 (1983).

252. See *id.* at 282-83.

253. See KINGDON, *supra* note 242, at 1-2; Cohen, March & Olsen, *supra* note 244, at 1-2.

## 1. Focusing Event

John Kingdon sheds light on how a remote issue like FEC reform can gain political attention: “To make an item from a less visible arena move up on a governmental agenda, something must happen, and that something often is a real crisis—the sort of thing government decision makers cannot ignore.”<sup>254</sup> Anthony Downs, recognizing that “American public attention rarely remains sharply focused upon any one domestic issue for very long—even if it involves a continuing problem of crucial importance to society,” has tried to identify how an issue “suddenly leaps into prominence” for a short period of time and then “gradually fades from the center of public attention.”<sup>255</sup> Downs describes an “issue-attention cycle” that social problems go through, in which experts and interest groups identify an undesirable social condition before the public notices. The public later seizes upon the issue as a result of a dramatic series of events. After the public learns of the cost and difficulty of fixing the problem, it gradually fades out of public interest and into a “prolonged limbo” of lesser attention.<sup>256</sup>

The pattern of sporadic attention paid to campaign finance through the nation’s history is consistent with the issue-attention cycle Downs describes and the need for a focusing event that Kingdon identifies. Scandals including the 1904 presidential campaign, Teapot Dome, Watergate, the Keating Five, Clinton’s pardon of financier Marc Rich, Enron, and Jack Abramoff have all resulted in a spike in attention toward campaign finance reform, but have then faded from the public radar shortly afterward, whether or not any real reform actually occurred. Consistent with the pattern that has emerged over time, it is likely that Congress will not reform the FEC until a scandal forces the issue to the forefront of the public’s consciousness. Downs states that “[a] problem must be dramatic and exciting to maintain public interest because news is ‘consumed’ by much of the American public (and by publics everywhere) largely as a form of entertainment. As such, it competes with other types of entertainment for a share of each person’s time.”<sup>257</sup>

The scandals mentioned above indicate that while a focusing event may thrust the issue of the shoddy enforcement of campaign finance laws

---

254. KINGDON, *supra* note 242, at 95.

255. Anthony Downs, *Up and Down with Ecology: The “Issue-Attention Cycle in AGENDA SETTING*, *supra* note 248, at 27 (reprinted from 28 PUB. INTEREST 38 (1972)).

256. *See id.*

257. *Id.* at 30–31.

into the public eye, there is no guarantee that reform will result. Commentators were confident that reform would come out of the Keating Five scandal, but attempts to enact legislation ultimately failed. In that scandal, Charles Keating, Chairman of the bankrupt thrift Lincoln Savings and Loan donated a total of approximately \$1.3 million to five senators who, in turn, intervened with federal regulators who were trying to close down Lincoln Savings and Loan.<sup>258</sup> One reporter stated, “the Keating Five scandal has provided the impetus for reform that 20 years of Common Cause diatribes about ‘special interest money perverting the political process’ never could.”<sup>259</sup> The scandal, which has been called “the quintessential case of institutional corruption,”<sup>260</sup> resulted in putting campaign finance reform on the agenda, but no legislation was passed.<sup>261</sup> In other words, a major scandal may be necessary, but it is certainly not sufficient to prod Congress to follow through with reform.

## 2. The Media

When a focusing event for campaign finance reform occurs, the public depends on the media to call the event to the public’s attention.<sup>262</sup> Voters learn about political issues more or less “in direct proportion to the emphasis placed on the campaign issues by the mass media.”<sup>263</sup> For a remote issue like FEC reform, significant media attention sustained over time is required to dramatically increase the issue’s salience.<sup>264</sup> Watergate, the one scandal in America’s history that actually led to a significant

---

258. Phil Gailey, *Dirty Laundry and Red-faced Reform*, ST. PETERSBURG TIMES, Jan. 19, 1990, at 10A. For a detailed discussion of Charles Keating’s misconduct and the Savings and Loan Scandal generally, see *Lincoln Sav. & Loan Ass’n v. Wall*, 743 F. Supp. 901 (D.D.C. 1990).

259. Andrew Bates, *The Keating 535; Charles Keating Did Us a Favor: He Showed Us How to Clean Up American Campaigns*, WASH. MONTHLY, April 1991, at 35.

260. Garrett, *supra* note 10, at 672.

261. Probably the most significant effect of the Keating Five scandal on campaign finance reform was turning McCain, one of the five Senators implicated in the scandal, into a leading champion of reform. While no legislation was passed immediately following the scandal, BCRA, passed after more than a decade of McCain’s effort, was a direct, though much delayed, result.

262. Lutz Erbring, Edie Goldenberg, and Arthur Miller explain that government trust (an issue closely related to campaign finance reform, a purported solution to quid pro quo corruption) is a “genuine media issue” in that people cannot experience government corruption directly but rely on media reporting for information. Lutz Erbring, Edie N. Goldenberg & Arthur H. Miller, *Front-page News and Real-world Cues: A New Look at Agenda-setting by the Media*, 24 AM. J. POL. SCI. 16, 38–39 (1980).

263. Maxwell E. McCombs & Donald L. Shaw, *The Agenda-setting Function of Mass Media*, 36 PUB. OPINION Q. 176, 177 (1972). See ERIKSON & TEDIN, *supra* note 12, at 229–32; KINGDON, *supra* note 242, at 57.

264. See KINGDON, *supra* note 242, at 58–59; Erbring, Goldenberg & Miller, *supra* note 262, at 39; Lang & Lang, *supra* note 248, at 282–83.

increase in the strength of the campaign finance enforcement mechanism,<sup>265</sup> is a revealing example of the need for persistent media attention in order to raise an issue to the top of the political agenda. When information about the Watergate hotel break-ins surfaced in 1972, the public was not initially very concerned, and Nixon was reelected in a landslide victory. Gladys Engel Lang and Kurt Lang explain the public's initial apathy, saying that Watergate "was outside the range of most people's immediate concerns. The details of the incident seemed outlandish and their import difficult to fathom."<sup>266</sup>

Soon after the election, however, public perception began to change. As Robert Mutch describes, "The public had paid little attention to Watergate in 1972, but the January trial, McCord's letter [charging that the burglary was part of a larger conspiracy], and the wave of resignations in the spring all heightened popular interest in the case."<sup>267</sup> The January trial of the Watergate defendants "breathed new life into a story that had almost expired,"<sup>268</sup> and by the time the Senate Watergate hearings began several months later, the country was riveted. Approximately seventy percent of the U.S. population watched the live television broadcasts of the Senate Watergate Hearings in the summer of 1973.<sup>269</sup>

Lang and Lang explain, "To create a Watergate issue, the media had to do more than just give the problem publicity. They had to stir up enough controversy to make it politically relevant . . ." <sup>270</sup> The public was primed for Watergate for some time before the issue broke with full force. There was already a climate of unprecedented public mistrust of the government.<sup>271</sup> Mutch notes, "Watergate occurred well after public confidence in political leaders had begun to decline. People had been prepared for Watergate in a sense, so it only confirmed their already low opinion of politicians."<sup>272</sup> Even with a scandal as monumental as Watergate, it took more than a year of constant media bombardment for

---

265. A campaign finance enforcement mechanism, currently the FEC, is not to be confused with substantive campaign finance reform, which has been enacted regularly since the early twentieth century.

266. Lang & Lang, *supra* note 248, at 283.

267. MUTCH, *supra* note 28, at 48.

268. Lang & Lang, *supra* note 248, at 284.

269. MUTCH, *supra* note 28, at 48.

270. Lang & Lang, *supra* note 248, at 285. Cf. KINGDON, *supra* note 242, at 128 ("[E]ntrepreneurs attempt to 'soften up' both policy communities . . . and larger publics, getting them used to new ideas and building acceptance for their proposals. . . . Without this preliminary work, a proposal sprung even at a propitious time is likely to fall on deaf ears.").

271. See MUTCH, *supra* note 28, at 42-44.

272. *Id.* at 42.

public outrage to manifest sufficiently to mandate legislative reform.

### 3. Policy Entrepreneurs

Even with the dramatic focusing event that Watergate provided, and the media's persistent coverage, "[t]he headlines alone would not have been enough to transform a problem so removed from most people's daily concerns into an issue . . . ." <sup>273</sup> Advocates were needed to translate public opinion into public policy. Policy entrepreneurs, or "political actors who promote policy ideas," are a crucial component of a strategy for achieving legislative reform. <sup>274</sup> A window of opportunity opened by a focusing event and its media coverage will soon close again if it is not acted on promptly. <sup>275</sup> Consequently, "policy entrepreneurs must develop their ideas, expertise, and proposals well in advance of the time the window opens." <sup>276</sup> In order to be successful, "[w]hen a window opens, advocates of proposals sense their opportunity and rush to take advantage of it." <sup>277</sup> Both public interest groups pushing from the outside and dedicated legislators pushing from the inside will be needed to pass FEC reform.

#### a. Public Interest Groups

Public interest groups are an effective mechanism for individuals to convey their opinions on policy issues to their elected representatives. Kingdon states that "[a] group that mobilizes support, writes letters, sends delegations, and stimulates its allies to do the same can get government officials to pay attention to its issues." <sup>278</sup> Furthermore, interest groups are particularly influential when it comes to low-visibility issues, including administrative policy, in which the general public is less involved. <sup>279</sup> Public opinion does not always translate into legislative action, but when legislators fear that ignoring public opinion would lead to electoral defeat, they have an incentive to choose the public's preference over their own preferences. <sup>280</sup> Consequently, an outpouring of interest group lobbying for FEC reform may be able to pressure legislators into acting.

Watergate reflects these trends as well. Common Cause's membership

---

273. Lang & Lang, *supra* note 248, at 286.

274. Michael Mintrom, *Policy Entrepreneurs and the Diffusion of Innovation*, 41 AM. J. POL. SCI. 738, 738 (1997). See ARNOLD, *supra* note 11, at 88.

275. See KINGDON, *supra* note 242, at 175–78.

276. *Id.* at 181.

277. *Id.* at 175.

278. *Id.* at 49.

279. *Id.* at 47. See ERIKSON & TEDIN, *supra* note 12, at 324.

280. See Erikson & TEDIN, *supra* note 12, at 284, 286–87. See also ARNOLD, *supra* note 11, at 5.

skyrocketed in 1973 and 1974, creating an active campaign finance reform constituency that had never previously existed.<sup>281</sup> The reform constituency was instrumental in passing the 1974 FECA amendments that created the FEC.<sup>282</sup> In combination, “the morning newspapers, nightly television news, constituent mail, and pro-reform lobbyists all over the Capitol had created pressure for new legislation that was too great to resist.”<sup>283</sup> Finally, an enforcement mechanism for campaign finance laws, the FEC, was created, after decades of futile attempts.

The reform community has grown tremendously since that time. Unlike in 1974, when Common Cause was more or less on its own, there are now dozens of advocacy groups for campaign finance reform, including the Campaign Finance Institute,<sup>284</sup> the Center for Responsive Politics,<sup>285</sup> FEC Watch,<sup>286</sup> the Center for Public Integrity,<sup>287</sup> Democracy 21,<sup>288</sup> and the Campaign Legal Center.<sup>289</sup> There are also academically based organizations like the Brennan Center,<sup>290</sup> and foundations like the Pew Charitable Trusts<sup>291</sup> and the Brookings Institution<sup>292</sup> that support campaign finance reform. These groups were instrumental in the effort to pass BCRA. Reformers knew how integral it was to give Congress the impression that failure to implement reform would have negative political consequences, and they advocated rigorously until Congress responded.<sup>293</sup> If the reform community is committed to achieving adequate enforcement of campaign finance laws, it must renew its advocacy efforts and be prepared to take full advantage of a focusing event when one arises. Without such advocacy, it is unlikely that FEC reform will have enough support to be enacted.

#### b. Legislators

There is a group of legislators currently in Congress, most notably Senators McCain and Feingold and Representatives Shays and Meehan, who are poised to push FEC reform through Congress as soon as the

---

281. See MUTCH, *supra* note 28, at 46.

282. See *id.* at 42–46.

283. *Id.* at 46.

284. Campaign Finance Institute, <http://www.cfinst.org> (last visited July 15, 2006).

285. Opensecrets.org, <http://www.opensecrets.org> (last visited July 15, 2006).

286. FEC Watch, <http://www.fecwatch.org> (last visited July 15, 2006).

287. Center for Public Integrity, <http://www.publicintegrity.org> (last visited July 15, 2006).

288. Democracy 21, <http://www.democracy21.org> (last visited July 15, 2006).

289. Campaign Legal Center, <http://www.campaignlegalcenter.org> (last visited July 15, 2006).

290. Brennan Center, <http://www.brennancenter.org> (last visited July 15, 2006).

291. Pew Charitable Trusts, <http://www.pewtrusts.com> (last visited July 15, 2006).

292. Brookings Institution, <http://www.brookings.edu> (last visited July 15, 2006).

293. See Sager, *supra* note 236.

opportunity arises. McCain and Feingold already wrote and introduced a bill attempting to replace the FEC with a better-functioning independent enforcement agency in 2003.<sup>294</sup> Similarly, when Watergate broke, Senators Hugh Scott (R-PA) and Charles Mathias (R-MD), and Representatives Bill Frenzel (R-MN) and Dante Fascell (D-FL) were leading champions of an independent FEC. Scott and Mathias had already introduced a bill to create an independent agency in 1971.<sup>295</sup> The Senate Watergate Committee's conclusion that creating an independent agency was crucial, and the pursuant support of both Democratic and Republican senators bolstered the reform efforts of these legislators.<sup>296</sup>

Kingdon instructs that in order for entrepreneurs to succeed at passing their agenda item, they must "do more than push, push, and push for their proposals or for their conception of problems. They also lie in wait—for a window to open."<sup>297</sup> Once the window of opportunity for action is open, they must immediately engage in what Kingdon terms "coupling" or joining the problem to their support for a solution.<sup>298</sup> McCain has proven his prowess as a policy entrepreneur in the past. He was able to capitalize on the publicity from his presidential campaign and the Enron scandal to pass BCRA, and he exploited the window opened by the Swift Boat Veterans For Truth and other 527 groups during the 2004 presidential campaign to push his 527 Reform Act.<sup>299</sup> He and his allies should continue to work with the reform community to refine their proposals for a new enforcement agency or reforms to the current Commission and lie readily in wait to seize the next window of opportunity for FEC reform.

BCRA's passage was a monumental success for campaign finance reform, but the sweeping new law still did not address the fact that the FEC is ill equipped to efficiently enforce it. Building the requisite public support behind administrative reform will likely be even more challenging than it was to garner the support to pass substantive campaign finance reform.<sup>300</sup> While FECA, a sweeping campaign finance reform bill, was passed with the help of a rising sense of dissatisfaction with the government, it took

---

294. Federal Election Administration Act of 2003, S. 1388, 108th Cong. (2003).

295. MUTCH, *supra* note 28, at 83.

296. S. REP. NO. 93-981, at 564 (1973); MUTCH, *supra* note 28, at 86-87.

297. KINGDON, *supra* note 242, at 181.

298. *Id.*

299. See Nelson, *supra* note 7. As of this writing, an amended version of the act, the 527 Reform Act of 2006, passed in the House and is awaiting action in the Senate. See H.R. 513 Bill Summary and Status, The Library of Congress, Thomas, <http://thomas.loc.gov/> (last visited Aug. 8, 2006).

300. Cf. ERIKSON & TEDIN, *supra* note 12, at 324 (discussing the lack of public interest in administrative policy).

Watergate, arguably the largest scandal in the nation's history, before Congress was willing to follow the lead of a few dedicated legislators and implement an independent enforcement agency. Policy entrepreneurs will again be an essential component of any future efforts to enact FEC reform.

#### B. KEEPING THE BALL ROLLING

The prevailing perception of the FEC as weak and ineffective leaves plenty of room for unscrupulous candidates to try to get away with campaign finance violations. It is likely only a matter of time before a campaign finance scandal, or focusing event, comes along, particularly if public interest groups and the media are active in turning over stones to look for impropriety. A scandal, as long as it does not take place at a time when it is overshadowed by other issues, should draw significant media coverage and call attention to the focusing event. There is a group of legislators in Congress who are eager to push FEC reform through Congress as soon as they are able to get enough colleagues on board to pass the legislation. But this will probably not happen until legislators believe that the electoral consequences of failing to pass FEC reform outweigh the costs of tougher enforcement. The missing piece is grassroots support.

Following BCRA's passage, the media buzz about campaign finance reform declined dramatically,<sup>301</sup> but the issue seemed to be gaining

---

301. While far from a scientific study, a LexisNexis database search is revealing about how much attention campaign finance reform is receiving in the news. A search for news articles (in both the "All News" database and the "Major Newspapers" database) with at least three mentions of the phrase "campaign finance reform" shows a sudden drop-off following BCRA's passage in March 2002.

Year	Number of Hits in "All News"	Number of Hits in "Major Newspapers"
2006*	69	13
2005	216	62
2004	271	51
2003	255	31
2002	1446**	264
2001	2324	399
2000	2206	430
1999	1429	280
1998	1274	284

\* The 2006 figures run from January 1, 2006 to the date of this writing, April 28, 2006. Despite the Jack Abramoff scandal, the preliminary figures for 2005 appear to be in line with the low numbers seen in 2003 through 2005, as opposed to the high numbers seen from 1998 through 2002.

\*\* There were 1100 articles from January 1, 2002 through April 30, 2002, approximately one month after BCRA was signed into law on March 27, 2002; there were only 346 articles from May 1, 2002 through December 31, 2002.

momentum again in 2002 and 2003. In 2003, soon after Project FEC issued its damning report of the FEC's underwhelming performance, entitled *No Bark, No Bite, No Point*, Senators McCain and Feingold introduced their Federal Election Administration Act, which mirrored many of the Project FEC report's recommendations, including replacing the FEC with a new agency. But nothing significant has happened with the issue since, aside from the occasional biting comment from Senator McCain about the FEC's failure as an agency. While his current project on 527 reform does not attempt to repair the FEC's shortcomings, McCain was quick to point his finger to where he thinks the problem is coming from: "the tragedy of all this, really, is that the Federal Election[] Commission has failed to do their duty."<sup>302</sup>

FEC reform does not appear to be a priority issue even for self-proclaimed "government watchdog" and campaign finance reform groups. Scanning through the homepages, recent press releases, and news items on the websites of public interest groups like Common Cause,<sup>303</sup> the Campaign Legal Center,<sup>304</sup> Democracy 21,<sup>305</sup> and the Center for Responsive Politics,<sup>306</sup> what little information about FEC reform they have is buried in information about issues that are clearly higher on their agendas. Currently, lobbying, congressional ethics, and 527 reform appear to be commanding most of the attention.<sup>307</sup> Common Cause's homepage has a small link to an "FEC Reform" page, which simply contains a blurb listing several of the problems it sees in the FEC and stating, "We support abolishing the current FEC and rebuilding an effective enforcement agency in its place."<sup>308</sup> There is no information suggesting that Common Cause is doing anything to actively pursue FEC reform, or indicating what individuals can do to get involved in advocating for FEC reform.

The scant information about FEC reform available on reform group websites is a far cry from Kingdon's recipe for interest group success, which suggests that "[a] group that mobilizes support, writes letters, sends delegations, and stimulates its allies to do the same can get government officials to pay attention to its issues."<sup>309</sup> The minimal interest group

302. News Conference on the 527 Reform Act of 2005, *supra* note 1 (statements of Sen. McCain).

303. Common Cause, <http://www.commoncause.org> (last visited July 15, 2006).

304. Campaign Legal Center, <http://www.campaignlegalcenter.org> (last visited July 15, 2006).

305. Democracy 21, <http://www.democracy21.org> (last visited July 15, 2006).

306. Opensecrets.org, <http://www.opensecrets.org> (last visited July 15, 2006).

307. *See* websites cited, *supra* notes 285-93, 304-07.

308. Common Cause, FEC Reform, <http://www.commoncause.org/site/pp.asp?c=dkLNK1MQIwG&b=202306> (last visited July 15, 2006).

309. KINGDON, *supra* note 242, at 49.

activity in this realm, in combination with the current low level of media reporting on campaign finance issues (as compared with the high level prior to BCRA's passage), suggests that there is not enough popular support behind FEC reform to push legislation through Congress, even if a scandal were to emerge. Reform groups should work with legislators and members of the academic community, who Kingdon calls "the next most important set of nongovernmental actors" after interest groups, to develop a unified vision for a reformed FEC.<sup>310</sup> If they are serious about wanting to implement reform, public interest groups must ratchet up their level of advocacy for reform to the pre-BCRA levels and create the same sense of urgency about the issue that led to BCRA's passage.

## V. CONCLUSION

The FEC in its current form is crippled by structural flaws and inadequate tools for enforcement, making the Commission incapable of effectively carrying out its mission to enforce campaign finance laws. The FEC's weakness is the result of Congress's self-interested desire to have latitude in raising campaign funds without fear of serious repercussions. Congress's conflict of interest, together with the low visibility of FEC reform as a political issue, makes it very difficult for FEC reform to reach the top of the policy agenda.

Because legislators are motivated by their desire to be reelected, they will support policies that they disfavor if they perceive that failing to do so would have negative electoral consequences. If legislators believe that enacting FEC reform will increase their chances of reelection, they will support it despite their conflict of interest. Thus, policy entrepreneurs must strive to raise the profile of FEC reform on the political agenda. With the help of a focusing event and media attention, public interest groups and key legislators should be able to work together to push reform legislation through Congress if they are prepared to seize on a scandal when it breaks.

Watergate demonstrated that the combination of a scandalous focusing event, ongoing media attention, and strong advocacy can combine to create sufficient pressure to spur Congress into enacting campaign finance enforcement legislation. Subsequent campaign finance scandals including the Keating Five, Clinton's pardon of financier Marc Rich, and soft money donations by Enron officers, have led to much talk but little action in the area of strengthening the campaign finance enforcement mechanism. If

---

310. *Id.* at 53.

reform is to occur, now is the time for the reform community to mount a serious public relations campaign to try to raise the salience of FEC reform. With the help of drastically increased public interest group advocacy and a cadre of savvy legislators ready to act on the first opportunity, meaningful campaign finance enforcement legislation may be able to gain passage for the second time in the nation's history. Once public interest groups are again advocating at their peak, it is just a matter of waiting for the next Watergate to be exposed, creating a mandate for reform too strong for Congress to ignore.