RECONSIDERING THE FEDERAL ELECTION COMMISSION:
The FEC as Independent Agency and Political Target

Testimony of
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I appreciate, more than I can say, the opportunity to address this Committee on the structure and operation of the Federal Election Commission.

The community of lawyers within which I practice is small; and the community of those who care deeply about this area of law is larger but not imposingly so. Many people, of course, hold opinions about campaign finance: about the corruptive influence of money in politics, and more specifically about the allegedly voracious, self-interested activities of candidates and parties chasing resources for their political activities. Many have heard and will repeat with confidence that the enforcement agency is controlled by politicians and refuses to police the activities of its masters. But those with a passionate interest in these issues are few; and those who observe the turnout at Commission meetings know that empty seats are typically plentiful. I once asked a reporter, and a good one, why he skipped public Commission meetings, and he replied, off the record: "The stuff is really boring."

And so I am glad that this Committee, in the discharge of its oversight function, has invited practitioners, among others, to submit views of the issues faced by the FEC in the enforcement of the statute.

The Standard Complaints about the FEC

Let me state at the outset my perspective, developed over 27 years of practice before this agency. The FEC, long an object of sharp criticism, has struggled with the effective conduct of its mission, and the criticism it has drawn for various shortcomings is not, by any means, unjustified. Yet much of the criticism, particularly the overheated kind, is simply a convenient and effective way of refusing to acknowledge the existence of legitimate, good faith differences over how the statute should be interpreted and applied in specific circumstances.

This sort of criticism plays on the ready belief of the uninformed and the cynical that Congress has rigged the enforcement process for its own, self-interested purposes.

So rather than admit that the regulation of politics is hard business, and that we will always face deep division over how to go about it, these critics insist that there are clear answers that the FEC refuses to adopt only because it is paralyzed politically and corrupted by partisanship. The attacks against the FEC from this vantage point represent a merely tactical choice in the larger war over fundamental constitutional and statutory issues. And those attacks find a willing audience among many who find it all too credible that the Government, once again, is betraying the public trust.

This has been true throughout the history of the agency. It was denounced in the seventies as "stalled from the start"[1] and in the eighties as exemplifying the "broken promise"[2] of campaign finance enforcement. Critics insisted that Congress constructed the agency so that it would be harmless, staffing it with impotent and politically sycophantic Commissioners eager to do the bidding of their Congressional masters.

Most reform proposals, concerned with this perceived problem of "independence" from Congress, have gathered around means of shoring it up: by providing for a strong Chairman, by adding a "public commissioner," by adding still another commissioner to avoid partisan deadlock on major votes,[3] and even by insulating the Commission from annual review of its authorization and appropriations.[4] Another proposal, reported by the Rules Committee to floor in 1993, would confer authority on the General Counsel to break a deadlock among Commissioners over the institution of an investigation.[5] Most recently, in a comprehensive proposal advanced by Senators McCain, Feingold and others, the agency would be abolished in favor of a newer version with three members headed by a Chairman, with "broad powers," appointed for a ten year term.[6]

But these reform proposals rest on the following claims or assumptions, all of which bear—and none of which stand up to—close examination. These are:

1) that Congress intended to establish a sham agency without true independence;

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[1] *See* Common Cause, *Stalled from the Start* (1981).

[2] *See* Brooks Jackson, *Broken Promise* (1990) at 63-66.

[3] *Id.* at 63-66.

[4] David Magleby and Candice Nelson, *The Money Chase* (1990) at 135.

[5] *See* Remarks of Senator Ford, *Congressional Record (*May 24, 1993) at S6338.

[6] A discussion of the Federal Election Administration Act of 2003 is found on Democracy 21's website, at http://www.democracy21.org/index.asp?Type=B_PR&SEC={059F4FED-104E-4053-A7A0-49E1DE102341}&DE={86BAC5B0-79EA-4772-B256-DA6E1A710C1B}.

2) that Congress provided the FEC with a uniquely cumbersome, politically divided structure, assuring that it could not function successfully;

3) that the FEC has met Congress' expectations in being singularly, even notoriously, ineffective.

What Congress Intended

Contrary to general assumptions, Congress did not loathe the coming of the FEC in 1974. Both parties in the House and the Senate embraced the concept of an independent agency with relative equanimity. Senate debate in 1974 did not feature a single amendment to the Rules Committee provision to establish this agency. Floor debate produced only positive comments by both sides, heatedly disagreeing on other issues, about the need for an independent enforcement body.

The calm on this issue on the Democratic side is not surprising.[7] The quiet in Republican ranks is less easy to explain. The Republican Party, it is fair to say, had long expressed in fairly uniform fashion the gravest reservations about—and partisan suspicion of—Government control of the political process. It seems, however, that the Republicans embraced the FEC in large measure as an instrumental element in their defense against the provision they dreaded most in the bill—public financing.

Republicans argued that public financing went entirely too far—that the need for such a drastic remedy had not been demonstrated. On the contrary, they insisted, a large part of the problem lay in the inadequacies of enforcement of existing law. Properly enforced contribution limitations and disclosure requirements would obviate the need to drain off taxpayer funds for political campaigning. As Senator Dole argued in support of an amendment of his own, which adopted the approach to the FEC by the Rules Committee bill reported to the floor, "the basic premises of the 1975 Campaign Act are still valid and should be maintained." An FEC—a strong independent bipartisan enforcement agency—would make the difference. Dole thus had printed in the Record the following case for a strong FEC with only modest changes to existing law:

> *If properly enforced, existing statutes are, by and large, adequate to deal with the individual instances of dishonesty that will always be with us. Thus, no new laws were necessary during the past two years to successfully prosecute former Vice President Spiro T. Agnew; Sen. Daniel Brewster of Maryland;*

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[7] The Democrats embraced the role of the FEC with enthusiasm—in one case, wild enthusiasm. Senator Clark of Iowa proposed an amendment which would require the FEC to establish and maintain accounts for candidates and pay their bills. The amendment failed. *Congressional Record (*April 5, 1974) at S5335.

Representatives Cornelius Gallagher of New Jersey and John Dowdy of Texas; and former Illinois Governor Otto Kerner.

However, too often existing laws have not been enforced. To provide for enforcement of the reforms that inevitably will be enacted, Congress should establish a federal-election commission composed equally of Democrats and Republicans. The assurance that future scandals will not be covered up, no matter who is involved, will of itself help revive public confidence.[8]

A significant number of Republicans voted for final passage of the whole bill, including the public financing provision. The FEC provisions passed along with the rest. But because of Republican strategy on the floor, there was little debate about the kind of "independent" agency which would be created to regulate political money. The Senate, at least, exhibited nothing approaching resistance.

The House, however, reflected a marked uneasiness with the proposed new agency. Congressman Wayne Hays, plainly unhappy with the prospect of a robust political enforcement agency, was not alone. Other members, such as Republican Congressman Dickinson, complained in colorful terms that "if we set up a Commission that is going to be headhunters [W]e will be serving two sentences, one for 2 years in Congress and one for 2 years in jail."[9]

A revealing conflict developed on the Democratic side, dividing Wayne Hays from members of his own party who believed that Hays' formulation—and that of the bill reported by the Administration Committee—simply afforded inadequate "independence" to the new agency. They objected particularly to a "Board"[10] whose voting members included Congressional officers and whose regulations would be subject to veto by House and Senate oversight committees. Hays relented and a compromise passed which transferred legislative veto authority to both Houses, and limited the Clerk of the House and the Secretary of the Senate to non-voting participation.

House Republican amiability on this issue is also notable, mirroring the willingness they also displayed in the Senate. The compromise measure on the FEC passed by an overwhelming vote. Later, upon final passage, Republican Congressman

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[8] *Congressional Record* (April 10, 1974) at S5650.

[9] *Congressional Record* (August 8, 1974) at H7809.

[10] The original House bill referred to the agency as a Board of Supervisory Officers and the "Federal Election Commission" as named by the Senate emerged from Conference.

Bill Frenzel declared the establishment of this independent agency to be the cornerstone of the new reform.[11]

Congress had quarreled over a variety of features of the reform. While public financing occasioned the most heated debate, there were others, such as the size of the contribution limits. But the newly established Federal Election Commission, charged with supervision of campaign finance practices and endowed with a range of powers to pursue its mission, passed with broad bipartisan support. At all times its virtue was widely promoted by Democratic and Republican alike to be its "independence."[12]

Was the FEC Set Up to Be Different from Other Agencies?

The hope that an independent enforcement agency would moot the need for public financing accounted in some measure for the paucity of consideration of the new Agency and its powers. But politics and legislative strategy did not alone account for the outcome. The FEC came into being in a period of dramatic growth in the number of "regulatory" agencies and in the scope of their operations.[13]

Moreover, the establishment of the FEC also reflects some of the measures, such as the legislative veto, more generally adopted by Congress to hold these increasingly powerful agencies to some degree of legislative accountability.

Critics rarely see the FEC as influenced by any such broad trend in political life or administrative law. Watergate is the dominant narrative, treated as virtually self-contained. Of course, Watergate was unique in nature and in consequence. Yet those legislators who had decisions to make in response to Watergate chose among options then available or popular. This background helps to explain why the otherwise extraordinary action—to create an independent agency to regulate political activity—could sweep through the Congress with little debate.

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[11] *Congressional Record* (October 10, 1974) at H10331.

[12] Robert Mutch acknowledges that "independence" was to be a "key feature" of the agency, made possible by broad "investigatory, subpoena and regulation writing powers." Robert Mutch, *Campaigns, Congress and the Courts* (1988) at 87. But he has his doubts; his principal concern is the "unique appointment process" which reflected "grudging acquiescence in the form of independence while retaining as much Congressional control as possible." Of course, subsequently, the Supreme Court in *Buckley v. Valeo*, 424 U.S. 1 (1976), invalidated the original grant of appointments authority to Congress.

[13] Apart from the growth in numbers of regulatory agencies form 1964 to 1977, *see* David Vogel, *Regulation in Perspective* (1982) at 157, the staff employed in regulatory agencies rose over the period of 1970 to 1979 by 216%, and total expenditures by regulatory agencies in this period increased 374%. Cass Sunstein, *After the Rights Revolution* (1990) at 244.

This background of expansion in the field of administrative activity and its implications for Congressional control drew extensive comment at the time, even if little was directed at the FEC. Professor Richard B. Stewart of Harvard University wrote in 1975 in the Harvard Law Review that "American administrative law is undergoing a fundamental transformation," resulting in "the delegation to agencies of considerable discretion to determine government policy and to distribute the resulting benefits and burdens."[14]

This "reformation" included an increasing emphasis on assuring that agencies operated "independently" by giving adequate scope to the representation of public rather than private interests. Stewart's article noted a dramatic growth in legislative measures and judicial intervention to assure that the "public" was heard and that individual agencies were not "captured" by the powerful interests they were established to control in the broader public interest. Stewart suggested that these developments had caused the collapse of a "traditional model" of administrative law which held that Congress should closely instruct administrative agencies in their tasks and assure that judicial review was available to control any excessive administrative intrusion on private property or liberty.

As noted, some of the devices reflected in the establishment of the FEC were not uncommon for the time. The one-house veto, for example, was included in the same year that the FEC was established in bills controlling the General Services Administration's regulations concerning Nixon's papers. Two-house vetoes were enacted to control regulations issued by the Commissioner of Education and also the issuance of passenger restraint rules by the National Highway Traffic Safety Administration. In a few years more, Congress would add a one-house veto over incremental pricing regulations by the Federal Energy Regulatory Commission and a two-house veto over Federal Trade Commission rules.[15] Congress was also concerned, as it traditionally had been, to construct administrative agencies free of partisan control.

The FEC did not, therefore, materialize out of some legislative ether. While there was some concern about the unique mission—and dangers—of an agency which would supervise the campaign finances of Members of Congress, there was general acceptance that such an agency should be created and that it should be an "independent" like any other.

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[14] Richard B. Stewart, "The Reformation of American Administrative Law," 88 *Harvard L. Rev.* 1669 (1975) at 1669, 1811.

[15] *See* Louis Fisher, *The Politics of Shared Power* (3d ed. 1993) at 73-78. Robert Mutch sees the "legislative veto . . . [as] designed to keep election commissioners under the Congressional thumb" but then concedes that "it was not unique, having been written into other laws." Mutch, *supra* note 9, at 88.

Congress did adapt the design of the agency to its particular circumstances, such as providing that no political party could control more than half of the Commission's votes. The Congress also provided that the agency could take no investigative or other final action without a majority of four votes. Considered together, this prohibition of a one-party majority, along with the requirement of a majority for action, clearly provided for a partisan check over major decisions.

The more pertinent question has, however, always been one of alternatives. An odd-numbered agency, presenting the possibility that one party would control more votes than the other, poses an even more direct threat of partisan "control." A seventh, or third, Commissioner has to be someone: that someone will face close scrutiny over any partisan leaning, reflected in voting or contribution patterns, or in prior associations.

Moreover, the discovery of someone widely considered to be "apolitical" does not end the problem, because a Commissioner needs to know something about the political process, even to care about it, to act sensibly, effectively and credibly. It is fair to note that the statute actually requires the appointment of Commissioners possessing "integrity, impartiality, and good judgment," but also "experience." 2 U.S.C. § 437c(a)(3).

In this light, the decision by Congress to require at least a majority vote drawing on votes from both parties seems wise enough. It is only unusual, because the agency's mission is unusual. In comparable circumstances, few as they are, the same approach has been adopted. The Senate, for example, has established the Select Committee on Ethics as a standing committee with six members divided evenly between the two major parties.[16] That Committee, while a legislative committee rather than an administrative body, also possesses the power to conduct investigations and make findings (including judgments on explicitly campaign-related matters) with wide partisan impact. The design of this committee reflects, as did the FEC's design, a recognition that because of its political mission, its actions require bipartisan support to be credible.[17]

The FEC is an independent agency largely like any other—except, of course, that it regulates politics and influences political outcomes. The argument over the FEC will

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[16]The House Committee of Standards of Official Conduct is also evenly divided between the majority and minority parties.

[17] As noted, one other major objection has been commonly lodged against the FEC: the original appointment power vested in certain officers of the Congress. *See* note 9. This objection is somewhat dated. The Congress no longer has this appointments authority as a result of the Supreme Court's decision in *Buckley v. Valeo*, 424 U.S. 1 (1976). Even at the time, moreover, Congress could also be seen to have done little more than retain some measure of the jurisdiction it had exercised for the better part of the century over campaign finance regulation. Jurisdiction is never surrendered easily. Critics also forget that *Presidential* control raises similar issues. Presidents have an enormous stake, as candidates and partisan party leaders, in the administration of the campaign finance laws.

remain bogged down in misunderstanding unless it is understood that some of the issues raised by the establishment and operation of all independent agencies raise particular problems for an agency charged with regulating political activities. In light of those special problems, it is remarkable that Congress went as far as it did to fashion the FEC on the independent agency model of the time.

The challenges faced by Congress in establishing the FEC are brought out by considering some fundamental features of the "independent agency" model. A task force established by the 1949 Hoover Commission set out the following advantages of an independent regulatory scheme. It is worth citing theses specific advantages, then assessing how easily they can be realized in the case of an agency, like the FEC, with the authority and power to intervene in politics.

> 1. *Resistance to pressures*. The extensive powers given to regulatory agencies and the administrative flexibility required for their effective use obviously open the door to favoritism, unfairness, political influence, and even corruption. The independent commission, with its multiple membership, shared responsibility, and security of tenure, is in a favorable position to resist partisan control and to expose pressures and improper actions.
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> 2. *Collective policy formation*. The commission, by requiring collective policy making and decision, provides a barrier to arbitrary or capricious action and secures decisions based on different points of view and experience. This process has definite advantages where the problems are complex, the relative weight of various factors affecting policy not clear, and the range of choice wide.
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> 3. *Expertness*. Regulated industries are complex and highly technical. Their problems need constant study and continuous attention. While expertness must be supplied in large party by the staff, the commission form is designed to assure expertness or at least familiarity with the problems of the regulated field on the part of the commissioners, who have fixed terms and a good chance of reappointment. Devoting full time to the particular industry, the commissioners become fully familiar with the technical aspects of the industry and its basic problems through day-to-day contacts.
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> 4. *Continuity of policy*. In order to enable private industry to plan ahead, the regulatory agency must seek to achieve as much stability in policy and methods as is consistent with continuous adaptation of regulation to meet changing conditions.[18]

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[18] Fisher, *supra* note 12, at 122-123.

Taking each one in turn, these precepts pose major problems of application to the FEC as an agency concerned with politics and able to affect political outcomes. The task of "resistance" to "political influence" raises more questions than it answers. The notion of an agency charged with politics which is immune from political accountability is, on its own face, disquieting. The structure of the FEC embodies Congressional recognition that the FEC cannot escape politics, or the suspicion of it, with decisionmaking. The business of this agency is politics, and Congress built into the design of the agency a check on partisan over-reaching and manipulation.

Changing the composition of the FEC will not settle this issue but will instead exacerbate it. Under the most recent proposal, the President affiliated with one party—who leads his or her party, campaigns for her candidates across the country and heads the Presidential and party ticket nationwide—will appoint a Chairman, able to cast the decisive vote on close issues, for a ten year term. How does this allay the concern with partisan "capture" of the agency? The problem, at bottom, is one of attempting to render bipartisan a function with vast partisan implications. Congress wisely chose to both recognize the unavoidable entanglement with politics while guarding against partisan control.

Equally complex are the problems presented for the FEC by the goal of "collective policy formation." By definition, the Hoover Task Force noted, collective policy formation is meant to avoid arbitrary or capricious action and to drive the agency toward consensus. The "collegiality" of the FEC and its attempts to reach consensus has been derided widely as partisan "clubbiness" in which members of the two major political parties come together only to serve the interests of the incumbents or other narrow political interests.

In effect, while the FEC has been charged with making decisions, there is widespread suspicion of whatever it does. When it deadlocks, complaints are heard that the agency is blocking enforcement; but when the FEC reaches decision by consensus, complaints follow that some larger partisan conspiracy reaching across party lines must be afoot.

"Expertness" lays bare some of the most obvious vulnerabilities of this agency. In what way can we say that the administrative agency which is the FEC is "expert" in elections? The expertness cited by the Hoover Task Force does not have to do with expertise in the statute but rather "with the problems of the regulated field" and "the technical aspects of the industry." It is difficult to say in what way the Commissioners, much less the staff, can be said to be "experts" on politics to whom we should give deference. Our views of government resist the notion that any public official has more expertise and should therefore exercise more discretion in elective politics than ordinary citizens.

As noted, the Commission may not properly claim expertise in politics but at least expertise in the statute. The two cannot be easily separated. The Commission must make a range of judgments about the political process and the way it operates in order to fashion rules which balance the needs of regulation against the interests of the regulated community and the requirements of the First Amendment. Its duty to do so is inescapable. This sort of "expertise" is not typical of the kind entrusted to "independent" agencies.

Finally, even the concept of such "continuity of policy" as is "consistent with continuous adaptation of regulation to meet changing conditions" presents some nettlesome problems for any coherent conception of the FEC. It is unclear how an agency such as the FEC, charged with supervising politics, can be trusted in its "expertise" to adapt to "changing conditions." Which conditions? Which *political* conditions? Is it really plausible or acceptable to confer on this agency that degree of flexibility in matters of politics? The recent uproar over the FEC's intervention in the "527" debate underscores the depth of the problem.

Given these difficulties, Congress' resolve in 1974 to proceed with independent agency enforcement seems in retrospect quite bold. We can pretend that it is an independent agency like any other—but it is not. And yet Congress attempted to devise a solution appropriate to the unique task.

The Performance of the FEC

Could the FEC do better? No doubt it could, but surely the same could be said of many agencies discharging statutes with less immediate partisan political significance and impact. As a lawyer who counsels and also defends clients whose activities are regulated by the agency, I am particularly frustrated by the inadequacy of due process and other forms of arbitrariness and efficiency that plague respondents in enforcement matters. The American Bar Association noted these problems some years ago, but little has been done to address it.

But all in all, there is little to support the common suggestion that the FEC has performed poorly, across the Board, in discharging a demanding mission. Here are some examples of strong performance by the FEC, operating with a relatively small staff and modest funding.

- An administrative fines program to allow the processing of simple reporting violations more speedily with readily determined penalties.

- An excellent Alternative Disputes Resolution (ADR) program, which makes possible the prompt disposition on a reasonable basis

of clear but routine violations that need not consume major agency resources.

- Improved focus in its enforcement efforts, resulting in more attention to significant cases that are resolved with commensurately significant penalties.

- The speed and effectiveness of its rulemaking response to BCRA, on a highly expedited timetable set by Congress. The Commission has subsequently issued some carefully drawn Opinions under the new rules, offering practical guidance on issues like the officeholder and candidate solicitation restrictions.

- New electronic filing processes, and a public information office widely accepted to be first-rate.

Now critics of the FEC will react with fury to this suggestion, insisting that on issues of the gravest importance, the agency has deadlocked or produced tepid results with little impact on abhorred practices. In many of these cases, however, these are issues about which there is a genuine and troubling lack of constitutional or legal clarity. And in most, the partisan implications of a decision, one way or the other, may also be pronounced. The FEC's caution in the face of these choices—or the deadlock that results from honest disagreement—is entirely appropriate, even reassuring in a polity where voter rather than Government decisionmaking should dictate the outcome of political competition.

The FEC and Reform Politics

Those organizations and editorial boards demanding from the FEC simple answers, easily reached, are simply promoting a substantive regulatory agenda. And, of course, there is no reason why they should not have their views or ardently advocate them. What should be resisted is the effort to paint the choices presented under this statute in simple, bold colors—the clearly right or clearly wrong answer; the honest or dishonest motive; the honorable or dishonorable course of action.

We see entirely too much of this excess in the public disputes over campaign finance reform and the FEC. We hear about "outrageous" and "disgraceful" agency inaction or servility; and about the "corrupt" conduct of our parties, elected officials and political activists. The tone is shrill, the arguments often *ad hominem*, and the arguments drawn with a studied disregard for the facts or for other points of view. This kind of polarizing, "negative" politics could stand some measure of reform, even more than our already highly developed rules for raising and spending campaign funds.