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SENATE COMMITTEE ON RULES AND ADMINISTRATION
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Thank you, Mr. Chairman, for inviting me to appear before your Committee and for having this hearing on oversight of the Federal Election Commission. It is much needed.

Perhaps because of the implementation of a new law, it has never been clearer that the Commission faces a daunting and seemingly contradictory task -- meshing First Amendment rights of political speech with an increasingly complex set of statutes all designed to channel that free speech.

Despite this unenviable task, my perspective as a practitioner of over 20 years representing political parties, candidates, PACs, corporations, tax exempt groups and political vendors is that the Commission lacks a clear sense of its own mission and priorities in both the regulatory and enforcement arenas. As a result, it seems unable to deal with major time sensitive issues that lie within its exclusive jurisdiction and unable to articulate a clear sense of enforcement priorities or policies.

If I can sum up what I believe to be the overwhelming sentiment about the Commission among the regulated community, it is frustration.

- Frustration in its inability to provide clear and complete guidance through either its rulemaking authority or advisory opinion powers, most noticeably in regards to 527 committees and their estimated $300 million in soft money spending in the first election after the role of soft money was supposed to be reduced.

- Frustration with an enforcement process where defeated and bloodied campaigns saddled with complaints on matters with no precedential value bear the greatest pain, significant cases go by the wayside and "timely resolution" takes on a meaning unique to the FEC.

- Frustration with an enforcement process reminiscent of the Star Chamber in which the Commission serves, at the same time, as prosecutor and then judge while the Office of General Counsel not only develops its own case but presents respondents' cases to the Commission with no opportunity for respondents to even be present as their fates are determined.

For those reasons, your oversight is most welcome. Specifically, I would urge you to look structurally at two areas – first, the Commission itself and, secondly, the Office of General Counsel and its enforcement "priorities". Let me also say that this is not a criticism of particular individuals – there are many fine, hard-working public servants there. But the FEC remains a very insular bureaucracy, and as a result it appears to the outside world as unable to act in a timely fashion and lacking a sense of priorities when it does get around to acting.

The passage of BCRA highlights both the strengths and the shortcomings of the agency itself. Faced with a new statute and a mandate on finishing regulations, the Commissioners and the Office of General Counsel did yeoman's work in completing the initial round of regulations.

But, not surprisingly, the regulations did not address some very crucial issues under the new law. And in both Advisory Opinions and supplemental rulemakings, the Commission has been either unable or unwilling to address questions that it simply should have. In the area of Advisory Opinions, for example:

- Most recently, the FEC refused to issue an advisory opinion (FEC AO 2004-15) on the extent of the "media exemption" and whether it applied to such communications as advertisements for documentary films. It is a difficult issue, but at least two examples have emerged in the last month. The issue is particularly relevant in light of BCRA's definition of "electioneering communications", which, without clarity from the Commission, could result in a communication from one entity being barred in the 30 days before a national convention, while an advertisement for a film with essentially the same message would be allowed. It is a real world issue that demands clarity from the governmental agency in charge of interpreting the law. The Commission declined to act.

- In Advisory Opinion 2004-1 requested by the Bush-Cheney campaign and a Kentucky congressional candidate, the Commission interpreted BCRA's coordination rules to bar the traditional candidate endorsement spot by a Presidential or other federal candidate within 120 days of an election. But in interpreting these new "coordination rules", the Commission refused to address some important questions in this new and confusing area of the law. What precisely is the "material involvement" by agents of the President that triggers improper coordination? Is there a distinction between political review for content and legal review to be certain that the President is complying with the laws? Is there a distinction between editing for political content, which would trigger coordination, and reviewing for: factual accuracy? quality? consistency with the candidate's positions? These questions, asked specifically because of their importance to the regulated community, were not addressed by the Commission.

- On the subject of soft dollar Section 527 committees, the Commission answered some questions by Americans for a Better Country, but avoided a plethora of crucial and highly relevant questions such as:

    - What do the Commission's coordination regulations mean in terms of the permissible roles that leaders of 527 committees may play with regard to PACs or party committees or campaigns or national conventions or even candidates?

    - What does being a "former employee" or a "common vendor" really mean?

    - Can a 527 official active in a federal PAC use his or her PAC role to talk to federal candidates and party committees without also tainting the 527 independent soft dollar spending?

The entire subject of soft dollar 527s has shown a Commission frankly dodging its responsibilities. There are strong views on the permissible activities of Section 527 committees. But rather than deal with the issue, the Commission has remained mute, leaving the regulated community to proceed on its own. The Commission had an obligation in this situation to say something definitive, rather than remain silent as a massive infusion of soft dollars will undeniably play a major role on the 2004 Presidential elections. The Commission's failure to act raises doubts about it as institution since it was asked or had the opportunity to provide guidance in multiple forums – advisory opinions such as ABC, a rulemaking and even a complaint with a request for an immediate motion to dismiss which would have provided final agency action so that a court could hear the matter if the Commission felt it could not decide.

Even the sliver of guidance it gave in the ABC Advisory Opinion does not reflect well on the Commission being able to deal with the situation. One $100 million soft dollar 527 is operating in clear contravention of the Commission's own ABC advisory opinion, as a complaint filed last week by Trevor Potter and others last week showed. I don't mean this in a partisan sense, but institutionally, how can the Commission square what it said in the ABC advisory opinion with what America Coming Together is doing day in and day out and the Commission's position of letting it happen?

The truth is that there is something wrong when, despite these ample opportunities to say something – anything -- the Commission opted to remain mute. If it couldn't reach consensus in the rulemaking, or the complaint laying out multiple examples of illegal coordination, or the advisory opinion on coordination and other matters it didn't answer, it could have at least issued a Statement of Commission policy as to what it would enforce, as it did after the U.S. Supreme Court's *Colorado II* decision. Instead, the express train of soft money has roared down the tracks with the Commission asleep at the switch. Members of the regulated community are proceeding with 527 activities, and the silence of the Commission is being taken as a clear sign that the cop on the beat is taking a nap and promises not to awaken until after it's all over but the shouting.

Enforcement: From my perspective, there seems no real set of enforcement policies or priorities by the Office of General Counsel and the Commission. Perhaps because actual experience in politics is considered a disqualifier for employment at the Commission or perhaps because of a confusion between a substantive enforcement policy and the number of "wins" it can claim, there is a general sense that the Commission is incapable of stopping (especially in a timely fashion) real lawbreaking but is quite adept at beating up on defeated and broke campaigns involved in minor infractions of no precedential value. In other words, OGC attorneys with weak cases and no evidence but a belief that "something is wrong" all too often turn the process into the penalty, while a large enough violations can escape sanction because it just overwhelms the Office of General Counsel's capacities.

Two still active cases from the 2000 cycle – governed by an old law replaced by BCRA – illustrate the point:

In one, a losing congressional campaign is being forced to turn over all its records because the OGC staff is obsessed by the possibility of a vendor buying books authored by the candidate for the campaign – even though the campaign paid for the books in a commercially reasonable time. Dormant for over two years, the Commission plows ahead with expensive discovery, all over a $12,000 expenditure in a matter with no precedential value.

In a second case, another losing congressional campaign is being forced to dig up all its files, as are its vendors, over an allegation of coordination with a third party group that may have spent $15,000 in radio ads over four days. BCRA imposed a new coordination standard so that the case will not set a precedent, and the irony of the OGC asking for massive discovery over a $15,000 radio expenditure in a primary over four years ago when it remained silent on the coordination publicly reported in the current soft money 527s is excruciating.

In more recent illustrations, the Commission has taken the wholly unsupportable position that a Federal officeholder's spending of personal funds on a state ballot initiative is prohibited soft money and limited by the BCRA. Thus, a Federal officeholder/candidate is drastically limited in how much of his or her personal money can be given to a state candidate or ballot proposition committee regardless of the limits under state law. Where is the corruption rationale here? Was this really what the framers of BCRA had in mind?

The truth is that even when the Commission does discover an arguably significant matter, its structure and the statute prevent a timely resolution. On March 31, 2004, the Commission finally received a judgment from the U.S. District Court in the District of Columbia on an enforcement matter stemming from the 1996 election on, of all issues, coordination between outside groups and candidates.

Even more striking is the length of time it took the Commission to resolve charges of illegal contributions from partnerships of over $500,000. The Commission discovered the violation as part of the 2000 Presidential primaries audit process. In reviewing the now closed files, it appears a pretty cut and dried case of violation. There is no great legal precedent reflected in the briefs. There is no partisan angle to the violations – one losing campaign paid a $16,445 fine but there is no insinuation that any campaign was involved in the scheme. Yet it took the Commission over four years to resolve the matter. That is a system that is not working.

Solutions

The bottom line is that there is a fundamental flaw when the Commission does not have a consistent enforcement policy and fails to answer major issues raised in Advisory Opinions. Simply put, as a matter of oversight, how can the Commission be improved to provide clarity to the regulated community, and to provide a degree of confidence in the system of electing federal candidates?

The first inherent solution is a structural revamping of the roles of the Commission and the Office of General Counsel in the enforcement process. The Commission is now three Democrats and three Republicans – which has the salutary effect of having the Commission be the saucer that catches and cools the scalding liquid from the teacup. It is also not unlike the Congress, which can become deadlocked and forced to work out a compromise. I do not think that it is an improvement to change the current makeup of the Commission by replacing it with three individuals who by statute can have no experience in the field they are supposed to regulate but do get long terms.

The solution is to alter the FEC so that the Commissioners and the Office of General Counsel can concentrate on certain tasks while revamping the structure to make it less Kafka-esque and to free it from the internal role contradictions under which the Commission now labors. Currently, the principle deficiency is that the Commission itself plays these often conflicting roles:

- Setting policy and interpreting the law through rulemakings and advisory opinions;
- Being in charge of enforcement by hiring the General Counsel and being responsible for those he or she hires.
- Acting as prosecutors through their power of determining which enforcement matters move forward.
- Acting as judges for those very same cases they voted to have go forward in the first place.
- Needing to show big numbers of enforcement "successes" for bureaucratic self-validation.
- Being an agency that prides itself on "full disclosure", but having an enforcement process that bars any sort of hearing for respondents, does not inform respondents of the status of their cases for months and even years, and has its lawyers both prosecute cases and present the respondent's arguments in closed sessions.

On top of that, the Office of General Counsel currently:

- Both investigates cases and presents recommendations to the Commission on whether to move forward.
- Since under the current statute, a respondent only has the right to present briefs but can never appear in person to advocate, the Office of General Counsel is charged both with presenting its case and the respondent's case to the Commission at a session which the respondent cannot attend.
- Has a bureaucratic need to show a large number of "wins" to demonstrate it is doing its job.

The solution here is, I believe, the institution of an Administrative Law Judge system. I disagree with the method suggested in S. 1388, but the concept of someone outside the insular world of the Commission and the Office of General Counsel is needed to inject some elementary due process into the system. Here is one suggestion for a new enforcement system:

- If either a complaint is filed or the OGC finds something during its investigatory function, the Commission decides whether to find reason to believe. At that time, a respondent may file a motion to dismiss or either the respondent or the Commission may seek a summary judgment finding requiring a written determination from an ALJ if no material facts are in question. That proceeding will be decided on the basis of briefs and oral arguments, if granted by the ALJ. A finding against a respondent leads to the conciliation process, and if conciliation is not reached then the Commission may go directly to federal district court.
- If the motion to dismiss and/or summary judgment is not granted, then a Commission majority could vote to authorize an investigation. Subpoenas would also be voted by a majority of the Commission upon the request of the OGC. Unlike now, a respondent

would have full access to all exculpatory evidence and to all materials that the FEC would use in making its case. A respondent would have a right to subpoena witnesses as well and to be represented at all formal depositions taken by the FEC. The FEC could be present at all depositions taken by a respondent.

- After its investigation, the OGC would present a probable cause brief to the respondent, who would have an opportunity to reply. On the basis of the briefs, the Commission would vote whether to proceed. If a Commission majority voted to proceed, the briefs would go to the ALJ who would schedule a hearing at which either party would be able to call witnesses and put on testimony.

- The ALJ would then decide the case. His or her written ruling would form the basis for conciliation, which would be subject to approval by the Commission. If conciliation is not reached, the Commission would have the power to take the case to court.

- The new system should also have tighter deadlines within which the OGC would have to act. The Congress should consider allowing prevailing respondents to sue for legal expenses if the Commission is found to be prosecuting meritless cases.

The point is that such a system would force the OGC to prioritize and to move cases in a timely fashion – neither of which it has to do now. Cases would be ruled upon by a neutral judge whose sole job is hearing cases – not deciding which cases should go forward and approving briefs and subpoenas for them before judging whether they are meritorious.

The Commission, under this new structure, would continue to be responsible for the overall policy of the agency. It would retain full rulemaking and Advisory Opinion authority, but it would not face the contradictory roles of judge, jury and prosecutor all at the same time.

I appreciate the opportunity to be able to present these views, Mr. Chairman.