Testimony of Trevor Potter
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Mr. Chairman, Senator Dodd, and members of the Committee,

I thank you for the honor of testifying before the Committee today on the subject of the Federal Election Commission, and commend the Chairman for holding a hearing on this important – but too frequently overlooked – subject. I am a former member of the Commission, having been appointed by the first President Bush in 1991. I served a year as Chairman in 1994, a year as Vice Chair, and as a member of the Commission's Finance and Regulations Committees. One of my priorities as Commissioner was the attempted improvement of the Commission's enforcement process, and the Commission's Enforcement Priority System was developed during my time in office.

Since leaving the agency, I have had continuing experience with the Commission as an election lawyer in private practice, and, since 2002, as president and general counsel of the Campaign Legal Center, a non-profit, nonpartisan organization dedicated to promoting the public interest in enforcement of the nation's campaign finance laws, and as general counsel of the Reform Institute, a non-profit seeking improvements in the election system. I also continue to serve as a lawyer in the political affairs practice at Caplin & Drysdale, a Washington law firm.

Mr. Chairman, these years of experience with the FEC lead me to conclude that the agency, in critical ways, fails to fulfill its responsibility to enforce the federal campaign finance laws. Instead, the Commission has often been the agent of the law's undoing, actually causing our most notable campaign finance disasters, including the soft money system, the current attempts to recreate that scheme through the improper use of so-called 527 organizations and the financing of supposedly publicly-funded political conventions by soft money entities completely unconnected to the cities actually hosting the conventions.

It is important to note that the problems that have arisen this year with regard to new 527 organizations created to affect the 2004 federal elections are not a function of the new Bipartisan Campaign Reform Act. The BCRA itself is clearly working, and accomplishing its goal of breaking the relationship between large soft money donors and federal officeholders and the political parties. And despite the predictions of some of the law's opponents, the parties and candidates are thriving under the new law, raising unprecedented amounts of hard money in the current election cycle: indeed, at this point, hard money raised in small individual contributions has more than replaced the funds raised through the huge soft money donations of the last election.

The growth this year of 527 soft money activity explicitly aimed at influencing the 2004 Presidential election is, however, yet another direct result of the Federal Election

Commission's failure to interpret and enforce the longstanding Federal Election Campaign Act.

In the spring of 2001, the FEC opened a notice of proposed rulemaking on the definition of federal "political committee," a key phrase in the Federal Election Campaign Act and an unresolved issue for 20 years. Seven months later, the Commissioners suspended this essential rulemaking without taking action, saying they wanted to see what Congress and the courts did with proposed campaign finance legislation.

Then, in December of 2003, the Supreme Court's decision in *McConnell v. FEC* made clear that "express advocacy" was not required to regulate spending by political organizations, thus rejecting a position taken repeatedly by a number of Commissioners.

After *McConnell,* the Commission reopened its suspended rulemaking on political committee status – but decided in May 2004 to postpone the rulemaking until August of this year, thus making it too late as a practical matter to have any new rule in place for this election.

Thus, we have the only agency with jurisdiction over campaign finance law unable to address, for a period of years, one of the most important current questions within its competence: whether 527 organizations that exist for the principal purpose of influencing federal elections meet the definition of federal political committees. The Commission deadlocked 3-3 in the crucial vote in May on the question of whether these 527s are required to use more than two percent hard money for their federal activities this year.

In my view, the problems of the Commission, in the broadest sense, arise from the agency's organizational structure and the culture of the appointment process for Commissioners. The agency is designed in a way that, if it does not encourage failure on important matters, certainly makes that result very difficult to avoid.

As the members of the Committee know, the statute that created the agency in 1974 established a six-member Commission, of which no more than three members can belong to the same party. And in order to take any action – whether to impose a penalty, approve an advisory opinion or implement the most straightforward regulation – a proposal must have four approving votes. Thus, the Commission's structure necessarily forces the public to rely on the capacity of the Commissioners to put aside partisan and philosophical considerations and cooperate in the public interest. Notably, that is a premise the Founders of the nation itself were unwilling to make, when they chose instead to place the means of breaking ties in both chambers of the United States Congress in the Constitution itself.

Indeed, there is only one other federal agency with an even number of Commissioners, the International Trade Commission. And in that agency, when the Commission deadlocks, investigations go forward; an absolutely crucial difference.

Furthermore, the Commission's enforcement powers are cripplingly weak. The agency should be given the authority to make findings in specific cases that violations of the law have occurred, and to directly impose penalties for those violations. Currently, the Commission cannot take direct action on its own except in the case of minor reporting violations. Otherwise, the only option is for the Commission to reach a voluntary settlement agreement with those accused of a violation or to sue the alleged violator in federal district court.

I commend to the Committee a recent, 140-page analysis of the FEC's structural and enforcement shortcomings, entitled "No Bark, No Bite, No Point." This review was assisted by eminent administrative law experts and is a very useful summary of the difficulties the FEC's current structure creates.

If the Commission's structure poses challenges, the culture of the agency has made those challenges nearly insuperable. That culture is largely driven by the uniquely unfortunate way in which the Commission's members are selected.

When Congress created the agency, it attempted to maintain effective control over the Commission's membership by giving itself the power to appoint four of the six Commissioners, letting the President appoint the remaining two. When the U.S. Supreme Court struck that method down as unconstitutional in *Buckley v. Valeo,* Congress amended the law so that the appointment process for the FEC is, in theory, the same as it is for all other administrative agencies: the President nominates, the Senate confirms.

In practice, however, the President looks to his own party's lawyers and officials, and his party's Congressional leadership, for FEC appointments, and defers to the leaders of the "other" party for nominees to "their" three slots on the Commission. And in the very few instances in which the President has resisted a party's choice, the Congressional leaders have generally insisted on having their way, and succeeded in placing their chosen nominee on the Commission.

It is difficult to get around the conclusion that this unusual nominating process has played out in a way that has created a sharply partisan Commission in the administrative agency in which partisanship is perhaps most destructive. Historically, the congressional leadership has chosen party officials or lawyers as Commissioners for the clear, if unstated, purpose of protecting their party's interests. In the interest of full disclosure, it was my own background as a party lawyer that led to my appointment in the early 1990s. More recently, several Commissioners have been appointed because of their ideological opposition to most federal election regulation, and thus, the core work of the Commission itself. Unfortunately, a Commission composed exclusively of these categories of Commissioner is unlikely to produce the kind of nonpartisan, efficient agency required to implement the nation's election laws in a rigorous and fair manner.

This unhealthy nominating process has effectively rendered the Commission a "captured" agency that caters to and protects the community it is supposed to be regulating. Indeed, I remember my surprise when, as I first arrived at the agency, I learned that the

Republican-appointed Commissioners' practice up until then had been to caucus before every Commission meeting to discuss what the Republican position would be on the matter before us. The Democrats followed a similar practice.

The end product of these structural and cultural problems has been a Commission that frequently deadlocks on the most important issues the agency confronts. Historically, these deadlocks have usually reflected a partisan, 3-3 split; in other instances, ideological concerns have driven that result. The cause of the agency's deadlocks, however, is not as important as the result. What matters is that the agency charged with issuing advisory opinions, implementing regulations and enforcing the law has been unable to do so on a number of important instances, in a complete abdication of its only statutory obligation: to interpret and enforce the laws Congress makes. Attached to my testimony are two summaries of FEC deadlocks, which demonstrate that the agency's inability to act is neither infrequent nor unimportant.

Allow me to address a couple of the fallacies often offered to justify the FEC's current structure and practices:

- "The Commission actually does act on the large majority of the matters before it, without tie votes."

The reality is that this is technically true, and thoroughly misleading. The vast majority of enforcement matters are straightforward factual or legal questions, involving matters of little lasting import in the overall scheme of things, and resulting in small penalties. In those small-stakes matters, the Commission frequently acts unanimously.

In the most central, high-stakes legal and policy questions of the past decades, however, the Commission has often deadlocked and failed to act, often against the recommendation of the agency's legal staff and general counsel. This was true under the previous general counsel, as well as the current one.

These deadlocks have even extended in recent years to the question of whether the FEC will defend its own statute and appeal important adverse court decisions. When courts rule against administrative agencies on constitutional grounds, the normal, and appropriate, agency response is to appeal that decision – as other agencies do, and as has historically been the practice at the FEC, too. However, in a number of recent decisions, the Commission has failed to muster the four votes to appeal, and as a result, has not done so.

In 2002, for example, the Fourth Circuit held that the federal law prohibiting corporate and union campaign contributions was unconstitutional when applied to nonprofit corporations. The Commission voted 3-2 against seeking Supreme Court review, thereby leaving the lower court result in place. The FEC's failure to act was then effectively overruled by the U.S. Solicitor General, who petitioned for certiorari on the Administration's behalf. The Court took the case, and ultimately reversed the lower court decision, upholding the source prohibitions in a 7-2 vote.

- "The FEC's most important function is disclosure, and that it performs that function well."

The FEC has always been known for its high-quality disclosure office, although with electronic filing the same information is usually also available from a range of organizations that offer better search functionality and databases. However, the first and most important function of the FEC is the enforcement and policy functions which drive disclosure. If political committees are not defined and penalized for failing to register, for instance, they will not file any reports with the FEC in the first place for the agency to disclose.

- "The FEC has been imposing larger fines in recent years."

In reality, the agency has imposed a few large fines each year for the last decade. But those fines have always been imposed against corporations and individual contributors – not against the political parties or candidates, who are after all the primary actors in the political field, and whom the Commission has regularly protected from serious enforcement action.

- "The FEC has quickened the pace of its enforcement activities in recent years."

The reality is that a large number of cases still are not concluded several years after they come to the Commission's attention, or dismissed without even an investigation. This is so despite the fact that there is evidence that the FEC is dealing with far fewer enforcement cases in recent years. According to research by the Campaign Legal Center, the agency opened 342 enforcement cases in 1994. In 2002 – whether because the FEC opened far fewer cases on its own authority, or because the agency's enforcement failures have discouraged members of the public from filing complaints - the agency opened a mere 118.

- "Internal procedural fixes can do all that needs to be done to make the FEC work better."

The reality is that the current structure of the Commission builds partisanship and the potential for deadlock into the core structure of the agency, and no matter how hard the talented staff at the agency work to overcome problems, that central reality continues to guarantee gridlock on many of the most important issues the agency faces.

The 2002 report "No Bite, No Bark, No Point" produced multiple examples of the agency's failures. It is useful to consider a few of them.

-- During the 2000 election, a group called "Republicans for Clean Air" spent $2 million on advertisements attacking a candidate for the Republican presidential nomination. In 2002, the Commissioners deadlocked 3-3 on whether to even open an

investigation into whether this spending violated disclosure and political committee registration requirements.

-- In 2001, the Commission deadlocked on party lines on whether to appeal a Fourth Circuit decision striking down an FEC regulation defining "express advocacy," ignoring the general counsel's recommendation to appeal.

-- And, in one of the most disastrous failures, the Commission deadlocked in 1996 and declined to adopt the professional staff's recommendation to require both the Clinton and Dole presidential campaigns to repay public funds to compensate for receiving illegal soft money contributions from their parties in the form of coordinated "issue ads."

Indeed, the soft money saga provides the most telling metaphor for an agency that not only fails to enforce the law, but actively undermines it.

When the Supreme Court upheld the soft money ban in the Bipartisan Campaign Reform Act of 2002 late last year, the Court majority explained in unambiguous terms how we ended up with the soft money problem in the first place. The justices laid the blame squarely at the doors of the FEC, saying it was clear that through years of bad rulings and rulemakings, calculated to promote either one political party or both at various moments in time, the agency had systematically eroded the longstanding prohibitions on corporate and union money in federal elections. The Court said the Commission "subverted" the law by issuing regulations that "permitted more than Congress . . . had ever intended" in this area, and with its allocation rules, had "invited widespread circumvention of FECA's limits on contributions."

No sooner had Congress acted to correct those mistakes, and the Court to uphold the new regime, than the agency set about undermining the law again. When it issued regulations to implement the new law, the Commission proceeded to weaken and open numerous loopholes in the statute, ignoring the intent of Congress, which was plainly expressed in voluminous comments to the Commission. The regulations were sufficiently egregious that they are now the subject of a lawsuit seeking to have them thrown out as arbitrary and capricious and contrary to law.

One of the Commission's rulemaking failures is unfolding before our very eyes this summer. A study released last week by the Campaign Finance Institute concluded that the national political conventions will raise and spend a total of $103 million in private donations, the bulk of it corporate and labor soft money. If that sounds like a flat violation of the law Congress wrote prohibiting political parties or officeholders or candidates from raising or spending soft money, or the 1974 law requiring that conventions be funded only with public funds, that's because it is. But the Commission's rules implementing BCRA expressly exempted the conventions. In fact, the Commission went even farther, actually reversing its old convention funding rule that host committees could only raise convention funds from corporations and other groups that were actually connected with the host city. As a result, Members of Congress and the parties have a

new incentive to raise money from interests with business before the federal government – exactly the opposite of what Congress intended in 1974 and 2002.

The Commission's refusal this spring to decide the issue of 527 group regulations is another signal failure. As the Supreme Court made clear, the FEC's allowances for soft money over the years was one of the agency's many missteps. In fact, the law's requirement that such political groups be funded with hard money had been clear since FECA was passed in 1974, and the Supreme Court interpreted it in *Buckley* in 1976: any group that has a "major purpose" of influencing federal elections, and spends $1,000 or more to do so, must register with the FEC as a "political committee." They are necessarily subject to the normal restrictions on such committees – namely, they have to adhere to the same source prohibitions, contribution limits and reporting requirements that apply to all other political committees. This year, a variety of organizations with the stated principal purpose of electing and defeating federal candidates have ignored these requirements, and the FEC so far has done nothing to stop them.

Some 527 groups have organized as a political committee, but with a nonfederal account. These groups have been allowed to take advantage of completely irrational FEC allocation rules. Under those rules, a political committee can arrange its activities to spend 100 percent soft money for voter drive efforts that are clearly for the purpose of influencing federal elections. One of the major 527 groups operating in the present election – Americans Coming Together – is plainly working around the clock and around the country to defeat one presidential candidate and elect another. Yet in a required report to the FEC, ACT claims that under the Commission's allocation rules, it can fund its highly partisan voter drives with 98 percent soft money.

There is, of course, nothing wrong with partisan voter drives – we want more voters. The FEC should enforce the law, however, so that all political groups play by the same rules, and use only funds permitted in federal elections for these partisan activities.

Despite the clear direction from the Supreme Court, and a good, bipartisan proposal from Commissioners Michael Toner and Scott Thomas that could have dealt with these issues simply and quickly, the Commission chose not to act in May, when it could have been relevant. Instead, it deadlocked 3-3 on the key issue of allocation and scheduled itself to revisit the political committee issue in August, in time to affect only the next election – if it can muster a majority to act at all.

Mr. Chairman, it is simply time for a change. Many of us with a long history of involvement with the FEC, from both parties, come to this task with an open mind, without any hard-and-fast notions of what a reformed agency should look like. As you know, there is a proposal now before both chambers that would reorganize the agency to include a smaller, odd number of Commissioners to address the problem of deadlocks, and introduce administrative law judges into the process to add an objective layer to the process. The legislation would also give the Commission crucial authority to find violations and impose penalties.

Regardless of the means, these goals are important, and the issue is urgent if the campaign finance laws are to be fairly and thoroughly enforced.

I thank the Committee for this opportunity to testify.