



FEDERAL ELECTION COMMISSION
Washington, DC 20463

*Opening Statement of Bradley A. Smith
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INTRODUCTION

Thank you Mr. Chairman and members of the Committee. I am pleased to have this opportunity to address you and to answer your questions about enforcement of our nation's campaign finance laws in general, and reforming the Federal Election Commission (FEC) in particular. Since my appointment in 2000 I have consistently urged both Houses to take a more active role in Agency oversight, and I applaud you for holding this hearing.

Before addressing the nitty-gritty of FEC's enforcement process, however, I think it important that we consider what we are trying to achieve, both with reform of the Commission, and with "reform" generally. I do not think that in my time working in the field of campaign finance I have ever seen so many misunderstandings over the state of law, and so many inaccurate statements made about what the law does or does not require, often by people who should, and I suspect sometimes do, know better. All of this threatens to obscure the larger policy debate, which is enormously important.

CURRENT STATE OF THE LAW & PROPOSALS FOR STRUCTURAL REFORM

As an initial matter, the American people need to understand that under recent Supreme Court rulings, those who criticize or praise the voting records of their elected representatives have less Constitutional protection than pornographers, tobacco advertisers, Klan members who burn crosses outside black churches, flag burners, or topless dancers.

Moreover, had the Commission adopted the recently proposed new restrictions on 527 groups, it would have been the most far-reaching expansion of regulation in this area since the 1974 amendments to the Federal Election Campaign Act (FECA), and far more expansive than the Bipartisan Campaign Finance Reform Act (BCRA) itself. To those expedient partisans on the Right who complain that the Commission should have acted to silence groups such as MoveOn.org and Americans Coming Together, I point out that the proposal also would have effectively crushed such groups as the Young Republicans, the

College Republicans, the Republican National Lawyers Association, and numerous other conservative groups by making them political committees regulated by FECA. Moreover, it must be made clear that the approach being advocated for regulating so many groups was neither Congress' nor the public's understanding of the law prior to the passage of BCRA, and was not mandated by either BCRA or the Supreme Court's decision in *McConnell v. FEC*. Perhaps the legislature will make a considered judgment that this type of regulation is appropriate. But such a far reaching expansion of the law ought to emanate only from Congress, not from an unelected bureaucracy.

These are the real policy issues on the table. The sudden rush to abolish the FEC, and replace it with an Election Czar, is a feint and a distraction. One need only look at the fact that the FEC's decision not to regulate 527 groups is cited as "proof" of the need for a new enforcement structure. It is silly to suggest that the Commission's failure to propound new, far-reaching regulations on 527 groups, on the basis of a highly questionable legal theory and in the heat of a campaign, demonstrates the Commission's "inability to get things done." In fact, the proposed 527 regulations failed on bipartisan votes of 4-2, with a majority of both Republican and Democratic Commissioners opposed. It is for some reason suggested that this proves that the Commission needs to be replaced by an Election Czar – think Janet Reno if you're a Republican, Kenneth Starr if you are a Democrat. More recent proposals, such as S. 1388, the Federal Election Administration Act, provide the window dressing of two other Commissioners, but a closer look at the proposed legislation shows that these two Commissioners have no real power. Be that as it may, why does a pair of 4-2 votes against a hurriedly conceived proposal for new 527 regulations, not mandated by any court decision and certainly not mandated by BCRA, suggest that the Commission structure is wrong? Suppose the vote had gone the other way? Would these so-called "reform" proponents argue that a vote to regulate showed the need to abolish the Commission? Of course not. So what is the difference? It's nothing more than that they lost the vote.

Now, when you are on the losing side of a vote in the Senate, do you argue that the Senate should be reconstituted? Perhaps we should have a 3 person Senate, with a Majority Leader and two other ornamental senators, one from each party. The argument is absurd to anyone who gives it a moment's thought. The point, of course, is that many of the current complaints about the FEC structure are really just complaints about losing certain votes.

Proponents of S. 1388 also argue that the Commission's bipartisan six member make-up is "prone to gridlock" or "a recipe for inaction." This is not true, and has never been true. Even during the period of greatest Commission inaction, during the 1990s, the Commission "deadlocked" 3-3 or 3-2 on fewer than 3% of its substantive votes. Since that time, the percentages have remained stable. So far in 2004, only 3.1% of Commission votes have resulted in 3-3 tallies. In 2003, barely 1%, or just 13 of the Commission's 1286 votes, were decided 3-3. Moreover, only 7 of these 13 votes were along party lines. So far in 2004, there have been only two party-line 3-3 votes on enforcement matters.

By pointing out the undisputed fact that 3-3 votes are rare, however, we risk obscuring the fact that there is nothing particularly problematic with most 3-3 votes. In most matters, a 3-3 vote decides the issue as decisively as a 5-1 or 6-0 vote. If a proposed new regulation fails 3-3, the old regulation remains in place. If the Commission votes 3-3 against finding “Reason to Believe,” the case is as fully terminated, and the controlling legal analysis as complete, as if the vote were 6-0. Remember that this structure, requiring bipartisan support for investigations, was intentionally created by Congress to assure that the Commission would not simply become a partisan weapon for the controlling party to use against its opponents. It has worked well, and as the statistics show, there is simply no basis to the assertion that it is a “recipe for inaction.”

Does this mean that there is no need for reform at the Commission? Of course not. Reevaluations and reassessments are always important. But before rushing off to appoint an Election Czar (with, of course, two ceremonial commissioners to provide the illusion that there is not an Election Czar) we need to take serious stock of where we are and what we hope reform will achieve.

THE ENFORCEMENT PROCESS AT THE FEC

As you know, Mr. Chairman, I was nominated to the Commission on your recommendation to President Clinton. I remain deeply appreciative of your consistent support for that nomination in the face of substantial criticism from some quarters. I have always understood that I was appointed to the Commission precisely because it was believed that the Commission needed to reform itself.

During the period from 1991 to 1998, it is fair to say that the FEC had become something of a laughing stock in Washington. At one point, the Commission lost 11 of 12 cases that it took to U.S. Courts of Appeal, and lost them not because it could not prove the facts involved, but because the Courts held that the legal positions taken by the Commission were contrary to the statute, the Constitution, or both. In 1997, in *Christian Action Network v. FEC*, the Fourth Circuit described the Commission’s legal position as one that “simply cannot be advanced in good faith,” and went so far as to take the highly unusual step of requiring the Commission to pay the respondent’s legal fees. The Commission’s investigations during this period were typified by the investigation against the Christian Coalition, an investigation that lasted many years, involved over 70 depositions, imposed enormous legal fees on respondents, and finally ended in 1999 with all but the most trivial charges tossed out by a federal court.

During this period, the Commission developed the reputation that still plagues it today. In 1998 the Commission dismissed 86 cases as stale and in 1997 the Commission dismissed 208 pending cases as “stale.” (A case is referred to as “stale” if the Commission does not open an investigation of a complaint within 18 months.) Other cases lagged for months before even being activated or years before being acted on. Yet in the end, the Commission’s fines were low and cases too often lost. It was often said in Washington that in dealing with the Commission, “the punishment is the process.”

That began to change in 1998, in large part, Mr. Chairman, due to your efforts and some of your colleagues who serve on this committee. You demanded that President Clinton make appointments for 3 seats, two of which were being held by holdover appointees whose terms had expired, and the third of which had been open for nearly 3 years, since its previous occupant resigned mid-term. You supported the nomination of my colleague, David Mason, whose intelligence, industry, and political acumen have been instrumental in reforming the Commission, and also of my former colleagues Republican Commissioner Darryl Wold and Democratic Commissioner Karl Sandstrom, who are largely responsible for the Commission's Alternative Dispute Resolution System, implemented in 2000, which has helped the Commission to process more cases and to process them faster. My appointment was another step in placing reform minded persons on the Commission, as were later appointments of my current colleagues Ellen Weintraub and Michael Toner. Not to be dismissed in the effort have been the vital contributions of two long serving commissioners, Scott Thomas and Danny Lee McDonald, whose ideas, drawn on long experience and knowledge of the Commission, and whose ability to say, "been there, done that," have been vital to the improvements made at the Commission since 1998. Commissioner McDonald's support, in particular, was instrumental in pushing for the creation, with Congressional authorization, of the Administrative Fines program in 2000, which has been very successful in conserving Commission resources, speeding up case processing for certain reporting violations, and reducing the number of late and non-filed reports.

These reforms have been implemented and augmented through innovative management by creative and dedicated staff. In particular, I would single out General Counsel Lawrence Norton, who was hired by the Commission in 2001, and Deputy General Counsel James Kahl and Associate General Counsel for Enforcement Rhonda Vosdingh, whom Mr. Norton later hired or promoted to their current positions.

Today, case closings due to "staleness" are a thing of the past. The Commission has not closed a case for staleness this fiscal year and closed only one stale case in FY '03. Moreover, the median time to activate a case has dropped from 4 months to 3 weeks over the past year. Over the past year, the median time that the Commission takes to approve the 1st General Counsel's Report in an enforcement matter has dropped from 9 months to 3 months.

Additionally, the Commission has revised its internal procedures to provide added, and necessary, due process protections to respondents. For example, for many years the Commission did not allow respondents to view even their own deposition transcripts. This has changed. During the 1990s, the Commission issued a warning to witnesses that they could not speak about the case to anyone, leading many witnesses to believe it was illegal even to speak to Respondents. This was supposedly justified under FECA's confidentiality provisions, but in fact the warning went far beyond the statute's provisions and served to deprive respondents of the ability to gather the information and testimony needed to defend themselves. This has been stopped, and confidentiality notices now contain more appropriate language, grounded in the actual statute. These are just two of the more obvious examples in a sea change of the manner in which the

Commission handles complaints. The result, not coincidentally, is that even as due process protections to respondents have been increased, fines have been assessed more quickly and are at record levels. In FY '03, the Commission assessed a record \$2,774,603 in civil penalties. As of July 2004, the Commission has already exceeded that amount by 24% with four months remaining in FY '04. Since 2001, we have reached our largest conciliations ever with a single respondent; with multiple respondents in one MUR; with a corporation, with an individual, with a sitting member of the House, and with a sitting member of the Senate. In short, in the 1990s the punishment may have been the process, but in the 2000s the punishment is the punishment, and respondents know that they will be treated fairly in the process.

This has been done while pursuing a very heavy regulatory burden created by the passage of the Bipartisan Campaign Reform Act.

PROPOSALS FOR CHANGES IN THE FEC'S ENFORCEMENT PROCESS

All of this is not to say that more reforms at the Commission cannot be made. For example, the Commission still falls short, in some areas, of what most people consider to be basic due process norms. There is still no provision for a candidate or committee to appear in person before the Commission before we rule on a case. Respondents are not allowed to cross-examine witnesses and are still not allowed to see all the evidence compiled, even at the Probable Cause stage when the Commission has concluded its investigation. These are issues that I believe should be addressed.

It may be that these can be best addressed through the use of Administrative Law Judges, (ALJ) which is being advocated as part of S. 1388, the Federal Election Administration Act of 2003. But while adding ALJs would dictate added due process, having practiced before ALJs in other agencies, I am somewhat skeptical that they would be beneficial. ALJs, like the Commission, have long been criticized for delays in processing cases. There are numerous examples to suggest that ALJs would not necessarily "streamline" the FEC's enforcement process. Experience from other agencies is replete with examples of delayed enforcement processes at agencies where ALJs are used. For example in *Copeland v. Veneman*, 350 F.3d 1230, 1232 (Fed. Cir. 2003), we saw a situation where an ALJ's decision was handed down 5 years after a government contractor defaulted on his obligations and was charged with Davis Bacon violations. Administrative appeals added two more years and the case was finally decided in court 11 years after the conduct at issue. In *Suggs v. Apfel* (1998 WL 178822), it took an ALJ 6 years to make a determination about whether a claimant was eligible for Social Security Disability Income (SSDI), and the final action came 8 years after the initial claim. Such examples are plentiful. There is no magic hurry-up button on an ALJ.

With this as background, if one thinks that the use of ALJ's is going to lead to most cases being resolved before the election in which the alleged violation takes place, one is dreaming. Consider – if a complaint is filed immediately after Labor Day and the respondent is given just 15 days to reply, even if there are no legal issues to consider or factual issues to resolve, the case would not get before a judge prior to the beginning of

October, at the absolute earliest. Given any investigation of facts, or complex legal issues requiring analysis, most complaints simply cannot be resolved prior to an election no matter what system of enforcement is adopted.

Preliminary injunctions prior to a decision on the merits are not an answer – Would any of you imagine a system in which your campaign could be ordered to stop running an ad, or to return to donors a quarter of your campaign budget, before even getting a hearing on the merits? Furthermore, courts have always frowned on the use of preliminary injunctions where First Amendment rights are involved. So time will be a problem in any case, which is one reason I have supported a regulatory system based less on penalties and more on disclosure.

Further, adding ALJs to the process, under the current proposals, actually adds one more step to the process. Under current law, the Office of General Counsel investigates the complaint, the Commission adjudicates the matter, and if the respondent refuses to pay, the Commission must sue in federal court, bearing the burden of proof. Under the proposals introduced, the Office of General Counsel would investigate the complaint, a trial would be held before an ALJ (with the burden of proof on the Commission), and if a penalty is assessed, the respondent could appeal to the 3 member Federal Election Administration. In many instances, such as *Copeland* and *Suggs* cases that I mentioned earlier, those administrative appeals can add up to 2 or more years to the process. Then, if the Federal Election Administration upheld the ALJ's decision, then the matter still could be appealed to a federal court. I am not sure when the "faster enforcement" enters into the equation, and I have seen no effort to put forth evidence for the proposition that ALJ's speed the process in other agencies.

Additionally, in considering the use of ALJ's we must take into account that ALJs have less leeway to address vital policy considerations, and virtually none to consider constitutional issues. Given the important policy and constitutional issues in this field, this may not be wise. Finally, I would emphasize that the vast majority of cases are already resolved without going to court – over 98% of all cases, and over 96% of those in which fines are assessed.

So, what would be the point of using ALJs? Is it to speed the process? If so, the record of ALJs is not particularly noteworthy, and adding them would add an extra layer of review in many, if not most cases resulting in violations. Or is the point to provide added due process to respondents? I don't think you will find supporters of this proposal arguing for that. I would favor more due process, but I would note that those changes can be made without changing the Commission's structure or adding ALJs.

Proponents of ALJs have argued that they will be non-partisan in their enforcement of the law. However, I have seen no statistical evidence of a partisan bias in the manner in which the FEC disposes of enforcement matters. Quite to the contrary, as I highlighted, partisan 3-3 votes are very rare on the Commission. Now, there may be anecdotal evidence to suggest that the FEC enforces the law in a partisan manner. However, there is anecdotal evidence to suggest the contrary. For example, last year

three Republican commissioners voted against fining the Sierra Club and a Democratic congressional candidate in Tennessee in two separate enforcement matters, whereas the three Democrats voted in favor. It is hard for me to see how anyone could view this as partisanship. Moreover, some outside observers contend that ALJs could prejudice the system against respondents because they become “captured” by the agency that employs them. See e.g. John J. Coffee, Jr., *Paradigms Lost: The Blurring of the Criminal and Civil Law Models, and What Can be Done About It*, 101 Yale Law Journal 1875, 1887 (“The [agency] always seems to win before its in-house judges.”) This view is hardly unanimous, of course. But if what reformers are arguing is that ALJs will inherently result in “tougher” enforcement, I would suggest that the idea that Congress should try to systematically bias justice against respondents does not merit your consideration.

I believe that the question of incorporating ALJs into the FEC’s enforcement process is worth investigating. The key question here would be whether or not the added levels of review is worth the inevitable delays in the enforcement process and whether the added due process could be had through the current system without adding that extra layer of review. My misgivings about this topic notwithstanding, I believe this is an open question that merits serious consideration by this committee and the Senate as a whole.

Meanwhile, though old images die hard, it is undeniable that the Commission is making great strides in effective enforcement. Since the 1990s, processing time is down dramatically, due process rights of respondents are being acknowledged, more cases are being handled, and fines are at record levels. So if the Commission is operating more effectively than ever, and if there is no magic in ALJs, what is this current effort at reform really about? It is, as I have suggested, about the dissatisfaction that a small group of self-styled “reformers” have with the voting records of particular Commissioners. This is perhaps best illustrated by the fact that S. 1388 includes one provision that bans just 8 people in the entire world from ever sitting on the new Federal Election Administration – and those 8 include all 6 sitting Commissioners. Now, let’s be clear – I have no dog in this fight. My term at the Commission expires next year, and I am not eligible for reappointment; nor would I seek reappointment if I were eligible. But the motives of the so-called reformers are self-evident.

Those supporting “reform” make no bones about the fact that they view the Commission as being insufficiently “aggressive.” But what is meant that the Commission is not “aggressive” enough? I was there, Mr. Chairman, when the current “abolish the Commission” effort got underway at a May 15, 2002 press conference. I listened to the former President of Common Cause say that campaign finance violations “should be treated like murder,” and that “people need to go to jail” for these violations. When the Commission held a hearing on its enforcement procedures last year, the leader of one of the campaign finance reform groups argued that respondents before the Commission who, I remind you, may not cross examine witnesses, see all the evidence against them, or appear in person at the FEC, have *too many* due process rights. Perhaps this is what Congress wants; but let’s understand that as the goal.

CONCLUSION

As I have demonstrated, the nation's campaign finance laws are being effectively enforced in a fair and balanced manner by a bipartisan agency. We still need reforms so that respondents before the Commission have the right to basic due process norms, such as the right to see all the evidence, and to appear before the decision makers in person. Nevertheless, the Commission has become far more respectful of those rights than it was in the past. And by any objective standard the Commission is operating far more effectively than it was during the 1990s.

After holding this hearing and after deliberating in a reasoned manner, this Committee might decide that it wants to change the structure of the Federal Election Commission. However, that important debate should not be premised upon faulty assumptions and should not serve as a diversionary proxy for those who are unhappy that particular Commissioners, appointed by the President and confirmed by this body for their expertise in this area, refuse to act always as the so-called "reformers" wish.

Thank you.