HEARING ON FEDERAL ELECTION COMMISSION ENFORCEMENT PROCEDURES

HEARING

BEFORE THE

COMMITTEE ON HOUSE ADMINISTRATION HOUSE OF REPRESENTATIVES

ONE HUNDRED EIGHTH CONGRESS

FIRST SESSION

HEARING HELD IN WASHINGTON, DC, OCTOBER 16, 2003

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FEDERAL ELECTION COMMISSION ENFORCEMENT PROCEDURES

THURSDAY, OCTOBER 16, 2003

HOUSE OF REPRESENTATIVES,
COMMITTEE ON HOUSE ADMINISTRATION,
Washington, DC.

The committee met, pursuant to call, at 3:00 p.m., in room 1310, Longworth House Office Building, Hon. Robert W. Ney (chairman of the committee) presiding.

Present: Representatives Ney, Ehlers, Linder, Doolittle, Larson, Millender-McDonald, and Brady.

Staff Present: Paul Vinovich, Staff Director; Matt Petersen, Counsel; Jeff Janas, Professional Staff; Jennifer Hing, Assistant Clerk; George F. Shevlin, Minority Staff Director; Charles Howell, Minority Chief Counsel; Tom Hicks, Minority Professional Staff; and Matt Pinkus, Minority Professional Staff.

The CHAIRMAN. The committee will come to order. The committee is meeting today to discuss the enforcement procedures at the Federal Elections Commission. The FEC is unique among Federal agencies in that its regulatory activities deeply implicate a poor constitutional liberty; namely, political speech. Although agencies charged with overseeing commodities, financial transactions, or public safety may incidentally affect the political process, the actions of the FEC have a direct and substantial impact on our Nation's political dialogue and electoral system. Our Founding Fathers deemed the freedom of speech, especially the ability to speak freely on political matters, to be so vital to a healthy democratic republic that they enshrined protections for speech in the first amendment to the Constitution.

The founders also included the due process clause in the Bill of Rights to ensure that fair procedures govern any administrative or legal proceeding conducted by the government.

Any examination of the FEC's enforcement procedures must determine not only whether they efficiently achieve their enforcement objectives but also the extent to which they respect and fully comply with these two constitutional principles. The Federal Election Campaign Act gives to the FEC exclusive jurisdiction over civil enforcement of the act.

Enforcement actions taken by the FEC are conducted according to procedures set forth in the act and internal Commission directives. In the past, many in the regulated community have expressed concerns about the FEC enforcement process. These criticisms, from what we have been told, have focused on the inability of respondents in enforcement actions to appear before the FEC to

present an oral argument; the FEC practice of naming nearly everyone mentioned in a complaint as a respondent, even if they have little or no involvement in the alleged violation; the FEC's confidentiality advisement which has often impeded the ability of respondents to gather facts, even from friendly witnesses; and the limited ability of respondents to access all the evidence against them and to challenge the recommendations made by the FEC's Office of General Counsel.

In addition to these complaints it has been alleged that the burden—and I want to repeat, alleged—that the burden of FEC enforcement activity is unevenly borne by grass-roots volunteers and small political actors whose lack of experience and inability to afford sophisticated legal counsel leave them less equipped to navigate the complexities of the act.

It would indeed be a cruel irony if our Federal campaign finance system, whose aim is to reduce cynicism and encourage political involvement among our Nation's citizenry, ended up stifling grass-roots activism by disproportionately penalizing civic-minded individuals with fewer resources and less expertise.

This past summer the FEC held a hearing and sought public comment on its enforcement procedures, and we give the FEC credit for that. We commend them for taking this proactive step of critically examining some procedures to see where it can improve its performance by making its procedures more fair and more efficient. As a result of that hearing, the FEC recently announced certain alterations to its deposition policies. We hope this will be the FEC's first step in a continuing process of evaluating the effectiveness of its enforcement procedures.

I also want to commend the FEC for a pretty difficult job and a lot of time that the FEC puts into this. And again, it is something I know is difficult to balance at times, but I do commend you for having the hearing.

So the purpose of today is, again, to air some of these issues and to hear testimony on it. And with that, at this point I would like to recognize Mr. Larson, our Ranking Member, for any remarks he may have.

Mr. LARSON. Thank you, Mr. Chairman. Obviously, in light of the upcoming election cycle relating to the Federal Elections Commission, there certainly is a great deal of interest in many of our minds. I want to thank you certainly for holding this hearing on such a timely matter, and I want to thank our esteemed panelists and the witnesses for their participation and the insights they will share with us.

Recently, as you have noted, the FEC responded to requests for copies of transcripts of those deposed by the FEC. While this policy change is certainly a step in the right direction, it is only a small step. I believe a giant leap forward is needed to bring some clarity to our election guidelines. At issue today is how the FEC responds to enforcement issues. Yet it is not only its response that warrants discussion, but also the confusing interpretations and the lack of clarity about the Federal election guidelines that must be addressed as well. These issues are of great concern not only to those who are inspired to run for political office, but also those who already hold such office.

As the Chairman points out, we recognize clearly the difficulty of the task and the awesome responsibility and job that members of the Federal Election Commission have, and appreciate your hard work. And I hope you further appreciate the need, especially amongst Members who we talk to on a daily basis, treasurers of committee, people who—do not possess the same legal minds and background, who are anxious and earnest to be involved in our political process, yet look at some of the laws associated with us and are sometimes intimidated by them.

So I thank the Chairman again for providing the opportunity for us to have the Commission enlighten us and to bring greater clarity and more light to these important issues, especially in lieu of the landmark legislation that was passed in this body just last year, and certainly that has the interest of a number of our colleagues. I spoke with Mr. Meehan earlier today, who shares a number of concerns as they relate to making sure that we go forward with the reforms of the landmark legislation that was passed last year.

And with that, Mr. Chairman, I yield back the balance of my time.

[The statement of Mr. Larson follows:]

CHA Hearing on
Federal Election Commission Enforcement Procedures
October. 17, 2003

REP. JOHN B. LARSON'S OPENING STATEMENT

Mr. Chairman, in light of the upcoming election cycle, issues relating to the Federal Election Commission (FEC) are certainly on the minds of many. I thank you for holding a hearing on such a timely matter, and I thank our esteemed panels of witnesses for their participation and the insights they will share.

Recently, the FEC responded to requests for copies of the transcripts of those deposed by the FEC. While this policy change is certainly a step in the right direction, it is only a small step. Rather, I believe a giant leap forward is needed to bring some clarity to our election guidelines.

At issue today is how the FEC responds to enforcement issues. Yet, it is not only its response that warrants discussion, but also the confusing interpretations and lack of clarity about federal election guidelines that must be addressed. These issues are of great concern to not only those who are inspired to run for political office, but also to those who are already in office.

I first entered politics in 1977. Of all the candidates and elected officials that I have encountered since that time, I cannot recall anyone who set out to create an election violation. On the contrary, by and large, people who campaign for elected office do so with the best of intentions. However, it is the very system that was established to oversee how campaign laws are enforced that is a hindrance to those with a passion to serve the public.

In addition to the day to day challenges of running a campaign, or serving in elective office, a candidate or elected official must also be concerned with violating any number of FEC guidelines, which are often left to interpretation. Those who have never run for office, and who may not have an experienced treasurer, could find themselves in a serious situation due to one innocent mistake. Given the recently announced criminal penalties for campaign violations, what we have essentially created is a "gotcha" environment for those in politics.

What does this indicate to the other important group of individuals in our political process: voters? When they see that our election laws are so difficult to understand, and easily open to misinterpretation, why would they want to be a part of the process? A process that was created to encourage, not discourage, public participation.

As I believe we will learn from today's witnesses, we must remain vigilant in the area of campaign finance if we are to maintain an open and democratic political system. At the same time we must be open to changes that will improve the FEC and inspire more Americans to serve, or at least to participate. I recognize that it is difficult to make substantive changes overnight. As Thomas Paine wrote in 1776, on the eve of the American Revolution:

"[A] long habit of not thinking a thing wrong, gives it the superficial appearance of it being right, and raises at first a formidable cry in defence of custom. But the tumult soon subsides. Time makes more converts than reason."

Putting Mr. Paine's comments into context of today's hearing, if there are FEC enforcement procedures that may not be serving the greater good, but rather the fortunate few, we must not continue to allow these "long habits" of our own.

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The CHAIRMAN. I want to thank our Ranking Member.

Just as a footnote, too, this doesn't just provide some type of clarity and service to incumbents, I think actually what you do is very, very important to the challengers to Members of the House. After all, if you are an incumbent and you have a campaign account and you are raising money, you can have accountants, people that are challenging and may not have those economic resources. As I warn them these days, they are going to have be very, very careful and that is why clarity is going to be important. Otherwise, I tell them, they need to hire an accountant, an attorney, and a bail bondsman maybe, in order to run for Congress. So the clarity I think is going to be very important for the challengers, frankly, probably more so even than the incumbents.

And, Mr. Linder, do you have a statement? Mr. Brady?

With that, we will go ahead and commence with testimony from our witnesses. And we are honored today to have a number of distinguished individuals testifying before the committee. On our first panel we will hear from Commissioner Ellen Weintraub, the current Chair of the FEC, and Commissioner Bradley A. Smith, the current Vice Chair of the FEC.

STATEMENTS OF ELLEN L. WEINTRAUB, CHAIR, FEDERAL ELECTION COMMISSION; AND BRADLEY A. SMITH, VICE CHAIRMAN, FEDERAL ELECTION COMMISSION

The CHAIRMAN. And Commissioner Weintraub, we will begin with you. Thank you.

STATEMENT OF ELLEN L. WEINTRAUB

Ms. WEINTRAUB. Good afternoon, Mr. Chairman and members of the committee, and thank you for inviting me here today. As a former House staffer, it is always a pleasure to be back on the Hill and particularly to be here since, when I was on the Hill, I worked at the House Ethics Committee and had many, many conversations and contacts with the staff of the House Administration Committee in my time here.

I am pleased to appear before you to discuss the Federal Election Commission's enforcement procedures. As someone who practiced election law before joining the Commission last December, I am particularly interested in seeing that the Commission enforces the law fairly and efficiently. I had the good fortune of having arrived at the Commission at a time when there was a great deal of interest on the parts of commissioners, agency staff, and those who practice before the Commission in improving the enforcement process.

I was therefore happy to convene an unusual hearing on June 11 of this year, focusing on the Commission's enforcement procedures. We invited the regulated and reform communities in to critique our performance and offer suggestions on how we can improve. I am not aware of other agencies so frankly inviting criticism in this way, and I think it is a tribute to our general counsel and his staff that all of the testimony was received without defensiveness and with an open mind. This reflects our current general counsel's enforcement philosophy that the investigative process is not an adversary proceeding and that his primary responsibility in that process

is to provide the Commission with objective recommendations based on a fair reading of the record and careful, thorough consideration of the issues.

The Commission received a number of thoughtful, sensible suggestions, both in writing and in oral testimony. We may not adopt every suggestion that has been made, but all of the testimony is being given serious consideration. At the hearing we discussed such topics as the timeliness of investigations, an area of particular concern to me as a former practitioner—and any of my enforcement staff can tell you that I am just a demon on the subject whenever I feel there is unnecessary delay in the process—whether the Commission should adopt a publicly available civil penalty schedule, which I personally favor and I think would really enhance the regulated community sense of the fairness of the process; the appropriate scope of treasurer liability; the method by which respondents are identified; the agency's discovery practices; and concerns about the statutory trigger for initiating an investigation, which is currently a finding by the Commission that there is "reason to believe" that the law has been violated.

Although I do not share all of Vice Chairman Smith's views, I join him in urging you to consider amending the language of the statute so that the trigger for an investigation would be a Commission finding not of reason to believe that the law has been violated, but of reason to investigate whether the law has been violated, which would more accurately reflect the status of our knowledge at that preliminary stage and not create a misleading appearance as to what the Commission has actually found at that point.

In response to that hearing, the Commission has already made several modifications to its enforcement procedures. Witnesses are now given access to their deposition transcripts. The Office of General Counsel is currently drafting recommendations for changing our practices with respect to naming treasurers as respondents. Our staff is developing new language for our confidentiality advisement to clarify that there are no statutory restrictions on witnesses' cooperation with respondents' counsel. We are developing a new policy on sua sponte submissions. The Commission is implementing a variety of internal management controls to speed the disposition of cases, and we are also on track to have the public records for closed Matters Under Review, what we call MURs, available on the FEC's Web site by the end of the year. We won't have all of the MURs for all time up, but we will have the current election cycle up and we will continue to work to build that database so that anybody, anywhere in the country, will have access to these historical precedents that now are currently only available if you come into the office. It is my personal belief that increased efficiency and increased transparency will go a long way towards alleviating any remaining concerns of the regulated community about the agency's enforcement practices.

Now is an ideal time for the Commission to make as much headway as possible on these issues as we await the Supreme Court's opinion on the constitutionality of the bipartisan Campaign Reform Act. We appreciate the interest that the House Administration Committee has shown in the FEC's enforcement procedures, and of course I would be happy to answer any questions that you have.

The CHAIRMAN. I want to thank Chairwoman Weintraub for your testimony.

[The statement of Ms. Weintraub follows:]

Opening Statement
Ellen L. Weintraub
Chair, Federal Election Commission
Before the
Committee on House Administration

October 16, 2003

Good afternoon, Mr. Chairman and Members of the Committee, and thank you for inviting me here today.

I am pleased to appear before you to discuss the Federal Election Commission's enforcement procedures. As someone who practiced election law before joining the Commission last December, I am particularly interested in seeing that the Commission enforces the law fairly and efficiently. I have the good fortune of having arrived at the Commission at a time when there is a great deal of interest, on the parts of Commissioners, agency staff, and those who practice before the Commission, in improving the enforcement process.

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our General Counsel and his staff that all of the testimony was received without defensiveness and with an open mind. This reflects our current General Counsel's enforcement philosophy that the investigative process is not an adversary proceeding, and that his primary responsibility in that process is to provide the Commission with objective recommendations based on a fair reading of the record, and careful, thorough consideration of the issues.

The Commission received a number of thoughtful, sensible suggestions, both in writing and through oral testimony. We may not adopt every suggestion that has been made but all of the testimony is being given serious consideration. At the hearing, we discussed such topics as the timeliness of investigations; whether the Commission should adopt a publicly available civil penalty schedule; the appropriate scope of treasurer liability; the method by which respondents are identified; the agency's discovery practices; and concerns about the statutory trigger for initiating an investigation, which is a finding by the Commission that there is "reason to believe" that the law has been violated. Although I do not share all of Vice Chairman Smith's views, I join him in urging you to consider amending the language of the statute so that the trigger for an investigation would be a

Commission finding of "reason to investigate," which would more accurately reflect the status of our knowledge at that preliminary stage.

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Now is an ideal time for the Commission to make as much headway as possible on these issues, as we await the Supreme Court's opinion on the constitutionality of the Bipartisan Campaign Reform Act. We appreciate

the interest that the House Administration Committee has shown in the FEC's enforcement procedures. I would be happy to answer any questions that you have.

The CHAIRMAN. And we will move on now to Commissioner Smith.

STATEMENT OF BRADLEY A. SMITH

Mr. SMITH. Thank you, Mr. Chairman, Congressman Larson, and members of the committee. I will avoid repeating things that the Chair has said, but I will note that I am in agreement with virtually all and perhaps all of what she said. Perhaps I didn't pay quite enough attention to know if it is absolutely all.

I want to start by stressing one point. It is sometimes suggested that the Commission need not concern itself with due process of respondents because, in fact, if respondents refuse to pay a fine assessed by the Commission, the Commission must take them to court where the Commission is the plaintiff and bears the burden of proof, and there they can get the due process to which they are entitled.

I hope that people would instinctively feel that that seems an incorrect way for a government agency to operate, but I would further point out that that simply does not reflect the reality of the Commission. Twenty years ago the chairman of the Section on Administrative Law of the ABA appeared before this same committee and noted that the respondents before the Commission are denied many basic due process rights. And while many of those procedures have changed, some have not. And the ABA at that time noted that the Commission has, quote, de facto adjudicative phases and functions. And that is the truth. In fact, 99 percent of all cases before the FEC and over 96 percent of those in which we find a violation are adjudicated without going to court. So truly the FEC is where cases end, not where they begin, and thus process is particularly important.

The Chair has noted that progress is being made, that there is a new climate at the FEC which I think is beneficial. I would also highlight additionally that we have created programs. The administrative fines program created by Congress pursuant to an FEC recommendation, the alternative dispute resolution program created by the Commission, have helped to speed the handling of a large number of matters and I think have been very positively received by all segments of the public.

Additionally, I agree that we have an excellent management team in place. Our general counsel, Larry Norton, deputy general counsel, Jim Kahl, associate general counsel for enforcement, Rhonda Vosdingh, have all been in their positions only 25 months or less, and they are working to implement a number of managerial changes that improve our handling of complaints. For example, to lend a few facts to what the Chair has already pointed out, since 2000 the number of inactive cases sitting at the Commission on a monthly average has declined from 98 to 57. The number of cases dismissed as stale, in other words simply dismissed because we didn't get to them, has dropped by 92 percent. The median time to conclusion of a case has dropped by 28 percent. So I think the Commission is making progress.

Chair Weintraub has also mentioned a number of things that are being changed: the ability to get your own deposition, and hopefully very soon we will see a new confidentiality statement that will re-

solve those concerns; new policy statements on treasurer liability and sua sponte submissions. I think there are some other areas of process that need to be considered and the Chair has mentioned one, changing the RTB terminology. I think that could be done without a statutory change, but a statutory change would certainly clarify that.

Additionally, there is no right to a hearing before the Commission, as Chairman Ney mentioned. And I think this is something that really ought to be considered, and the Congress may want to consider whether it should be done by statute. In fact, our counsel's people come up to the table and they are present at the hearing room to argue the position of the counsel, which in this scenario is that the Commission should find probable cause. It seems odd, then, that there is no right for the opposing counsel to be present to make the argument. And while I think people from the counsel's office make an honest, fair, professional attempt to present the case and its weaknesses, human nature tells us that there are different incentives that someone who has recommended that the Commission find probable cause may find it very difficult to turn around and at the table adequately represent the interest of the respondent.

A second issue that I think is very important is access to the documents, depositions and interrogatories, that are produced during a hearing. Your lawyers or the lawyers of anybody who appears before the Commission have no right to see these documents. They do not get to see these investigatory documents even at the stage at which we are finding probable cause. At that stage, we are clearly in an adjudicatory mode and I think it is very important that someone see these. Defendants see things differently than our own lawyers. So what our own lawyers think is relevant may not be what the defendants think is relevant, and I think that is something that very definitely needs to be reviewed.

Additionally, there are areas that Congress might want to look at. It would be helpful to have some guidance as to what should be made public, and I think you will hear witnesses later complain about the Commission's past policies of making information public.

And in my last few seconds I will note as well, I think in the end, the most important thing for Congress is to make clear that it does view process as important at the Commission. I think most of these changes can be made at the Commission level, but some expression that that is the desire of Congress and that there is this type of oversight I think is very beneficial. Thank you.

[The statement of Mr. Smith follows:]

Testimony
Bradley A. Smith, Vice Chairman
Federal Election Commission
Before
House Committee on Administration
October 16, 2003

Thank you Mr. Chairman and members of the Committee for inviting me here to testify today about enforcement practices at the Federal Election Commission. My understanding is that I have been asked to testify because of my position and the knowledge and expertise it brings, and because of my longstanding work in the field, rather than on behalf of the Commission per se. Accordingly, I am not speaking today for the Commission, but I believe that all the views I will raise are shared by at least some of my colleagues.

Let me begin with some good news. Over the past several years, the Commission has introduced a number of new programs or made changes that have improved the enforcement process. Most notably, the Administrative Fines program, enacted by Congress on the basis of a legislative recommendation from the FEC, and the Alternative Dispute Resolution program, introduced by the FEC, have helped us to dramatically increase the number of cases handled each year, while reducing the time needed for resolution. And though the purpose of this hearing is to focus on enforcement issues, I would be remiss not to mention the incredible job that the Agency has done in responding to passage of the Bipartisan Campaign Reform Act of 2002 ("BCRA," or "Shays-Meehan"). The agency successfully completed seven major rule makings implementing the Act within 270 days of passage, has conducted numerous public seminars on the Act, and revised virtually all of our forms and publications. These acheivements strongly refute those who argue that the Commission is hopelessly mired down in partisan

gridlock and incapable of functioning effectively. Quite the opposite, the FEC and its staff have proven more than able to take on big challenges. *See generally* Bradley A. Smith and Stephen M. Hoersting, *A Toothless Anaconda: Innovation, Impotence, and Overenforcement at the Federal Election Commission*, 1 Journal of Election Law 145, 145-151 (2002).

Another criticism I frequently see in the press quotes from so-called experts -- many if not most of whom have never worked for the Commission nor represented clients brought before the Commission -- alleging that the Commission is a "toothless tiger." Such remarks do not reflect the Commission with which I am familiar. For example, earlier this year, the Commission fined a sitting member of the House over $200,000 for accepting too large a contribution, not from some nefarious special interest, but from his parents. Such a fine for such an infraction is hardly "toothless" enforcement. Also in the past year we conciliated with a sitting member of the Senate for $250,000 in fines and refunds. In the last year we have assessed penalties in cases involving illegal corporate activity of $849,000 in one case, and $477,000 in another. In addition, we have assessed numerous other six-figure penalties in the past year.

But equally, if not more important, than the large fines issued by the Commission are the smaller cases. It is important to remember that in a significant percentage of cases brought before the Commission, the targets of our investigations are not political professionals. They are certainly not people engaged in what we might call acts indicating moral turpitude, wanton disregard for the safety or welfare of others, or lack of civic spirit. Quite the opposite, they are people who volunteer to serve as treasurers, or in some other role, in campaigns because they believe doing so can make a positive

difference in our political life. They are leading citizens who unknowingly exceed the contribution limits of the Act. They are civic-minded individuals who in their zeal to support a candidate or cause - behavior we normally praise as public spirited – accidentally cross one or more of the sometimes arbitrary rules that constitute the Federal Election Campaign Act. In my experience these people, far from finding the FEC to be a "toothless" enforcer, find it to be a frightening agency with sometimes bewildering procedures. *See* Smith and Hoersting, *supra* at 151-162.

Furthermore, these types of political activities represent core First Amendment speech. Generally, our society encourages people to give to political candidates and causes, to volunteer for campaigns, and to take an active role in political life. We want average citizens to be involved. We do not want politics to become a realm dominated by highly paid professionals and consultants. We believe that the average person should not have to contact a lawyer before trying to effect political change.

For these reasons, an agency such as the FEC should be especially sensitive to respecting the procedural rights of those called before it. Due process ought to be particularly important to the FEC. A sense that the law is fair and understandable is essential if the public is to have confidence in, and support for, the law.

Unfortunately, the Agency has not always placed a proper premium on the rights of those citizens targeted for investigation. The good news here is that Commission, with support from the Office of General Counsel, is now engaged in a far-reaching review of its enforcement practices. But there is much to do, and it is appropriate that the Commission's enforcement procedures receive attention from Congress.

As far back as 1983, the Chairman of the American Bar Association's Section of Administrative Law testified before a task force of this very Committee that the FEC's administrative process could be criticized as "unduly prolonged" and "operating in a star chamber style." He noted in particular that, "those who are investigated are not clearly appraised of what it is they are alleged to have done, and they are never given the opportunity to plead their cases in the way that most of us as lawyers are accustomed to: by addressing the decisionmakers." Statement of William H. Allen, Hearings Before the Task Force on Elections of the Committee of House Administration, 98th Cong., 1st Sess., p. 323. Despite some reform, twenty years later most of the procedures that sparked these criticisms remain in place at the FEC. "FEC procedures are lacking in several respects. First, individuals and committees accused of violations are denied due process." Kenneth A. Gross and Ki P. Hong, *The Criminal and Civil Enforcement of Campaign Finance Laws*, 10 Stanford Law & Policy Review 51, 52 (1998). To give just three examples: In proceedings before the FEC, the accused has no right to oral argument before the Commission makes a final determination of "probable cause" and assesses a fine; an accused has no right to cross examine witnesses; and an accused has no right of access to the documents, correspondence, interrogatories, and deposition transcripts that support the General Counsel's recommendation of probable cause. Even exculpatory information is denied the respondent.

These procedures, which I will describe in more detail below, are justified, and even cheered, by certain persons on the grounds that the FEC "cannot impose a penalty or order on anyone to take action." Public Hearing on Enforcement Procedures, Federal Election Commission, June 11, 2003, p. 123 (testimony of former FEC General Counsel

Lawrence Noble). And it is true that if a party refuses to pay the penalty assessed by the FEC, the FEC can only proceed to initiate an enforcement action in federal court, where the FEC will have the burden of proof as the plaintiff. In other words, because the accused can eventually get his case heard by a federal judge, where he will have the full protections of the Constitution, it is suggested that the FEC need not concern itself with the rights of those it investigates. The reality, however, is quite different. As a practical matter, the FEC does adjudicate those matters brought before it, and I imagine candidates, committees, and campaigns brought before the Commission would be surprised to hear otherwise.

The General Counsel's recommendations to the Commission include recommendations for "civil penalties," which, as we have seen, can run into substantial sums. Newspapers regularly describe these penalties as "fines" or "penalties." *See e.g.* Richard A. Oppel, Jr., *Democrats are Fined $243,000 for Fund Raising Violations*, New York Times, Sep. 21, 2002, p. A13; Associated Press, *FEC Settles Case Against New Jersey House Member*, Washington Post, June 14, 2003, p. A11 ("The Federal Election Commission has assessed a $210,000 civil penalty"); Patrick McGreevy, *Federal Probe of Mattel, 2 Former Official Yields Fines of $477,000*, Los Angeles Times, Dec. 6, 2002, p. 3. When the FEC finds "probable cause" and assesses a civil penalty, I know of no respondent who views this assessment as anything but a "fine," or who views its payment as voluntary, or who takes comfort in knowing that if he feels he has been treated unfairly, he can demand to be sued in federal court.

The idea that FEC does not assess penalties or adjudicate cases is, as a practical matter, wholly at odds with reality. As the members of this Committee well know,

political campaigns are not profit making ventures with legal departments and a budget for legal fees. Losing campaigns and smaller political committees rarely have the funds needed to defend themselves in litigation with the federal government. But even winning campaigns, or larger committees, are typically in no financial position to defend themselves. Furthermore, campaign finance litigation is unlike most other litigation with the government. Most complaints filed with the Commission are filed by political enemies of the named respondents, as much as to harass and garner bad publicity for the respondent as to vindicate the public. A campaign, no matter how innocent it is, or how flimsy the charges against it, cannot afford to be involved in daily public news stories about alleged violations of campaign finance law - charges which, as you know, can then be seized upon by political opponents to create an air of scandal, knowing that the case will not be resolved and the candidate cleared before the next election. For this reason, Congress included Section 437g(a)(12) in the Federal Election Campaign Act, requiring the FEC to keep ongoing investigations confidential. Only when the Commission has completed its work and found, or not found, a violation is the fact of the investigation disclosed. Enforcement in court, however, is public, and every allegation, no matter how baseless, may be trumpeted by the press and a candidate's or committee's political enemies.

Those who argue that the FEC need not concern itself with due process argue that a "probable cause" finding, assessment of a penalty, and the threat to pursue the respondent in federal court is merely the beginning of the adjudicatory process. But the reality is that it is, in the vast majority of cases, the end of the adjudicatory process. *See* Public Hearing on Enforcement Procedures, Federal Election Commission, June 11,

2003, (written comments of California Political Attorneys Association, p. 4)("virtually all cases are resolved by pre-probable cause conciliation' or settlement after a probable cause determination and before civil litigation is initiated"). As noted in the ABA's 1983 report presented to this Committee, the Commission has, "de facto adjudicative phases and functions." Statement of William H. Allen, *infra* at 325. It is "investigator, prosecutor, and ultimately judge and jury." *Id.* Indeed, it is clear from the structure of the statute that Congress intended for most complaints to be resolved without resort to the courts. In fact, for fiscal years 1995 through 2003, the Commission adjudicated 1582 cases. In 433 of those, the Commission assessed penalties. In only 16 cases – that is 1 percent of the total cases adjudicated, and just 3.7% of cases in which the Commission assessed a fine, did the respondent require the Commission to sue in court. Thus, the due process rights of respondents before the Commission ought to be of paramount concern to both the Commission and to Congress.

Allow me, then, to describe aspects of the FEC's enforcement process in detail.

When a complaint is filed, the FEC reviews it to be sure it complies with the basic statutory requirements of the Act, to wit, that it be in writing, signed and sworn, notarized, and made under the penalty of perjury. *See* 2. U.S.C. 437g(a)(1). The Commission does not require that the complainant have personal knowledge of the facts behind the alleged infraction. Newspaper clippings and speculation will do so long as the complainant will swear a belief in their veracity. This allows political opponents to file charges on the flimsiest of evidence, and then to trumpet their own allegations in press releases. Congress may want to consider if a higher standard should be required to file a complaint. Although the complainant may designate certain persons or entities as

respondents, the Commission frequently names added respondents on its own. This practice certainly has some merit. For example, if a campaign is accused of accepting an illegal corporate contribution, it makes sense for the Commission to add as a respondent the corporation alleged to have made the illegal contribution, for its alleged actions, if proven, would also violate the law. Unfortunately, the Commission has no clear or regular guidelines for naming adding respondents. As one frustrated practitioner who regularly represents clients before the Commission recently put it, "I suspect it [the process] is, that someone goes through and looks for any proper noun, and whatever proper noun is found in the complaint gets a letter that they are a respondent…." Testimony of Marc Elias, Public Hearing on Enforcement Procedures, *supra* at 34. While I assure the Committee that that is not the process, Mr. Elias's testimony before the Commission fairly sums up the frustration of those trying to understand the basis for designating respondents.

Pursuant to the statute, designated respondents have just 15 days to respond to the complaint. To the credit of the Office of General Counsel, it routinely grants extensions of time for respondents to answer the complaint. After receiving the response, the Office of General Counsel, or OGC, will make a recommendation to the Commission on whether to find "reason to believe" that the FECA has been violated. Although the phrase implies that a substantive determination has been made by the Commission, in fact this finding of "reason to believe," or "RTB," is merely the statutory predicate for launching an investigation. It is not a substantive finding on the merits by the Commission. Quite the opposite, a very low threshold is required for RTB. Unfortunately, what that threshold is is nowhere defined, and different commissioners are

free to use differing standards in voting on RTB recommendations. In my experience, however, commissioners have been generally consistent in all applying a standard not dissimilar from judgment on the pleadings in a civil lawsuit: that is, where the facts alleged, liberally construed, would if true constitute a violation of the Act, the Commission will find RTB. In making an RTB recommendation, however, the Counsel may follow the theories set out in the complaint, but he may also add additional theories or counts based on its reading of the facts in the complaint. Thus, respondents do not have an opportunity to respond directly to the potential RTB finding, which is not hemmed in by the theories laid out in the complaint. This, too, may merit attention.

The bigger problem, though, is the terminology itself. An RTB finding merely triggers a full investigation. But if, after the investigation, the Commission determines that there is insufficient evidence to find a violation (or determines that it is clear that no violation has occurred), it merely votes to "take no action and close the file." It does not rescind the RTB finding. To the average citizen unschooled in the finer points of practice before the FEC, learning that this government agency has found "reason to believe" that he has violated the Act sounds very much like a conclusion on the merits. The fact that the government later decided to "take no action" hardly seems an exoneration. These findings are then placed on the public record, and may be reported in local media or elsewhere. The effect of this practice, in my mind, is to unfairly stigmatize many good citizens, candidates, and campaign volunteers with violating the Act where no such violation has been proven. This problem is especially hard on members of the licensed professions, such as the accountants and lawyers who are frequently candidates, donors, or campaign volunteers named as respondents. Imagine having to explain to the state

licensing agency that though the federal government found "reason to believe" that you had violated the law, it really didn't mean that you had done anything wrong!

This problem could be alleviated simply by changing the terminology involved. The phrase "reason to believe" comes directly from the statute. *See* 2 U.S.C. 437g(a)(2). A more neutral and more accurate phrase might be "reason to open an investigation into allegations." Where an investigation then leads the Commission to "take no action and close the file," it will be clear that no violation was found. It has long been the view of the Commission that changing this finding to more neutral language requires a change in the statute, and we have made that recommendation to Congress. I have come to believe, however, that no statutory change is necessary for the Commission to simply change the finding from "reason to believe" that the Act has been violated to "reason to open an investigation into allegations" of violations. However, action by Congress would clearly resolve this problem, and alleviate the undeserved stigma that so often results from this unfortunate statutory phrase.

In the investigation that follows an RTB finding, the Commission has the authority to subpoena documents and witnesses. During this process, respondents have no right to be present at the examination of witnesses, let alone to conduct cross-examination. Until very recently, respondents were even denied the right to obtain copies of, or to take notes on, their own depositions. Furthermore, when taking depositions, the FEC has long had a policy of requiring third party deponents to sign a "confidentiality" statement, by which they are instructed that they may not discuss the matter with anyone. Respondents have long complained, and I agree, that this statement has been worded in such a manner as to mislead deponents into thinking that they may not discuss the matter

even with the respondents themselves. In short, the Commission's practice has turned a provision of the statute intended to serve as a shield for respondents into a sword for the government.

At the close of an investigation, which can sometimes last years, the Office of General Counsel may recommend that the Commission take no action against respondents; or it may recommend that the Commission find "probable cause" to believe that a respondent violated the Act. Before making a recommendation to find probable cause, OGC sends a brief to the respondent outlining the Counsel's position, and the respondent has an opportunity to file a reply brief within 15 days. Again, OGC liberally grants extensions of time, although if the case is near the statute of limitations, the respondent will normally be required to waive the statute of limitations in order to receive an extension of time. After receiving the reply brief, the Counsel's Office will then make a final recommendation to the Commission in the form of a memorandum that discusses the factual and legal arguments raised by the respondent. As one might expect, since these reports to the Commission are drafted by the same attorneys who have already determined that probable cause exists, these reports rarely find the response convincing. The Commission then votes on whether or not to find probable cause, and if it does find probable cause, determines a penalty, and approves a settlement agreement which typically includes an admission clause. The Commission is then required to attempt to conciliate with the respondent for at least 30 days. During this period, changes in the language of the conciliation agreement or the penalty amount may be agreed to. However, if after 30 days no settlement is reached, the Commission may sue in federal court.

It is at the stage of finding probable cause that many of the deficiencies in the Commission's procedures become apparent. Most obvious might be the lack of any opportunity to appear in person before the Commission. This is not unheard of in litigation, of course. In courts, many actions, including dispository motions, are decided on motion without oral argument. What is different is that at the Commission, the Counsel is present during deliberations and able to answer questions and promote his view of the case. Were the FEC merely a "prosecutor," as some would like to claim, this might make sense. But as ABA Committee noted twenty years ago - and nothing has changed this - in the vast majority of cases the FEC is also judge and jury. For most respondents, probable cause is not the beginning of the process, as some claim. It is necessarily the end of the process, and the stage at which fines are meted out. To the extent that the ABA is correct and a probable cause finding is the de facto adjudication of the complaint, that determination is made in what is effectively an ex parte hearing at which respondents are not represented.

Additionally, respondents at the probable cause stage have no right to see the documents, interrogatories, and deposition transcripts on which the probable cause recommendation is based. The Office of General Counsel will make available, if requested, portions of documents that are specifically cited in the Counsel's brief, but it denies that there is any "right" to these documents, and does not allow respondents general access to such documents. Even exculpatory information is denied to the respondents. As noted in the 1983 ABA report, the Commission justifies this practice with three arguments. I agree with the ABA Committee that each of these arguments are seriously wanting. First, it is argued that such information violates work product

privilege. However, documents, interrogatories, and depositions are not covered by work product privilege. Second, it is argued that providing this information would violate the confidentiality provisions of the Act, which require that, "Any notification or investigation made under this section shall not be made public by the Commission or by any person without the written consent of the person receiving such notification or the person with respect to whom such investigation is made." 2 U.S.C. 437g(a)(12)(A). However, this section is intended to protect innocent targets of investigations from adverse publicity, not to deprive respondents of information useful to their defense. As with its required "confidentiality" statements, the Commission has turned a provision intended as a shield for defendants into a sword for the government. Finally, it is argued that this policy of withholding information is needed to insure effective investigations. However, once the General Counsel has submitted a probable cause brief, the investigation is closed. Thus, there should be no need to continue to withhold these documents from respondents.

All of the problems I have described above are exacerbated by a number of lesser practices that frustrate lawyers who must defend clients before the FEC. For example, the FEC does not publish an enforcement manual or penalty schedule; it lacks coherent, consistent policies for handling *sua sponte* submissions and for designating campaign treasurers as respondents; a substantial backlog of cases to build up during the 1990s, with a resultant delay in the resolution of cases that is only now being reduced.

Claims that the FEC need not concern itself with due process should chill the spine of ordinary citizens and will not, I hope, be taken seriously by this Committee. Nevertheless, it may be that full panoply of due process rights available in a court may

not be appropriate for the Commission. For example, because the FEC does have investigatory as well as adjudicative functions, it may be necessary to deny respondents the right to attend depositions of third party witnesses during the course of an investigation. However, because the FEC's enforcement actions routinely take place in the realm of core First Amendment rights, and because its targets are generally citizens seeking only to contribute to the nation's political life, the FEC should strive to provide the maximum due process compatible with enforcement of the law. Historically, however, that has not been the culture of the FEC.

Now back to the good news. I am pleased to say that the FEC has recently begun to take positive steps in this direction. On June 11 of this year the Commission, Chair Weintraub scheduled a public hearing to seek input on possible changes to the Commission's enforcement practices. This re-evaluation has the support of the Commission's General Counsel of just two years, Larry Norton, and of Deputy Counsel Jim Kahl, and Associate General Counsel for Enforcement, Rhonda Vosdingh, who assumed their positions just last year. Since that hearing, one change has already been implemented - for the first time, the FEC now provides respondents with the right to obtain copies of their own depositions. Additionally, I have been informed by the Counsel's office that it will soon make recommendations to the Commission regarding policies on treasurer liability and *sua sponte* submissions, and changes to the Commission's longstanding "confidentiality statement" intended to make clear that the confidentiality provisions of the Act do not preclude witnesses from speaking to respondents. Additionally, Chair Weintraub and Counsel Norton have made it a priority to determine ways to further expedite the pace of investigations, and we are already

seeing some progress. Cases are being resolved more rapidly. The number of open, inactive cases has declined from a monthly average of 98 in FY 2000 to just 57 in 2003. Moreover, in FY 2003 only one case was dismissed as stale, as compared to 86 just five years ago, and 13 in FY 2000. Under the supervision of Mr. Norton and Ms. Vosdingh, the Counsel's office has attempted to be more discriminating in naming respondents. I hope that the Commission will adopt clear guidelines in that area. Thanks to the decision of the U.S. Court of Appeals for the D. C. Circuit in *AFL-CIO v. FEC*, it appears that the Commission will also be revisiting its policies on the placement of documents on the public record at the close of an investigation, something that has been the source of some complaint. Here, too, Chair Weintraub has been in the forefront of pushing the issue forward. These are important changes, though they leave unaddressed such rudimentary due process concerns as the right to a hearing, the right to have exculpatory information made available, and the right to view all of the documents produced by third parties, interrogatories, and deposition transcripts on which probable cause findings are based.

I believe that most of the changes that ought to be made can be made without direct action by congress. However, Congress may wish to take a more active role. As I noted earlier, a simple change that would remove a needless stigma associated with Commission proceedings is to change the statutory language of 2 U.S.C. 437g(a)(2) from "reason to believe" to "reason to open an investigation into allegations." Though I believe the Commission could do this on its own, congressional action would clarify the matter. Additionally, Congress may wish to consider changing the statute to allow respondents, by statutory right, to have access to documents, interrogatories, and depositions at the probable cause stage, as was recommended by the ABA in 1983.

Congress may wish to consider amending the statute to require the Commission to make provisions for oral argument at the probable cause stage where the potential penalties exceed a certain amount. But because these changes, and others, can in fact be made directly by the Commission, perhaps all that is needed is a strong signal from Congress that it expects the FEC to carry out its duties with a stronger concern for the due process rights of the citizenry than it has sometimes shown.

Thank you.

The CHAIRMAN. I want to thank you, Commissioner Smith and Chair Weintraub, for your testimony. I also, before I ask a question, wanted to also make a comment. I think you have—your information specialists I think are tremendous. And I personally have called on questions that we have, which is the way you should do it before you expend funds. Whether you give your name or you don't give your name, it is irrelevant on how fast the call is answered. I think they have done a good job. They get back to you. I know you are probably getting thousands of calls, but I just want to tell you I think the information specialists have really done a pretty good job.

Ms. WEINTRAUB. I think so, too.

The CHAIRMAN. Thanks. The question I have is the outlines of the FEC enforcement process are set forth in the act. How much discretion and authority do you have to modify its current enforcement procedures? We can start with either one.

Ms. WEINTRAUB. I think that we have a great deal of flexibility in modifying our enforcement procedures. It is like everything else that happens at the Commission, it requires four votes.

I do want to say that I respect everyone's concerns about the due process that is afforded to people at the Commission. I have a different perspective from the Vice Chairman on that. I am very concerned that affording the kind of hearing that he is talking about could bog down the process. We are potentially talking about an awful lot of hearings which would slow down the process considerably. It would force our staff to take their time away from processing more cases to preparing for the hearings. And I am not sure that we would actually gain that much at the end of the process. I know lawyers would feel better about having an opportunity to come in, but I think it would also exacerbate the difference between the savvy Washington insiders and the people who are out in the heartlands, who wouldn't know enough to hire some of the fine counsel that are sitting behind me today to come in and represent them.

The CHAIRMAN. Can I ask you one question? Not to interrupt, but from your opinion having stated that, is it a financial consideration? In other words, if there were more finances available, would it be a good thing to do, or it goes beyond that with you?

Ms. WEINTRAUB. I just don't think that it is—I suppose more finances would help. Then we would have more staff. But I don't see it primarily as a financial matter. The practices that the Commission follows are consistent and, in fact, afford more rights to respondents, more opportunities to respond than other similar agencies. We have looked at the practices at the SEC and the FTC and the CFTC, and none of those agencies offer the kind of opportunities that we do. Respondents receive a copy of the complaint and they get an opportunity to respond to that. Then if the Commission finds reason to believe, we open an investigation, the respondents receive a detailed statement of the factual and legal basis for the investigation and they again have a chance to respond to that. And if the general counsel reaches the point where he recommends that the Commission find probable cause, respondents again receive a brief, setting out all of the arguments and they have a chance to respond to that.

And I think that it is very important to correct the impression that the counsel's office functions as a prosecutor. There are many, many times when the counsel comes to us and says "don't go forward." We do not think there is reason to investigate. We do not think there is reason to find probable cause here at the end of an investigation. I think that the notion that we have a bunch of prosecutors who are out to get people fundamentally misapprehends what happens at the agency. In terms of the document production, again, it would be a cumbersome process. We would have to prepare confidentiality logs. We would have arguments over attorney-client privilege. We would then have to be litigating over that, which again would slow down the process. And I am very concerned about the pace at which these cases proceed as it is. Again, I think that all of these things would give a big advantage to the savvy Washington insiders who would have access and knowledge of who to hire to go in there and represent them, whereas the people out in the heartlands who perhaps would not have the resources or the sophistication to hire those kinds of lawyers or to come in and examine the documents would be disadvantaged.

The CHAIRMAN. Do you think that the general counsel should have more prosecutorial powers?

Ms. WEINTRAUB. I don't think it is a prosecutorial role. We are an administrative agency. I don't think he is looking to prosecute people.

The CHAIRMAN. Mr. Smith.

Mr. SMITH. Mr. Chairman, if I may add a few comments? I think this shows why some congressional direction as to how important you feel these kinds of due process rights are would be helpful. I think that if you—when the comparison is made to other agencies, that is made on the basis of generally what rights the person has before the case goes before an administrative law judge or before the agency otherwise is launching an adjudicatory suit; in other words there is not such a lengthy investigatory process. And this is the point I attempted to emphasize at the beginning, is that the practical reality is the Commission is adjudicating cases. We are the final stopping point.

Now, there are reasons, for example, why we might limit hearings. For example, people in courts are not entitled to hearings on absolutely everything. You can't demand a jury trial for your speeding offense generally, and so on. But certainly I think that we would have the flexibility, I think the Commission has it, but again Congress could direct it or at least give us directions to have at least some hearings where, for example, the case is knowing and willful and therefore potentially could lead to a criminal investigation, or where the violation exceeds a particular amount. Criteria can be developed.

Similarly, on the production of documents as it stands now, people are not allowed to see even exculpatory information, information that we uncover that might tend to show that they are not guilty of some type of violation. And I think to most lawyers' ears, that instinctively just sends off dozens of red flags. Would there be some added difficulty for the Commission? Yes. But this is something that prosecutors in various agencies in the government live with all the time. In fact, in my mind it is an argument for not only

giving exculpatory information, but for essentially giving all of the information that is uncovered in the investigation at the probable cause stage.

We have—back to the issue of oral hearings, we have oral hearings under title 26 when we handle repayments for public funds in the Presidential elections. I think all of us find those oral hearings to be extremely helpful on the Commission, and I have found when we have had those hearing the counsel and being able to ask questions directly about interpretations of the fact affect things. The counsel is not a prosecutor. The counsel is put in a difficult position. But it is worth noting that when we had our hearing on June 11, the agency's prior general counsel of 14 years emphasized that we were exactly a prosecutorial body and he was a prosecutor.

So you see that there are different views here and the views that hold sway now may not hold sway in the future, and that is why it is worth it to institutionalize some of these problems.

Finally, whether the counsel views himself as a prosecutor or not, as I say, it is simply human nature. Yes, the counsel also recommends that we not go forward with a case; but when the counsel recommends that we do go forward, human nature tells us that when we have that meeting and the counsel is sitting at the table—and we sit at a table much as you do, and the counsel sits at the end of that table with his staff and participates in the discussion and the debate—human nature tells us that he is not going to represent the interest of the defendant the same way the defendant would. No matter how competent, no matter how professional the lawyers there are, they have made already their finding and recommendation and there is going to be a human nature tendency to defend that.

The CHAIRMAN. It raises two more questions. Some of the answers. Under the current law, could the FEC alter its enforcement procedures to allow for oral arguments? Can it do that?

Ms. WEINTRAUB. Yes, I believe that it can.

The CHAIRMAN. And Commissioner?

Mr. SMITH. I agree.

The CHAIRMAN. Okay. The second—you mentioned exculpatory evidence is withheld from respondents. What would be the enforcement rationale for this policy to withhold?

Mr. SMITH. If I may, I think there have been three that have been offered. First—and I think all of them lack merit, and this was discussed even 20 years ago in the ABA report—the first is that it is necessary to protect the integrity of the investigation, but, of course, at the probable cause stage the investigation is concluded, so I am not sure that that holds merit.

Second, that it is necessary under the confidentiality clause of the statute which prohibits the fact of investigations from being made public. But that turns the confidentiality clause on its head. That clause is intended to prevent candidates and campaigns and committees who have been accused from being unfairly smeared in the press during the pendency of the complaint. It is not intended to keep them from getting the information they need when they need it.

Finally, the argument is that certain materials would be privileged, but of course one would not suggest that privileged materials

would be turned over, or memoranda, to the Commission. Rather, we are talking about the documents that are uncovered through document requests, the interrogatories and the deposition transcripts. And so I think that these can be required. I think they ought to be required. It would certainly be possible to do it with some exception that could be made where there is a belief that revealing the information would, for example, harm an investigation.

But I think the general rule when we are dealing with the first amendment rights of citizens participating in politics is that we should be aiming to give them as much process as we possibly can that is consistent with us fulfilling our role rather than taking the view it is much easier for us, it is much more convenient for us, it is much less work for us if we kind of trim that process back.

The CHAIRMAN. Thank you. Chair.

Ms. WEINTRAUB. I think it is more than a matter of administrative convenience. I do think that it would slow down the process substantially. We would get bogged down in litigation over whether we had produced every document that we were supposed to produce. And again I think the current situation, and it has been alluded to earlier, where cases sometimes get resolved years after the original litigation is filed serves no one. It doesn't serve the complainants. It doesn't serve the respondent. It doesn't serve the regulated community. It doesn't serve the reform community and it certainly doesn't make the agency look very good.

So I am reluctant to engage in extended exercises that I think will impair that important goal of getting the cases resolved quicker.

The confidentiality concerns are not always unidimensional because frequently we have more than one respondent. So if you have more than one respondent and we are gathering information from more than one respondent at the same time, each could have confidentiality concerns about their own documents that they didn't want to share with another respondent in the case.

And perhaps the strongest argument is that I think it is a solution in search of a problem. Before the recent AFL–CIO case which limited the documents that we would produce after an investigation, the agency routinely produced everything in their files at the conclusion of an investigation. I am not aware of anybody ever coming forward and saying, "Aha, I found this document that you didn't share with me and this would have made a difference in the resolution of my case." I don't think it has ever happened. It was my experience as a practitioner that I always felt that I knew more about the case than the FEC lawyers did on the other side. You have the benefit when you are representing the respondent that you have a little bit franker access to the facts of the case. And I think there is really no evidence that this has ever actually posed an obstacle to anybody.

The CHAIRMAN. Thank you. Mr. Larson.

Mr. LARSON. Thank you, Mr. Chairman. I want to thank the panelists as well, Madam Chairman, Vice Chair.

I have three questions that I would like to ask. The first, cuts right to the chase. Members of the reform community have called for the FEC to be abolished. Many have called it the Failure-to-Enforce Commission. They view the FEC as too lax in its enforcement.

What would be your answer to those critics? And hasn't the present structure of three Democrats and three Republicans, without a tie-breaking entity been problematic, and would an odd number of commissioners serve to break that deadlock?

Ms. WEINTRAUB. I think that it is not true that we are the failure-to-enforce Commission. In fact, if we were, I think the regulated community wouldn't be nearly so concerned about our enforcement procedures. Our penalties have been increasing in amount and in frequency over the last few years, and I think that it is really a misnomer entirely.

As to the question of deadlock in the proposal to abolish the agency and substitute one with an odd number of commissioners, I am very sympathetic to the concerns of the reform community when we have a deadlock situation. I know it is personally very frustrating to me when this happens, but it doesn't happen very often. Our staff did a study and they came up with a figure of 3 percent of all the decisions resulted in a 3–3 split. So it is not a problem that comes up on a daily basis. Usually we work to find common grounds. And usually we find it. As I said, it doesn't happen all the time. But when it does, it is—you know, it is frustrating, but I think we create a larger problem by having an odd number of commissioners. Right now there are three Democrats and three Republicans. If we had an odd number of commissioners, there would be either more Republicans than Democrats or vice versa. And I think that that would create a very, very dangerous situation when we are talking about people who supervise the political process and look at campaigns.

If it is true, as the proponents of this proposal suggest, that we vote on party lines all the time, then creating a situation where there are more of one party than the other would be extremely dangerous to the party in the minority. I think that there are current tendencies to avoid deadlock, we wouldn't have the same brakes on because there wouldn't be any need to try and work together if you knew that you could just roll the other side any time. So I sympathetic to the concerns. I understand where they are coming from, and I know they are very sincerely held, but I am not in favor of that proposal.

Mr. SMITH. If I can add briefly, and I think one thing to note, you see that we exchange our views pretty strongly and we are not afraid to do that. But the fact is that shouldn't overshadow the fact that on the majority of the things we tend to be in agreement that we are talking about today, and this is one of those again.

I would add just a couple of points on the deadlocks. Not only as the Chair says is the percentage of deadlock votes, or 3–3 votes would be a better way to put it, very very small; a deadlock is not to say that the Commission did not decide the issue. It decides the issue and in the vast majority of cases it decides it as clearly as the vote. In other words, if the Commission votes 3 to 3 not to pursue a violation, that is as final a decision as a vote 5 to 1 not to pursue a violation. So I think far too much can be made of that issue. Sometimes I have heard it said, well, the Commission deadlocks on important votes. But when you actually ask what are important votes, I remember some of the ones that I have seen cited. One was the Commission split 3 to 3 on whether it should file an

amicus brief in Federal court on a case involving State law. I don't see that as a really important issue. And if that is the best that people can come up with, I suggest that this is not really as great a problem as is suggested.

Also, when we talk about even or odd number members of the Commission, the one other possibility that the Chair did not mention would be to have an independent designated. I just know that that does occur in some States and I don't think that it really makes any difference. You still have the same problem. And of course the fights over who that independent is become fierce because, as we know, there are independents who almost always vote Republican and there are independents who almost always vote Democratic. And it is a little facile to suggest that that would solve the problem.

Mr. LARSON. As a follow-up to that question, what is your view of the legislation that Shays-Meehan, H.R. 2709, introduced calling for a new agency? Their agency would be the Federal Election Administration, the FEA, replacing the Federal Election Commission, with enhanced authority to enforce Federal campaign finances laws. Are you familiar with their proposal?

Ms. WEINTRAUB. I am. And that is basically what I was talking about when I talked about the proposal to avoid the 3–3 split by having an odd number of commissioners. I think that is the heart of the proposal, and I think it is also its greatest weakness.

Mr. SMITH. If I may add just a bit. I am not familiar with all the details of the proposal, but I have written an article which is cited in my testimony, entitled "The Toothless Anaconda" actually, which discusses—this was written before this bill was introduced, but it essentially discusses the same type of proposals and I think explains at length why the Commission really wouldn't solve such problems that are alleged to exist.

I would also note in terms of lax enforcement, in my prepared testimony which I have submitted, I cite a number of recent cases. It is worth noting in the last year the Commission has assessed in one case a fine of over $800,000. In another case we fined a sitting Congressman over $200,000 for taking too much money from his parents, not the most nefarious violation that one could ever imagine and not something that I think speaks of lax enforcement.

Mr. LARSON. Some groups, the Campaign Finance Institute, Common Cause, Alliance for Better Campaigns, are endorsing a fix to the Presidential public finance system that if left in the current state will not survive the 2008 election cycle. What is your feeling on that? And should these proposals include congressional races? And what is your opinion in general on our public financing of campaigns and the extension of those to congressional races?

Ms. WEINTRAUB. I am not fluent in all of the details of the proposal that you allude to. I am familiar with this in its basic outlines, and I will add that a couple of our colleagues, Commissioners Thomas and Toner, put forth another proposal to try and fix the Presidential financing system. I think both of these proposals go towards the same end of getting more money in the system, getting it to candidates earlier, and making it a more attractive package so that more people will want to participate rather than opt out of the system.

I am in favor of either of those proposals. Whatever could get the votes I would be in favor of it. In terms of extending it to congressional races, I have to say, frankly, I just don't see any appetite out there for the kind of investment that that would require of public dollars. I might in a hypothetical world say that would be a good idea, but I just don't see that there is much support for it out there, given how vastly expensive it would be.

Mr. LARSON. Mr. Smith.

Mr. SMITH. I really have nothing to add. I would tend to agree with that. I think if Congress were going to consider reform of the Presidential system, I think that the Toner-Thomas proposals probably make sense. My general view is those proposals do ask for a considerable added sum to be spent on government campaigns, government financed campaigns, and I am just not sure that in a time where people keep talking about the need to get the budget under control and pay for other things, prescription drug benefits and antiterrorism and numerous other things, that that is where the public really wants to see its money spent. But that is a political judgment that is your area of competence where the public wants its money spent, not mine.

If you were looking for something on the Presidential system, I think that would be a good place to start. I do note that of the public, only a very small percentage check the box on tax forms now, and I will say that having studied elections for a long time as an academic, I have not really seen the clear, concrete benefits from government financing systems. That is, I don't think people look at Arizona and say that Arizona with its government financing is inherently governed better than New Mexico with its private financing and unlimited corporate contributions or that other States, those kind of comparisons can be drawn. But I think really that becomes more of a political issue for Members of Congress, and you may have a very different view as to the possible benefits.

Mr. LARSON. Is it a political issue or a philosophical issue?

Mr. SMITH. Well, it is political, philosophical. I assume that your politics are driven by your philosophy of government.

Mr. LARSON. Well, I have always noticed that people who aren't in elective office refer to them as political issues. We think sometimes that heads of commissions should look at this philosophically and express their opinion as well, so that we are better informed of your views on these issues.

Mr. SMITH. Well, I mean my view would be—and I have written again, articles on it which I would be happy to call the Commission's attention to—my general sense is that there are potential benefits.

Mr. LARSON. I am interested in the toothless Anaconda, you know, because that sounds like something that is going to squeeze the death out of you but then not eat you.

Mr. SMITH. That is sort of the idea. I would say on the government financing system, I think that a system potentially could be designed which would have certain benefits. But my sense is that that is more of a theoretical design; that in practice, government finance campaigns almost immediately tend to become outdated. They can't keep up with the changes in campaigns, in our system, where we have a robust first amendment and people are going to

participate on their own. You can't really stop outside groups from participating so you can't stop the concerns about corruption directly by simply having the candidates themselves be government financed. You can't address the—all of the concerns about equality because there will still be millionaires out there spending money on their own, doing things like that. So that is how I tend to ultimately to look at the issue. So you asked, and that is sort of my view on it.

Mr. LARSON. I am happy to hear it. Thank you.

Mr. SMITH. Thank you.

The CHAIRMAN. Just a question of the Ranking Member. The new bill, the FEA, what does that stand for?

Mr. LARSON. It stands for the Federal Elections Administration.

The CHAIRMAN. I heard the term Federal Execution Administration. That is why I was just kind of curious.

Mr. Ehlers.

Mr. EHLERS. Thank you, Mr. Chairman.

Mr. LARSON. Don't tell Mr. Shays I said that.

The CHAIRMAN. I have already informed him.

Mr. EHLERS. Fortunately we don't have capital punishment in Michigan, except by the Federal Government. Your comment about Arizona reminded me, I was out there for a hearing on elections issues at one point, shortly after that law passed, and the advocates there testified very strongly in favor of public financing. But it turns out most people don't know that over 50 percent of the campaign for public financing was financed by one wealthy individual and the proposal definitely would not have passed without that large contribution. So I thought that was an interesting side light.

I do want to thank the Commission, as the Chairman did, for their helpfulness. And particularly my campaign staff. I have told them definitely we are never going to do anything wrong, and don't ever make me hire an attorney. And so far they have succeeded. But they check with you frequently on questions of interpretation and always have been given good responses rather rapidly, and I appreciate that.

We even—my first election was a special election. We had just a few weeks before the primary, a few weeks between the primary and the general. The paperwork was sloppy. The reports were inaccurate. I thought I might go to jail before I was sworn in. But we just got a CPA and sent him down to your headquarters here in Washington and worked through the whole thing in 4 hours and got it straightened out, and I was very appreciative of your staff's willingness to do that and sit down and take that time. So I just want to say the only experience I have had with you has been very positive.

On the proposal for the—for having an odd number Commission, it seems to be very strange. You have to recognize that in a political partisan situation, there are times you simply have to have the same number on both sides. And you are well aware of that with your experience on the so-called ethics committee, which is Standards of Official Conduct Committee. That would never work if we were not an even number on both sides. So I think the FEC should remain with the same number on both sides.

In addition to that, we have too many odd organizations in Washington already, so clearly we don't want to have—give you an odd number.

I have no specific questions beyond that. I just wanted to make those observations. And thank you. Thank both of you for your work.

Mr. SMITH. Perhaps, Congressman, I could make a couple of observations in response. First, I will just point out it is good to hear from you, because I am a native Michiganian myself. I remember that long Michigan debate as to whether we are Michiganians or Michiganders.

Mr. EHLERS. We are still Michiganders.

Mr. SMITH. And we were Michiganians at some point. Or maybe not. I don't know. I was on the losing side of that one.

But one thing I would add, you mentioned I think our staff can be very helpful, and I think one thing we do is a very good public outreach effort to explain things. But I think it is worth it to go back a little bit. Congressman Larson mentioned my article, "A Toothless Anaconda." that was a bit of play off the critique that the Commission is a toothless tiger, that you don't necessarily need teeth to kill your victims.

I think it is worth noting that I have found that while the Commission may not be overly frightening to a lot of folks in Washington, it can be very confusing and frightening to folks at the grass roots. And you talk about your lawyers trying to make sure nothing goes wrong. When you decide to run for Congress, you get a package. If you ask the Commission what do you need to comply with, you will get a package of materials. And I just saw it today, and I wish I had thought of it and brought it down. It is several pounds. I can't remember the exact weight. But somebody had calculated the exact weight. It totals, hundreds and hundreds if not over thousands of pages. It is very complex.

And I find when I go to a party convention, people say, "well what do you do?" And I say, "well, I am a commissioner at the Federal Election Commission." And they have left the punch bowl and are across the room before the words finish coming out of my mouth. It can be a very frightening organization to these types of groups. And I think that is worth keeping in mind.

Mr. EHLERS. If I may reclaim my time. I would like to mention that the weight of that package is probably as much our fault as yours. And I sometimes long for the day when we simply say, the only thing you have to do is count the money accurately and record it all and who it came from, because we have imposed so many different regulations on myself. I, in fact, recall a businessman who complained to me more years about the paperwork that we create for business. Then he ran for office as a State legislator, and his next comment to me was, "You treat yourself worse than you treated us." we in fact have created more paperwork for ourselves than we have for a lot of other people. And I really decry that. I think it should be simple and straightforward, because we want to encourage citizens to run for public office and not discourage them, and currently we discourage them.

Ms. WEINTRAUB. If I might, just a brief comment also. Speaking as somebody who used to work for the House Ethics Committee, I

find that people are extremely friendly to Federal election commissioners by comparison. But I want to thank you for your kind comments about our staff. I do think that the public outreach that we do is one of the best aspects of the agency, and the people who work in that division do a terrific job, and in fact we routinely go around the country to try to reach out to people. We do make it as accessible as possible for people who are not Washington insiders.

The CHAIRMAN. Thank you. Gentlelady, Congresswoman Millender-McDonald? Gentleman.

Mr. BRADY. Just briefly. I, like my colleague, ran in a special election and was completely confused on what I had to do. It has been quite some time, and since then I am still completely confused to what I have to do, and you probably have a staff member directly assigned to me all the time, and I just appreciate that and I thank him or her, wherever they may be.

Mr. LARSON. Just a follow-up to that, because you mentioned that you do the outreach. I am curious. How many programs do you conduct annually for outreach? And are they in every region of the country? And do you have the budget to accommodate that?

Ms. WEINTRAUB. We usually do, I am going to have to give you an approximate figure, but I can get back to you with the exact number. But I think we probably do about half a dozen conferences a year, some of them in Washington and some of them around the country. Usually three of them are in other places. This year we went to Boston, Chicago, and San Diego. San Diego one is the one that is coming up in another couple of weeks. And our commissioners go out to those conferences.

I have been to all of the conferences around the country this year to do that kind of outreach and to show people that we really do care.

Mr. LARSON. What is the attendance at the conferences?

Ms. WEINTRAUB. Could be 80 people, could be 100 people. It is usually in that range. The first conference that we did this year in Washington right after BCRA passed was standing room only. There were a lot of people who wanted to come to that. And then the staff go around and do separate conferences, just sort of 1-day mini-conferences in different parts of the country, and they will do maybe three or four.

Mr. LARSON. Like somebody in Idaho was interested or—does the staff go out there?

Ms. WEINTRAUB. We don't necessarily have one in Idaho. But we have been to Denver, we have been to Chicago, we are going to Tampa, San Diego, Seattle, and San Francisco. We try to cover both coasts. And then somewhere in the middle. And somewhere in the south maybe, somewhere in the north, we try and spread it around. I think it is really a valuable thing that the agency does. And the feedback that I get when I go to these conferences is that people really do appreciate our coming out.

Mr. LARSON. I think they would be extraordinarily valuable, and to Mr. Smith's point, especially if you are in the hinterlands, so to speak. And you receive, as Mr. Ehlers points out, a pound of documents; that has got to be pretty intimidating in and of itself.

The thrust of my question is do you feel that you have enough resources? Does the Commission feel it has enough resources to carry out its function?

Ms. WEINTRAUB. I feel pretty comfortable that we are doing a good job with the resources that we have. If you want to give us more resources we would be happy to have more conferences. I will go Idaho if you want me to.

Mr. LARSON. Thank you.

The CHAIRMAN. Gentlelady.

Ms. MILLENDER-MCDONALD. Thank you, Mr. Chairman, and it is good to be here. It is good to have you here. I am sorry I had to step out, but the floor action has us coming and going. More going than coming.

When I left, Mr. Smith was suggesting that a lot of the cases you have to throw out because, I guess, the time limitations on some of the cases. And is it because of a lack of personnel that you are having a backlog of these cases?

The other thing that I want to ask is the lacks in enforcement, and given the structure of three Democrats, three Republicans, who breaks the tie if there is a tie to be broken or the deadlock or whatever? Is this composition workable?

Mr. SMITH. You referred to my comments as you stepped out. I don't recall at what point you stepped out. I had mentioned that the Commission had substantially reduced the number of cases that are simply not gotten to. In fact in the last fiscal year, it was one.

Like any government agency, like any private business, like any household, sure we could use more money. That would be nice.

Ms. MILLENDER-MCDONALD. I am not advocating on that.

Mr. SMITH. Right. Particularly, I think that it would be—I think that due process rights are important and I think that if it is true that there is a concern that that would slow the process, that it would be valuable to provide the resources to provide that due process. I think that generally, though, we have been able to cut the backlog. Not only the number of dismissals for stale cases cut down to one in the last fiscal year, but the time it has taken to process cases we have cut considerably. And this week the Counsel's Office provided us with ambitious goals on further shortening processing time. We have been able to cut this down through good management in the Counsel's office and through introduction of programs such as admin fines and the alternative dispute resolution program.

So there are ways to address this beyond simply constantly pleading for more money. And I just would say that I think we do the best we can with the resources that we have, and we will continue to do that. I don't think in my mind that the real problem is that we are not getting to cases at all. It is that cases could be sped up with our current resources and I think we are working on that.

And then on the deadlock issue we did have a colloquy a bit on that. And as the Chair pointed out in response to an earlier question, we deadlock about 3 percent of the time or have 3–3 votes I prefer to say. And as I pointed out, the fact that we tie 3–3 does not necessarily mean that the issue is not resolved. In fact in the

vast majority of cases it clearly resolves the issue. In an enforcement matter, a 3–3 vote is just as decisive a vote as a 6–0 vote not to go forward. It decides the issue.

Ms. MILLENDER-MCDONALD. So does it stay in its present form when you have the 3–3? You say it is a decision nonetheless. Which way does it go if 3 is for and 3 is opposed?

Mr. SMITH. Tie goes to the defendant. The statute requires four votes to move forward on any particular matter.

And I think that system actually has worked very well. I find it ironic that many of the people who criticize the Commission and criticize that structure and say they deadlock all the time 3–3, which first is not true, those same people when allegations are made that the Commission has been partisan in the past would be the first to point out that well, no, the Commission structure requires at least one Democrat to chase any Democrat, at least one Republican to vote to chase any Republican. They will go right back to that bipartisan structure to defend allegations that the Commission has been partisan or too aggressive. So I think that bipartisan structure serves a real purpose and people who levy the complaint know it serves a purpose. They rely on that purpose themselves. Frankly, I think that argument is a red herring. It is an argument that people instinctively think sounds true, but once you know what goes on at the Commission and see the figures, it is a red herring argument I think.

Ms. WEINTRAUB. I do not disagree with anything that the Vice Chairman has said on this point. I would add that it is a misperception to think that when we walk into the room the first thing that happens is three people vote one way and three people vote the other way and we start dickering on who is going to change their vote. I think that philosophical approaches to the law more often governs than partisan differences. Sometime we deadlock 3 to 3 and it is not along partisan lines. Sometimes people who normally do not agree with each other agree with each other. Sometimes I will go over and join my Republican colleagues and sometimes I am the sole vote and everyone is voting against me. It varies from one case to the next.

But the fact that there are three and three of us forces us to work together a lot more than we otherwise would. It forces us to seek common ground.

Ms. MILLENDER-MCDONALD. That is one way to look at it.

The CHAIRMAN. I know we have a second panel, but I have a brief question. The FEC in the past has come under some debate for designating additional respondents in a complaint that have only the most tenuous connections to the alleged violation. And a lot of times the individuals are not made aware of the reasons why they have been named as a respondent. Would it hinder your enforcement process at all for the respondents that they be given a brief explanation as to why they have been designated as such?

Ms. WEINTRAUB. No, I don't think so. Usually people are designated as respondents because they are named in the complaint, and they may not be formally named but they are mentioned in there somewhere and they get a copy of the complaint, so they are on notice as to what the general basis of it is. Sometimes we have what are called internally generated respondents who are not nec-

essarily named in the complaint formally and the General Counsel's Office recommends that we proceed against them because there is information in the complaint that suggests they may have violated the law.

I think this is another area where the Vice Chairman and I agree. We should be providing notice to those individuals at some point before we make any decisions with respect to them. And I know that the General Counsel's Office is currently working on preparing a new policy on naming respondents which I expect to have within a matter of weeks.

It is an area that we are well aware of and that we have been working on. It has been a problem in the past, but I think we are addressing it.

Mr. SMITH. I would add only that I think it is being addressed and I think we are better about not—one of my favorite stories was we had a person file a complaint a couple of years ago and he had worked for the campaign and had not been paid his salary. And he was accusing the campaign of various activities, misuse of funds and so on. But he said, "I keep trying to get what I am owed and they will not pay me. In effect I was forced to make a $10,000 contribution to the campaign." So we named him as a respondent for having made an excessive contribution to the campaign because he was complaining about not getting his salary.

I think that was an outlier even at that time, but sometimes it shows that the process got out of hand. I think that has changed and I think there has been a strong effort to be more careful about naming respondents. But I think one reason this is a problem or at least perceived as such by people who practice before us is that they do not know how we do it. And the Commission has—you may hear in the second panel, they talk about sort of secret procedures and so on, and there are a lot of procedures at the Commission simply have not been regularized or made public so the public does not understand what is going on. And as you know, when people do not understand what is going on, that is when they get suspicious and nervous and feel they are not being treated fairly and that is when they feel they can't trust their government.

We need to work on that. I think we are. I don't know exactly what to do but I think we need to continue working there.

The CHAIRMAN. I want to thank both the Chair and the Commissioner. Personal note to Commissioner. I know you were born in Michigan. You worked in Columbus, Ohio. I hope you remember when the Buckeyes go up to Michigan pretty soon to topple Michigan where your loyalties lie.

Mr. SMITH. Are you asking me to state at this time?

The CHAIRMAN. If you would like to, which team you are going to root for.

Mr. SMITH. I will confess——

The CHAIRMAN. Thank you very much. I appreciate it. Thank you. And we will begin with the second panel.

I want to welcome panel two. We have James Bopp, Jr., partner of Bopp, Coleson & Bostrom, General Counsel, James Madison Center for Free Speech; Don McGahn, General Counsel, National Republican Committee; Karl Sandstrom, Partner, Perkins Coie,

Former Commissioner of the FEC; and Marc Elias, Partner, Perkins Coie.

STATEMENTS OF JAMES BOPP, JR., PARTNER, BOPP, COLESON & BOSTROM, GENERAL COUNSEL, JAMES MADISON CENTER FOR FREE SPEECH; DON McGAHN, GENERAL COUNSEL, NATIONAL REPUBLICAN CONGRESSIONAL COMMITTEE; KARL SANDSTROM, PARTNER, PERKINS COIE, FORMER COMMISSIONER, FEDERAL ELECTION COMMISSION; AND MARC ELIAS, PARTNER, PERKINS COIE

The CHAIRMAN. We will welcome the panelists and will start with Mr. Bopp.

STATEMENT OF JAMES BOPP, JR.

Mr. BOPP. Thank you very much, Mr. Chairman. The topic before this committee is really an important one. The enforcement procedures of the Federal Election Commission and more generally, the matters that come under its jurisdiction go to the very heart of the health of our democracy. The FEC, unlike any other governmental agency, is charged specifically with regulating the four indispensable democratic freedoms that are necessary for us to conduct our representative democracy. So not only are they charged with regulating such activities in those circumstances in which there is a sufficiently compelling governmental interest, but also they are active in investigating whether or not violations have occurred of the act.

These investigations themselves impinge, infringe, and can violate the first amendment rights of our citizens. This is most obvious, I think, in the fact that the FEC routinely accumulates a lot of documents that go to the political strategies and plans, be they legislative, campaign-related or whatever, the disclosure of which would seriously jeopardize the ability of those groups to conduct their first amendment-protected activities.

Thus I view the Federal Election Commission, even though it is not an adjudicatory agency—and shouldn't be in my judgment—that the Federal constitutional guarantees of due process are applicable because the activities, the matters which are within the supervision and jurisdiction of the Commission, go to first amendment-protected rights and how they conduct their activities also can violate those rights. And as a result, due process is required in order to ensure that the citizens are protected from the government.

Now, there is another danger with the Federal Election Commission. That would be the danger that it could be used for partisan advantage. And I think, frankly, every campaign for Congress, in their plan, has a chapter on when they are going to file an FEC complaint to smear their opponent, to try to divert their attention, to waste their resources, et cetera.

And having the Commission 3 to 3 means that it is very difficult to use the Commission for a partisan advantage.

Secondly, the Commission is a governmental agency and powerful governmental officials are apt to use government agencies to chill citizens from criticizing them. So that is also a danger.

And finally is the danger that an agency such as this would simply become overzealous. This warning was really issued in 1980 in a second circuit case where Judge Kaufman said, quote: This danger, that is infringement of the first amendment rights of citizens, is especially acute when an official agency of the government has been created to scrutinize the content of political expression, for such bureaucracies feed upon speech and almost inevitably come to view unrestrained expression as a potential evil to be tamed, muzzled, or sterilized.

I would want to report to you all that in my judgment, the Commission has fulfilled some of those fears. That is, that it is fair to say that the Commission has engaged in a wide variety of overenforcement, particularly against issue advocacy speech where the Commission for 25 years, through a series of enforcement actions and regulatory efforts, were seeking to draw within the jurisdiction of the FEC issue advocacy by citizen groups which the U.S. Supreme Court has said repeatedly has the highest form of first amendment protection.

The result has been costly and intrusive investigations, often with an eye toward shaping the law rather than pursuing somebody who has obviously violated the law. The Christian Coalition case which I recount is a tragic example of the overenforcement, overinvestigation, and misuse of the agency in my judgment to try to impinge upon—intentionally impinge upon the first amendment rights of citizens.

Well, this could get worse. The Bipartisan Campaign Reform Act—I view that anachronism as saying before campaigning, retain an attorney—would vastly increase the authority of the Federal Election Commission to investigate first amendment-protected activities.

So as a result, I would just mention two essential reforms in my judgment. One is to separate the conflicting role that the general counsel currently has between being an investigator, a prosecutor, and a legal advisor to the agency and the Commission.

I think that these create an inherent conflict and that historically—I am not talking about the current general counsel—but historically, the role that the general counsel has assumed is one as a prosecutor, no matter what stage they are at. And secondly, I would urge the Congress to incorporate into the FECA the decision of the D.C. Circuit in AFL–CIO vs. FEC which limited release of documents at case closure. I am very concerned that—and I would commend the Commission and this committee for their efforts that they have launched in the self-examination and trying to, I think, address some of the problems that the past has revealed.

The CHAIRMAN. Thank you.

[The statement of Mr. Bopp follows:]

Federal Election Commission Enforcement Procedures

Testimony of James Bopp, Jr.
Before the United States Committee on House Administration
October 16, 2003

INTRODUCTION

I am James Bopp, Jr., attorney at law, and I thank you for the opportunity to testify before this Committee. A substantial part of my law practice involves defending clients from governmental incursions against constitutionally-protected freedom of speech and freedom of association. I have defended the rights of citizens to participate in the electoral process in administrative investigation and through litigation, *amicus curiae* briefs, scholarly publications, and testimony before legislative and administrative bodies. Much of my practice involves representation of persons before the Federal Election Commission, so I am familiar with their practices and procedures. The appended summary of my professional résumé summarizes my work in this area. I testify today as a practitioner of federal election law and not as a representative of any client

In this testimony, I will first give a brief background of the First Amendment and the role of the Federal Election Commission ("FEC") in regulating it. Second, I will briefly discuss the dangers to our Democracy that such regulation entails. Third, I will propose some reforms, grounded in the requirements of due process, that would ameliorate these dangers.

I. The FEC's Mission is to Regulate First Amendment Activities.

The First Amendment is a very special kind of law because its aim is to restrict government, not the general public. It is a mandate that "Congress shall make no law" and,

through this mandate, our Founding Fathers sought to guarantee the four "indispensable democratic freedom[s]"[1] necessary for the People to exercise their right of self-government.

At first blush, it seems as if the First Amendment prohibits all laws and regulations that restrict speech. After all, "Congress shall make no law . . . abridging the freedom of speech."[2] The First Amendment, however, does not proscribe government restrictions on speech that are justified by a compelling governmental interest. Therefore, it is the conflict between the First Amendment's protection of fundamental rights with claimed governmental interests that gives rise to many constitutional issues in campaign finance law.

A. The Purposes Behind the First Amendment.

The purpose of the First Amendment is to further our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."[3] Thus, "there is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs."[4] Political speech is protected because the Framers' understood that it is "integral to the operation of the system of government established

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[1]*Tomas v. Collins*, 323 U.S. 516, 529-30 (1945).

[2]U.S. Const. amend. I.

[3]*New York Times v. Sullivan*, 376 U.S. 254, 270 (1964).

[4]*Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (*quoting Mills v. Alabama*, 384 U.S. 214, 218 (1966)).

by our Constitution."[5] As a result,

> in a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation.[6]

Indeed, "public discussion" was viewed by the Framers as not only a political right, but as "a political duty."[7] This stems from the fact that the "opportunity for free political discussion" is vital to assuring "that government may be responsive to the will of the people and that changes may be obtained by lawful means."[8]

Therefore, freedom of speech is a condition essential to our political liberty. "The First Amendment does not protect a 'freedom to speak.' It protects the freedom of those activities of thought and communication by which we 'govern.'"[9] Therefore, our commitment to freedom of expression is anchored in promoting a framework of discourse in which unrestricted deliberation on matters of public concern is secure from the intrusion of government power. The outcome in

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[5] *Id.*

[6] *Id.* at 14-15.

[7] *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

[8] *Stromberg v. California*, 283 U.S. 359, 369 (1931).

[9] Alexander Meiklejohn, *The First Amendment Is An Absolute*, 1961 Sup. Ct. Rev. 245, 255.

this secured "marketplace of ideas" will be determined by the persuasiveness of the speakers' reasons used in support of their values and beliefs, *not* by the dictates of the government.

As Justice Brandeis eloquently stated, democratic society must value free speech "both as an end and as a means."[10] Free speech is a valuable goal because it is a manifestation of the ultimate purpose of government: to free its citizens so that they may pursue self-fulfillment.[11] As a means, free speech is an indispensable means to political truth.[12]

The effect of placing government restrictions only on political speech cannot be easily compartmentalized. The aim of the First Amendment is not only the protection of discourse from the intrusion of governmental authority to secure self-governance, but also the independence of citizens as rulers of themselves.[13] That is, it leaves to individuals the

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[10]*Whitney*, 274 U.S. at 375.

[11]*Id.* at 375-76.

[12]*Id.*

[13]These two dimensions of freedom of expression are not mutually exclusive. It would be impossible to adequately protect one dimension of speech without also extending considerable protection to the other. Strict constraints on the public consideration of different moral points of view is not likely to lead to wide open political debate. Similarly, prohibiting the advocacy of certain political points of view is likely to have repercussions on moral discussion. Hence the *Buckley* Court's observation that "the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application."

independence to deliberately define for themselves their beliefs, morals, and ideas.[14] As Justice Brandeis stated in his famous concurrence in *Whitney v. California*:[15]

> Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary . . . . They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth . . . that public discussion is a political duty; and that this should be a fundamental principle of the American government . . . . Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law – the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.

Free speech on political matters, then, is the key to the preservation of self-government and concomitant personal liberties. The Supreme Court's decisions have been unanimous in upholding this principle. Therefore, political free speech is strictly guarded by the Constitution for at least three inextricably interwoven reasons: (1) because it was the Framer's intention to preserve free speech (which is obvious on the face of the First Amendment); (2) because political speech has an indispensable role in the preservation of self-government; and (3) because, given

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Buckley, 424 U.S. at 42.

[14]*See* Paul G. Stern, Note, *A Pluralistic Reading of the First Amendment and Its Relation to Public Discourse*, 99 Yale L.J. 925, 934 (1990).

[15]275 U.S. at 375-76 (citations omitted).

its role in preserving self-government, free political speech undergirds all other civil liberties protected by the Constitution. Thus, the Court reiterated almost sixty years later that "[t]hose who won our independence believed that the final end of the State was to make men free to develop their faculties . . . . They valued liberty both as an end and as a means."[16]

B. The FEC Regulates Activity at the Core of the First Amendment.

The First Amendment protects the right of self-government by protecting the four "indispensable democratic freedoms" of speech, press, assembly and petition. Thus, these constitutional guarantees have their "fullest and most urgent application precisely to the conduct of campaigns for political office."[17] Closely aligned with the freedom of speech is the freedom of association, since "effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association. [Consequently,] the First and Fourteenth Amendments guarantee freedom to associate with others for the common advancement of political beliefs and ideas."[18]

However, the protections of the First Amendment can be abridged, and government regulation upheld, if it advances a sufficiently compelling governmental interest. Statutes that target speech based on its content and which burden speech about the qualifications of candidate

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[16]*Federal Election Commission v. Massachusetts Citizens for Life*, 479 U.S. 238, 257 n.10 (1986) (*quoting Whitney*, 274 U.S. at 375 (Brandeis, J., concurring)).

[17]*Buckley*, 424 U.S. at 14-15.

[18]*Id.* at 15.

for public office are subject to strict scrutiny. "Under the strict-scrutiny test, [the State has] the burden to prove that the announce clause is (1) narrowly tailored, to serve (2) a compelling state interest."[19] In order to show that a given statute is narrowly tailored, the State must demonstrate that it does not "'unnecessarily circumscrib[e] protected expression.'"[20] Regulation of contributions, however, are generally permissible, since the government need only demonstrate that the "contribution regulation was 'closely drawn' to match a 'sufficiently important interest,'"[21] and the Supreme Court has recognized that limitations on campaign contributions further important governmental interests by preventing corruption and the appearance of corruption through quid pro quo contribution.[22]

Thus, when laws regulating campaign finance and elections have been upheld, it has been based on the existence of a sufficiently compelling governmental interest. *In that event, core First Amendment activity is being regulated.* Thus, the FEC's core mission involves the investigation and regulation of First Amendment rights. The FEC alone, of all government agencies, is in the peculiar position of being charged with enforcing laws that by their nature

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[19]*Republican Party of Minnesota v. White*, 122 S. Ct. 2528, 2534 (2002).

[20]*Id.* at 2535 (quoting *Brown v. Hartlage,* 456 U.S. 45, 54 (1982)).

[21]*Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 387-88 (2000).

[22]*Buckley*, 424 U.S. at 26-29.

infringe on First Amendment activity.[23]

C. Because the FEC's Core Mission Involves the Investigation and Regulation of First Amendment Rights, Due Process Is Required.

First Amendment freedoms are not only abridged by their regulation or proscription, but also by their investigation. "Governmental action may be subject to constitutional challenge even though it only has an indirect effect on the exercise of First Amendment rights."[24] "The fact that no direct restraint or punishment is imposed upon speech or assembly does not determine the free speech question. Under some circumstances, indirect 'discouragements' undoubtedly have the same coercive effect upon the exercise of first amendment rights as imprisonment, fines, injunctions, or taxes."[25]

As a result, a governmental investigation into First Amendment activities can violate those rights. "Merely to summon a witness and compel him, against his will, to disclose the nature of his past expressions and associations is a measure of governmental interference in these matters."[26] That the investigation itself "chills" First Amendment expression is shown in the

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[23]*See FEC v. Machinists Non-Partisan Political League*, 655 F. 2d 380, 387 (D.C. Cir. 1981) ("The subject matter which the FEC oversees [] relates to the behavior of individuals and groups only insofar as they act, speak and associate for political purposes.").

[24]*Laird v. Tatum*, 408 U.S. 1, 12-13 (1972).

[25]*American Communications Ass'n v. Douds*, 339 U.S. 382, 402 (1950).

[26]*Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).

following:

> The investigation by the HUD officials unquestionably chilled the plaintiffs' exercise of their First Amendment Rights. It is true that the agency did not ban or seize the plaintiffs' materials, and officials in Washington ultimately decided not to pursue either criminal or civil sanctions against them. But in the First Amendment context, courts must "look through forms to the substance" of government conduct. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 67 [] (1963). Informal measures, such as "the threat of invoking legal sanctions and other means of coercion, persuasion, and intimidation," can violate the First Amendment also. *Id.* n.8. This court has held that government officials violate this provision when their acts "would chill or silence a person of ordinary firmness from future First Amendment activities."[27]

Thus, although the FEC may conduct proper investigations that do not exceed its statutory authority, it must recognize that certain of its actions may "chill" the First Amendment activities of the citizens it investigates and circumscribe its conduct accordingly. "The creation of such an agency raised weighty constitutional objections, and its authority to exercise control over an area where 'uninhibited, robust, and wide open' activity is constitutionally protected was approved by the Supreme Court only after being meticulously scrutinized and substantially restricted."[28]

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[27] *White v. Lee,* 227 F.3d 1214, 1227 (9th Cir. 2000).

[28] *Machinists Non-Partisan Political League*, 655 F. 2d at 387.

Furthermore, an FEC investigation can cause the release of documents, the subject matter of which, "represents the very heart of the organism which the first amendment was intended to nurture and protect: political expression and association concerning federal elections and office holding."[29] In virtually all cases the FEC investigates, the FEC demands all available material concerning a group's internal communications regarding its political activities. Thus, the government becomes privy to knowledge concerning which of its citizens is doing what politically. "This information is of a fundamentally different constitutional character from the commercial or financial data which forms the bread and butter of SEC or FTC investigations, since *release of such information to the government carries with it a real potential for chilling the free exercise of political speech and association guarded by the first amendment.*"[30] As a result, "[t]he Supreme Court has long recognized that compelled disclosure of political affiliations and activities can impose just as substantial a burden on First Amendment rights as can direct regulation."[31] Thus, the First Amendment demands that FEC investigations should be carefully circumscribed.

That the FEC is engaged in a lawful investigation does not resolve the issue of whether the scope of the investigation itself and how it is conducted is lawful. This is where due process concerns arise. The leading case is *Sweesy v. New Hampshire*, which involved a contempt action

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[29] *Id.* at 388.

[30] *Id.* (emphasis added).

[31] *AFL-CIO v. FEC*, 333 F. 3d 168, 175 (D.C. Cir. 2003).

based upon the refusal of a college professor to answer certain questions posed in an investigation by a state attorney general. These questions involved the professor's "right to lecture and his right to associate with others" that "were constitutionally protected freedoms which had been abridged through th[e] investigation."[32] But the critical flaw was a due process one.

> "No one would deny that the infringement of constitutional rights of individuals would violate the guarantee of due process where no state interest underlies the state action. Thus, if the Attorney General's interrogation of [the professor] were in fact wholly unrelated to the object of the legislature in authorizing the inquiry, the Due Process Clause would preclude the endangering of constitutional liberties."[33]

Thus, "[c]urrent first amendment jurisprudence makes clear that before a state or federal

> body can compel disclosure of information which would trespass upon first amendment freedoms, a 'subordinating interest of the State' must be proffered, and it must be compelling."[34] As a result, It is particularly important that the exercise of the power of compulsory process be carefully circumscribed when the investigative process tends to impinge upon such highly sensitive areas as freedom of speech or press, freedom of political association, and freedom of

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[32]*Sweeny*, 354 U.S. at 249-50.

[33]*Id.* at 354.

[34]*Machinists Non-Partisan Political League*, 655 F. 2d at 389.

communication of ideas. . . .[35]

As a result, "protection of the constitutional liberties of the target of the subpoena calls for a more exacting scrutiny of the justifications offered by the agency."[36]

Due process provides the procedural rights that will ensure that the investigation is carefully circumscribed.

II. Because the FEC is Unlike Other Government Agencies, Its Activities Should Be Carefully Circumscribed in Order to Do Minimum Damage to Our Democracy.

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A. The FEC is Unlike Other Governmental Agencies.

The FEC is certainly unlike any other government agency. First, as explained above, the FEC is uniquely empowered to regulate core First Amendment activity. Thus, every action of the FEC is subject to constitutional oversight, leading courts to conclude that "the government must not only show that the [FEC's] inquiry is of 'compelling and overriding importance' but it must also 'convincingly' demonstrate that the investigation is 'substantially related' to the information sought."[37]

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[35] *Sweezy,* 354 U.S. at 245.

[36] *Federal Election Commission v. Larouche Campaign*, 817 F.2d 233, 234 (2d Cir. 1987).

[37] *Branzburg v. Hayes*, 408 U.S. 665, 739-40 (1972) (citations omitted).

But it goes deeper than that. The activities that the FEC regulates are the activities that are essential to participation in our Democracy. Thus, unlike the regulation of pornography, nude dancing and flag burning, each of which enjoy some First Amendment protection, the health of our Democracy and the ability of citizens to participate in it is at stake.

And this leads to one of the greatest dangers arising out of the activities of the FEC: that they will be exploited for partisan political advantage. By its inherent nature, the FEC launches investigation based usually on a complaint, resulting in an investigation of only one of the players in the political process, even if many groups conducted themselves in the same way. Thus, the burden is not shared, but falls selectively, with an inevitable partisan effect. Furthermore, the FEC's current investigation and document disclosure procedures "encourages political opponents to file charges against their competitors to serve the dual purpose of 'chilling' the expressive efforts of their competitor and learning their political strategy so that it can be exploited to the complainant's advantage."[38]

Even more ominously, governmental officials are apt to use government power to silence their critics and the FEC is just the vehicle for such efforts. The risk is that "[o]fficials can misuse even the most benign regulation of political expression to harass those who oppose them."[39]

Thus, the very nature of the FEC's activities demand that they be carefully circumscribed

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[38] *AFL-CIO*, 333 F.3d at 178.

[39] *Federal Election Commission v. CLITRIM*, 616 F.2d 45, 55 (2d Cir. 1980) (J., Kaufman, concurring).

to maintain the health of our Democracy.

B. The FEC Has Conducted Itself in Ways That Undermine First Amendment Values.

Unfortunately, in their zeal to enforce the FECA "as Congress intended," the FEC has been consistently criticized for "insensitivity to First Amendment values."[40] This has been especially true in its zealous effort to regulate issue advocacy, as outlined below. Unfortunately, this danger is inherent because of the nature of government agencies and the task that the FEC has been given. "This danger is especially acute, when an official agency of government has been created to scrutinize the content of political expression, for such bureaucracies feed upon speech and almost ineluctably come to view unrestrained expression as a potential 'evil' to be tamed, muzzled or sterilized."[41] Thus, careful limits should be imposed on the activities of the FEC in order to insure that the FEC honors its "weighty, if not impossible, obligation to exercise its power in a manner harmonious with a system of free expression."[42]

1. During the Investigation Stage, FEC Lawyers Assume Guilt That Must Be Proved.

Any seasoned FEC practitioner would agree that over the last 25 years, the lawyers at the FEC have conduct themselves with one uniform assumption: that respondents are guilty and it is

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[40] *Id.* at 54.

[41] *Id.*. at 55

[42] *Id.* at 55.

their job to find evidence of that guilt.[43] That attitude has been pervasive and infected every stage of the process. This attitude has informed the General Counsel's recommendations on investigations and enforcement actions, proposals for regulatory changes, and conduct of investigations. Obviously, this attitude is appropriate and salutary once the FEC has determined, based on an objective and dispassionate examination of all the evidence, that this conclusion is warranted. However, before that time, respondents deserve fair treatment. Part of the problem arises from the breadth of the General Counsel's responsibilities and part of the problem arises due to the ideological biases of recent General Counsels.[44] Congress can deal with the breadth of the General Counsel's responsibilities, and it should.

2. The FEC Has Initiated Costly, Intrusive Investigations and Enforcement Actions, When the Law Was Unclear and in Flux.

The FEC has engaged in a twenty year assault on the right of citizens to engage in issue advocacy. At almost every turn, the efforts of the FEC to regulate issue advocacy through enforcement actions and regulatory schemes have been rebuffed by the courts on First

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[43]This is certainly true under the tenure of recent General Counsels. The new General Counsel, Lawrence Norton, was recruited from outside the FEC and these comments are not directed at his tenure.

[44]The most recent FEC General Counsel, Larry Nobel, left the FEC to go to work for one of the major "reform" groups, the Center for Responsive Politics.

Amendment grounds. Initially, the FEC sought to regulate issue advocacy as an expenditure, under the FECA, prohibited by corporations and labor unions and regulated, through reports and disclaimers, if done by individuals. This effort was consistently defeated in the courts.[45] The FEC then shifted its regulatory focus to capturing issue advocacy as an "in-kind contribution" to candidates, if it were "coordinated" with the candidate. This effort too was wrecked on the shores of the First Amendment after numerous costly and intrusive FEC investigations and enforcement actions.[46]

In each case, the FEC launched enforcement actions in an effort to shape the law. In pursuing various enforcement actions seeking to treat issue advocacy as a prohibited expenditure, the FEC was audaciously attempting to overturn the Supreme Court's decision in *Buckley*, which had adopted the express advocacy test to limit FEC regulation of issue advocacy.[47] These efforts failed, with the FEC ultimately ordered by the Fourth Circuit to pay attorneys fees to one of the victims of its enforcement action.[48] In addition, its efforts to adopt

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[45]*See generally* Bopp & Coleson, *The First Amendment Is Not A Loophole: Protecting Free Expression In The Election Campaign Context*, 28 U. W. L. A. L. Rev. 1 (1997).

[46]*See generally* Bopp & Abegg, *The Developing Constitutional Standards for "Coordinated Expenditures": Has the Federal Election Commission Finally Found a Way to Regulate Issue Advocacy?* 1 Election L. J. 209 (2002).

[47]*See The First Amendment Is Not A Loophole* at 11-15.

[48]*FEC v. Christian Action Network*, 110 F.3d 1049 (4th Cir. 1997).

regulations to provide legal support for its regulation of issue advocacy was also rejected by the federal courts.[49]

In pursuing issue advocacy as a prohibited "coordinated expenditure," the FEC launched enforcement actions into unchartered waters, seeking to develop the law through law suits, rather than regulation.[50] These investigations and enforcement actions were quite costly and intrusive and pursued expansive legal theories when the law was unclear and in flux. These enforcement actions were uniformly unsuccessful in developing the law as envisioned by the FEC.[51]

The most important of the "coordinated expenditure" investigations and enforcement actions was against the Christian Coalition, with the end result that the Coalition was exonerated of almost all charges.[52] Since that time, the FEC has taken commendable action to dismiss many

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[49] *Virginia Society for Human Life v. FEC*, 263 F.3d 379 (4th Cir. 2001); *Maine Right To Life Comm. v. FEC*, 98 F.3d 1 (1st Cir. 1996) (per curiam); *Faucher v. FEC*, 928 F.2d 468 (1st Cir. 1991); *Right To Life of Dutchess County v. FEC*, 6 F. Supp. 2d 248 (S.D. N.Y. 1998).

[50]The FEC's sole regulatory effort, prior to the *Christian* Coalition case, was to limit voter guides, which also was rejected by the courts on First Amendment grounds. *Clifton v. FEC*, 114 F.3d 1309 (1st Cir. 1997).

[51]*Colorado Republican Federal Campaign Comm. v. Federal Election Commission*, 518 U.S. 604 (1996); *Federal Election Commission v. The Christian Coalition*, 52 F. Supp. 2d 45 (D.C.C. 1999); *FEC v. Public Citizen*, 64 F. Supp. 2d 1327 (N.D. Ga. 1999).

[52]*The Christian Coalition*, 52 F. Supp. 2d 45. I served as lead counsel to the Coalition in

of its "coordinate expenditure" investigations and adopted a regulation incorporating many of the features of the federal judge's ruling in the *Christian Coalition* case into the FEC's standards for determining if a "coordinated expenditure" occurred.[53] Several FEC Commissioners now recognize that "overenforcement" has been a big problem at the FEC, leading to "wasted resources and infringements on First Amendment rights."[54]

However, the FEC's investigation of the Christian Coalition is a prime example of the intrusiveness of FEC investigations, particularly the "coordinated expenditure" variety. In brief, the FEC alleged that the Coalition's voter guide activity was coordinated with six different federal campaigns in three different election cycles, 1990, 1992 and 1994. In addition, the FEC alleged that the Coalition expressly advocated the election or defeat of three candidates for federal office. The investigation and subsequent enforcement action against the Coalition spanned six and a half years and was very intensive as the FEC tried to ferret out any evidence of contacts between people associated with the Coalition and various candidates.

The FEC took 81 separate depositions of 48 different individuals, from the former President and Vice President of the United States to Ralph Reed's former secretary. The

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this case.

[53]65 Fed. Reg. 76,138. However, in the Bipartisan Campaign Reform Act ("BCRA"), Congress ordered the FEC to repeal these regulations and promulgate new ones. H.R. 2356, 107th Cong. section 214(b) and (c) (2002).

[54]Smith & Hoersting, *Toothless Anaconda: Innovation, Impotence, and Overenforcement at the Federal Election Commission*, 1 Election L. J. 145 (2002).

deponents included past and present Coalition employees, members of Coalition state affiliates, and staff members from the National Republican Senatorial Committee and Bush-Quayle, North, Inglis, and Hayworth campaigns.

The FEC conducted a large amount of paper discovery during the administrative investigation and then served four massive discovery requests during the litigation stage that included 127 document requests, 32 interrogatories, and 1,813 requests for admission. Three of the interrogatories required the Coalition to explain each request for admission that it did not admit in full, for a total of 481 additional written answers that had to be provided. The Coalition was required to produce tens of thousands of pages of documents, many of them containing sensitive and proprietary information about finances and donor information. Each of the 49 state affiliates were asked to provide documents and many states were individually subpoenaed. In all, the Coalition searched both its offices and warehouse, where millions of pages of documents are stored, in order to produce over 100,000 pages of documents.

Furthermore, nearly every aspect of the Coalition's activities has been examined by FEC attorneys from seeking information regarding its donors to information about its legislative lobbying. The Commission, in its never-ending quest to find the non-existent "smoking gun,"[1] even served subpoenas upon the Coalition's accountants, its fundraising and direct mail vendors, and The Christian Broadcasting Network.

Third parties were also required to comply with burdensome FEC document requests. The Republican National Committee, the National Republican Senatorial Committee and the Helms, North, and Bush-Quayle campaigns were required to produce irrelevant yet confidential and proprietary information such as polls, surveys, and internal memorandums. The Bush

Presidential library archivists were required to search through two warehouses full of boxes without the benefit of a catalogue. Such investigations impose substantial burdens on third parties and can have serious adverse consequences.[55]

All in all, the investigation was exceedingly burdensome, costing the Coalition hundreds of thousands of dollars in attorneys fees and countless lost hours of work by Coalition employees and volunteers. In Washington, it is often said that "the procedure is the punishment." This case proves that statement right.

In stark contrast to the need for a compelling interest to justify the mind-boggling breadth and intrusiveness of the investigation, the FEC has repeatedly probed into the private areas of an individual's beliefs and associations with questions that the average citizen would find irrelevant and highly intrusive.

A principal area of intrusive inquiry by the FEC was the personal religious beliefs and practices of individual deponents. One startling example of how far FEC attorneys would pry into the private religious beliefs of deponents occurred during the deposition of Oliver North,

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[55]Former Secretary of State, James Baker, another third party deponent, who realized long ago how burdensome and intrusive government investigations can become, remarked, "I don't prepare written summaries because somebody like you will come along and want to subpoena them." Robert Teeter, the chairman of the Bush-Quayle committee, stated that personal notes were no longer routinely kept, not even for historical purposes because of "too many of these sessions." "And there's less historical records today than there's ever been. . . . [N]obody keeps any of that stuff."

which sets the tone for the nature of the entire inquiry by the FEC:

Q: (reading from a letter from Oliver North to Pat Robertson) "'Betsy and I thank you for your kind regards and prayers.' The next paragraph is, 'Please give our love to Dede and I hope to see you in the near future.' Who is Dede?"

A: "That is Mrs. Robertson."

Q: "What did you mean in paragraph 2, about thanking -you and your wife thanking Pat Robertson for kind regards?"

A: "Last time I checked in America, prayers were still legal. I am sure that Pat had said he was praying for my family and me in some correspondence or phone call."

Q: "Would that be something that Pat Robertson was doing for you?"

A: "I hope a lot of people were praying for me, Holly."

Q: "But you knew that Pat Robertson was?"

A: "Well, apparently at that time I was reflecting something that Pat had either, as I said, had told me or conveyed to me in some fashion, and it is my habit to thank people for things like that."

Q: "During the time that you knew Pat Robertson, was it your impression that he had- he was praying for you?"

O: "I object. There is no allegation that praying creates a violation of the Federal Election Campaign Act and there is no such allegation in the complaint. This is completely irrelevant and intrusive on the religious beliefs of this witness."

O: "It is a very strange line of questioning. You have got to be kidding, really. What are you thinking of, to ask questions like that? I mean, really. I have been to some strange depositions, but I don't think I have ever had anybody inquire into somebody's prayers. I think that is really just outrageous. And if you want to ask some questions regarding political activities, please do and then we can get over this very quickly. But if you want to ask about somebody's religious activities, that is outrageous."

Q: "I am allowed to make-"

O: "We are allowed not to answer and if you think the Commission is going to permit you to go forward with a question about somebody's prayers, I just don't believe that. I just don't for a moment believe that. I find that the most outrageous line of questioning. I am going to instruct my witness not to answer."

Q: "On what grounds?"

O: "We are not going to let you inquire about people's religious beliefs or activities, period. If you want to ask about someone's prayers-Jeez, I don't know what we are thinking of. But the answer is, no, people are not going to respond to questions about people's prayers, no."

Q: "Will you take that, at the first break, take it up- we will do whatever we have to do."

O: "You do whatever you think you have to do to get them to answer questions about what people are praying about."

Q: "I did not ask Mr. North what people were praying about I am allowed to inquire about the relationship between-"

O: "Absolutely, but you have asked the question repeatedly. If you move on to a question other than about prayer, be my guest."

Q: "I have been asking you a series of questions about your relationship with Pat

Robertson, the Christian Coalition. . . . It is relevant to this inquiry what relationship you had with Pat Robertson and I have asked you whether Pat Robertson had indicated to you that he was praying for you."

O: "If that is a question, I will further object. It is an intrusion upon the religious beliefs and activities of Dr. Robertson. And how that could—how the Federal Government can be asking about an individual's personal religious practices in the context of an alleged investigation under the Federal Election Campaign Act, I am just at a complete loss to see the relevance or potential relevance, and I consider that to be also intrusive."

Q: "Was Pat Robertson praying for you in 1991?"

O: "Same objection."

A: "I hope so. I hope he still is."

FEC attorneys continued their intrusion into religious activities by prying into what occurs at Coalition staff prayer meetings, and even who attends the prayer meetings held at the Coalition. This line of questioning was pursued several times. Deponents were also asked to explain what the positions of "intercessory prayer" and "prayer warrior" entailed, what churches specific people belonged, and the church and its location at which a deponent met Dr. Reed.

One of the most shocking and startling examples of this irrelevant and intrusive questioning by FEC attorneys into private political associations of citizens occurred during the administrative depositions of three pastors from South Carolina. Each pastor, only one of whom had only the slightest connection with the Coalition, was asked not only about their federal, state and local political activities, including party affiliations, but about political activities that, as one FEC attorney described as "personal," and outside of the jurisdiction of the FECA. They were also continually asked about the associations and activities of the members of their congregations, and even other pastors. Pastor Hamlet said it best:

> But why am I here? I have no connection to the Christian Coalition, none whatsoever, and there is no reason. But I want to say, here, what is behind this is an attempt at intimidation . . . . It is about an attempt at religious harassment.

Most of the deponents, regardless of whether they are Coalition employees or volunteers or third parties, were subject to probing inquiries about their political activities that were not even remotely connected with this lawsuit. Specifically, the FEC attorneys wanted to know, regardless of when such activity occurred, whether the deponents are politically active, and if so, with which political party and when their first involvement with the party occurred, whether they currently, or in the past, held a paid or unpaid position or office in the local, state or national party and why they left those positions, whether they have raised money for the party, whether they attend Republican social functions and which ones, whether they have ever been a candidate for public office, whether they have ever been a delegate to state or national conventions, and in one case, whether a deponent had talked with specific public officials. One deponent was even asked whether he had ever contributed on the federal level to any political parties or to any federal candidates.

The breadth of the FEC's probe into every aspect, past, present, and even future, of the deponents' political activities is mind-boggling. Nearly all of the deponents, including third parties, have been forced to answer questions about their paid and volunteer activities for local, state and federal candidates and campaigns, no matter if they occurred before or after 1990 through 1994, or before or after their involvement with the Coalition, including how much time they put into their volunteer efforts and on which issues a deponent advised a state gubernatorial candidate.

Several deponents have had to answer irrelevant questions about their spouse's, family members' (which includes children and in-laws), state Coalition board of directors', and other individuals' political affiliations, party activities, including whether they have been state or

national delegates, and candidacies *"[b]ecause it's something that we need to know."* FEC attorneys continually questioned deponents, including third party witnesses, about irrelevant matters regarding conservative groups and individuals. Grover Norquist, who had no connection whatsoever with the lawsuit, was brought up four times. In addition, deponents were asked whether they were members of other organizations, sometimes specifically mentioning right to life groups, the National Rifle Association, and the Commonwealth Group.

Third party deponents were often asked about irrelevant and private relationships, connections, and interaction between campaigns they had worked for and various Republican party structures. These deponents were questioned extensively about the inner workings and strategies of campaigns and parties that were not at issue in the lawsuit. In addition, deponents were frequently questioned about their private business dealings and those of their family members, including political consulting done unrelated to tats case.

FEC attorneys also questioned deponents' legislative and lobbying activities, such as contacts and conversations with elected officials regarding issues and pending bills. An FEC attorney even intruded upon Congressman Inglis' official functions.

Deponents were questioned extensively about their private and personal relationships with Dr. Robertson, Dr. Reed, and other individuals by FEC attorneys who allow not even the most irrelevant and personal details to remain private. Areas of the deponents' lives that should remain private and hidden from the government and the public in general were laid bare for all to see.

Thus, the *Christian Coalition* case is a tragic example of the excesses of the FEC and the danger its activities pose to citizens' groups and ultimately to our Democracy.

C. Recent Changes in Federal Election Law Makes Reform of the FEC More Urgent.

With the passage of the BCRA, the dangerous effect of the current "culture of regulation"[56] on citizen participation has vastly increased. To the extent that the Supreme Court upholds its restrictions and prohibitions, this new law will also result in increased governmental oversight, increased governmental investigations, and a necessary increase in the level of knowledge and expertise needed by citizens in order to comply with complex regulations.[57] Before the BCRA, campaign finance laws were already so complex that many citizens fear FEC investigations. Without a cadre of lawyers and accountants to ensure compliance with campaign finance laws, citizens simply drop out of the public debate altogether rather than risk penalties for noncompliance. Furthermore, complex campaign finance laws also cause inadvertent violations of law. For example, of the more than 60 contributors whose reported annual

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[56]*See* Rodney A. Smolla, *The Culture of Regulation*, 5 Comm. Law Conspectus 193 (1997).

[57]For example, Mrs. McIntyre, acting on her own, distributed a simple handbill composed on her home computer to express her opposition to a proposed school tax levy being voted upon in an upcoming referendum. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995). As a result of not complying with Ohio's election laws, she was fined $100 and became embroiled in litigation that survived her death and eventually made its way up to the U.S. Supreme Court– simply because she exercised her right of free speech by distributing a few handbills.

donations exceeded $25,000 in 1990, elderly persons "with little grasp of the federal campaign laws," made up 25% of this group.[58]

As the amount of regulation grows, ordinary citizens and those of modest means withdraw from the public debate. Deprived of their ability to participate, they cease self-governing. Those that are left in the debate are wealthy individuals and organizations, candidates, parties, and the media. The end result of government regulation is that only the wealthy and the elites are able to participate in the political process. This result however, is in the interest of incumbent politicians as the primary beneficiaries of increased government regulation. To the extent incumbents can limit accountability and the information available, they can control the debate and advance their own elections.

This effect can be ameliorated if appropriate reforms, as suggested below, are adopted.

III. The FEC Should be Restructured and Due Process Should Be Guaranteed to Respondents.

As suggested above, the fact that activities protected by the First Amendment are being regulated by the FEC demands that the FEC conducts their activities in accord with due process. Some changes that Congress could make are structural and others procedural.[59] The main ones

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[58]Sara Fritz and Dwight Morris, *Federal Campaign Donors' Limits Not Being Enforced Politics*, L.A. Times, September 15, 1991, at A1.

[59]Commendably, the FEC itself has begun a self-examination of its procedures and has begun to institute some overdue changes that afford more due process in the conduct of their affairs.

are suggested below.

A. The FEC Should be Restructured to Separate the General Counsel's Current Conflicting Roles of Investigator, Prosecutor and Legal Advisor.

The General Counsel has wide ranging responsibilities that combine the roles of investigator, prosecutor and legal advisor to the Commission. These roles are in inherent conflict and it is inevitable that one of these roles is likely to dominate. This has in fact proved to be so, as the lawyers at the FEC have adopted the attitude of a prosecutor in conducting their various roles. Thus, these roles need to be separated; certainly the role of prosecutor should be separated from the General Counsel's roles of investigator and legal advisor to the Commission. This could be accomplished by limiting the role of the General Counsel to representing the FEC in court, including enforcement actions, (currently the Litigation Division) and giving the Staff Director the responsibility of supervising the other Divisions currently under the General Counsel's charge (the Policy, Enforcement and PFESP Divisions).

B. Respondents Should be Afforded Procedural Due Process.

1. Specific Due Process Proposals.

Many specific proposals have been made to ensure fairness in FEC investigations. Some of these only require action by the FEC and others require action by Congress. While the FEC is not an adjudicatory agency, and should not become one, full due process rights should be accorded those subject to an FEC investigation, because those investigations involve First Amendment protected activities. These would include notice of and cross-examination of deponents, motion practice before the Commission pertaining to investigations, and appropriate opportunities to orally argue before the Commission, especially before a finding of "probable

cause." Respondent currently believe that they are a subject of an unfair "star chamber" proceeding that can have a devastating effect on their civil activities and reputations. Allowing respondents to have some participation in the investigation will help alleviate those concerns and minimize the compromise of First Amendment rights.

2. The Complete Investigative File Should be Released to Respondents' Before They Respond to the General Counsel at the Probable Cause Stage.

After the completion of an investigation, the FEC's General Counsel issues a report to the Commission reporting their findings and recommending what action should be taken. The respondents to the matter are given the opportunity to respond to the General Counsel's recommendations, but are given only limited access to the evidence accumulated during the investigation. This is unfair both to the respondents, who are crippled in their ability to respond to the General Counsel, and to the Commission, who are entitled to a full examination and explanation of the evidence before committing the FEC to a finding that a person has violated the law. Access to this information is important enough that it should be mandated by Congress.

3. The Limited Release of Documents Upon Case Closure, Order in *FEC v. AFL-CIO*, Should be Incorporated into the FECA.

The D.C. Circuit, in *AFL-CIO v. FEC*, found that, even though the FECA does not limit the release of investigatory documents at the closing of an FEC investigation, the First

Amendment interests at stake require only limited disclosure of such material.[60] This salutary decision should be ratified by Congress and incorporated into the FECA.

C. The Stages of the FEC's Complaint Procedure Should be Renamed.

Complaints filed with the FEC initially begin with the 'reason to believe" stage, where the FEC considers whether to open an investigation regarding a complaint. However, to open the investigation, the Commission is mandated under the FECA to find "reason to believe that a person has committed . . . a violation of the act."[61] This sounds a lot like a finding on the merits of the complaint, but it is not, only an investigation is opened to determine if a violation has occurred. A stigma thus attaches because of the misnaming of this step in the administrative procedure that encourages complaints for partisan advantage and unjustly besmirches the reputations of respondents. Congress should revise this section of the FECA to more accurately reflect that just an investigation has been opened.

D. Proposals to "Streamline" and "Expedite" FEC Enforcement Actions Should be Rejected.

Some have proposed that the FEC be restructured to move in a different direction, that its procedures be "streamlined" and its enforcement actions be "expedited."[62] These proposals

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[60]333 F.3d 168.

[61]2 U.S.C. 437g(a)(2).

[62]Project FEC: *No Bark, No Bite, No Point* (2003) available on the website of Democracy

conceive of the FEC as a adjudicative agency, headed by a single person, with the power to seek pre-election injunctions against "violators" and with complainants also authorized to sue the alleged "violators." Each of these proposals would severely aggravate the current evils in the enforcement of the FECA.

First, adjudicatory agency are severely limited in their ability to consider constitutional issues during the administrative adjudication of alleged violations. Since nearly every issue before the FEC involves First Amendment rights, the administrative adjudication of these issues would mean that the constitutional issues would be set aside for later judicial review. The FEC would then be adjudicating the guilt of people during the administrative phase without regard to whether the law is constitutional or can constitutionally be applied in this circumstance. While this would enable the FEC to administer the FECA "as Congress intended it," it would minimize or set aside the constitutional questions that are integral to the FEC activities. The First Amendment right of citizens would be further undermined by this process.

Second, the "reformers" would have the FEC administered by a single person, rather than a six person Commission. To put it simply, this new "FEC Czar" would be the most powerful person in Washington – with the authority over the functioning of our entire Democracy. Who he or she is becomes the most important thing – since the new FEC Czar would have the sole authority to launch investigations and enforcement actions that would derail candidacies, cripple organizations, and expose campaign plans and activities. Wouldn't it just be cheaper to cancel elections and have the FEC Czar name who he or she wants to be the next President?

Third, the "reformers" would empower the FEC with the power to seek injunction to

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enjoin violations pre-election. This power would spawn the most direct and egregious violations of First Amendment rights since it would authorize prior restrains on speech, particularly the speech prior to an election. If such injunctions would issue, speech prior to an election would go unheard, the speaker would suffer irreparable harm, and the election campaign would be distorted. If the trial court was wrong in issuing the injunction, it would go unremedied because the election would be over. Wouldn't it just be cheaper to cancel elections and let the courts determine the winner?

Finally, the "reformers" would empower complainants with the power to sue alleged violators. Under the current FECA, those seeking a partisan advantage by filing FEC complaints must rely on the FEC to do the dirty work for them. But with a complaint process and a bipartisan commission, there are barriers to this misuse of the FEC. However, if a private cause of action were authorized, the partisan can just sue their competitor outright, with all the adverse consequences to the victim of the suit. Some state election laws authorize such suits and they are predicably exploited by powerful politician to attempt to silence their critics.[63] Wouldn't it just be cheaper to cancel elections and let the lawyers file suits to determine the winners?

CONCLUSION

Because the activities of the Federal Election Commission directly implicate First Amendment rights and the health of our Democracy, the FEC should afford substantial due process to those that come within its jurisdiction. The history of the FEC demonstrates that it has

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[63] *See Governor Gray Davis Committee v. American Taxpayers Alliance*, 125 Cal. Rptr. 2d 534 (2002).

shown insufficient regard for such rights and Congress needs to act to insure protection of those rights in the future.

SUMMARY OF RÉSUMÉ OF JAMES BOPP, JR.

James Bopp, Jr. is an attorney with the law firm of Bopp, Coleson & Bostrom in Terre Haute, In. and with the law firm of Webster, Chamberlain & Bean in Washington, D.C. His law practice concentrates on first amendment cases regarding political free speech and free exercise of religion and constitutional law cases regarding pro-life issues. He represents numerous not-for-profit organizations, political action committees, and political parties.

Mr. Bopp's extensive federal and state election law practice includes successfully arguing the landmark United State Supreme Court case of *Republican Party of Minnesota v. White*, 122 S. Ct. 2528 (2002), which struck down restrictions on the speech of candidates for elected judicial office on First Amendment grounds. His successful federal litigation includes striking down five sets of Federal Election Commission regulations in cases including *Faucher v. FEC*, 928 F.2d 468 (1st Cir. 1991), *Maine Right to Life Committee v. Federal Election Commission*, 98 F.3d 1 (1st Cir. 1996) and *Minnesota Citizens Concerned for Life v. Federal Election Commission*, 113 F.3d 129 (8th Cir. 1997). Mr. Bopp has also successfully challenged state election laws in over two dozen states on free speech grounds, including winning the seminal cases of *Day v. Holahan*, 34 F.3d 1356 (8th Cir. 1994), and *New Hampshire Right to Life Political Action Committee v. Gardner*, 99 F.3d 8 (1st Cir. 1996). Finally, Bopp has successfully litigated several redistricting cases, including *La Porte County Republican Central Committee v. Board of Commissioners*, 43 F.3d 1126 (7th Cir. 1994). He currently serves as one of the lead counsel in *McConnell v. Federal Election Committee*, which challenges the recently passed amendments to the Federal Election Campaign Act known as the McCain-Feingold bill.

Because of Bopp's expertise in election law, he has testified on campaign finance reform before the United States Senate Committee on Rules and Administration and before the United State House Committee on House Administration and the Subcommittee on the Constitution of the United States House Judiciary Committee. Bopp has published several leading law review articles on election law including *The First Amendment Is Not A Loophole: Protecting Free Expression in the Election Campaign Context*, 28 UWLA LAW REV. 1 (1997), *The Developing Constitutional Standards for "Coordinated Expenditures": Has the Federal Election Commission Finally Found a Way to Regulate Issue Advocacy?* 1 Election L. J. 209 (2002), *Constitutional Limits on Campaign Contribution Limits*, 11 REGENT U. LAW REV. 235 (1998-99) and *All Contribution Limits Are Not Created Equal: New Hope in the Political Speech Wars*, 49 CATHOLIC U. LAW REV.11 (1999). He has also published opinion pieces in The Washington Post and The Washington Times.

Mr. Bopp currently serves as General Counsel for the James Madison Center for Free Speech and as Co-Chairman of the Election Law Subcommittee of the Free Speech and Election Law Practice Group of the Federalist Society. The James Madison Center can be found at <http://www.jamesmadisoncenter.org>.

The CHAIRMAN. Mr. McGahn.

STATEMENT OF DON McGAHN

Mr. MCGAHN. Thank you, Mr. Chairman. Mr. Chairman, members of the committee, thank you for inviting me to testify here. The FEC enforcement process is a mystery to most people. Believe it or not, even to some practitioners who specialize in this area.

As has been alluded to in others' comments, I think it was Commissioner Smith who mentioned this, there are many mystery procedures and sort of insider things that occur. That is the first theme I want to hit. The problem with those, even if you eventually understand them, is that those who understand them the quickest tend to be the ones who are the most sophisticated actors; that is to say, incumbents or people who are political professionals. Those who are attempting to become involved in the political process for the first time, a volunteer treasurer, a first-time candidate, a college student volunteering for a campaign, are the ones most susceptible to these procedures and with the most to lose.

This is not the sort of message we need to be sending. I think the message needs to be more people should be involved in politics, not less. There ought to be more people excited about being involved in politics, not scared. Based upon my own personal experience, I have had several clients who have run for Congress, have made mistakes that perhaps if they had thought about it ahead of time they maybe would not have made, but they were mistakes and they were excellent candidates just in the wrong election cycle or the wrong district. And there are several that I wish would run again, but they won't because they have gone through the FEC gauntlet. And I understand from my other colleagues in the Bar that the same happens on the other side of the aisle; that there are several very fine people who want to run but really get somewhat petrified.

This week I taught a candidates school for new candidates and I can tell you, without revealing any of my insider baseball or whether there is something in a notebook about filing FEC complaints during the campaign, that these candidates are very, very worried about all the things they read in the newspaper about criminal penalties and fines and all sorts of things.

And any potential reforms I think flow from that premise. Whether it is clarifying whether or not the treasurer is liable, and when is the treasurer liable versus when the candidate is liable, this is amorphous and I don't think there is a clear answer to this day. What does it take to start an investigation at the FEC? Is it reason to believe? That is the what the law says. What does that mean? It begs the central question, is that a reason to investigate or is that a reason to believe that there has been a violation of law?

The notion that I do not actually feel as if you have gotten your day in court, so to speak, as Commissioner Smith mentioned. Many, many, many, many of the cases do not go to litigation. They are resolved by the Commission through conciliation, and people pay a fine which is voluntary. But in my experience it certainly does not feel voluntary when you look at cost of litigating the matter versus the cost of paying the fine, which will be much less than litigating.

I do not advocate oral argument in every matter or somehow slowing down the process any more than it can be slowed down. But having been someone who has done criminal defense work and has worked in a prosecutor's office and done extensive motions practice, although it may be a cultural shock to the FEC, it is possible to not slow down the process but still give folks a hearing when it is warranted. I am not advocating a hearing at all times, but it should be in the discretion of the Commission to grant an argument at times when the case may warrant it.

Having spoken to others after certain matters have closed, it seems it would have been helpful to the commissioners to have heard from the lawyers or the respondents personally, because although they believe that sometimes the briefing that goes on is thorough, sometimes oral argument does bring out things that are not abundantly clear in the paper that is presented to the Commission.

The confidentiality provision is another mystery to many people. It is, in many instances, a sword for the Commission and not a shield for the respondents. I believe the original intent was to protect respondents, not to enable the Commission to hide the ball, so to speak. If a party is deposed in a case in which you are a respondent, you are not entitled to be there to partake in the deposition or at least observe.

I have had at least one situation where I had a client who had a former employee who was being deposed, and attorney-client privileges were potentially going to arise, and I was not allowed in the deposition to object on behalf of my client for attorney-client privilege purposes. That is one extreme example, but the concept of attorney-client privilege has come up in the first panel. One of the first two panelists mentioned it.

These are the fundamental rights protections. Whether or not it is an adjudication or not, whether or not it is an administrative agency or something that requires due process, the effective result is that it is an adjudication for most, and that therefore the protections ought to be there, and sometimes they are not.

With that, I conclude, and look forward to answering any questions you may have.

The CHAIRMAN. Thank you.

[The statement of Mr. McGahn follows:]

Testimony of
Donald F. McGahn II
Before
House Committee on Administration
October 16, 2003

Thank you Mr. Chairman and Members of the Committee for inviting me here to testify today about enforcement practices at the Federal Election Commission. Although I am the General Counsel of the National Republican Congressional Committee and represent numerous other Republicans and Republican organizations, I am not speaking today for my clients, but instead as someone who represents others before the Commission.

If one were to simply read news accounts and editorials, one could conclude that the FEC's enforcement of the law has been ineffective. Nothing could be further from the truth. Whether one looks to the administrative fine program applicable to late filers, or to the numerous fines that the FEC has secured through conciliation, the FEC is obviously enforcing the law. Accusations of being a "toothless tiger" or the like are simply inconsistent with my experiences with the Commission.

The issue now, however, should not be whether the FEC is enforcing the law, or whether the Commission with its current structure is capable of enforcing the law, or any of the other overly-simplistic sound bites that are currently en vogue regarding the Commission. The Commission itself has taken the initiative to focus the issue, and has already held a public hearing on its own enforcement procedures. I testified at that hearing, and in lieu of a more detailed submission here, I respectfully direct the Committee to my testimony before the Commission.

By way of summary, the issue which was consistently raised before the Commission, and the issue that I hope this Committee explores, is whether or not the FEC's processes are fair to all. By that I am referring to the first-time candidates, the volunteer treasurers and the other non-professional political actors who get drawn into the FEC's enforcement process. In my experience, there is room for improvement. To the uninitiated, the FEC's processes are counterintuitive, and at times murky. For example, according to Commission folklore, there exists some sort of schedule that sets the fines for various offenses. It is not a public document, which is odd given that the Commission is a public agency. Another example is the various internal Commission rules and policies that supposedly govern the enforcement process. Time and time again, we are told the Federal Rules of Evidence do not apply, or that certain things are confidential, or that attorney-client privilege is of no consequence. Not only do such policies raise serious due process concerns, they send what I believe is the wrong message to political actors.

Probably the one procedure that is most surprising to the uninitiated is that a respondent is never afforded the chance to appear before the Commission, either personally or through counsel. There is no oral argument. The Commission does not hear live testimony. Instead, the Commission receives its information, even the information and argument offered by a respondent in his or her defense, by way of its General Counsel. Time and time again, this leaves respondents feeling confused, as if they never really "got their day in court," so to speak. Although some like to split hairs over whether due process requires such safeguards before a supposed non-adjudicatory administrative agency, the practical effect is that many respondents feel they have no

choice but to pay a fine. They coming way believing that there has been an adjudication against them imposed by a Commission they have never seen.

I look forward to assisting the Committee in its pursuit of these and other issues, and a happy to answer any questions the Committee may have.

The CHAIRMAN. Mr. Sandstrom.

STATEMENT OF KARL SANDSTROM

Mr. SANDSTROM. Chairman Ney, Mr. Larson, and members of the committee, I want to thank you for the opportunity to appear here today. I spent 12 years of my life working as a staff member for the Committee on House Administration. The Committee on House Administration is the smallest committee on the Hill and also the oldest. And the reason it is the oldest committee is because the first thing the original Congress had to deal with was an election matter, and it is good to see 200 years later you are still dealing with election matters.

And in that regard, I would like to commend the committee, because it proved last year that it was "The Little Engine That Could," and passed the Help America Vote Act. And all of the members of this committee are be commended for the effort you put into that. It was a tremendous service to the country.

The subject of today's hearing, the proper enforcement of our campaign finance laws, is of increasing importance in light of the Bipartisan Campaign Reform Act. The new law fundamentally reshapes the enforcement landscape. Prior law focused on regulating financial transactions, primarily the reporting and acceptance of contributions. The new law expands the scope of regulation to cover political communications generally. The old law imposed liability primarily on political committees and, to a lesser extent, on unfortunate treasurers. The new law imposes personal liability on candidates, their agents, and their vendors.

Under BCRA, political activity that had been the exclusive province of State law is now subject to Federal regulation. Lastly, BCRA places greater reliance on criminal penalties to achieve compliance.

An unavoidable consequence of these changes is an extension of the Federal Election Commission enforcement jurisdiction. The demand placed on the Commission to enforce the law over a substantial and large swath of political activity and to do so in a constitutionally sensitive manner is potentially crushing. It will strain the Commission's resources and test its judgment. The Commission's task is not made easier by the fact that it operates in a politically charged environment. Enforcing campaign finance laws is a political act. Complaints are filed for political reasons. The resolution of a complaint has political consequences. This does not mean that the FEC cannot be fair and impartial in enforcing the law, but quite the opposite; it means that the FEC must be. Commissioners must be willing to take fire from the left and the right, from Democrats and Republicans and from reformers and from skeptics.

Importantly, the process must be fair and heedful of what is being regulated. Enforcement insensitive to the political arena in which it operates exacts a high price. Political participants can be unjustifiably tarred, political activity can be chilled, election outcomes can be affected.

The first obligation of the Commission is to tell the public what the law is. Clear rules must precede enforcement. Enforcement proceedings should not be the occasion for the Commission to articulate how it intends to enforce the law. Ambiguity in the law

shouldn't be resolved by enforcement. When it comes to the regulation of politics, fair notice is essential.

It is far too difficult to get people to participate in politics. Uncertainty in the law dampens participation. Vague standards are not the only enemy of participation. Strident enforcement is also a culprit. Harsh penalties for inadvertent violations assure that the uncomprehending violator will abandon politics. Drawn-out investigations sideline even the wrongly accused. Any regime of campaign finance law that relies primarily on the threat of severe penalties ultimately will fail. Voluntary compliance and correction must be the goal.

In recent years, the Commission has made great strides in implementing alternatives to the traditional enforcement process. The administrative fine program for late filers has improved the timeliness of reports by referring enforcement resources on more important matters. The alternative dispute resolution process allows inadvertent, unaggravated violations to be resolved with expenditure of no investigatory resources.

The Commission's willingness to dismiss matters because the complaint fails to state a violation of law has allowed the Commission to timely respond to frivolous, politically inspired complaints. All these changes should be applauded and expansions of these efforts should be encouraged.

Because of the enhancement of criminal penalties under BCRA, what, other than misdemeanors, are now felonies? The Commission will need to revisit its working relationship with the Department of Justice. All indications are that the Department of Justice is going to be less willing to defer to the Commission. The number of concurrent investigations is undoubtedly going to increase. This is going to prove to be a challenge of civil enforcement.

Subjects, targets, and even witnesses in a criminal investigation will be less likely to cooperate with the Commission until the criminal matter is resolved.

My colleague, Mark Elias, has addressed a number of specifics of the enforcement process that could be improved. The Commission has been open to change. Listening to the concerns of those who practice before it, and generally to the public, is not a sign of weakness but of strength. You cannot effectively regulate taverns from a monastery. You cannot regulate politics without a knowledge of how it is practiced. The Commission needs to reach out, and unless it does it will be unable to discharge the immense responsibility that the new law imposes upon it.

The CHAIRMAN. Thank you.

[The statement of Mr. Sandstrom follows:]

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Testimony of Karl J. Sandstrom
Before the Committee on House Administration
October 16, 2003

The subject of today's hearing, the proper enforcement of our campaign finance laws, is of increasing importance in light of the Bipartisan Campaign Reform Act ("BCRA"). The new law fundamentally reshapes the enforcement landscape. Prior law focused on regulating financial transactions, primarily the reporting and acceptance of contributions. The new law expands the scope of regulation to cover political communication generally. The old law imposed liability primarily on political committees and to a lesser extent on treasurers. The new law imposes personal liability on candidates, their agents, and their vendors. Under BCRA, political activity that had been the exclusive province of state law is now subject to Federal regulation. Lastly BCRA places greater reliance on criminal penalties to achieve compliance.

An unavoidable consequence of these changes is an expansion of the Federal Election Commission's enforcement jurisdiction. The demand placed on the Commission to enforce the law over a substantially enlarged swath of political activity and to do so in a constitutionally sensitive manner is potentially crushing. It will strain the Commission's resources and test its judgment. The Commission's task is not made easier by the fact that it operates in a politically charged environment.

Enforcing campaign finance laws is a political act. Complaints are filed for political reasons. The resolution of a complaint has political consequences. This does not mean that the FEC cannot be fair and impartial in enforcing the law, but quite the opposite. It means that FEC must be. Commissioners must be willing to take fire from the left and the right, from Democrats and Republicans and from reformers and from skeptics. Most importantly, the process must be fair and heedful of what is being regulated. Enforcement insensitive to the political arena in which it operates exacts a high price. Political participants can be unjustifiably tarred. Political activity can be chilled. Election outcomes can be affected.

The first obligation of the Commission is tell the public what the law is. Clear rules must precede enforcement. Enforcement proceedings should not be the occasion for the Commission to articulate how it intends to enforce the law. Ambiguity in the law should not be resolved by enforcement. When it comes to the regulation of politics, fair notice is essential. It is far too difficult to get people to participate in politics. Uncertainty in the law dampens participation.

Vague standards are not the only enemy of participation. Strident enforcement is also a culprit. Harsh penalties for inadvertent violations assure that the uncomprehending violator will abandon politics. Drawn out investigations sideline even the wrongly accused. Any regime of campaign finance law that relies primarily on the threat of severe penalties ultimately will fail. Voluntary compliance and correction must be the goal.

In recent years the Commission has made great strides in implementing alternatives to its traditional enforcement process. The administrative fine program for late filers has improved the timeliness of reports while freeing enforcement resources for more complex matters. The alternative dispute process allows inadvertent, unaggravated violations to be resolved without the expenditure of investigatory resources. The Commission's willingness to dismiss matters because the complaint fails to state a violation of law has allowed the Commission to timely respond to frivolous, politically inspired complaints. All these changes should be applauded and the expansion of these efforts should be encouraged.

Because of the enhancement of the criminal penalties under BCRA -- what were misdemeanors are now felonies -- the Commission will need to revisit its working relationship with the Department of Justice. All indications are that the Department of Justice is going to be less willing to defer to the Commission. The number of concurrent investigations is undoubtedly going to increase. This is going to prove to be a challenge to civil enforcement. Subjects, targets and even witnesses in a criminal investigation will be less likely to cooperate with the Commission until the criminal matter is resolved.

My colleague, Marc Elias, has addressed a number of the specifics of the enforcement process that could be improved. The Commission has been open to change. Listening to the concerns of those who practice before it and generally to the public is not sign of weakness but of strength. You cannot effectively regulate taverns from a monastery. You cannot regulate politics without knowledge of how it's practiced. The

Commission needs to continue to reach out. Unless it does, it will be unable to discharge the immense responsibility that the new law imposes upon it.

The CHAIRMAN. Mr. Elias.

STATEMENT OF MARC ELIAS

Mr. ELIAS. Thank you, Chairman Ney, Congressman Larson, and members of the committee. I want to thank you for the opportunity to appear and testify before you today.

The issue you consider, the Federal Election Commission's enforcement procedures, is an important one not only for the agency, but for the regulated community as well.

For the last 10 years as an attorney at Perkins Coie, I have represented officeholders, candidates, party committees, PACs, and individuals all in matters before the Federal Election Commission. My firm, as some of you on the committee know, represents both the Democratic Senatorial and Democratic Congressional Campaign Committees. I have seen the good and the bad in the FEC's process. I have filed complaints against my clients' adversaries and defended more than my fair share filed against my clients.

I have conciliated FEC complaints, what I refer to as MURs, and have litigated against the agency in Federal court when the process failed. On a handful of occasions I have sued the FEC when the agency has failed to act on a complaint that my client filed. Several months ago I had the opportunity to testify before the FEC itself regarding this same topic.

I think it is important to recognize at the outset the commissioners' initiative in seeking comments from the regulated community about how the enforcement process works and how it could be improved.

I have been impressed by the Commission's focus on this subject and the steps it has taken towards reform so far. In particular, the Commission and its general counsel deserve credit for reforms and changing the rule on access to deposition transcripts. While only one change, it is an important step towards a more transparent and open enforcement regime.

During the FEC's review, it sought comments on specific topics. I would ask the committee to allow me to submit for the record the written comments my firm submitted in connection with the FEC's hearing.

For the sake of brevity I would like to amplify on a few of these. Before I do, I would also like to say that my partner, Bob Bauer, was out of town today or otherwise would have liked to have been here as well. And the comments I offer reflect his thoughts on this as well.

First, I would like to stress how important time is in the enforcement process. In nearly every matter, clients are acutely aware of how long the FEC takes to review and dispose of enforcement matters. Several years ago I litigated a case against the FEC over its failure to act in a timely fashion on a complaint that had been filed by the Democratic Senatorial Campaign Committee. Just by way of background, the complaint was filed shortly before the special runoff election. Then-Senator Wyche Fowler was in a runoff against his challenger Paul Coverdell. That complaint was filed prior to the 1992 cycle.

In 1997 we were in Federal court with the FEC, arguing over why a complaint that the FEC itself ranked in its top tier of most

important complaints had still not been resolved. The FEC at the time acknowledged that it would not resolve the case within the 5-year statute of limitations and offered the court an estimate of between 3.3 and 4.6 years to resolve a typical complaint.

From the respondent's perspective, the length of the typical MUR means that a quick vindication is almost never possible. A complaint facing a newly filed MUR is told that it will be years before the matter is resolved and indeed it may be more than a year before anyone at the agency even reads the complaint to see whether it has any merit.

Things are no better for the party filing the complaint. From the perspective of the complaining party, the likely delay facing them is simply disheartening. The enforcement process offers no real avenues for addressing harms occurring in realtime during hotly contested elections. The result is that all too often the enforcement process becomes a burden to a defunct campaign who has alleged the offending conduct is years in the past.

More than once I have had to explain to a client that, despite the fact that the campaign was years behind them and that there was no money left in the campaign or prospect to raise any more, they could not terminate their campaign because the FEC had not yet acted on a MUR.

I would also like to highlight the uncertain role that campaign treasurers face in the current enforcement process. As members of this committee know, every political committee must have a treasurer. In fact, he or she is the only statutory officer of the committee. While treasurers are often nothing more than symbolic figures in a campaign, they learn in an enforcement process they, and they alone, will be named as a respondent. Even when the conduct at issue has nothing to do with reporting or compliance, the treasurer is named in the enforcement process and any resulting litigation.

For a significant number of individuals, this has become unacceptable and finding campaign treasurers is increasingly difficult. Some campaign treasurers simply refuse to allow campaigns to settle matters with the FEC because they will be named and are afraid of the stigma that will be associated with it. The current practice blurs the distinction between those situations where the Commission intends to impose individual liability for fines and penalties upon a treasurer and those circumstances where the treasurer is simply named in his or her official capacity.

Finally, I just want to say a brief word about how respondents are named in enforcement matters. For years the FEC has maintained what I describe as a curious process for naming respondents, which I noticed when I was a young associate, by the fact I would file FEC complaints against adversaries—and, I will acknowledge, typically Republicans—and I learn years later that a whole group of people who I had never contemplated to be respondents had wound up having to respond to the FEC complaint. I think Commissioner Smith noted in his written testimony that I over time developed a theory that the FEC simply scanned all incoming complaints for proper nouns and simply all proper nouns became respondents in the FEC complaint. I am relieved to hear

that that is not as simplistic a process as I thought, although I remain puzzled by the criteria that are used.

I would like only to add that the burden and time associated with responding to complaints when you are representing someone who was not even named by the complaining party is worth review and consideration.

Again I want to thank you for having me here today, and I would be happy to answer any questions.

[The statement of Mr. Elias follows:]

Testimony of Marc E. Elias
House Committee on Administration
October 16, 2003

Chairman Ney, Congressman Larson and Members of the Committee, I want to first thank you for offering me the opportunity to testify before you today. The issue that you consider today, the Federal Election Commission's enforcement procedures, is an important one for both the agency and the regulated community.

For the last ten years as an attorney at Perkins Coie, I have represented officeholders, candidates, party committees, PACs and individuals in matters before the Federal Election Commission. I have seen the good and the bad of the FEC's process. I have filed complaints against my clients' adversaries and defended many that have been filed against my clients. I have conciliated MURs and I have litigated against the agency in federal court when the conciliation process failed. On a handful of occasions I have sued the FEC where the Agency failed to act on a complaint that my clients had filed.

Several months ago I had the opportunity to testify before the FEC itself regarding this same topic. I think that it is important to recognize the Commissioners' initiative in seeking comments from the regulated community about how the enforcement process works and how it could be improved. I have been impressed by the Commission's focus on this subject and the first steps they have taken towards reform. In particular, the

Commission and its General Counsel deserve credit for reforming the rules regarding access to deposition transcripts. Though only one change, it is an important step towards a more transparent and open enforcement regime.

During the FEC's review, it sought comments on specific topics. I would ask the Committee to allow me to submit for the record the written comments my Firm submitted in connection with the FEC's hearing (attached). For the sake of brevity, I would like to simply recognize and amplify on a few of these.

First, I would like to stress how important time is in the enforcement process. In nearly every matter, clients are acutely aware about how long the FEC takes to review and dispose of enforcement matters. Several years ago I litigated a case against the FEC over its failure to act in a timely fashion on a complaint that has been filed by my client, the Democratic Senatorial Campaign Committee. Despite the FEC's assignment of the DSCC's complaint to "tier one" – its highest priority status, the complaint, when sued, the agency conceded that it could not resolve the matter within the five year statute of limitations period. When asked, the FEC estimated at the time that enforcement actions, on average, take between 3.3 and 4.6 years to resolve.

From the respondent's perspective, the length of the typical MUR means that quick vindication is almost never a possibility. A client facing a newly filed MUR is told that it will likely be years before the matter is resolved and indeed it may well be more than a year before anyone at the agency even reads the complaint to determine if it has an merit.

Things are no better for the party filing the complaint. From the perspective of the complaining party the likely delay facing them is simply disheartening. The enforcement process offers no real avenue of redressing harms occurring in real time during a hotly contested election.

The result is that all too often the enforcement process simply becomes a burden to defunct campaigns whose allegedly offending conduct is years in the past. More than once I have had to explain to a client that, despite the fact that the campaign was years behind them and that there was no money left in the campaign or prospect to raise any more, they could not terminate their campaign because of a pending MUR. In other instances, I have been surprised to receive a letter from the FEC, years after an election had passed, to inform me that a complaint that I had filed two cycles earlier had finally been resolved.

Second, I would like to highlight the uncertain role of campaign treasurers in the current enforcement process. As Members of this Committee know, every political committee must have a treasurer. In fact, he or she is the only statutory officer of the committee. While treasurers are often nothing more than symbolic figures in a campaign, they learn that during the enforcement process they, and they alone, are named along with the committee as respondents.

Even where the conduct at issue had nothing to do with reporting or compliance, the treasurer is named in the enforcement process and any resulting litigation. The FEC's

practice of always naming the treasurer in every MUR has several collateral consequences.

First, a significant number of individuals, especially professionals, simply refuse to serve as treasurers. With the enhanced civil and criminal penalties in BCRA, this problem will likely increase. Second, some treasurers refuse to allow the campaign to settle matters with the FEC because of the stigma they fear that they will suffer as the named respondent. Again, this stems from the FEC's past insistence that treasurers be named as respondents in any settlement document. Finally, the current practice blurs the distinction between those situations where the Commission intends to impose individual liability for fines and penalties upon the treasurer and those circumstances where the treasurer is simply named in his or her "official capacity." This last concern is a real one for individuals serving as treasurers and implicates their individual rights to due process and fair notice.

Third, I want to say a brief word about how respondents are named in enforcement matters. For years the FEC has maintained a curious process for naming respondents in MURs generated by complaints. I first noticed this when, as a young associate, I started filing and defending FEC complaints. Oddly, I noticed that regardless of whether the complaint itself named an individual as a respondent, the sheer fact that an individual's name appeared in a complaint meant that the FEC was more than likely going to treat them as a respondent. As Commissioner Smith note in his testimony, over time I developed a theory that someone at the FEC simply scanned all incoming complaints for

proper nouns and then made them all respondents. Although I am relieved to learn that the process is not quite this simplistic, I remain puzzled by the criteria that are used. In addition to what is set forth in my Firm's comments, I would only add that given the burden and time associated with being a respondent in a MUR, the process of naming respondents is worth review and consideration.

Again, I want to thank the Chair and the Committee for allowing the opportunity to appear here today and will be happy to answer any questions.

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VIA FACSIMILE & FIRST CLASS MAIL

May 30, 2003

Commissioners
Federal Election Commission
999 E Street, NW
Washington, DC 20463

RECEIVED
FEDERAL ELECTION
COMMISSION
OFFICE OF GENERAL
COUNSEL
2003 MAY 30 P 3:19

Re: Enforcement Procedures

Dear Commissioners:

On behalf of the law firm of Perkins, Coie, I am submitting the following comments in response to the Commission's request for public comment on its enforcement procedures. Our firm has over twenty years of experience representing clients before the Commission and is pleased to be given the opportunity to share with the Commission our views on how the Commission's enforcement process can be reshaped to better meet the needs of the affected public. I would like to request an opportunity, along with my partner, Marc Elias, to testify at the Commission's hearing on this subject.

Our comments follow the order in which the issues are presented in the public notice.

[09901-0001/DA031500.023]

1. Designating Respondents in a Complaint

The current practice of the Commission is to delegate to the General Counsel the responsibility for designating the persons that are to be treated as respondents in enforcement matters. The General Counsel discharges this responsibility on a case-by-case basis ungoverned by any preset standards. This approach works reasonably well in cases where the violation is clearly alleged in the complaint. In those instances, the General Counsel will name any person who is alleged to have violated the law along with any person whose wrongful participation in the violation would likely have been necessary to its accomplishment. The example given in the notice where a complaint alleges an illegal receipt of a corporate contribution by a campaign well illustrates the General Counsel's approach. In that case, even though the complaint only alleged a violation by the campaign, the General Counsel would also designate the corporation as a respondent.

Understanding why naming the corporation as a respondent in the example is appropriate may shed some light on how the General Counsel should exercise his discretion in naming additional respondents. The reason that corporation could properly be named as a respondent is because facts have been alleged in the complaint or are otherwise available to the Commission that if proven true would constitute a violation of law by the corporation. Naming the corporation as an additional respondent is not mere guesswork or even informed speculation. Rather it is a matter of logical induction from assumed fact. It follows then that General Counsel can comfortably name the corporation as a respondent because the facts that the General Counsel is assuming to be true would constitute a violation of law by the corporation.

The naming of additional respondents is not a whimsical process, though at times to outsiders it may seem so. To the contrary it is almost always the product of the unarticulated factual assumptions under which the General Counsel is operating. Making those assumptions explicit and known to the respondent would strengthen the process. It would have internal and external benefits. Internally it would provide focus for the investigation. As different attorneys become engaged in a matter, particularly those with multiple respondents, it would provide them with an understanding of the theory of the case. Externally it would provide respondents something to meaningfully respond to. Too often respondents are named in a matter, the case lingers for years and they are then inexplicably dropped. If respondents are provided with a brief statement setting forth the reasons that they have been designated as respondents, they will be more likely to give a full response. As a result the Commission will be able to conclude matters more expeditiously.

The General Counsel may worry that setting forth the factual assumptions under which a person is made a respondent will tie his hands in an investigation. This is an unfounded concern. The bounds of all investigations are the facts actually discovered. If facts are discovered during the course of an investigation that reveal different violations than originally assumed, the General Counsel is free to pursue those violations notwithstanding his initial theory of the case. Regularly articulating his theory of a case during the course of an investigation disciplines the investigation.

No one likes to be accused of violating the law. To the Commission naming a person as a respondent may seem an insignificant act. To a respondent it is often of major consequence. It may require hiring of an attorney. It can create paralyzing fear that

something that they did or might do may expose them to significant civil and potentially criminal liability. The uncertainty and accompanying anxiety are exacerbated when the respondent is not even informed of the reasons that he or she is being investigated. By providing a respondent with a brief statement setting forth the reason for his or her inclusion in an enforcement matter, the Commission can alleviate the problem.

A related problem is the practice of naming treasurers of committees as respondents. The Commission should expressly inform the treasurer if he or she is being named in a personal or in a representational capacity. The interests of the treasurer and the committee are not always coincident. Consequently, if a matter risks exposing the treasurer to personal liability for a violation, the treasurer should be informed upfront about this prospect. If a treasurer is initially designated as respondent only in a representational capacity and during the course of the investigation that changes, the Commission should expressly inform the treasurer of the change. Important choices such as selection of counsel and invocation of the right against self-incrimination may turn on this knowledge. A benefit to the Commission of such a practice is that a treasurer who is confident that their testimony is not exposing them to personal liability may be more forthcoming.

2. Confidentiality Advisement

As the notice points out, the confidentiality provision 2 U.S.C. 437g(a)(12) can be wrongly understood by witnesses to bar them from speaking to respondent's counsel. It is the practice of the Commission to advise a witness that he or she is prohibited from discussing the matter under investigation with any outside party. Because

witnesses often are unaware of who the respondents are in a matter, witnesses assume that the safest course is to talk to no one about the matter. This in turn impairs the ability of respondent's counsel to represent his or her client. To some extent the problem can be alleviated if witnesses are informed in writing of the scope of the prohibition and expressly advised that the witness can speak with respondent's counsel. Rather than having the Commission identify for the witness all the respondents in a matter, the witness acting in good faith should be able to rely upon a representation made by counsel that he or she represents a respondent in the matter. Counsel making false representations could be disciplined by the bar or by the Commission.

Beyond the issue of advisements, the Commission should more broadly address its procedures governing confidentiality. One issue that stands out is the practice of publicly releasing audit reports that suggest violations of law prior to the final resolution of those matters. Serious allegations of violations of law are made by Commission staff and referred to the General Counsel for further investigation without the respondent being extended the protections afforded by confidentiality provisions of the statute. This is done under the fiction that there is a distinction between audits conducted pursuant to 2 U.S.C. 437g and 2 U.S.C. 438. From the respondent's perspective there is no difference. Audits that are initiated under Section 438 become Section 437g investigations once the auditors discover evidence of violations of law that are subject to referral to the General Counsel office. Public disclosure and discussion of those issues should be subject to confidentiality under 437g(a)(12). The problem is accentuated by the fact that what is being put on the public record are mere staff conclusions with respect to both fact and law. The

Commission may disagree with both, but the public is led to believe that the findings in the report are the "Commission's". The damage is done and the harm that the confidentiality provision is intended to prevent is exacted upon the respondent.

Another issue relating to confidentiality is the Commission's failure in light of the District Court's decision in the *AFL-CIO* case to conform its procedures. Apparently protected records are still being publicly made available. The interests of respondents and witnesses alike are being sacrificed because of Commission self-paralysis. The Commission needs to resolve openly and publicly how it intends to balance its interest in public transparency and the respondent's interest in privacy. Politically and personally sensitive private information is entitled to protection unless there is a compelling need to make the information available in order to explain publicly a Commission's decision.

3. Motions Before the Commission

The Commission acknowledges in the notice that it entertains motions filed in enforcement proceedings. The Commission concedes that it does so in the absence of formal procedures governing their consideration. In the notice the Commission notes that it is not required by the Administrative Procedures Act, 5 U.S.C. 551 *et seq.* to consider motions made by respondents in non-adjudicative proceedings. The fact that the Commission is not required to entertain motions does not undercut the solid administrative justification for doing so. Particularly during the discovery stage of a proceeding the choice for the Commission is often between entertaining the motion or having to resort to court action to obtain the desired evidence. For all parties involved

administrative consideration is usually preferable to judicial. Allowing respondents to file appropriate motions then is sound practice.

The notice indicates no intention on the part of the Commission to depart from its current practice. The question is to what extent should those practices be formalized and made public. Establishing and then publishing the Commission procedures makes a good deal of sense. What motions the Commission will entertain should not be shrouded in mystery. Nor should the fate of a motion be determined by the inventiveness of counsel in styling the motion. The Commission should examine the range of motions typically available in adjudicative proceedings and determine which motions and under what conditions such motions should be available in Commission enforcement proceedings.

As a matter of standard practice, respondents should not be asked to toll the statute of limitation as a condition for the Commission's consideration of a motion. Filing a proper motion to protect an asserted right should not prejudice a respondent. For example, if a respondent files a motion to quash a subpoena in the good faith belief that evidence that the Commission is seeking is constitutionally privileged, the respondent should not be disadvantaged by his action. This is not to argue that it is never appropriate for the Commission to ask for a tolling of the statute of limitation before a requested action is granted. Respondent's counsel should not be able to thwart the timely conclusion of an investigation with frivolous motions. On the other hand the Commission should not be able to avoid its obligation to timely prosecute matters by artificially extending the statute of limitation by routinely requiring tolling.

The Commission should require tolling only where its interest in the proper administration of the law would be seriously prejudiced. Tolling should not be the price exacted from a respondent for the Commission's failure to timely and properly investigate and prosecute a matter. For example, the General Counsel should not be free to embark on a major fishing expedition, knowing that respondent's counsel is being given the Hobson choice of moving to limit discovery and thus extending the statute of limitations or complying with the discovery request and harming his client's interest. Procedural rules should limit the opportunity for legal gamesmanship by respondent and Commission counsel alike.

4. Deposition and Document Production Practices

The current Commission practice is to deny witnesses the opportunity to obtain a copy or take notes on his deposition transcript until the entire investigation is complete. Testifying before a federal agency is a serious matter. False statements can give rise to criminal prosecution. During deposition witnesses are often asked far ranging questions on matters on which their personal knowledge is limited and often dated. Often the question will relate to a matter upon which the witness has had little opportunity to refresh his memory. Under these circumstances questions can often be misunderstood. Mistakes in testimony can be made.

A degree of self-doubt haunts any witness who testifies extensively on a matter. A witness knowing that his testimony becomes a secret record will become shy in offering his testimony, fearful that his desire to be helpful and fully candid will be used against him. By denying the witness his own testimony, the Commission limits his opportunity to correct or amplify his statements. Mistakes remain uncorrected on

the record and can form the basis for wrongful judgments by the Commission. Consequently, Commission policy can be counterproductive.

The apparent purpose for the Commission practice is to prevent the coaching of witnesses. One wonders whether the Commission practice actually serves this purpose. If it is an important safeguard, then why do other agencies find it unnecessary?[1] Other agencies may well have concluded that the notes taken by a respondent's counsel during a deposition undermine any value to the agency of restricting access to the actual deposition. The Commission needs to ask itself whether in light of actual practice the quality of its investigation is enhanced by the restriction. Is there any evidence to suggest that the existence of the practice actually results in less "coaching" of witnesses? In fact, it might result in more "coaching". As suggested above, a witness's counsel may instruct his client to volunteer little information and to avoid any speculation because there will be no opportunity to review his precise testimony for accuracy. So even a witness who wants to be fully cooperative may be cautioned by counsel because of the rule to be more circumspect in his answers.

The Commission also seeks comment on its procedures governing a respondent's access to the depositions of others. The numerous questions that the Commission asks

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[1] It is worth noting that the case that the Commission cites *Commercial Capital Corp. v SEC*, 360 F2d 856 involves an agency, the Securities Exchange Commission, that generally provides witnesses with access to transcripts of their testimony. 17 C.F.R. 203.6

on this topic underscore the difficult and potential costs of expanding access to raw investigatory materials prior to the conclusion of the Commission's investigation. The danger of premature disclosure of an investigation is undoubtedly heightened when broad access is given to investigatory materials. Factual disagreements among witnesses and respondents can easily become the fodder for press stories. The confidentiality provisions of the statute are intended to protect respondents in this regard. As a general rule, restricting respondent's access to investigatory materials prior to the probable cause stage is sound policy.

At the probable cause stage, a respondent should be given access to any evidence that the General Counsel relies upon in recommending to the Commission that it find probable cause to believe that the respondent violated the law. The scope of access should be determined on a case by case basis, but should be broad enough for the respondent to be able to fully evaluate the evidence in context. In making evidence available to respondents the Commission needs to balance a number of competing interests including protecting the integrity of their investigation, maintaining confidentiality, facilitating conciliation, and treating respondents fairly. The decision to withhold evidence from a respondent should be the product of evaluating these interests. Access should never be denied on the basis that providing the evidence would weaken the General Counsel's recommended disposition of the matter. Consequently, exculpatory evidence should be identified and made available to a respondent for use in preparation of the respondent's response brief.

5. Extensions of Time

Extensions of time should be routinely granted at the probable cause stage. In any complex matter, the statutory time frame of fifteen days is insufficient to adequately respond to the legal and factual claims made in the General Counsel's brief. To expect respondent's counsel to able to respond in such a short time frame to evidence accumulated in a multi-year investigation and frequently to novel legal theories is unrealistic. Granting two weeks extensions should be a matter of course and longer extensions should be granted upon a showing of good cause. For extensions of two weeks or less tolling of the statute of limitations should not be required. The General Counsel should anticipate the granting of a two-week extension and therefore it should be reflected in the office's timetable for the consideration and prosecution of a matter. The Commission's planning process needs to be improved so that the statute of limitations does not become an excuse for not providing the normal and necessary courtesy of an extension.

6. Appearances Before the Commission

The Commission seeks comments on whether respondents should be given the opportunity to appear before the Commission. From this firm's vantage point, it is hard to imagine how this idea would be put into practice. Adopting such a procedure would fuzz the line between an investigation and adjudication. If a respondent appeared before the Commission, would the respondent be put under oath and questioned by the General Counsel and the Commission? Could the respondent offer evidence? Would the General Counsel then be allowed to put on rebuttal evidence?

It is hard to imagine how the internal dynamics of the Commission would not be seriously and negatively changed by the adoption of such a procedure. Almost as a matter of human nature, each Commissioner would give greater weight to the testimony provided in a hearing and subject to their inquiry than to other evidence in the record. The hearing would become a mini-trial eclipsing the importance of the investigation.

7. Releasing Documents or Filing Suit Before an Election

The Commission's practice of releasing to the public closed enforcement matters in the normal course of business even if this occurs immediately prior to an election in which a respondent is involved needs to be revisited. The Commission should not run the risk of influencing the outcome of an election by the public release of the results of an investigation. Requiring a respondent to divert time and energy from his or her campaign to publicly rebut claims made by the Commission or by witnesses in an unresolved matter is unjustified. In effect it imposes a penalty without the procedural protection that a respondent is entitled to under the statute. The press and the public with the tireless assistance of the opposing candidate may give great weight to claims made by the Commission that are legally and factually wrong. Governmental agencies should go to great lengths not to intervene in campaigns. The Department of Justice has guidelines in this regard. Like the Commission, it must deal with dilatory tactics and statute of limitations issues. The Commission may find the Department's policies instructive as it fashions its own.

8. Public Release of Directives and Guidelines

Keeping the Commission's penalty guidelines secret serves no apparent purpose. Experienced counsel develops over time a sense of those guidelines. For others, conciliating with the General Counsel is like negotiating with a used car salesman but with the car dealer one has the advantage of the Blue Book price. No one is going to knowingly violate the law because he knows the size of the likely penalty, for the simple reason that a knowing and willful violation is subject to different penalties. The risk of calculating the penalty before violating the law is the risk of going to jail. Therefore if respondent gaming the system is not a risk, it is unclear what purpose keeping the penalty guidelines secret serves.

9. Timeliness

There is no doubt that the Commission has serious problems in timely disposing of matters. This is actually a blessing for those respondents who are immune to the pain and anxiety of uncertainty. It is true that the innocent sleep easier when they expect a quick resolution of a matter. On the other hand, the guilty usually sleep very well during dormant investigations. At the risk of sounding unduly cynical, timeliness is foremost an issue with which Commission must internally grapple. Improvement in this area must begin with candid self-examination of the problem.

10. Prioritization

The Commission asks to what extent should it give emphasis to cases that presents issues on which there is little consensus about the application of the law. It is unclear

from the notice where this lack of consensus resides. The foremost obligation of the Commission is tell the public what the law is. If there is no consensus on the Commission on what the law requires, it should not pursue a case to discover the applicable law. There is of course a difference between what individual Commissioners may think the law ought to be and what the law, as previously announced by the Commission, is. No respondent should be made a sacrificial lamb in order for the Commission to receive instruction from a court on how the law should be enforced. If the lack of consensus is between the Commission and some in the regulated community, then it is certainly appropriate and often desirable for the Commission to bring a case to resolve significant disagreements. Litigation is not, however, a substitute for rulemaking. Where possible, rulemaking is the best vehicle for the Commission to clarify the law.

11. Memorandum of Understanding with the Department of Justice

The new criminal penalties under BCRA elevate the importance of the Commission's agreement with the Department of Justice. Adherence not only to the letter but also to the spirit of the agreement is critical. Civil enforcement of the law should generally be preferred. The Commission's expertise should not be slighted. The Commission is often in a better position to determine when a violation is knowing and willful and when it is significant and substantial enough to merit criminal prosecution. Overly aggressive criminal enforcement can have a profound chilling effect on our political process. If history is a guide, criminal enforcement is open to political abuse. The partisan balance on the Commission is an important safeguard against the

politicization of our campaign finance laws. Consequently the Commission should do whatever it can to assure that its role in enforcement is not diminished under BCRA.

12. Dealing With 3-3 Votes at "Reason to Believe" Stage

The statute at 2 U.S.C. 437g(a)(2) clearly requires an affirmative vote of four Commissioners for the Commission to find reason to believe that a person has committed a violation of law. To suggest that a tie can be broken without a change in the vote by one or more Commissioners cannot be reconciled with the express unambiguous requirements of the statute.

13. Other Issues

A. *Naming Treasurers as Respondents*

As recommended above, the Commission should expressly identify whether the treasurer is being named a respondent in a representational or personal capacity. If the treasurer is being named in a representational capacity, then the current treasurer should be named and not the treasurer at the time of the alleged violation. Treasurers are often volunteers and regularly relinquish their responsibilities when a conflict arises with job or family. It is not uncommon for a past treasurer to have moved away from the area or to otherwise have severed all relationship with the committee. Under these circumstances there should a compelling reason to include such a person as a respondent in a matter. Unless the complaint alleges that the treasurer was personally involved in the violation or other facts available to the Commission suggest that the treasurer actually assisted in the accomplishment of the violation, the Commission should not name a prior treasurer as a respondent. Certainly adoption of this policy

does not in any manner preclude the Commission from seeking evidence from the former treasurer.

For similar reasons the Commission should never name a current treasurer as respondent in their personal capacity unless the treasurer is responsible for the acts that constitute the alleged violation. One can hardly overstate how emotionally and even financially disruptive it can be for an innocent individual to be named as a respondent in a matter in which he or she had absolutely no involvement. Imagine the position that such an individual is placed when filling out an application to refinance their home and are confronted with the question whether they are the party to any legal proceeding. Do they answer truthfully and risk not qualifying for a loan to pay for a child's education? The Commission answer to this question should serve as sufficient justification for the Commission to change it policy.

B. *Statement of Designation of Counsel*

Requiring respondents to sign a designation of counsel is totally unnecessary. If courts do not require such statements, what purpose does the Commission believe its requirement serves? Any attorney who falsely represents he or she is serving as a respondent's counsel is subject to severe discipline from the bar and can be prohibited from future practice before the Commission. In light of these penalties there is no justification for this statement. As a matter of administrative convenience, counsel will provide the contact information when requested. Often the information will already be in the possession of the Commission.

In closing, I want to thank the Commission for this important initiative. The Commission's willingness to consider these issues at a time when the demands being placed on the Commission by the new law are so great is to be applauded. This effort holds substantial promise for everyone involved. Regulation of politics is a delicate matter. It requires that the Commission remain ever sensitive to the real costs that accompany enforcement. While the Commission has the responsibility of enforcing the law and it cannot shy away from that duty, it also must remain ever cognizant of the precious activity that it is regulating. This proceeding is a welcome display of the Commission's appreciation of this obligation.

Very truly yours,

Robert Bauer/mjs

Robert F. Bauer

RFB:mjs

[09901-0001/DA031500.023]

The CHAIRMAN. I want to thank the panel for your testimony. I wanted to ask about what your thoughts were briefly on the possibility of being able to withdraw a complaint. And this has been raised several times, I know, before different people. Somebody files a complaint, it goes on and on. They take a look at it and say, I was wrong, I shouldn't have filed it. I guess the backup question would be, would they pay some type of penalty or legal fees or something of that nature? Do you have any thoughts on that? Because you cannot withdraw a complaint once it begins, as I understand it. Yes?

Mr. SANDSTROM. It would be a difficult choice to allow someone to withdraw a complaint, where the Commission has confirmed there has been a violation of law. If the Commission has actually begun an investigation, has determined that there is likelihood of a violation, the Commission can hardly acquiesce in that violation.

The CHAIRMAN. I wonder if the Commission has not determined it, it just begins and the person says, I did it, I was wrong.

Mr. SANDSTROM. Certainly I think the Commission could entertain that, but you would have to be concerned whether somebody had been politically pressured to withdraw a legitimate complaint. That complaint, once it is out there, has made that person a target and they may have wanted to relieve the political pressure that has been brought upon them.

The CHAIRMAN. Anybody else that wants to answer these, just feel free.

Mr. MCGAHN. The notion of withdrawing a complaint, I agree with Mr. Sandstrom in what he said, is difficult once the agency makes a finding that there is some violation.

The CHAIRMAN. What about pre-finding?

Mr. MCGAHN. That is the point I want to address. First of all, the complaints are filed under oath, so the person filing the complaint does have to go under oath and have a notary print the complaint and file it. And so there is some liability to the person filing it if they file a false complaint. However, if the person files what he or she thinks is a truthful complaint—let's say it is based on information and belief, which is an acceptable standard to file a complaint—but then discovers that they were just wrong, based on new information, I am not aware of any formal procedure that would allow that person to withdraw the complaint or otherwise correct it.

I have had this situation arise. The advice is, if the person filing the complaint could send a letter to the commission saying, gee, I think I got the facts wrong—but whether or not the Commission entertains that is not mandatory, nor is I think there any formal provision.

The CHAIRMAN. Under the law, the Commission can entertain, they can look at it, but I don't think that can cause a withdrawal.

The other question I wanted to throw out is probably a complete pipedream that would cost the Commission a lot of money. And I should have asked the Commission, but I didn't think of it. In the State of Ohio we have an Election Commission. It is different. Part of it I do not agree with. They monitor your free speech. You make a statement in the newspaper and say, my opponent is not a good supporter of this or that issue, they can actually take you to the

Elections Commission for what you said in the newspaper, which I think someday will be very unconstitutional in the State of Ohio because it is monitoring speech.

But on the other hand, the Ohio Election Commission does do something, though, on the filing of these, whether it is on speech or violation of the use of funds. And if it is a certain—and I wish I could remember what the time frame is, but if within a certain time period before that election something is filed, the Election Commission does an expedited basic emergency hearing so a decision is basically made before that election.

What that does in our process, you have to think twice before you file, if you are going to file something frivolous, to file 2 weeks before the election this outrageous filing, that is going to be decided before the election. And if you filed something that is frivolous and it is shown frivolous, you will probably lose on a vote, and then it is going to be held against the person in the election.

Do you think there is an ability or enough money that there could be an expedited procedure if something is filed within a certain time—6 weeks before the election, 2 weeks before the election? Would that help? Would that hurt? Or is that probably impossible?

Mr. SANDSTROM. I would just note the Commission is fallible. And would you want the Commission determining the fate of an election based on wrongful findings? If you have a rush to judgment; you run a great risk of making a bad judgment.

Mr. ELIAS. I agree with Karl. I am not sure I would want them making a rush to judgment. I do think, however, that a process whereby at least a threshold determination is made whether or not to find reason to believe, I think you are right——

The CHAIRMAN. I apologize. I don't know the exact section of law in Ohio. There might be a preliminary decision in Ohio. I probably misstated. They do not decide the case but they make a preliminary decision in a stated period of time that there is probable reason to advance or not. There is something there in the law, and I wish I knew it.

Mr. ELIAS. I think everyone here on this panel has had a client who has had a complaint filed against them that has no merit. But since it will take the Commission months or years to even look at the complaint, no less dismiss it, that complaint looms during the pendency of the election. So even at a minimum, if there was some rule that there would be some at least screening of those complaints by the Commission so that complaints that are clearly not meritorious could be screened out prior to elections, that I think would be helpful.

The CHAIRMAN. Which brings me to another question. Would there ever be the ability of the FEC to basically try to screen actions against—try to prescreen about inexperienced political actors, as they may be called, that are making these filings and some of them are inexperienced or they are volunteers? Would there be an ability to prescreen those, or is that probably impossible?

Mr. BOPP. That would require a considerable refinement of the FEC's current procedures, and certainly we know as lawyers disciplinary commissions often have a series of filters where they filter through complaints and try to quickly dispose of those that, on their face, have no merit and try to categorize ones depending upon

their potential severity and treat them differently. That might have some merit.

The CHAIRMAN. I think I confused you, Mr. Sandstrom, on my question. But if somebody in good faith brings something to the FEC, they are inexperienced and they are volunteer, and I wonder if there is a pre-way to say this is very clearly not a violation, but if you want to file it you can. And in good faith, they do not file it because they are really not an experienced person. I guess that was the nature of my question.

Mr. SANDSTROM. I am fully with the Chairman's desire to find ways by which matters that shouldn't be before the Commission because they are frivolous, they are not substantiated, the person was operating on facts they have now determined to be false, would have an opportunity to have that matter taken out of the political process. So there is vindication for the accused. To the extent the Chairman is looking for a way to give early vindication, I am fully supportive of the Commission exploring it.

And the Commission has done a much better job. They actually now find no reason to believe on occasion. They will actually look at a complaint and say this does not rise to a level where the facts that have been alleged constitute a violation. So you get an opportunity to get those matters dismissed at an early stage. I think the Commission should improve on this process and try to make those findings even earlier.

The CHAIRMAN. I believe we had occasions where somebody would write here to House Administration and say, a sitting Member of Congress didn't have a right to run because they are a sitting Member, and we want an investigation of their election process. And we look at that and have to do an official dismissal, and we come to a quick conclusion that that is something that we shouldn't spend a lot of time on. I was comparing it to that.

My last question: In your opinion, would greater procedural fairness—which has been an issue—would that actually result in more compliance with the law or would it result in less compliance with the law?

Mr. SANDSTROM. Maybe because I am a former commissioner, I have some fairly strong views on a number of these issues and am more than happy to offer them. I think oral hearings are a bad idea. There is a difference between a commissioner and a judge. I was in a previous life the chairman of an administrative review board which I reviewed along with my board members, administrative law judges' decisions. The judges are the ones who sat through all the testimony, sat through the cross-examination, made credibility judgments with respect to witnesses. The Commission is not in a position to do that. No lawyer coming before them is offering fact testimony. It is only then questions of law.

If the question of law is whether the law is ambiguous, I question whether the Commission should be prosecuting that matter. So I really do not believe that with respect to having an oral hearing, you would do anything positive and you may disrupt the process because there is a real danger here. That is what I would call "partisan creep." It is difficult for three Democrats and three Republicans to judge people of their own party. That sympathy would likely come out in a hearing. It is just natural. You are more likely

to be sympathetic to your witness, and therefore hearings would change the dynamics of the Commission in a way that I think would not be to anyone's benefit.

Mr. BOPP. Thank you, Mr. Chairman. I really do not know the answer to your question. That is, I don't know whether or not there would be more willing enforcement or compliance with the FECA or not with procedures, because I don't think procedures are intended for that purpose. I think the purpose of the procedures is to ensure that the FEC, in carrying out its activities that inherently impinge on first amendment rights, does the minimum amount of damage to our democracy and to the exercise of those rights in carrying out their investigatory responsibilities.

So simply the government asking questions of a private citizen about their first amendment activities is itself a violation of their rights. It chills them, it inhibits them. So I think the purpose of heightened procedures is to ensure that agreed important work of the Federal Election Commission is done with minimal damage to our democracy.

The CHAIRMAN. Thank you. Mr. Larson.

Mr. LARSON. Thank you. And I want to thank the panelists, and I have a couple of questions I would like to get to. The Chairman has asked a couple of them already.

My first question has to deal with something you mentioned earlier, Marc, and that was with regard to the new law that is going into effect. I say this in general terms, because just a hunch on my part that most Members of Congress have not thoroughly read or understand the ramifications of this law. While people may be used to the fact of the treasurer and the treasurer's statutory cite and authority, you mentioned something about agents, and could you explain or elaborate what that means and what the ramification of that is?

Mr. ELIAS. Sure. For a number of years before the new law predictably—several times a cycle I would get a call from a candidate who would say, would you mind talking to so-and-so, I want him to be my treasurer. I would say, sure. They would say, he is a little nervous; could you tell him this is not that big of a deal? I would say, okay, I will do the best I can. And in the back of my mind I always knew that the treasurer was, in fact, the only person who was going to be on the hook. That no matter what went wrong, who was solicited, what was done right or wrong, what was reported or wasn't reported, it was only the treasurer who could potentially have a problem. The candidate would not and, by and large, the people who worked for the campaign would not.

The 2004 cycle has ushered in a new conversation. Now it is candidates calling and officeholders calling. I hear now it is no longer Joe Smith the treasurer who is liable. They say, now it is me. And that is one of the big changes in the Bipartisan Campaign Reform Act. The ban, for example, on soliciting soft money is not a ban on treasurers. It is not a ban on campaign workers. It is a ban on officeholders and candidates, and it is a ban on officeholders and candidates and their agents and individuals acting on their behalf.

So if candidate so-and-so goes out now and solicits soft money, it is that officeholder or that candidate who has now broken the campaign finance laws, not the treasurer. And that is also true

with respect to individuals who are acting as agents on behalf of the candidate.

Mr. LARSON. How would you define an agent?

Mr. ELIAS. This was a subject of some discussion among the Commission, so I will inevitably get an electroshock from one of them if I get this wrong. An agent is someone who acts on behalf of a candidate or officeholder, with actual authority to act on behalf of the officeholder, and in their capacity to act on behalf of the officeholder or candidate. So they need to be empowered by the officeholder or candidate to be acting on their behalf and they need to be acting in that capacity when they do the action.

Mr. LARSON. How many people in a campaign do you think feel that they are empowered by the candidate?

Mr. ELIAS. An increasing number of people do not want to be empowered by the candidate. And all the joking aside, there has already been significant discussion and at least one advisory opinion, which I submitted on behalf of a relative of an officeholder, as to whether or not what is now known as the two-hat theory, which is whether it is—you have Jeb Bush in Florida or a family member of a Member of Congress—whether they can continue to raise money for State candidates as they always had, or whether they are somehow wearing a hat acting on behalf of their relative. And the Commission I think sensibly came to the conclusion that you can raise multiple hats.

But it now raises this unfortunate question where now people call, if I am an agent, how do I know which hat I am wearing? And you have to sort of search inside your soul, and when you are doing this, are you acting on behalf of the Federal officeholder or on someone else's behalf? It is a real problem. I think the Commission has taken a sensible and practical approach to interpreting it.

Mr. LARSON. Is there a solution, as Mr. Sandstrom alluded to before, where we can draw bright lines? Where there can be—where we can make clear the intent?

Mr. ELIAS. Yes. And I think the Commission has done as good a job of that, both through their regulations on the agent, and also in the advisory opinion that I alluded to.

Mr. BOPP. And I think in interpreting the BCRA, the Commission has made sincere efforts to draw bright lines. You should know, however, Congressman, that Mr. Shays and Mr. Meehan disagree with the regulation that drew the bright line on who is an agent, that is, you have to have express authority. They have sued the Commission to overturn that regulation, because they want liability cast on all Members of Congress by the actions of any person with apparent authority. So that even if you have told someone you are not to do this or do this for me, if they go out and do it and they have apparent authority because of their position with your candidacy, you are liable.

Mr. LARSON. Well, I wish Mr. Shays and Mr. Meehan were here to respond, but I will follow up with that.

That leads into my next question and one that I was asking the previous panelists. So is there enough money for the FEC to broadly reach out and explain to the candidates and the treasurers and the agents in this process to inform them of these new rules and

regulations inasmuch as this portion of the law takes effect November 1st, if I am correct?

Mr. BOPP. It took effect last November 1st. And my sense of it is no, they do not have enough money to do this role, and this is a very salutary role for the Commission to undertake.

Mr. ELIAS. I will answer by saying I don't know whether they have enough money. I will say one thing that I do think is important, and that is as the Commission goes forward, especially after the McConnell litigation is resolved, that in addition to the trainings, the need for them to do whatever new implementing regulations quickly and to resolve advisory opinion requests quickly is as important, frankly, as the trainings that I think go on out in the countryside, which are vital.

And, again, I want to say I think the Commission has done a very good job here so far in coming to clear lines in their regulatory and advisory opinion process.

Mr. LARSON. Should the Commission do a study of the ambiguities in the existing law and correct those or come up with suggestions?

Mr. SANDSTROM. The Commission should be always doing a continuous study of ambiguities in law. You referred to these public information sessions. During those conferences, questions come up that the staff can't answer. One of the obligations of that staff should be "if I can't answer it, the Commission needs to give me an answer." If the Commission can't provide an answer, then it does need to do a regulation or find some means to publicly answer.

So this is one avenue, this constant feedback from staff should be part of the regular process by which the Commission goes about providing clear rules.

Mr. LARSON. Anyone else on the panel wish to respond to that?

Just out of curiosity, I know the Chairman has stepped out, but I think it would be interesting on the part of the committee to hold a symposium for members so that they can fully appreciate, or hopefully understand—we all know how enlightened every Member of Congress is on every salient issue before them but, nonetheless, I do think that, especially given the criminality involved with these issues, that members hopefully ought to be more aware of them, or at least more informed about the various consequences and some of the remedies and procedures and who to go to and how to contact them and how to avoid any of the problematic concerns that the law anticipates might happen.

Mr. DOOLITTLE [presiding]. While the Chair is gone and I am filling in for him, let me say I agree completely. This change in the law was designed, frankly, to take away the bright lines and make things more subjecting, more blurred, more questions of fact. For potential defendants that is a problem. So I think our members ought to realize just the possible jeopardy they are now going to be placed in by these changes, and I think one of the best things this committee could do would be to try and shine a light on that. Knowledge will give us power to act effectively.

Has Mrs.——

Mr. LARSON. She has not.

Mr. DOOLITTLE. You are recognized.

Ms. MILLENDER-MCDONALD. I agree with you, but I am of the ilk that everything falls back to me, so I see that as my being liable, irrespective of the new law or the old law. But I will take you one by one to get you back to some of the things you said.

Mr. Bopp, you mentioned in your testimony, I have read, that you are here as a practitioner and not one who is representing any client.

Mr. BOPP. Yes.

Ms. MILLENDER-MCDONALD. Given that, you have said that the general counsel of the FEC wears many hats; he or she is a prosecutor, investigator, regulator, all of the other things that you said. And you said that this FEC tends to infringe on the first amendment right.

Given that, then would it be—should we, then, look at—and I am not sure you said this, because I wrote side-bar notes, the FEC complaints are used for partisan advantage. If you did say that, then would it be best that we create a new FEC agency that has a nonpartisan person at the helm?

Mr. BOPP. Well, there are proposals that the agency be reformed as either with a single administrator or I think you asked earlier having an odd commissioner. Well, if that is the way it would be conducted, then I want to be either the odd commissioner or the single administrator because I would be the most important person in this town. I would have the unilateral authority to derail candidacies by launching investigations and enforcement actions. I would have the ability unilaterally to smear candidates and other groups or citizens that want to participate in some way in our democracy. I would have the power to stifle speech that I disapproved of and disliked.

That is why—I mean, I would have more power to affect ultimately our government than anyone. And it seems to me that we have gone through a period now of 3 years where we have seen in Florida the problem of lawyers, courts, you know, trying to determine the outcome of elections. We then saw the same sorry spectacle in California, efforts to derail democracy—derail democracy as I would view it——

Ms. MILLENDER-MCDONALD. I am a Californian.

Mr. BOPP [continuing]. With the lawsuits and judges and the court orders to stop or put off the election.

If we had that kind of system, I think we should just cancel elections and just have the lawyers, the courts, and the Federal bureaucrats decide who is going to run our country.

Ms. MILLENDER-MCDONALD. That is preposterous, yes.

Mr. McGahn.

Mr. MCGAHN. McGahn.

Ms. MILLENDER-MCDONALD. You said that people see the FEC as a mystery. What type of mystery—I may have not noted some of those things that you quoted as a mystery—but what would be the mystery that some folks see at the FEC?

Mr. MCGAHN. There are several instances of either internal procedures or investigatory procedures that are either counterintuitive or not publicly disclosed. There is, or so I have heard—I have never worked at the Commission so I do not have any firsthand knowledge of this—it has been mentioned in other hearings that there

is a schedule of some sort that listed fines for certain offenses, or some table where you have a pretty good idea of where you are going to end up in the conciliation process. That is not a document that I can get. That is not a public document.

So when clients ask me, once they have done something that they think is wrong, what do you think the damage is going to be fine-wise, I have to use my best guess just based on research of other MURs and that sort of thing. But yet there is some internal schedule. A public agency, one would think, would have to make that public, but so far it has not been made public.

The second area is in the depositions and the like. As I mentioned in my opening, if you are a respondent to a matter under review, you are not entitled to be in depositions, for example, where your case is being discussed. And that is irrespective of whether or not there are issues that you really ought to be there for or not. On the one hand the Commission says that that would somehow compromise the enforcement process or somehow impinge upon the confidentiality provisions in the statute, but on the other hand it is counterintuitive to people that they do not get to be a part of that.

The third thing is the notion of appearing before the Commission in some capacity. Time and time again, people are shocked, stunned and amazed, that they are presented with preapproved conciliation agreements by a faceless Commission that they have never seen, never met, in a building that they will never step into. And I have alluded and been misquoted in alluding to Kafka's "The Trial." There is a lawyer who is the go-between who speaks the dialect of the faceless government agency who becomes the shuttle back and forth, and the poor respondent did not know what is happening day to day. They know they are in trouble but they just do not know quite sure why.

At the end of the day if you give people hearings, is it going to change the cases? Probably not. Lawyers are lawyers and the arguments are the arguments. At the end of the day, the charm and charisma of a certain attorney is probably not going to change the Commission's mind. But the respondents, particularly those who they mentioned who are the novice political actors, come away feeling they got more of a fair shake. The feeling is that there is not a fair shake. There is a cloud of secrecy over the Commission, and that is why I think the more it can be opened up, it may not change the result of cases, nor would I think it would enhance the process, simply because people would have more confidence and trust in what is going on.

Ms. MILLENDER-MCDONALD. Mr. Sandstrom, given that you are a former commissioner and the statement was made by Mr. Bopp that the general counsel in and of itself wears a lot of hats, how do you respond to that? Because it seems as though Mr. Bopp, not putting words in your mouth, but has the appearance that this general counsel really has too many different areas that he or she has to contend with under the cloak of general counsel.

Mr. SANDSTROM. First, I would agree with something that Jim said, that in fact he would be an odd commissioner. But, I think it is very important to know that there is a trade-off once you go to hearings, mini-trials. I mean, the costs, anybody that is familiar

with administrative law proceedings before ALJs understand they involve all the expense that a regular trial would. They involve witnesses, cross-examining them, reviewing documents, so if you actually want the general counsel not just to be the attorney to the Commission advising the commission on whether to proceed with the matter, based upon the general counsel and their staffs' judgment set forth in a document about whether this matter merits finding probable cause that having been responded to, you would have to look at what is the alternative. Is the alternative actually worse than the current process? And I would posit that it could well turn out to be much worse.

Don, another good friend said you would like some of the mystery taken out. And maybe his clients would like to sit through an administrative law judge type trial. I don't think so. I don't think that would be healthy for the process. The fact that we have so few cases actually going to trial is a good thing. If the Commission was actually bringing more cases in courts, because more things merited going to court and could not be worked out for conciliation, that would be worse for the system. So——

Ms. MILLENDER-MCDONALD. So a lot of the cases are resolved outside of court?

Mr. SANDSTROM. Almost all of the cases. I heard the figure like 98 percent. That is healthy, even though I understand that the Commission has maybe undue leverage in those cases. Because, the respondent's choice is either to give in at the conciliation or have to go to court and trial. But if the choice is to have the trial earlier, I think you are going to lose out there and you are going to turn something into a very adversarial proceeding where currently it is not an adversarial proceeding even though to many I understand why it appears to be.

Ms. MILLENDER-MCDONALD. Mr. Elias, given the fact that Mr. Sandstrom has said that most of the cases are resolved outside of court, and you raise the issue that a screening process might be important to have initially as opposed to I guess the fact finding that goes on given the cases that come before this Commission, would it then be proper to try to have the screening before the fact finding mission, or should we have the fact finding mission and just ignore screening to try to alleviate some of the time element that some of these cases imposes?

Mr. ELIAS. Let me just start by commenting on the question about an independent administrator. If it is going to be an Independent rather than a Democrat or Republican, I would commend either Senator Jeffords or Congressman Sanders as the kind of Independent that I would like to see handling it. In terms of your question, I think the question of screening gets to whether there are certain kinds of complaints that come in for which no facts could be found for which there is going to be a violation. A lot of FEC complaints come in that are very, very straightforward. They allege that, you know, candidate so and so failed to report X poll and the response comes in and says we did report it, here it is on our FEC report. And it is very, very frustrating to people, frankly, in you all's position that you call me and say what do we do. We got this complaint and we reported it and I have a copy of the page and I say, well, we will put together a response and we will attach

the page and we will reference it. And then you naturally assume that that means it is over. And you say, well, when will the FEC tell us that we didn't do anything wrong so that I can tell the newspaper that we are right. And I will tell you, well, it will likely be several months at a minimum, more likely more than a year before the FEC says something.

I get letters. To be honest with you, one of the problems with the FEC is they send the letters and simply tell you what MER number it was. I get letters telling me that complaints have been dismissed. I can barely figure out who the client was, I mean it was so long ago. I mean, 4 years, and I am glad to hear the FEC is speeding up their process and I have no doubt that that is the case and I think that is great. But we are right now as a law firm dealing with a number of complaints that relate to the 1998 cycle.

Now, why are we dealing with complaints against the 1998 cycle? Because it is 5 years from the end of the 1998 cycle, so the general counsel's office is pushing through all of the MERs that are approaching the 5-year statute of limitations. Now that is appropriate. They ought to because they ought not to go stale. They ought to be resolved in a timely fashion. But my idea of screening is that some number of MERs we ought to be able to just get knocked out of the box rather than them sit for months before some human being looks at them.

Ms. MILLENDER-MCDONALD. And that should be done by general counsel?

Mr. ELIAS. Someone under the general counsel's auspices. I don't know who within the organization would do it.

Ms. MILLENDER-MCDONALD. So to all of you, should that be a restructuring of FEC given the new laws that we have because it seems like these laws are absolutely far riskier, I guess you might say, or certainly puts us in a different position than what the old laws were? Should there be a restructuring of the FEC whereby more accountability is brought to bear and this screening process is done by someone who has the legitimacy to do that and then dispose of it?

Don't all speak at once.

Mr. BOPP. I think both those would be, are salutary proposals. The additional one that you have referred to is my concern that I have expressed in my testimony that the general counsel has multiple hats that I think are conflicting and has compromised how that office has conducted its respective roles because, in my view, in my practitioner's view, the prosecutorial role has seemed to historically come to the fore, even at the earliest stages of looking at complaints, certainly in the cases of investigations that I am familiar with. So you know, I think that the prosecutorial role is one. I think that the advice that the general counsel is now obligated to give, which is intended and should be objective, you know, legal advice, you know, is a completely different role. And I think the agency would function better and each of these roles would be served better by separating those roles.

The CHAIRMAN. Thank you.

Ms. MILLENDER-MCDONALD. No other comments on that.

Mr. ELIAS. I would just say I think that, to get back to the screening role, I think that the agency can't let the perfect be the enemy of the good.

Ms. MILLENDER-MCDONALD. I am sorry?

Mr. ELIAS. The agency can't let the perfect be the enemy of the good. And if some numbers of complaints get screened out that maybe shouldn't have in an ideal world, great. I mean the FEC recently dismissed a complaint involving whether Wal-Mart could put out a magazine. I might have seen life—I might have seen called balls and strikes slightly different than they did, but God bless them. They at least called balls and strikes in a fashion that didn't take more than a year or so. And I think if cases just moved quicker, whether it was always the result that I would like or the result that Don McGahn would like, I think we would all be happier.

The CHAIRMAN. Thank you.

Ms. MILLENDER-MCDONALD. You know, Mr. Chairman, this has been a very informative panel, it has raised a lot of issues, and has raised my eyebrows. And as Mr. Elias said, our treasurers have been pretty much symbolic, a symbolism, but they were really liable for anything that would come to bear in terms of infractions. And now the tide has turned. I agree with the ranking member. We should look at some type of symposium to instruct these Members or to at least inform the Members of the new laws and how they are now applied as opposed to the old laws that were applied differently.

The CHAIRMAN. Thank you. When I was out of the room and I came back in, Mr. Larson had informed me of your statement, and you know I think we can do that. Just add a couple of things. We have I know with other incumbents stressed to them to call. And one of the reasons, as I interpreted or also with some legal advice, some Members of Congress may agree to go ahead and put their name to something for a local party and to try to help out and the next thing you know everybody's going to be drug into a real problem. And then obviously there is going to be anger within your own party because of what you did to them because you know they didn't know it. And I think these are general concerns and in discussions that we have I would even venture to say that some of the people that were participants in writing the law are not able to clearly answer some of the questions that are asked of them.

So we have tried to warn people to call attorneys, pick an attorney, would take it one step further, too. We can do this for the incumbent and I have no problem in doing it. I would also urge both political parties and any other political party to do it for challengers. We can't do it for challengers, but I think that they should do it for challengers so that if you have got John or Susie Smith out there they might spend a grand total of $6,000 or 7,000 but that has them making a filing. They should also have the availability to know what they are into so they don't make some kind of mistake on only spending 5,000 and also have a legal problem.

So I think the more we can educate, the better off we would be. And I am going to now refer to, if the FEA is created, my candidate for life time appointment as head of that organization, Mr. Doolittle. He is unbiased.

Ms. MILLENDER-MCDONALD. Oh, yeah, right.

Mr. DOOLITTLE. Mr. Chairman, I can guarantee you I would do my part to try and uphold the freedom of speech. It seems to have fallen by the board in recent times. I truly apologize for missing the first panel. I just had—something came up and this was the best I could do. So some of these concerns I can't fully address although let me ask if we get to submit questions in writing.

The CHAIRMAN. Without objection.

Mr. DOOLITTLE. And I will want to do that. But I am concerned, I understand the Department of Justice's Public Integrity Unit has stated they intend to make violations of the Federal Election Campaign Act a greater priority and intend to ratchet up investigations against candidates. And pursuant to that, I understand the Department of Justice has asked the FEC to renegotiate at some, I don't know, 20-year-plus old memorandum of understanding which sets forth the civil versus the criminal responsibilities of each agency. And I guess I would like to know, if one of the people at this panel can tell me, how do cases get referred from the FEC to the Department of Justice?

Mr. SANDSTROM. Having referred a couple of matters or voted on such matters when I was on the Commission a referral requires a majority vote of the Commission. At least four commissioners must support the referral. It usually comes at the probable cause stage if it involves a FECA violation. Referral matters that may involve, for instance, false statements may be handled differently. But that is one of the things that really needs to be worked out between the Department of Justice and the FEC, what is going to be the referral policy going forward.

Mr. DOOLITTLE. Well, does it concern any of you that—I don't know. I mean, America is about the freedom of speech. That is, I thought that provision of the Constitution was put in to preclude exactly what Congress has recently done because it seems like we are abridging the freedom of speech in the name of some supposedly greater value. I don't know what could be greater. So does it concern you that now we are going to be sort of threatening people with criminal prosecution for things that I thought were sort of in the protected realm?

Mr. BOPP. Well, if I may, I am one of the counsel representing clients in McConnell vs. FEC that has sued many of the provisions of the Bi-Partisan Company Reform Act. And the fundamental concern there is I think the one that you are expressing. The first amendment says quote, Congress shall make no law. Well, BCRA was 90 pages. We now have over a thousand pages of FEC regulations and explanations of those regulations, all of which people are now supposed to try to understand that govern a multiple—many different organizations and individuals in many different ways. I think we are into a culture of regulation of what the founders intended to be a free marketplace, which was to be our elections and our speech and our association. And we are soon going to reach the point where the only people that will participate are the wealthy, the corrupt, the reckless and the ignorant. I mean, that is what we are getting to. And as we add layer upon layer of regulation, what we are talking about here and I think what I have been talking about is how can we ameliorate, you know, what the essential fea-

ture of the regulatory regime that has now been imposed upon our democracy.

Mr. SANDSTROM. Mr. Doolittle, I am very sympathetic to your question, but I think it may oversimplify. If I am an employer and I shake down employees for contributions, that should be criminally prosecuted. If I receive foreign money or route it through some American citizen, that probably should be prosecuted. In the past the Department of Justice has shown good judgment, I think, with respect to matters that they have prosecuted. The future is open to question. And that is where I think your question is most legitimate, is asking how will this expanded felony jurisdiction of the Department of Justice be employed. And if it is employed in some of the areas that Mr. Bopp is most concerned with, the content of communication, private political conversations and such, then I think there is real danger there. But I think you still need to retain criminal enforcement for the truly aggravated violations, for instance, foreign national contributions, conduit contributions and such.

Mr. DOOLITTLE. Well, I think if it were confined to that we would all have a better comfort level. But I think we are all aware of examples where you have some prosecutor some place that is out to make a name for himself, and I just worry about this. I think this is very much subject to abuse. Yes, sir.

Mr. BOPP. If I might make one more comment on that. The problem here is we are in a downward spiral. The more regulation, the more laws you pass, the more incentives there are for people who are otherwise corrupt to violate the law. The law abiding obey. The one who is prepared to skirt the law gains an advantage in an election which occurs at a given point in time and we can never go back. So they win the election by corrupt practices, and the more restrictions on law abiding people, the more opportunity and incentive there is for the corrupt to violate laws. Therefore, the reformers, correctly understanding that, then say, well, then therefore we need to increase penalties.

Mr. DOOLITTLE. Yeah it is a self-fulfilling prophecy and this will only go from bad to worse if we continue down this road just as it has gone from bad to worse. It was bad. Now it is worse. It will be yet worse than this. Some day we are going to have a Congress and a Supreme Court that will give a literal reading of the Constitution like has been done in the past but not now. I hope we will follow Ms. Millender-McDonald's recommendation and really get into this.

Let me say if you have ever had the misfortune to be on the receiving end of one of these investigations, it is very troubling. You all of a sudden learn what your real rights are and aren't and there are very few real rights that you have as a practical matter. You don't even get—you know, under the present practices you don't even have to have exculpatory information turned over to you by the FEC. They can at their discretion withhold that. And I just think there is some real unfairness that has been—even, I was looking for this. The head of the American Bar Association in 1983 recommended that access be given to documents, interrogatories and depositions at the probable cause stage and yet as I understand it that really has not happened. You know, here we are 20

some years later. And unfortunately, by the time you discover what your rights really are it is too late. You know, you are then the defendant.

But I think it is our job as the policy makers to try and stand up for the rights of the accused. It troubles me. I think of my first race for the State Senate and I got a friend to be my treasurer. I would never do that to a friend today. I mean, there was never even possibility of any—I mean, as long as he was trying to be honest he would be okay. But today, you would have to go to a professional and you are going to pay. I didn't pay my treasurer anything. He volunteered. You would have to pay someone to do this today because they incur liabilities. And you know this is just one of the things that raises the cost of campaigns, and all these big reformers constantly complain about the amount of money we are spending on these campaigns when they through their onerous regulation have caused a lot of it.

So anyway my time is up, Mr. Chairman. It was a good hearing, the part I was here for, and I look forward to the next one.

The CHAIRMAN. Thank you. Also wanted to note too, leaving ourselves out of it for a second, just to make a warning out there to challengers, challengers and their treasurers can get themselves in horrific problems, end up having to hire an attorney, maybe to have a campaign account of you know 30,000 some dollars and they expended it. They hire an attorney. They end up with a bill of 50,000 and lose their house or have to mortgage it or whatever they have to do because they don't even have the resources we do with campaign accounts where we can raise money, hire the attorneys, and I just think also, and again, if somebody's committing a wrongful act, sure. But I think and what was passed, which I didn't support, but what was passed, if not defined very, very clearly and carefully, then I believe a lot of challengers, not so much us, where we can put an attorney on retainer, you know, call the attorney and they push the clock and bill us. But a lot of challengers, I think, are going to not have that luxury and the average citizens will start—after a couple of people owe 50 or 60,000 and somebody loses their house the average citizen might say, wait a minute. So then you are back to where you've got to be a State Senator or State Rep or somebody on the inside to run for a public office because you know you have been around, you know people, you have raised contributions.

So I just think this should be very chilling, again if it is not spelled out exactly what you do and how you do it from a very complicated law, which I didn't agree with campaign finance reform. But you know it is here and if the Supreme Court acts then I think it has got to be spelled out very, very carefully and that is just as much a problem for challengers as it is for incumbents.

Ms. MILLENDER-MCDONALD. Mr. Chairman, I will defer to the ranking member.

Mr. LARSON. Thank you. Just a couple of quick points here. First, I would hope and I know that we have already chatted with the first panel, but it seems, that a symposia or some gathering where we can bring Members together would be entirely appropriate. But I would also think that the Commission has got to have something like the 10 most commonly asked questions by campaigns of the

Commission so that that would be something that could be put out for everybody's perusal. And then also, a sense from people who handle these issues on a regular basis, the most avoidable offenses, commonly made mistakes by campaigns with a fuller, hopefully a better or fuller appreciation with the bright lines that need to be drawn, to amplify these concerns for both incumbents and challengers alike.

And finally, why I share a number of the concerns that have been raised here and we talked earlier about philosophical concerns, and I certainly can appreciate those who say, well, you know, if there were no regulations at all then you know clearly we would operate in the spirit of a free marketplace by reporting everything. There is also a whole other philosophy that says that if there was public financing of campaigns, and we reclaim the air waves that belong to the public, there would be free access to disseminate information during an election for the public as well. So I just raise that point philosophically.

The CHAIRMAN. Gentlelady.

Ms. MILLENDER-MCDONALD. I think only, Mr. Chairman, that given the information that we have received this committee I think would be best to send a letter to our colleagues just talking about some of the critical issues that have come before this committee today and to tell them that given that, we should perhaps convene a symposium to talk about these issues, because they are most critical from the treasurer to all other aspects of what we have heard today.

The CHAIRMAN. Mr. McGahn, are we allowed to send such a letter? I thought I would ask you since you are with the NRCC.

Mr. MCGAHN. Yes.

The CHAIRMAN. Thank you. We have it from our expert legal counsel. With that, I want to thank all of the witnesses who worked hard to prepare for I think two good panels and a good hearing. I also want to thank our members for being here today and also Mr. Larson's staff as well as the staff of the members for preparing and participating in this hearing.

I ask unanimous consent that members and witnesses have 7 legislative days to submit material for the record, and those statements and materials will be entered in the appropriate place in the record without objection. The material will be so entered. I also ask unanimous consent that the staff be authorized to make technical and conforming changes on all matters considered by the committee at today's hearing. Without objection, so ordered. And having completed our business, the hearing is adjourned.

Ms. MILLENDER-MCDONALD. Don't adjourn before I commend you and the ranking member on the minority procurement workshop or seminar that we had. The ranking member came before the Congressional Black Caucus. He took some of their questions and their concerns under advisement. He presented it to you. The two of you are not minorities by virtue of our looking at you, but you were very sensitive to that issue, and with that, let me commend you and thank you so much for that. It was extraordinarily successful and we look forward to more of those, and thank you both so much.

The CHAIRMAN. Well, I thank the gentlelady for her comments and we had minority entrepreneurs and business people from

across the country, as you know. I want to thank Congressman Larson and yourself. You were there and the members also, the minority leader, Congresswoman Pelosi, and the Speaker of the House, Speaker Hastert was very supportive, and appreciate your comments.

With that, the hearing is adjourned.

[Whereupon, at 5:26 p.m., the committee was adjourned.]

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