

ENFORCEMENT OF FEDERAL CAMPAIGN FINANCE LAW

Introduction

We live in a stage of politics, where legislators seem to regard the passage of laws as much more important than the results of their enforcement.

William Howard Taft¹

This quote from the only individual in history to serve as both President of the United States and Chief Justice of the Supreme Court seemingly captures the contemporary struggle in the American political system over funding political campaigns and the enforcement of federal campaign finance law.

Federal campaign laws reflect a belief that democracy works best when voters make informed choices based on as much information as possible. Public confidence in the electoral process, then, depends not only upon transparency in the disclosure the sources of candidates' financial support, but also on the knowledge that those who violate campaign finance laws will be held accountable.²

It is unclear, however, how important enforcement of federal campaign finance law really is to the American electorate. On the one hand, a recent national telephone poll finds that 46% of respondents state that the system for funding political campaigns has so much wrong with it that it needs to be completely rebuilt. Another 39% state that there are some good things in the system, but fundamental changes are needed³. Yet, in the same poll, none of the respondents identify campaign finance reform as one of the top issues facing the nation.

As the LWV Money in Politics Committee seeks to inform members and citizens about the complex issues surrounding the financing of election campaigns, a brief examination of enforcement of federal campaign finance law is warranted. A review of the Federal Election Commission (FEC), the federal agency with exclusive jurisdiction over the civil enforcement of federal campaign finance law, and its efficacy as chief regulator and enforcer of federal campaign finance law is summarized below.

The Federal Election Commission

Money and patronage have been part of American political fabric since the inception of the Republic. Legislation governing political contributions has evolved, with regulations becoming increasingly complex with each new law passed. Among them, civil service reforms affecting federal workers were enacted in the 1870s, the Tillman Act of 1907 prohibited interstate banks from making direct contributions to federal candidates, and the Federal Corrupt Practices Act of 1910 established spending limits and disclosure requirements for congressional candidates. The Taft-Hartley Act of 1947 banned contributions by labor unions. The cumulative impact of these laws, however, was largely negligible, as they were rarely enforced and easily circumnavigated.⁴

In the early 1970s Congress sought to strengthen campaign finance laws by tightening disclosure loopholes and establishing a federal regulatory body to enforce newly enacted legislation. The Federal Election Commission (FEC) is the independent agency created in 1974 by amendments to the Federal Election Campaign Act of 1971 (FECA). While the creation of the FEC is largely attributed to the Watergate crisis, the 1974 reforms were the result of a cumulative process that began in 1966 with the enactment, then repeal, of the Presidential Election Campaign Act, and culminated with several legal challenges to the FECA of 1971.⁵

Prior to the establishment of the FEC, the Federal Election Campaign Act of 1971 authorized the Clerk of the House, the Secretary of the Senate and the Comptroller General of the United States General Accounting Office (GAO) to monitor compliance with the FECA. The Justice Department was responsible for prosecuting violations of the law referred by the overseeing officials. Although Congressional officials referred about 7,000 cases to the Justice Department following the 1972 elections, and the Comptroller General referred about 100, few were litigated.⁶

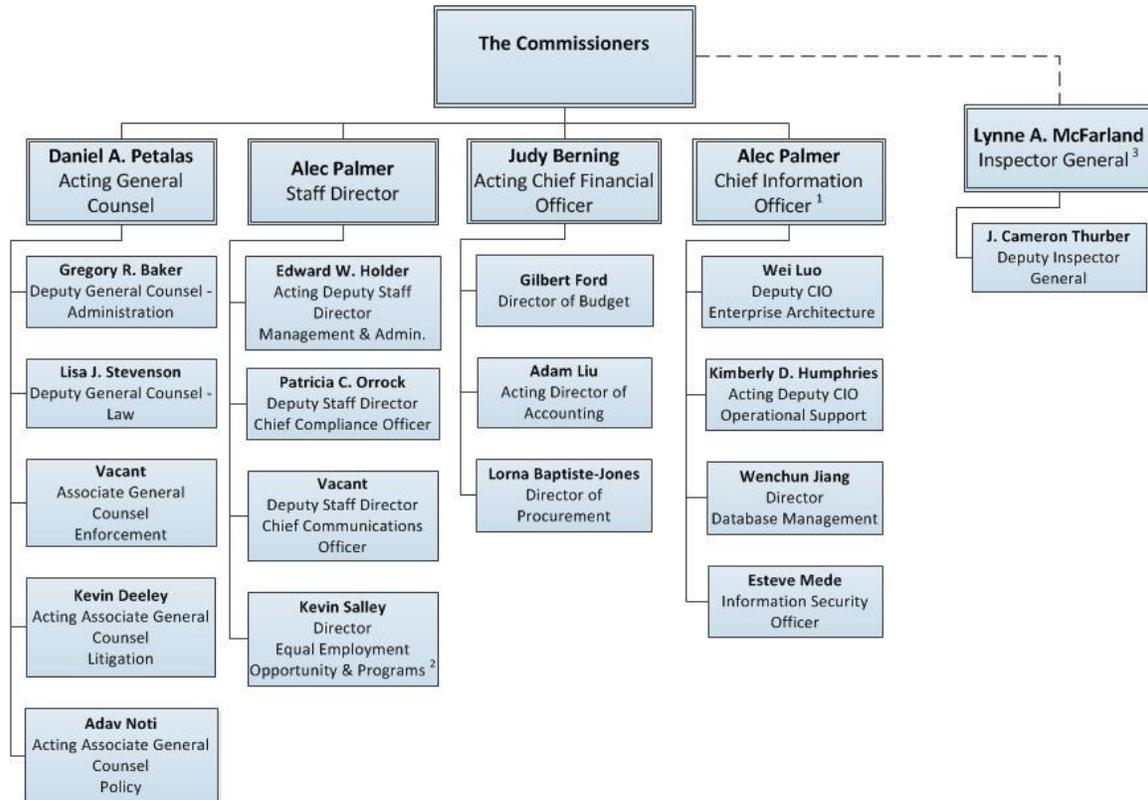
In 1974 a consensus emerged to create the FEC as an independent body to ensure compliance with the campaign finance laws. The FEC assumed the administrative functions previously divided between Congressional officers and the GAO. The Commission was given jurisdiction in civil enforcement matters, authority to write regulations and responsibility for monitoring compliance with the FECA. Additionally, the amendments transferred from GAO to the Commission the function of serving as a national clearinghouse for information on the administration of elections.

Under the 1974 FECA amendments, the President, the Speaker of the House and the President pro tempore of the Senate each appointed two of the six voting Commissioners. The Secretary of the Senate and the Clerk of the House were designated nonvoting, ex officio Commissioners. The first Commissioners were sworn in on April 14, 1975.

The Supreme Court, in *Buckley v. Valeo*, 424 U.S. 1 (1976), however, found that the method of appointing FEC Commissioners violated the constitutional principle of separation of powers since Congress, not the President, appointed four of the Commissioners, who exercised executive powers. As a result, beginning on March 22, 1976, the Commission could no longer exercise its executive powers. The agency resumed full activity in May when, under the 1976 amendments to the FECA, the Commission was reconstituted and the President appointed six Commission members, who were confirmed by the Senate.

Now in its 40th year, the FEC has evolved into a small, personnel-intensive organization that is responsible for administering, enforcing, defending, and interpreting the FECA, as amended. A number of offices support the agency in accomplishing its mission, including the Staff Director, General Counsel, Chief Information Officer, and Chief Financial Officer. An independent Inspector General's Office was created in 1989 and reports to both the Commissioners and to Congress. In FY 2016, the agency is projecting

funding for 360 full-time equivalent positions (FTEs).⁷ The current organizational chart is shown below.



How Enforcement Works

The FEC has sole jurisdiction over the civil enforcement of federal campaign finance law.⁸ In exercising that authority, the Commission uses a number of methods to uncover possible election law violations:

1. The agency's monitoring process may detect potential violations through a review of a committee's reports or through a Commission audit.
2. Potential violations may be brought to the Commission's attention through the complaint process. This process enables anyone to file a sworn complaint alleging violations and explaining the basis for the allegations.
3. Other government agencies can refer possible violations to the FEC through a referral process.
4. A person or entity that believes a violation has been committed may bring the matter to the Commission's attention.

Each method may lead to an FEC enforcement case or Matter Under Review (MUR). By law, these matters must remain confidential until they are closed. In some cases, respondents may be given the option to participate in the Commission's Alternative

Dispute Resolution program, which seeks to resolve matters more swiftly through negotiation. Violations involving late submission of FEC reports or failure to file reports are subject to administrative fines, based on a schedule of penalties.⁹

The agency's efforts at enhancing enforcement include implementation of a series of measures aimed at improving the efficiency and effectiveness of the enforcement program. Two of the initiatives are geared toward the agency's traditional enforcement program that is administered by the Office of General Counsel. These are the Enforcement Priority System (EPS) and the Case Management System (CMS). The Staff Director manages two additional improvement efforts, the Administrative Fine Program (AF) and the Alternative Dispute Resolution Program (ADR), both of which were started in 2000.¹⁰

In addition, the FEC issued a Commission Directive in 2009 on the subject of Enforcement Procedures. The purpose of the directive is to provide written guidelines on (a) how the FEC provides status reports to respondents and the Commission on enforcement matters; and (b) the process for accelerating enforcement and compliance matters that are subject to an expiration of the statute of limitations.¹¹ Statistics on enforcement and compliance operations, including a summary of the FEC's enforcement statistics for Fiscal Years 1977-2015, can be viewed at <http://www.fec.gov/em/enfpro/EnforcementProfile.shtml>.

In an average year, the FEC receives and processes campaign finance reports, statements, and related documents from more than 10,000 political committees and other filers. In FY13, 81,600 campaign finance filings were received, which disclosed almost 30 million financial transactions.¹² The trend toward increasing filings will likely rise significantly by the highly competitive Presidential race in 2016.¹³

Enforcement Challenges

As the chief enforcement agency, the FEC is facing several major organizational challenges that are arguably impacting its efficacy.

First, as of this writing, the agency is operating without permanent leadership in key enforcement, communications, and financial reporting offices. Among the vacancies are the positions of General Counsel, Associate General Counsel for Litigation and Associate General Counsel for Policy. With a staff of 120 personnel, including 70 attorneys, as well as investigators, the Office of the General Counsel (OGC) is the backbone of the FEC, responsible for directing FEC enforcement activities, representing the Commission in litigation, interpreting the FECA by issuing advisory opinions, and advising the Commission on matters brought before it.

Second, the FEC is charged with one of the most complex of statutory missions, yet is one of the smallest federal agencies with a FY15 budget of only \$67,500,000. One of the agency's primary objectives is to ensure public access to both raw data and data summaries on the FEC website.¹⁴ Access and delivery of data and other disclosure

information to the public, however, was abruptly interrupted during the 2013 government shutdown. While almost the entire FEC workforce was furloughed, foreign hackers infiltrated computer systems that contained information on how billions of dollars of campaign funds were raised and spent.¹⁵ Understandably, one of the FEC's FY16 budget priorities is "Smart IT Delivery," which includes replacing hardware and servers, develop a plan to lunch FEC data into a cloud environment, and enhance the agency's IT security program. The FEC's FY16 budget request is \$76,119,000.

Most importantly, the FEC's enforcement capacity has been hamstrung by a divided six-member Commission whose partisan votes consistently end in ties, resulting in stalemate. For a number of years, the FEC was barely able to function with five of the six Commissioners serving despite expired terms. While Congress and the White House did finally appoint new commissioners, the challenges continue. In a highly visible interview earlier this year, FEC Commission Chair Ann Ravel, a Democrat, said her hopes of bringing the Commission together to enforce campaign finance laws have been dashed. "The likelihood of the laws being enforced is slim. I never want to give up, but I'm not under any illusions. People think the FEC is dysfunctional. It's worse than dysfunctional."¹⁶

Conclusion

During the 1970s Congress fundamentally altered the regulation of federal campaign finances through the passage FECA and its amendments. Congress provided a structure to allow for public financing of Presidential elections, regulate contributions in Federal elections, require substantial disclosure of campaign financial activity, and to create an independent agency---the FEC---to administer and enforce these provisions.

The FEC's challenges associated with enforcement have been exacerbated by the 2010 Supreme Court decision in *Citizens United*, which declared that "association of citizens," including unions and corporations, enjoy First Amendment rights to free speech.

While the enforcement capability of the FEC is regarded by some as minimal, the agency has made significant strides in educating the public through the use of videos, access to databases and other information on their website, and by issuing advisory opinions.

In spite of all the criticism, one of the most high profile cases of enforcement reached resolution earlier this year when former political consultant Tyler Harber, pleaded guilty to illegally coordinating campaign spending between a political-action committee he had helped create and a Virginia congressional campaign he managed in 2012. Harber also pleaded guilty to lying to FBI agents investigating his activities. Prosecutors hailed the case as the first criminal prosecution in the U.S. based upon the coordination of campaign contributions between political committees. As a former general counsel for the Federal Election Commission observed "The prudent course here is for candidates and campaign managers to take it as a signal. I do think it should be taken as a message to them to redouble their efforts to make sure they're not running afoul of the coordination prohibitions in the Federal Election Campaign Act."¹⁷

¹ William Howard Taft (n.d.), BrainyQuote.com. found at <http://www.brainyquote.com/quotes/quotes/w/williamhow402570>.

² Federal Election Commission. “FY2014-2019 Strategic Plan,” p. 2, found at www.fec.gov/pages/strategic_plan/FECStrategicPlan2014-2019.pdf.

³³ New York Times/CBS News Poll, May 28-31, 2015; n=1,022.

⁴ League of Women Voters, 2014. *Money in Politics: Developing a Common Understanding of the Issues: A Primer for Engagement of League Members and Fellow Citizens*, found at <http://lwv.org/content/money-politics-developing-common-understanding-issues>.

⁵ Kurt Hohenstein, 2007. *Coining Corruption: The Making of the American Campaign Finance System*, Northern Illinois University Press, Chapter 7.

⁶ Appendix 4: The Federal Election Campaign Laws: A Short History, found at <http://www.fec.gov/info/appfour.htm>

⁷ Federal Election Commission. Fiscal Year 2016 Congressional Budget Justification, February 2, 2015. <http://www.fec.gov/pages/budget/budget.shtml> - Process

⁸ This summary is drawn from the FEC website, <http://www.fec.gov/em/enfpro/EnforcementProfile.shtml>

⁹ Ibid.

¹⁰ <http://www.fec.gov/em/enfpro/EnforcementProfile.shtml>

¹¹ Federal Election Commission, Manual of Directives, Number 68: Enforcement Procedures, December 31, 2009.

¹² Federal Election Commission, FY2014-2019 Strategic Plan, <http://www.fec.gov/pages/budget/budget.shtml> - Process

¹³ Federal Election Commission. Fiscal Year 2016 Congressional Budget Justification, February 2, 2015. <http://www.fec.gov/pages/budget/budget.shtml> - Process

¹⁴ Federal Election Commission, FY2014-2019 Strategic Plan. <http://www.fec.gov/pages/budget/budget.shtml> - Process

¹⁵ David Levinthal, “How Washington Starves its Election Watchdog,” Center for Public Integrity, updated January 5, 2015, found at <http://www.publicintegrity.org/2013/12/17/13996/how-washington-starves-its-election-watchdog>.

¹⁶ Eric Lichtblau. “F.E.C. Can’t Curb 2016 Election Abuse, Commission Chief Says,” The New York Times, May 2, 2015.

¹⁷ Matt Zapposky and Matea Gold, February 12, 2015. “Virginia Political Operative Pleads Guilty to Coordinating Campaign Contributions,” Washington Post. <http://www.washingtonpost.com/local/crime/va-man-pleads-guilty-to-coordinating-campaign-contributions/2015/02/12/e63a92dc-b146-11e4-827f-93f454140e>