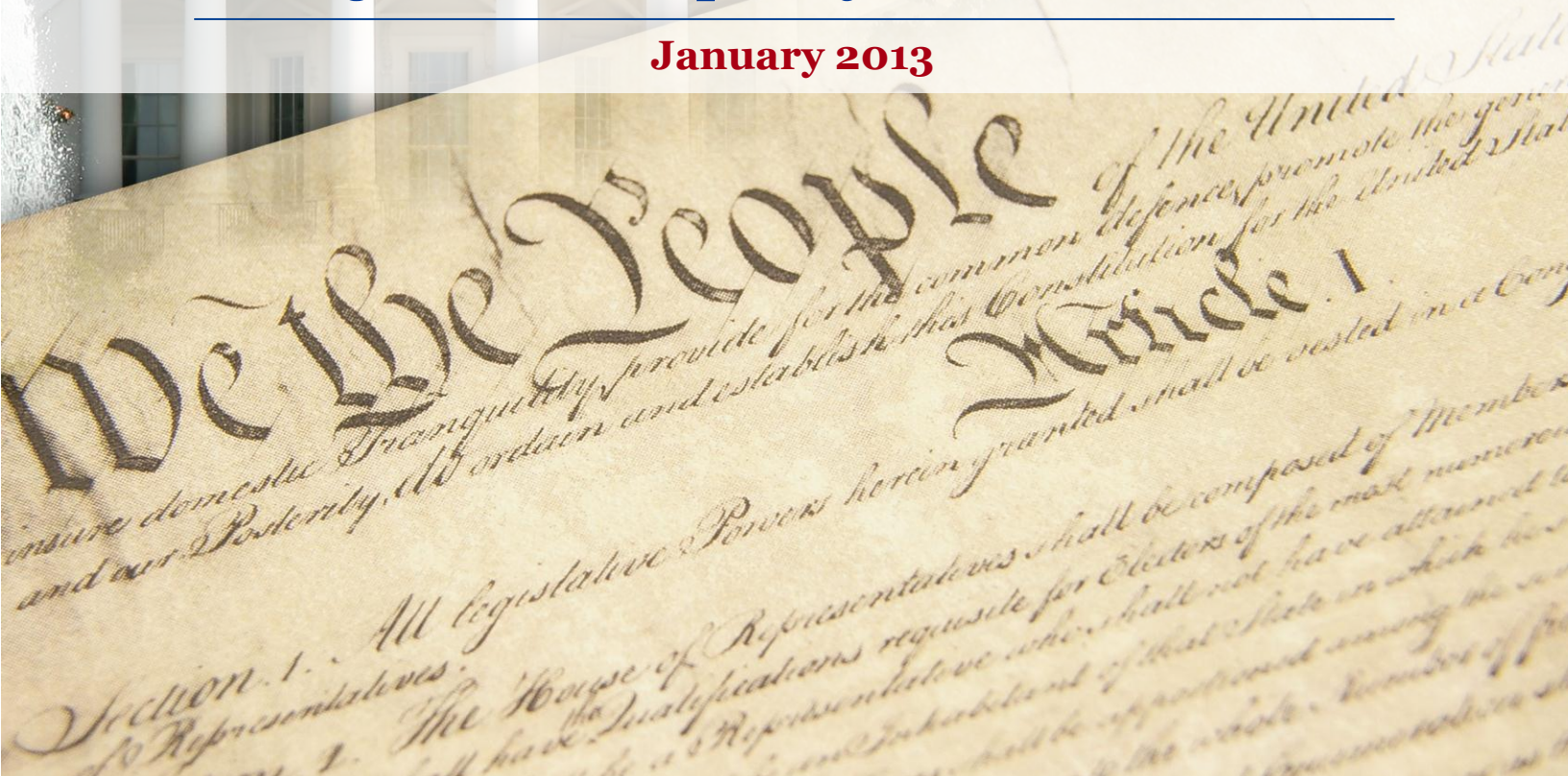




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Toward a More Perfect Union: A Progressive Blueprint for the Second Term

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“The FEC: The Failure to Enforce Commission”

by Fred Wertheimer and Don Simon

Toward a More Perfect Union: *A Progressive Blueprint for the Second Term*

“Toward a More Perfect Union: A Progressive Blueprint for the Second Term” is a series of ACS Issue Briefs offering ideas and proposals that we hope the administration will consider in its second term to advance a vision consistent with the progressive themes President Obama raised in his second Inaugural Address. The series should also be useful for those in and outside the ACS network – to help inform and spark discussion and debate on an array of pressing public policy concerns. The series covers a wide range of issue areas, including immigration reform, campaign finance, climate change, criminal justice reform, and judicial nominations.

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The FEC: The Failure to Enforce Commission

Fred Wertheimer and Don Simon***

Throughout its history, the Federal Election Commission (FEC) has been widely seen as an ineffectual agency that fails to carry out its statutory responsibilities to enforce and interpret the campaign finance laws in accord with their language, meaning and purpose. It has been labeled a “toothless tiger,” “toothless dog,” “pussycat agency,” “watchdog without a bite,” “muzzled watchdog,” “weak, slow-footed and largely ineffectual,” “FECKless,” and “designed for impotence,” among other things.¹ A *New York Times* editorial last year described the FEC as “borderline useless.”² A *St. Louis Post Dispatch* editorial went one step further, calling the FEC “completely useless.”³ Indeed, the FEC could be considered one of the great Washington success stories because it is exactly the weak and ineffective agency that members of Congress, whose campaign finance activities it oversees, intended it to be.

This Issue Brief explores some of the major regulatory failures over the history of the FEC, and suggests an agenda for structural reform of the agency so that it will better serve its vital function to protect the electoral process and our governance from corruption and the appearance of corruption.

I. An Agency Flawed by Design

A. The Original FEC

The FEC was established in 1974 as part of the Federal Election Campaign Act Amendments of 1974 (FECA), the comprehensive campaign finance reform legislation

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¹ DEMOCRACY 21 (CITIZENS TASK FORCE), NO BARK, NO BITE, NO POINT: THE CASE FOR CLOSING THE FEDERAL ELECTION COMMISSION AND ESTABLISHING A NEW SYSTEM FOR ENFORCING THE NATION’S CAMPAIGN FINANCE LAWS 5 (2002) [hereinafter NO BARK, NO BITE, NO POINT] available at <http://www.democracy21.org/vertical/Sites/%7B3D66FAFE-2697-446F-BB39-85FBBBA57812%7D/uploads/%7BB4BE5C24-65EA-4910-974C-759644EC0901%7D.pdf>. The authors of this Issue Brief wrote the Citizens Task Force report and have drawn from relevant portions of the report. The authors would like to recognize the very important role played by Kathryn Beard, Communications and Research Director for Democracy 21, in providing substantial research and writing contributions to this paper.

² Editorial, *So Much for the Referees*, N.Y. TIMES, Apr. 18, 2011, <http://www.nytimes.com/2011/04/18/opinion/18mon4.html>.

³ Editorial, *Time to Wake Up the Sleeping Watchdog That Is the Federal Elections Commission*, ST. LOUIS POST DISPATCH, Mar. 7, 2011, http://www.stltoday.com/news/opinion/columns/the-platform/time-to-wake-up-the-sleeping-watchdog-that-is-the/article_878f943c-4906-11e0-b3bf-0017a4a78c22.html.

enacted in response to the Watergate scandals. The FEC was created as an independent agency to oversee and enforce the campaign finance laws, following decades of failure to enforce the pre-FECA campaign finance laws.⁴ The previous enforcement system suffered from inherent conflicts of interest. The Clerk of the House and Secretary of Senate were responsible for receiving and overseeing the disclosure reports that congressional candidates were required to file. The Clerk and the Secretary, however, were employees of their respective bodies and directly accountable to the members of Congress they were supposed to oversee. In addition, they had no enforcement powers. The Justice Department had civil and criminal enforcement powers, but Democratic and Republican administrations alike did little or nothing to enforce the laws.

The FEC created by FECA consisted of six commissioners, no more than three of whom were allowed to be from the same political party. The original statute provided for two commissioners to be appointed by the president, two by the House Speaker and Minority Leader, and two by the Senate Majority Leader and Minority Leader. But in *Buckley v. Valeo*,⁵ the landmark Supreme Court decision that reviewed the constitutionality of FECA, the Court held that the appointment process for the FEC was unconstitutional. The Court said that because the statute allowed members of Congress to appoint individuals to an agency that exercised executive branch authority and powers, it violated the Appointments Clause of the Constitution. Following *Buckley*, the FEC was reauthorized by Congress in 1976, with the president given the power to nominate all six commissioners, subject to Senate confirmation. Notwithstanding the formal change in the appointments process, the actual practice for appointing commissioners has informally followed the approach set forth in the original statute. Over the years, House and Senate leaders have continued to name FEC commissioners by sending the names to the president who routinely forwarded them to the Senate for confirmation—a *de facto* version of the *de jure* process the Court held unconstitutional.

B. Today's FEC

Structural problems in the makeup and powers of the FEC lie at the heart of its reputation as the “Failure to Enforce Commission.” These structural impediments include cumbersome internal enforcement procedures, the agency’s absence of real enforcement powers, and the self-serving, conflict-laden process for appointing commissioners.

The FEC’s enforcement process is time consuming, and severely limits the organization’s ability to act. Former FEC Commissioner Scott Thomas has said, “procedural requirements and their attendant time allowances make it difficult—if not impossible—for the Commission to resolve a complaint in the same election cycle in

⁴ See NO BARK, NO BITE, NO POINT, *supra* note 1, at 7–13 (including a brief history of the establishment of the FEC).

⁵ 424 U.S. 1 (1976).

which it is brought.”⁶ Moreover, the agency currently lacks any real power to take significant enforcement actions on its own, and thus does not function as a real enforcement agency. It cannot directly impose penalties, except in minor matters, and cannot act in a timely manner. The Commission also lacks the ability to go into court to enjoin illegal activities and cannot undertake random audits of campaign committees. In the end, all the FEC can do, if a potential violator does not enter into a “conciliation” agreement, is to bring a lawsuit seeking civil penalties against the person and begin a process that is likely to drag through the courts for years.⁷

While membership of the Commission is generally made up of three members from each major party, the agency requires four votes to act on any matter—undertaking investigations, filing court cases, adopting regulations or issuing advisory opinions. This has proven to be a recipe for deadlock on important matters. If the FEC, for example, votes 3 to 3 on the question of whether to pursue an enforcement matter, the investigation is dropped. If the FEC votes 3 to 3 on issuing an advisory opinion, the individual or group requesting the opinion gets no advice.

In recent years, the agency has become completely dysfunctional. The three Republican commissioners on the six-member FEC have made clear that they are ideologically opposed to the campaign finance laws, and, as a result, have repeatedly refused to enforce the laws. In the 2012 election, candidates and political operatives were free to conduct campaign finance activities with little concern that the campaign finance laws would be enforced. We have reached the point where we have the illusion of campaign finance laws because in reality, there is little or no enforcement of these laws.

II. Major Campaign Finance Law Loopholes Created by the FEC

While the FEC’s failure to enforce the law is problematic by itself, the Commission also often creates new campaign finance problems in interpreting the law. Since its inception, the FEC has created some of the biggest campaign finance problems by proactively establishing major loopholes in the laws. The three situations set forth below illustrate how the FEC has fundamentally undermined the very laws the agency is supposed to enforce.

⁶ See NO BARK, NO BITE, NO POINT, *supra* note 1, at 50; see also 2 U.S.C. § 437g (2006) (noting agency enforcement proceedings, for instance, have to go through a “reason to believe” finding and a separate “probable cause to believe” finding before the agency can commence a civil action to seek penalties for a potential violation).

⁷ Most enforcement actions are concluded by a conciliation agreement in which a respondent typically does not admit liability but agrees to pay a civil penalty negotiated with the agency. 11 C.F.R. § 111.18 (2012).

A. Creating and Perpetuating Soft Money

The problems, and failures, of the FEC are nowhere better illustrated than in the story of the creation and growth of soft money in American politics. Soft money, before it was banned in 2002, was money donated to the national political parties that did not comply with federal contribution limits or source prohibitions. In other words, it was money that was *illegal* under federal law for the parties to raise and spend to influence federal elections.⁸ The soft money system was premised on a legal fiction created by the FEC: that the unlimited contributions raised and spent by the national parties for voter mobilization activities and ads about federal candidates could be treated as only affecting *non-federal* elections, and therefore did not need to comply with federal limits on contributions to parties.

This theory was first created by the FEC in a 1978 advisory opinion in which it held that certain party *mixed* activities—such as get-out-the-vote and voter registration activities that benefited federal candidates as well as state candidates—could be financed with a combination of federal and non-federal funds allocated (for instance, 30 percent federal funds, and 70 percent non-federal funds) to reflect, in theory, the relative impact of the activity on federal and non-federal campaigns.⁹ The FEC concluded that it could devise an allocation formula that would allow parties to pay for these activities with a mixture of soft money and hard money, with the soft money being artificially deemed to affect only non-federal voter activities and the hard money artificially deemed to affect only federal voter activities. But this allocation approach was based on a legal fiction and flawed from the beginning. It ended up allowing the national parties to spend unlimited soft money contributions to influence federal elections.

Common Cause sued the Commission in 1987 for failing to issue new rules to deal with the soft money problem.¹⁰ Federal district court Judge Thomas Flannery found that the FEC had failed to provide adequate guidance to the political parties to prevent soft money abuses of the allocation system. Judge Flannery found that the FEC's failure to take regulatory action on soft money was “contrary to law” and “flatly contradict[ed] Congress's express purpose,” and he ordered the FEC to issue new regulations.¹¹ After the FEC failed to take action in response to the court order, a second lawsuit by Common Cause resulted in the court's issuing a second order in 1988, again directing the agency to issue new regulations on its allocation system.¹² The court recognized “that there is a

⁸ Hard money, by contrast, is money donated to candidates and parties that complies with federal contribution limits and source prohibitions. FEDERAL ELECTIONS COMMISSION, CAMPAIGN FINANCE LAW QUICK REFERENCE FOR REPORTERS, http://www.fec.gov/press/bkgnd/bcra_overview.shtml (last visited Jan. 30, 2013).

⁹ FEC Op. 1978-10, [1976–1990 Transfer Binder] Fed. Election Camp. Fin. Guide (CCH) ¶5340 (1978).

¹⁰ Common Cause v. FEC, 692 F.Supp. 1391 (D.D.C. 1987).

¹¹ *Id.* at 1395–96.

¹² Common Cause v. FEC, 692 F.Supp. 1397 (D.D.C. 1988).

public perception of widespread abuse, suggesting that the consequences of the regulatory failure identified a year ago are at least as unsettling now as then.”¹³ Further, the court noted that “[t]he climate of concern surrounding soft money threatens the very ‘corruption and appearance of corruption’ by which the ‘integrity of our system of representative democracy is undermined,’ and which the [post-Watergate reform law] was intended to remedy.”¹⁴ In the end, the FEC adopted new regulations in 1990.¹⁵ They did not solve the soft money problem, however, but merely codified the existing flawed system. The FEC did take one positive step by adopting requirements for the parties to disclose their soft money contributions and expenditures.

By then, the problem presented by soft money being spent in federal elections had begun to dramatically increase. The presidential campaign in 1988 of Democratic nominee Governor Michael Dukakis started soft money off in a significant way with an effort to raise \$100,000 contributions for the Democratic Party to spend on so-called “party building” activities that were, in fact, expenditures to support the Dukakis presidential campaign. Vice President Bush’s campaign followed quickly with a similar program. By the end of the 1988 presidential race, each presidential campaign had raised some \$25 million in soft money from federally prohibited sources, or a total of \$50 million, and soft money had exploded into federal elections.

The total amount of soft money increased more than *five-fold* to \$262 million in the 1996 election cycle, and for the first time, a presidential candidate, President Bill Clinton, decided to spend soft money to finance a multimillion-dollar TV ad campaign promoting his reelection.¹⁶ In effect, President Clinton and his campaign ran two parallel presidential campaigns. The first was financed with public funds received by the Clinton campaign in return for limiting its campaign spending. The second involved unlimited expenditures financed with unlimited soft money contributions raised by the Clinton campaign and spent through the Democratic Party. Soon after the Clinton campaign undertook this practice, the Republican nominee, Senator Bob Dole, followed suit with similar expenditures.

The embrace of soft money and its use for TV campaign advertising, not surprisingly, fueled the demand for even more soft money. This pursuit of soft money resulted in the Clinton campaign finding itself embroiled in the worst campaign finance scandals since Watergate. The sale of presidential meetings, the White House coffees, the Lincoln Bedroom sleepovers, the Buddhist temple fundraiser, the illegal foreign contributions, the roles of John Huang, Charlie Trie and Pauline Kanchanalak, the Roger

¹³ *Id.* at 1399.

¹⁴ *Id.* at 1401.

¹⁵ NO BARK, NO BITE, NO POINT, *supra* note 1, at 26.

¹⁶ *Id.* at 24.

Tamraz fiasco—were among the parade of campaign finance abuses that marked the 1996 Clinton presidential campaign.¹⁷

The FEC, meanwhile, did nothing to address the problems. In 1997, *The New York Times* noted that “[h]ad there been an aggressive and vigilant Federal Election Commission, both campaigns might not have been able to make a mockery of campaign restrictions enacted in the 1970s.”¹⁸ By the 2000 national elections, the soft money system had grown to a \$500 million problem, a *ten-fold* increase from the \$50 million spent in 1988.

Finally, in 2002, Congress passed the Bipartisan Campaign Reform Act (BCRA), also known as the McCain-Feingold Law, which banned political party soft money entirely.¹⁹ BCRA prohibited the political parties from raising or spending any funds that did not comply with federal contribution limits and source prohibitions. The constitutionality of the new law was immediately challenged and was upheld by the Supreme Court in 2003.²⁰ In its decision, the Court made clear the central role played by the FEC in creating the soft money system. The Court admonished the FEC for having “subverted” and “invited widespread circumvention” of the campaign finance laws by adopting the regulations that created the soft money system.²¹ The Court further said that under that allocation regime created by the FEC in 1978, “the national parties were able to use vast amounts of soft money in their efforts to elect federal candidates.”²²

B. Improperly Implementing the Bipartisan Campaign Reform Act

Following the enactment of BCRA in 2002, the FEC adopted regulations to implement the new law. Many of these new rules, however, failed to properly interpret the law. The same agency that created the soft money system proceeded to adopt numerous regulations that undermined the very law just enacted to end the soft money system the agency created.

The House sponsors of BCRA, Representatives Chris Shays and Marty Meehan, brought a lawsuit in 2004 challenging many of the regulations adopted by the FEC. In *Shays v. Federal Election Commission*, a federal district court issued a stinging rebuke of the FEC by striking down, as contrary to law, fifteen of the nineteen FEC regulations that had been challenged in the lawsuit.²³ These regulations addressed a range of issues

¹⁷ *Id.* at 27.

¹⁸ Editorial, *Waking Up the F.E.C.*, N.Y. TIMES, Mar. 31, 1997, <http://www.nytimes.com/1997/03/31/opinion/waking-up-the-fec.html>.

¹⁹ Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (codified as amended at 36 U.S.C. § 510 and in scattered sections of 2 U.S.C.).

²⁰ *McConnell v. FEC*, 540 U.S. 93 (2003).

²¹ *Id.* at 142, 145.

²² *Id.* at 142.

²³ *Shays v. FEC*, 337 F.Supp. 2d 28 (D.D.C. 2004).

relating to the implementation of BCRA, including the definition of terms such as “coordination,” “solicitation,” “agent” and “federal election activity.” Mincing no words, Judge Kollar-Kotelly said that one of the regulations “runs completely afoul” of basic campaign finance law, another “severely undermines FECA’s purposes” and would “foster corruption,” another “would render the statute largely meaningless,” another had no rational basis.²⁴ The judge found the FEC’s actions “run[] contrary to Congress’ intent” and “create the potential for gross abuse.”²⁵

The FEC appealed the district court’s decision with regard to five of the fifteen regulations that had been struck down, and lost its appeal on all five.²⁶ The D.C. Circuit Court of Appeals sharply rebuked the FEC concerning the five regulations before it. The court found with regard to the various regulations, “[t]he FEC’s definitions fly in the face of [Congress’s] purpose because they reopen the very loophole the terms [‘solicit’ and ‘direct’] were designed to close;” “the FEC’s rule far exceeds any exemption BCRA would permit . . . and runs roughshod over express limitations on the Commission’s power;” and that one regulation “appears particularly irrational” and “makes no sense.”²⁷ The court of appeals also said:

Under the Commission’s interpretation, candidates and parties may not spend or receive soft money, but apart from that restriction, they need only avoid explicit direct requests. Instead, they must rely on winks, nods, and circumlocutions to channel money in favored direction—anything that makes their intention clear without overtly “asking” for money. Simply stating these possibilities demonstrates the absurdity of the FEC’s reading. *Whereas BCRA aims to shut down the soft money system, the Commission’s rules allow parties and politicians to perpetuate it, provided they avoid the most explicit forms of solicitation and direction.*²⁸

Following the court rulings, the FEC conducted new rulemaking proceedings for the fifteen invalidated regulations. While in some cases the Commission fixed its improper regulations, in other cases the FEC ignored the mandate of the court and again failed to cure the regulations and the problems the agency had created. The most egregious example of this FEC failure was its proposed new regulation that once again failed to deal properly with the critically important issue of defining when a third party is

²⁴ *Id.* at 63, 70, 79, 87.

²⁵ *Id.* at 65, 79 (citing *Orloski v. FEC*, 795 F.2d 156, 164, 165 (D.C. Cir. 1986)).

²⁶ *Shays v. FEC*, 414 F.3d 76 (D.C. Cir. 2005).

²⁷ *Id.* at 106, 109, 112.

²⁸ *Id.* at 106 (emphasis added).

illegally coordinating its expenditures with a candidate or political party.²⁹ The district court had struck down the FEC regulation defining “coordination” because it ran “completely afoul of [the] basic tenet of campaign finance law” that coordinated communications, like contributions, have great value to candidates, and that failing to regulate such communications accordingly “create[s] an immense loophole that would facilitate the circumvention of [federal] contribution limits, thereby creating ‘the potential for gross abuse.’”³⁰ The court of appeals reached the same result, though for slightly different reasons, and concluded that the FEC regulation authorized “a coordinated communication free-for-all for much of each election cycle.”³¹

The new “coordination” regulation adopted by the FEC in response to the court decisions, however, turned out to be even worse than the “coordination” regulation that had been rejected by the courts. As a result, Representatives Shays and Meehan went back to the district court and asked it to invalidate the FEC’s new coordination regulation as again being contrary to law. The court once again struck down the FEC’s coordination regulation, and the D.C. Circuit Court of Appeals once again upheld that ruling.³² In its opinion issued in 2008, the D.C. Circuit sharply criticized the FEC’s arguments in support of the “coordination” regulation, and in support of four other regulations that had been challenged in the second Shays and Meehan lawsuit. The circuit court called one argument “absurd,” said that another “flies in the face of common sense,” emphasized that another “disregards everything Congress, the Supreme Court, and this court have said about campaign finance regulation,” and concluded that another “ignores both history and human nature.”³³ In criticizing the FEC’s revised coordination rule, the court said:

The FEC’s rule not only makes it eminently possible for soft money to be used in connection with federal elections, but it also provides a clear roadmap for doing so, directly frustrating BCRA’s purpose. Moreover, by allowing soft money a continuing role in the form of coordinated expenditures, the FEC’s proposed rule would lead to the

²⁹ The Supreme Court held in *Buckley* that outside spending coordinated with a candidate should be treated the same as a contribution to the candidate, and thus subject to the contribution limitations. *See Buckley*, 424 U.S. at 47. Since *Buckley*, the definition of what constitutes “coordination” had become a crucial issue in the law, and the FEC had a history of weakly defining a standard for coordination. In BCRA, Congress repealed by statute the then-existing, flawed FEC regulation defining “coordination” and told the agency to do it over. Bipartisan Campaign Reform Act § 214. The problem came, however, when the FEC issued new regulations following the enactment of BCRA that were as poorly conceived as the ones invalidated by Congress. *See Coordinated & Independent Expenditures*, 68 Fed. Reg. 421 (Jan. 3, 2003).

³⁰ *Shays v. FEC*, 337 F.Supp. 2d 28, 63, 65 (D.D.C. 2004).

³¹ *Shays*, 414 F.3d 76, 100 (D.C. Cir. 2005).

³² *Shays v. FEC*, 511 F.Supp. 2d 19 (D.D.C. 2007), *aff’d*, 528 F.3d 914 (D.C. Cir. 2008).

³³ *Shays v. FEC*, 528 F.3d 914, 926–28 (D.C. Cir. 2008).

exact perception and possibility of corruption Congress sought to stamp out in BCRA”³⁴

By this time, it was more than six years after BCRA had been enacted, and there still was no valid regulation to implement the important coordination provisions of the law. The *Shays* cases illustrate how the FEC opened and perpetuated major soft money loopholes in a new law enacted to end the massive and corrupting soft money loophole the agency itself had created in the first place. The cases also show the willingness of FEC commissioners to ignore the clear intent of Congress and the clear decisions of federal courts in order to misinterpret laws enacted to prevent corruption and the appearance of corruption.

C. Undermining Disclosure Requirements

As part of BCRA, Congress in 2002 banned corporations, including nonprofit advocacy organizations and trade associations, and labor unions from making expenditures for “electioneering communications.” An “electioneering communication” was defined as a broadcast ad that refers to a federal candidate and that is run in the period 30 days before a primary election or 60 days before the general election.³⁵ These provisions were enacted to address the widespread problem of sham “issue ads” being financed by corporations and labor unions that were prohibited from spending their treasury funds on campaign ads to influence federal elections but were, in fact, financing such ads in the guise of their being “issue ads.”

Congress also adopted as part of BCRA comprehensive disclosure requirements for “electioneering communications.” These disclosure provisions required any person who pays for an electioneering communication to disclose “the names and addresses of all contributors who contributed an aggregate amount of \$1,000 or more to the person making the disbursement during the period beginning on the first day of the preceding calendar year and ending on the disclosure date.”³⁶ An alternative disclosure approach for the spender was also provided: the spender could set up a “segregated bank account” consisting only of donations from individuals who are U.S. citizens, and pay for electioneering communications out of that account. If this alternative was used, the spender only had to disclose the names and addresses of the individuals who contributed \$1,000 or more to that bank account.³⁷

In 2007, the Supreme Court greatly narrowed the scope of the BCRA provision banning corporations and labor unions from making expenditures for “electioneering

³⁴ *Id.* at 925.

³⁵ 2 U.S.C. § 434(f)(3)(A)(i) (2006).

³⁶ 2 U.S.C. § 434(f)(2)(F) (2006).

³⁷ § 434(f)(2)(E).

communications.”³⁸ The Court ruled that the ban applied only to “electioneering communications” that contained express advocacy—such as saying “vote for” or “vote against” a candidate— or that contained a campaign message that is so clear that it constitutes the functional equivalent of express advocacy. As a result of the ruling, corporations could now pay for “electioneering communications” that did not contain express advocacy or its functional equivalent. However, the ruling also left in place the disclosure provisions for those expenditures.

Because corporations were now permitted to pay for certain kinds of electioneering communications, the FEC issued new regulations in 2007 to implement the disclosure requirements that would apply to corporations. In its new regulations, however, the FEC radically narrowed the statutory contribution disclosure requirements. For “electioneering communications” made by a corporation and not paid out of a segregated bank account, the new regulations required disclosure of the name and address of “each person who made a donation aggregating \$1,000 or more” to the corporation, *but only* if the donation “was made for the purpose of furthering electioneering communications.”³⁹ Thus, even though the statute requires the disclosure of “all contributors” to a person spending money for an electioneering communication (unless the expenditures are made out of a segregated account), the FEC regulation requires disclosure of *only* those donors who gave a donation specifically “for the purpose of furthering electioneering communications.”

Under this 2007 FEC regulation, any person who gives money to a corporation, including a nonprofit corporation, that is not *explicitly* donated for the purpose of “furthering” electioneering communications escapes all contribution disclosure requirements, even if the money is used by the corporation to pay for “electioneering communications.” Thus, the FEC regulation created an easy path to evading the donor disclosure requirements, a path that was widely used in the 2010 and 2012 national elections. The donor simply avoids designating his donation specifically to further any “electioneering communication,” in which case no disclosure of the donor is required.

In 2010, the Supreme Court in the *Citizens United* case struck down the remaining narrowed portion of the corporate ban on financing electioneering communications.⁴⁰ This ruling freed corporations and labor unions to spend general treasury funds to make any kind of campaign expenditure or “electioneering communication,” including communications that contain express advocacy. The Court, however, by an 8 to 1 vote, upheld the existing contribution disclosure requirements in the statute that apply to spending by outside groups on “electioneering communications,” without any apparent

³⁸ FEC v. Wis. Right to Life, Inc., 551 U.S. 449 (2007).

³⁹ 11 C.F.R. § 104.20(c)(9) (2007).

⁴⁰ Citizens United v. FEC, 558 U.S. 310 (2010).

recognition that these contribution disclosure requirements had been radically narrowed by FEC regulations.

Following the Court's decision, the three Republican commissioners on the FEC further narrowed the already narrow disclosure requirement to the point of absurdity. They took the position in an enforcement proceeding that the contribution disclosure requirements applied *only* if a contribution was given for the explicit purpose of paying for the *specific* communication that was made. Thus, as long as there was no explicit statement that the contributions were being given to finance a specific ad, the donors did not have to be disclosed.

In March 2012, Representative Chris Van Hollen filed a lawsuit in federal district court in Washington, D.C. challenging the FEC's regulations dealing with the requirements for disclosure of contributions by outside spending groups. The district court proceeded to strike down the FEC disclosure regulation as contrary to the statute, stating that "there is no question that the regulation promulgated by the FEC directly contravenes the Congressional goal of increasing transparency and disclosure in electioneering communications" ⁴¹ The court further said, "the general legislative purpose here is clearly expressed and it favors plaintiff's interpretation of the statute: that Congress intended to shine light on whoever was behind the communications bombarding voters immediately prior to elections." ⁴²

This ruling was later reversed by the D.C. Circuit Court of Appeals, which found that the FEC regulation was not plainly foreclosed by the language of the statute. The court sent the matter back to the district court for further proceedings to determine whether the regulation was an arbitrary and capricious interpretation of the law. ⁴³ The district court, in turn, has given the FEC an opportunity to clarify its disclosure regulation and the case is pending.

Meanwhile, experience has borne out the fact that the Commission's 2007 disclosure regulation gutted the statute's contribution disclosure requirement. An estimated \$400 million was spent by nonprofit groups to influence the 2012 national elections with virtually no disclosure of the donors who financed these massive "dark money" expenditures. ⁴⁴ The FEC regulation has effectively interpreted out of existence the statutory requirement for contribution disclosure by outside spending groups making "electioneering communications."

⁴¹ Van Hollen v. FEC, 851 F. Supp. 2d 69, 83 (D.D.C. 2012).

⁴² *Id.* at 84.

⁴³ *Ctr. for Individual Freedom v. Van Hollen*, 694 F.3d 108 (D.C. Cir. 2012).

⁴⁴ Paul Blumenthal, 'Dark Money' in 2012 Election Tops \$400 Million, 10 Candidates Outspent by Groups with Undisclosed Donors, HUFFINGTON POST, Nov. 2, 2012, http://www.huffingtonpost.com/2012/11/02/dark-money-2012-election-400-million_n_2065689.html.

III. The Failure to Enforce Commission

While the FEC has historically been ineffective and subject to partisan deadlock on key issues, the degree of dysfunction at the agency in recent years has reached unprecedented levels. This core problem for the agency stems from the fact that the three Republican commissioners currently serving on the six-member body are ideologically opposed to the campaign finance laws. As a result, these commissioners have consistently blocked even routine enforcement of the law. A *Washington Post* editorial on June 15, 2009 captured the role played at the FEC by the Republican commissioners:

The three Republican appointees are turning the commission into The Little Agency That Wouldn't: wouldn't launch investigations, wouldn't bring cases, wouldn't even accept settlements that the staff had already negotiated. This is not a matter of partisan politics. These commissioners simply appear not to believe in the law they have been entrusted with enforcing.⁴⁵

A *New York Times* editorial on April 17, 2009 similarly noted:

[The agency] has become a model of repeated dysfunction as its three Republican members vote together to block major enforcement efforts affecting violators—from either party—producing 3-3 standoffs.⁴⁶

If anything, the enforcement problem at the FEC has only gotten worse since 2009. The Republican commissioners have consistently blocked the agency's professional staff from pursuing enforcement matters and have worked to prevent laws on the books from being properly interpreted. This concerted campaign has effectively shut down any significant enforcement of the nation's campaign finance laws and has made the FEC nonfunctional.

Examples abound of the refusal of the Republican commissioners to enforce the laws.⁴⁷ In two cases, for example, respondents had already agreed to conciliation

⁴⁵ Editorial, *Deadlocked in Regulation*, WASH. POST, June 15, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/06/14/AR2009061402400.html>.

⁴⁶ Editorial, *Mr. Obama's Chance to Fix the F.E.C.*, N.Y. TIMES, Apr. 16, 2009, <http://www.nytimes.com/2009/04/17/opinion/17fri3.html>.

⁴⁷ Fred Wertheimer, *Mayday, Mayday at the Federal Election Commission*, DEMOCRACY 21, May 9, 2009, http://www.democracy21.org/index.asp?Type=B_PR&SEC=%7B240FF259-2264-46CE-94C4-882DD39A1496%7D&DE=%7B2F9ED0AD-D6F4-4047-A43F-E09D95E33AEC%7D (“[T]he FEC's three Republican commissioners had voted to reverse the agency's course on key issues. . . . The recent votes represent a sharp break with the past. In late 2006 and throughout 2007, for example, different casts of

agreements, or "plea bargains," and to pay civil penalties. Nevertheless, the three Republican commissioners voted to reject the "plea bargain" agreements and instead killed the enforcement actions altogether. In one of these cases involving The November Fund, a 527 group⁴⁸ created by the Chamber of Commerce, the FEC professional staff entered into a conciliation agreement with the group regarding soft money expenditures the group made to influence the 2004 presidential election in support of President Bush. The 527 group agreed to pay a civil penalty as part of the agreement. The three Republican commissioners, however, refused to accept the "plea bargain" agreement and instead killed the enforcement action. Democratic Commissioners Ellen Weintraub and Cynthia Bauerly challenged their Republican colleagues "refusal to enforce the law" as a "dramatic departure . . . from the Commission's prior enforcement efforts and the laws itself."⁴⁹

In the second case, involving a Democratic congressional candidate, the candidate's campaign committee entered into a conciliation agreement with the FEC professional staff regarding the committee's failure to provide full disclosure information for nearly 90 percent of its contributors who gave more than \$200. The candidate's committee sent in a check to pay for the civil penalty imposed by the agreement. Despite the "plea bargain" agreement, and the support of the three Democratic commissioners for pursuing an enforcement action against the Democratic candidate, the three Republican commissioners rejected the conciliation agreement and instead killed the enforcement action.⁵⁰

There are numerous examples where the Republican commissioners have blocked enforcement actions against Democratic respondents that were proposed by the FEC professional staff and supported by the Democratic commissioners. The fact that the Republican commissioners voted not to pursue enforcement actions recommended by the staff against Democratic candidates that even the Democratic commissioners supported illustrates their across-the-board ideological opposition to the campaign finance laws.

- A former employee of the Washington State Democratic Central Committee admitted to a "knowing and willful" violation of the law by embezzling \$65,000 from the Democratic Party committee. The FEC professional staff recommended an enforcement action against the Democratic Party employee, and the three Democratic commissioners

FEC commissioners voted unanimously to impose some of the largest FEC fines ever in key cases involving controversial issues, such as restrictions on 527 groups.") (quoting a Jan. 5, 2009 BNA MONEY AND POLITICS Report).

⁴⁸ "527 groups" are groups organized as "political organizations" under §527 of the tax code, but not registered as "political committees" under the federal campaign finance laws. They accordingly claim the right to operate free of restrictions that apply to registered political committees.

⁴⁹ See Wertheimer, *supra* note 47.

⁵⁰ See *id.*

supported the staff recommendation. The three Republican commissioners, however, rejected the recommendation and killed the enforcement action. "This result was at odds with similar cases which resulted in large fines and in some cases jail terms."⁵¹

- In another case, the FEC professional staff, supported by two Democratic commissioners (the third Democrat recused herself), recommended that the Commission find "probable cause" that the Democratic Congressional Campaign Committee had violated the disclaimer requirement in the law. The three Republican commissioners rejected the recommendation and killed the enforcement action.
- The FEC professional staff recommended pursuing a complaint filed by the Arizona Republican party against the Arizona Democratic Party for illegally laundering soft money. The Democratic commissioners supported pursuing the enforcement action. The three Republican commissioners voted to dismiss the complaint and killed the enforcement action.
- The FEC professional staff wanted to pursue an enforcement lawsuit against billionaire Democratic supporter George Soros for failing to disclose independent expenditure activities attacking President Bush and supporting Senator Kerry in the 2004 presidential election. The Democratic commissioners supported pursuing the enforcement lawsuit against Soros. The three Republican commissioners rejected the lawsuit and killed the enforcement action.
- In a case involving the American Leadership Project, a 527 political group, a complaint was filed that the group illegally spent soft money to promote Senator Hilary Clinton's presidential campaign during the 2008 primary election. Two Democratic commissioners voted to find "reason to believe" that a violation had occurred and to pursue the case. (The third Democratic commissioner recused herself.) The three Republican commissioners voted to dismiss the complaint, killing the enforcement action.
- In a case involving improper payments by the Georgia Democratic Party from a soft money account, the three Democratic commissioners voted to pursue the investigation on the recommendation of the FEC professional staff. The three Republican commissioners voted against pursuing the case and killed the enforcement action.

⁵¹ See *id.* (quoting a Jan. 5, 2009 BNA MONEY AND POLITICS Report).

There are also numerous examples of the Republican commissioners blocking enforcement action against Republicans. Here are two examples.

- The FEC professional staff, supported by the three Democratic commissioners, wanted to pursue an enforcement action against the 2008 Republican presidential candidate Mitt Romney's campaign for accepting an illegal in-kind contribution of \$150,000. The Romney supporter chartered an airplane to fly a group of other Romney supporters from Salt Lake City to Boston for a fundraising event. The three Republican commissioners voted to reject the complaint and killed the enforcement action. Democratic commissioners Weintraub and Bauerly stated that this "was not a difficult case" under long-established law.
- In a case involving a Republican congressional candidate, the FEC professional staff recommended the Commission find "probable cause" that the candidate violated the "personal use" prohibition in the law after the candidate took \$70,000 from the sale of the campaign's contributor lists to a vendor. The three Democratic commissioners voted to pursue the enforcement action. The three Republican commissioners rejected the professional staff's recommendation, and killed the enforcement action.

The pattern of these and others FEC cases makes clear that the three Republican commissioners currently on the FEC are ideologically opposed to the campaign finance laws and have fundamentally undermined the laws by refusing to enforce them.

IV. Solutions

A. President Obama and FEC Appointments

President Obama has his share of responsibility for the current problems at the FEC because he has failed to nominate new commissioners to the agency, even though he has long had the opportunity to do so. The president could nominate five new commissioners to the FEC tomorrow. Currently, there are four lame duck commissioners who have continued to serve on the FEC in hold-over status long after their terms expired. (A fifth commissioner who also had lame duck status has stepped down from the commission, and the sixth commissioner will become a lame duck on April 30, 2013.)

The lame duck commissioners are ineligible to be reappointed to the agency but can continue serving on the FEC until their replacements are sworn in. President Obama could have acted long ago to nominate new commissioners, but has treated the problems of a dysfunctional campaign finance enforcement agency as a matter of little concern to his administration. Even if the president faced a filibuster in confirming his appointments, the nomination of new FEC commissioners would force the Senate to

stand up and be counted. Each senator would be required to take a public stand on whether they support or oppose the current lack of enforcement of the nation's campaign finance laws. As long as President Obama fails to nominate new commissioners, however, the absence of FEC enforcement of the campaign finance laws in the first instance rests with the president.

During his 2008 presidential campaign, then-Senator Obama was more than ready to take on the problems at the FEC. As a presidential candidate, Senator Obama said:

I believe that the FEC needs to be strengthened and that individuals named to the Commission should have a demonstrated record of fair administration of the law and an ability to overcome partisan biases. My initial goal as president will be to determine whether we can make the FEC more effective through appointments. What the FEC needs most is strong, impartial leadership that will promote integrity in our election system As president, I will appoint nominees to the Commission who are committed to enforcing our nation's election laws.⁵²

With the exception of one unsuccessful attempt in 2009, however, President Obama has not only failed to nominate commissioners “committed to enforcing our nation's election laws,” but he has failed to nominate *anyone* to serve on the FEC.⁵³ The president has stood by idly while the number of lame duck commissioners grew to five of the six seats, and the Republican commissioners continued to block enforcement of the laws.

In making new nominations to the FEC, it is essential for President Obama to abandon the business-as-usual approach of letting congressional party leaders select the nominees. This approach has played a pivotal role in creating the failed agency we have today. Democracy 21⁵⁴ and other reform groups have proposed that President Obama establish a bipartisan advisory group of distinguished individuals to recommend qualified nominees for each seat available on the commission. The president could then choose nominees based on these recommendations and in compliance with the statutory requirement that no more than three members of a political party can serve on the

⁵² MIDWEST DEMOCRACY NETWORK QUESTIONNAIRE, ISSUE FEC REFORM, 5 (2007), available at http://www.midwestdemocracynetwork.org/files/pdf/PresidentialQuestionnaire_FirstResponses.pdf.

⁵³ John Israel, *Withdrawn FEC Nominee Laments 'Broken' Confirmation Process*, CTR. FOR PUB. INTEGRITY, Oct. 7, 2012, <http://www.publicintegrity.org/2010/10/07/2450/withdrawn-fec-nominee-laments-broken-confirmation-process>.

⁵⁴ Democracy 21 is a nonpartisan, nonprofit, organization that works to strengthen our democracy and ensure the integrity and fairness of government decisions and elections. Its main focus is promoting effective campaign finance laws to protect against the corruption of federal officeholders and government decisions and to engage and empower citizens in the political process.

commission at the same time. In any event, President Obama must nominate new commissioners who are committed to enforcing the campaign finance laws if we are to get beyond the current dysfunctional FEC.

B. Democracy 21 Task Force Proposals

In December 2000, Democracy 21 established a bipartisan task force composed of campaign finance and enforcement experts at the national, state, and local levels to examine the failure of the FEC to effectively oversee and enforce the federal campaign finance laws, and to make recommendations on how to address this problem.⁵⁵ After studying the FEC for more than a year, the task force concluded that the FEC’s problems require fundamental, not incremental, structural change in order to be solved. The FEC has become a classic example of a “captured” agency; an agency serving the interests of the community it is supposed to regulate. The commission needs to be replaced by a new enforcement entity to fully eliminate its structural and historical failings, and to “achieve the independence, credibility and effectiveness that are essential to a workable system.”⁵⁶

1. A Single Administrator

The Democracy 21 task force identified several foundational principles to guide the creation of a new enforcement agency. It recommended that “[a] new agency headed by a single administrator should be established with responsibility for the civil enforcement of the federal campaign finance laws.” It concluded that the FEC, as currently structured, has become a highly politicized agency. This has produced a culture of responding both to the interests of the federal officeholders and party leaders who select the leadership of the FEC and to the interests of the campaign finance community it is supposed to regulate. To establish an effective and credible enforcement agency, the structure and leadership of a new agency must be freed from the partisan and ideological divisions that have prevented effective enforcement of the campaign finance laws.

The task force concluded that restructuring the agency around a single administrator would “provide the best opportunity for obtaining a highly qualified and publically credible person to lead the agency who could command the nation’s respect and confidence”⁵⁷ and would eliminate the often deadlocked divisions of the current six-member body. The *Washington Post* has endorsed a similar concept:

A far better model would put civil enforcement under the direction of one person, who—like the FBI director—would serve a term of years not corresponding to that of the President who appoints him or the Senators who confirm

⁵⁵ See NO BARK, NO BITE, NO POINT, *supra* note 1 at 33–46.

⁵⁶ See *id.* at 35.

⁵⁷ See *id.*

him. This person would not be nearly so answerable to the regulated community as are the current commissioners.⁵⁸

While an agency under the control of one individual would raise concerns of partisan decision-making, the presidential nominee would have to be confirmed by the Senate. Given the Senate's 60-vote requirement to overcome a filibuster against confirmation, each party would likely have veto power if they deemed the nominee too partisan.

2. A New Decision-Making Structure

To help prevent partisan decisions, the task force also recommended that the decision-making structure of the new agency include a system of impartial administrative law judges to hear enforcement cases and make initial decisions about potential violations of the law. It further recommended that “the new agency should have the authority to act in a timely and effective manner and to impose appropriate penalties on violators, including civil money penalties and cease-and-desist orders, subject to judicial review.”⁵⁹

Under the current system, the FEC can only seek to enter a conciliation agreement with a respondent to decide and settle an enforcement matter, invariably a lengthy process. And if no agreement is reached, the agency must pursue civil action in federal court, an additional lengthy process. This has led to long delays in resolving enforcement matters. To deal with this flawed process, the new agency must have the power to directly impose penalties for violations of the campaign finance law, including civil money penalties and cease-and-desist-orders. The goal of this proposed new system, according to the task force, is to “provide real time penalties for violations of the campaign finance laws, where possible, in order to remove the perception that there is no cost to violating the law.”⁶⁰

The task force also recommended that “the criminal enforcement process should be strengthened and a new limited private right of action should be established where the agency chooses not to act.”⁶¹ The task force recommended that the agency should have the discretionary authority to authorize a private complainant to “pursue a matter directly in court on the merits if the agency decides not to act on an enforcement matter brought to it by a private complainant.”⁶²

3. An Adequately Resourced Agency

⁵⁸ Editorial, *Rethinking the FEC*, WASH. POST, Mar. 5, 1999, at A32.

⁵⁹ See NO BARK, NO BITE, NO POINT, *supra* note 1, at 40–43.

⁶⁰ See *id.* at 43.

⁶¹ See *id.* at 44.

⁶² See *id.* at 45.

An approach must also be established to help ensure that the agency receives adequate resources to carry out its enforcement responsibilities. The FEC has an inherent conflict problem as it is funded by the very individuals who it is responsible for regulating. Congress has historically underfunded the FEC's enforcement efforts and imposed constraints on how the agency can use the money it receives. To help solve this problem, the task force recommended that the General Accounting Office make recommendations on the funding level that would be necessary for an effective new agency. It also recommended multi-year funding for the new agency, to provide stability during the course of an election cycle.

4. Legislative Response to the Task Force Proposals

The task force recommendations were incorporated into the Federal Election Administration Act of 2003 (FEA),⁶³ legislation introduced by Senators John McCain and Russ Feingold, and Representatives Christopher Shays and Marty Meehan, the sponsors of BCRA. One significant change to the legislation was based on the recommendations presented by the task force: the FEA provided for two additional administrators, one from each party, to join the lead administrator, who would have responsibility for running the day-to-day operations of the agency. The lead administrator would have a longer term than the other two administrators, whose principal roles would be to vote on formal actions to be taken by the agency. The FEA was reintroduced in succeeding Congresses through 2010, but Congress has shown no inclination even to examine the problems that exist with campaign finance enforcement. The legislation is expected to be reintroduced in the current Congress, and efforts will be made to obtain serious congressional consideration of the need to address the abject failure to enforce the campaign finance laws.

V. Conclusion

The FEC today is controlled by three Republican commissioners who are ideologically opposed to the campaign finance laws they were appointed to enforce. The commissioners consistently block agency action and prevent the proper enforcement and interpretation of those laws. As a result, it is widely recognized that the nation's campaign finance laws—enacted to prevent corruption and the appearance of corruption—are not being enforced. They will not be enforced in the future as long as these commissioners control the agency.

The responsibility to address this problem lies, in the first instance, with President Obama, who must nominate new commissioners to the FEC who are committed to enforcing the laws. As long as the president fails to act, we will continue to have a dysfunctional FEC. In the longer term, the structural problems that have caused the FEC

⁶³ Federal Election Administration Act, S. 1388, 108th Cong. (2003).

to be an ineffective agency throughout its history must be addressed. A new campaign finance enforcement agency is needed with the authority, power and independence to effectively enforce the laws. The current situation demands a real campaign finance enforcement agency to enforce the campaign finance laws and protect the integrity of our elections.