

FEDERAL ELECTIONS COMMISSION (FEC) REGULATION AS A SOLUTION TO CONTROL MONEY IN ELECTIONS

There are four Federal regulatory agencies that have legal authority to curb campaign spending: 1) the Federal Election Commission (FEC), 2) the Internal Revenue Service (IRS), 3) the Federal Communications Commission (FCC) and, 4) Securities and Exchange Commission (SEC).

This article discusses how the Federal Elections Commission (FEC) could control the excess of money in politics through regulations and why it is not happening. Other reports cover the other agencies.

The Federal Election Commission (FEC)'s web site explains the FEC role this way:

"In 1975, Congress created the Federal Election Commission (FEC) to administer and enforce the Federal Election Campaign Act (FECA) - the statute that governs the financing of federal elections. The duties of the FEC, which is an independent regulatory agency, are to disclose campaign finance information, to enforce the provisions of the law such as the limits and prohibitions on contributions, and to oversee the public funding of Presidential elections."¹

Given its role, the FEC would appear to be the most logical agency to control money in elections. However, the issue is not so simple.

Although the Supreme Court of the United States (SCOTUS) said in the *Citizens United* decision that corruption or the appearance of corruption of public officials could not happen because the Federal Election Committee (FEC) would enforce the clear definition of federal election activity in the existing McCain-Feingold campaign finance law, the League of Women Voters (LWVUS) differs. The LWVUS has testified before the Federal Election Committee and has joined other organization in writing letters to President Obama urging him *"to repair the grave damage to the enforcement of federal campaign finance law that has been done by the spectacularly dysfunctional Federal Election Commission (FEC)"²*. The League's position on the FEC is noted in *"A Primer for Engagement of League Members and Fellow Citizens-2014"*.

"At present, the Commission is not functioning effectively and needs a complete structural overhaul according to The American Constitution Society for Law and Policy. As of the end of 2013, the FEC no longer exercises its enforcement powers. The League advocates for better enforcement by the FEC. Questions would remain: Can the FEC become an agency with

¹ About the FEC, Federal Elections Commission, <http://www.fec.gov/about.shtml>, viewed 1/11/16.

² League of Women Voters Letter to President Barack Obama, "Deadlock on the Federal Election Commission", December 12, 2012, <http://lww.org/content/league-continues-call-president-obama-fix-fec>.

enforcement teeth? Can its rules be expanded to regulate PACs, Super PACs, and Hybrid PACs more effectively?"³

On February 11, 2015, LWVUS President Elisabeth MacNamara testified at a FEC Hearing on "Corruption in the Political Process". She stated, in part,

Secret money has no place in America's elections. Voters deserve to know -- have a right to know -- who is making unlimited political expenditures and influencing elections... However, the Center for Responsive Politics reports that almost a third of outside spending since 2010 has been from dark money groups, amounting to at least \$617 million of dark money in our elections, and the Brennan Center calculated that roughly 91 percent of the money spent in the 2014 Senate races by groups that hid some or all of their donors went to the eleven most competitive contests. And in those eleven contests, 59 percent of non-party outside spending came from groups that hid some or all of their donors.

Fair and clean elections, determined by the votes of American citizens, should be at the center of our democracy. Enhanced disclosure is the most basic step toward protecting the role of voters and ensuring that they can make informed decisions...

It is time for the FEC to step in and recognize that the fact that coordinated spending is occurring and must be better regulated. Candidates should not be allowed to solicit funds or assist in fundraising for outside groups that engage in independent campaigns. Campaign professionals should not be able to play musical chairs between candidate campaigns and independent spending groups. And family members should not be in the position of setting up supposedly independent activities."⁴

Other LWVUS actions, testimony and letters to FEC can be found at the following links.

<http://lww.org/content/league-calls-fec-reconsider-pay-pay-rules>

<http://lww.org/press-releases/league-and-partners-surpass-fec-petition-goal>

Congress Can Play a Role in the Enforcement of Campaign Finance Laws

Congress could support the FEC and require them to do their job, i.e., interpret and enforce campaign finance laws, provide the public clarity on what's acceptable, close loopholes, and require donors and recipients of campaign contributions to accurately identify themselves. For the FEC to be able to do this

³ "Money in Politics: Developing a Common Understanding of the Issues", League of Women Voters, May 2014, p.15, <http://lww.org/files/cfr%20Primer%20Final%20May%202017.pdf#page=1&zoom=auto,-13,798>.

⁴ MacNamara, Elisabeth, "Statement by Elisabeth MacNamara for FEC Hearing on 'Corruption in the Political Process'", Federal Election Commission Hearing on Corruption in Our Political Process, League of Women Voters, February 11, 2015, <http://lww.org/content/statement-elisabeth-macnamara-fec-hearing-corruption-political-process>, viewed 8/15/15.

work, the Commission members need timely confirmation by the Senate, the agency needs to be fully funded, and reform measures must be implemented and adopted by Congress. However, the chairwoman of the FEC says she has largely given up hope of reining in abuses in the 2016 presidential campaign, which could generate a record \$10 billion in spending.⁵

The commission is paralyzed because of ideological differences that have created a stalemate among the six members of the committee, three Republicans and three Democrats. Ellen Weintraub, a Democratic commissioner has stated that people feel free to ignore the few rules that are left. She further said, *“Republican members of the commission see no such crisis. They say they are comfortable with how things are working under the structure that gives each party three votes. No action at all, they say, is better than overly aggressive steps that could chill political speech.”*⁶

How did the FEC get to this point?

The following excerpts outlining the developmental history of the FEC are from a FEC brochure.⁷

“As early as 1905, President Theodore Roosevelt recognized the need for campaign finance reform and called for legislation to ban corporate contributions for political purposes. In response, Congress enacted several statutes between 1907 and 1966 which, taken together, sought to:

- *Limit the disproportionate influence of wealthy individuals and special interest groups on the outcome of federal elections;*
- *Regulate spending in campaigns for federal office; and*
- *Deter abuses by mandating public disclosure of campaign finances.*

In 1971, Congress consolidated its earlier reform efforts in the Federal Election Campaign Act (FECA), instituting more stringent disclosure requirements for federal candidates, political parties and political action committees (PACs). Still, without a central administrative authority, the campaign finance laws were difficult to enforce.

Public funding of federal elections originally proposed by President Roosevelt in 1907 began to take shape in 1971 when Congress set up the income tax checkoff to provide for the financing of Presidential general election campaigns and national party

⁵ Lichtblau, Eric, "F.E.C. Can't Curb 2016 Election Abuse, Commission Chief Says", The New York Times, May 2, 2015, http://www.nytimes.com/2015/05/03/us/politics/fec-cant-curb-2016-election-abuse-commission-chief-says.html?_r=0.

⁶ Lichtblau, Op. Cit.

⁷ "The FEC and the Federal Campaign Finance Law Brochure", Federal Elections Commission, February 2004, updated January 2015, <http://www.fec.gov/pages/brochures/fecfecfa.shtml>, viewed 8/15/15.

conventions. Amendments to the Internal Revenue Code in 1974 established the matching fund program for Presidential primary campaigns.

Following reports of serious financial abuses in the 1972 Presidential campaign, Congress amended the FECA in 1974 to set limits on contributions by individuals, political parties and PACs. The 1974 amendments also established an independent agency, the Federal Election Commission (FEC) to enforce the law, facilitate disclosure and administer the public funding program. Congress made further amendments to the FECA in 1976 following a constitutional challenge in the Supreme Court case Buckley v. Valeo; major amendments were also made in 1979 to streamline the disclosure process and expand the role of political parties.

The FEC administered the first publicly funded Presidential election in 1976.

The next set of major amendments came in the form of the Bipartisan Campaign Reform Act of 2002 (BCRA). Among other things, the BCRA banned national parties from raising or spending nonfederal funds (often called "soft money"), restricted so-called issue ads, increased the contribution limits and indexed certain limits for inflation.

As required by law, the Commission keeps enforcement matters strictly confidential until they are concluded. Once the Commission has closed a MUR (Matters Under Review), the pertinent documents are placed on the public record.

Portions of this publication may be affected by the Supreme Court's decision in Citizens United v. FEC. Essentially, the Court's ruling permits corporations and labor organizations to use treasury funds to make independent expenditures in connection with federal elections and to fund electioneering communications. The ruling did not affect the ban on corporate or union contributions or the reporting requirements for independent expenditures and electioneering communications. The Commission is studying the Court's opinion and will provide additional guidance as soon as possible.

The Commission has exclusive jurisdiction over the civil enforcement of the federal campaign finance law.

FEC staff may generate enforcement actions (MURs) in the course of reviewing the reports filed by committees. In addition, individuals and groups outside the agency may initiate MURs by filing complaints. Other government agencies may also refer enforcement matters to the FEC.

If four of the six Commissioners vote to find reason to believe that a violation of the law has occurred, the Commission may investigate the matter. If the Commission decides that the investigation by the FEC's Office of General Counsel confirms that the law has been

violated, the Commission tries to resolve the matter by reaching a conciliation agreement with the respondents. The agreement may require them to pay a civil penalty and take other remedial steps. If an agreement cannot be reached, however, the Commission may file suit against the appropriate persons in a U.S. District Court."

Examples of Gridlock within the FEC

Gridlock at the FEC is a result of sharp ideological divides among members and the fact that there is an even number of commissioners. The three Republicans believe the agency should protect free speech rights by allowing big money contributions and expenditures. The two Democrats and one Independent believe in strong regulation to control the political influence of corporations and wealthy donors.

In 2012, the FEC's Office of General Counsel recommended investigation of *Crossroads GPS* because their political spending was calculated to exceed 50%, which would classify them as a PAC, not a social welfare organization [501(c)(4)]. That recommendation was revealed by the FEC in 2014, but by then it was irrelevant, since the FEC did not act on it because of gridlock on the commission; i.e. a tie vote (3-3). *Crossroads GPS* disputed that percentage, claiming 38.8% campaign-related expenditures and that the group's primary purpose wasn't campaign activity.⁸ The change of IRS status would mean *Crossroads GPS* would have to reveal its donors.

On January 31, 2014, *Public Citizen* filed suit in the U.S. District Court for the District of Columbia challenging the FEC's failure to investigate whether *Crossroads GPS* met the legal definition of a "political committee." This suit was pursuant of a previous complaint in 2010, when *Public Citizen* had filed an administrative complaint with the FEC alleging that *Crossroads GPS* had violated federal campaign finance law by failing to register and report as a political committee during the 2010 elections. Although the FEC's Office of the General Counsel recommended an investigation of whether *Crossroads GPS* had violated the law, the FEC deadlocked 3-3 in December 2013 on whether to investigate and consequently, dismissed the administrative complaint.⁹

Another example of gridlock that occurred in 2012 was a case in which the FEC received a complaint about a race in North Carolina in which a robo call targeted a candidate for the House using "trigger words" covered in FEC regulations. There was no identification of its sponsor. Again there was a stalemate, and no action was taken.¹⁰

⁸ Hamburger, Tom and Gold, Matea, "Crossroads GPS Probably Broke Election Law, FEC Lawyers Concluded", Washington Post, January 15, 2015, https://www.washingtonpost.com/politics/crossroads-gps-likely-broke-election-law-fec-staff-reports-concluded/2014/01/15/15af18b6-7d73-11e3-93c1-0e888170b723_story.html, viewed 8/15/15.

⁹ "Public Citizen v. FEC", The Campaign Legal Center, <http://www.campaignlegalcenter.org/case/public-citizen-v-fec>, viewed 8/15/15.

¹⁰ Carney, Eliza Newlin, "Rules of the Game: Lame-Duck FEC Invites Scofflaws", Roll Call, April 5, 2015, http://www.rollcall.com/news/rules_of_the_game_lame_duck_fec_invites_scofflaws-223626-1.html, viewed 8/15/15.

History of the Funding for the FEC

The Federal Election Commission (FEC) was well funded from 1992 through 2005. Employment peaked in 2005 but has declined since, even though spending in federal election cycles has increased dramatically and workloads are exploding. Independent auditors have said FEC technology and software are outdated. Morale is low, with employees analyzing record numbers of reports. Political spending on campaigns went from \$2.85 billion in the 2005-2006 cycle to \$6.3 billion in the 2011-2013 cycle.¹¹

In 2010, the Federal Election Commission (FEC) budget was \$66.5 million; in 2013, it was \$63 million (because of across the board spending cuts); and in 2014, it was about \$65.8 million.¹²

Dave Levinthal, of the Center for Public Integrity, has written a series of articles about this situation. Initially, he wrote,

“In 2005, 385 people worked at the FEC. By late last year, just 338 people worked at the agency, which ended 2013 with 2.2 million pages worth of campaign finance disclosure reports not reviewed for errors, anomalies and completeness. That's a 22-week backlog, Goodman (former FEC chair/now commissioner) estimated at the time.”¹³

Later, he also wrote,

“Earlier this month (March 2013), President Barack Obama's fiscal year 2015 federal government budget proposal recommended \$67.5 million for the FEC — \$500,000 less than the FEC had requested in September. The White House's proposed allotment was a slight increase compared to the FEC's current budget of \$65.8 million, which is itself below the agency's funding level from four years ago. The FEC has warned Congress that their staff vacancies hurt their mission. The Committee on House Administration and Senate Committee on Rules and Administration have oversight of the FEC but are doing nothing about the problems. “Yet the fiscal year 2015 budget proposal was short of the millions of new dollars that'd be required to quickly — and all at once — fill dozens of FEC staff positions either cut or left vacant in recent years, erase a campaign finance report processing backlog 2 million pages thick and address numerous computer and IT needs.”¹⁴

¹¹ Levinthal, Dave, "How Washington Starves Its Election Watchdog", The Center for Public Integrity, December 17, 2013, <http://www.publicintegrity.org/2013/12/17/13996/how-washington-starves-its-election-watchdog>, viewed 8/15/15.

¹² Dave Levinthal, "Spending bill: FEC budget still below 2010 levels", *The Center for Public integrity*, Jan. 14, 2014, <http://www.publicintegrity.org/2014/01/14/14105/spending-bill-fec-budget-still-below-2010-levels>, viewed 01/12/16

¹³ Ibid.

¹⁴ Levinthal, Dave, "Congressional Investigations of FEC Stalled", The Center for Public Integrity, March 11, 2014, . <http://www.publicintegrity.org/2014/03/11/14390/congressional-investigations-fec-stalled>, viewed 8/15/15.

Describing the Chinese hacker attack of the FEC in October 2013, Dave Levinthal reported,

“The government had furloughed all 339 agency employees, save for the presidentially-appointed commissioners, and not even one staffer had been deemed “necessary to the prevention of imminent threats” to federal property, the minimum measure for keeping someone on the job.”

“It happened just months after an independent auditor commissioned by the government warned that the FEC’s information systems were at “high risk” of infiltration — a charge the FEC roundly disputed, saying its “systems are secure.”

An analysis of thousands of records and interviews with more than 50 current and former commissioners, staff members and associates reveals:

- *The commission over the past year has reached a paralyzing all-time low in its ability to reach consensus, stalling action on dozens of rulemaking, audit, and enforcement matters, some of which are years old.*
- *Despite an explosion in political spending hastened by key Supreme Court decisions, the agency’s funding has remained flat for five years and staffing levels have fallen to a 15-year low.*
- *Analysts charged with scouring disclosure reports to ensure candidates and political committees are complying with laws have a nearly quarter-million-page backlog. Commissioners themselves are grappling with nearly 270 unresolved enforcement cases.*
- *Staff morale has plummeted as key employees have fled and others question whether their work remains relevant. Among top FEC jobs currently unfilled or filled on an “acting” basis: general counsel, associate general counsel for policy, associate general counsel for litigation, chief financial officer and accounting director. The staff director doubles as IT director.¹⁵*

Levinthal reported for the Center for Public Integrity on March 7, 2014,

“The agency has reduced its workforce by 8 percent during the past four years, and during fiscal year 2013, left empty 19 of 24 vacant positions. At the moment, it has no general counsel, associate general counsel for litigation, associate general counsel for policy or chief financial officer. Its human resources division is operating with half a staff. Its audit division — critical to determining whether political committees are complying with laws — is down a manager and two staffers. But it also notes that ‘unfilled staff vacancies at all levels across the agency have begun to affect negatively the FEC’s ability to provide public services.’ — particularly its division that reviews and analyses campaign

¹⁵ Levinthal, "Starves Election Watchdog", Op. Cit.

finance reports. To date, about two million such reports have not been checked for errors, completeness and potential illegalities, the FEC notes.”¹⁶

In February 2015, Levinthal reported on a funding increase proposed by President Obama. He stated, *“President Obama’s proposal for the fiscal 2016 budget allots \$71.1 million to the FEC, up from \$67.5 million in the 2015 budget, with an additional \$5 million for possible moving costs since the FEC’s lease is up. Most of the new money goes to staff salaries, but some would go to switching to electronic filing of Senate campaign reports. However, the Senate prefers filing its reports on paper, so that probably won’t happen.”¹⁷*

Congressional committees are in charge of how the government will raise and spend money via the appropriations process. Increased funding for the FEC does seem highly unlikely since the budget that Congress passed cuts 2016 spending to below the 2015 budget numbers, restoring discretionary spending caps and reinstating the sequester of 2013. The appropriation bills must be signed into law by the president by October 1 or else the government risks a shutdown.¹⁸

Potential Strategies for Increasing the Effectiveness of the FEC

Increased funding for the agency: The Federal Election Commission (FEC) does not have adequate funding to do its job competently. They do not have an effective system for tracking donor contributions, thus making it easy to violate the law. Paul Blumenthal, for Huffington Post, wrote, *“...there is no unique identifier—a user ID—required for donors to federal campaign committees. Donors can give under multiple names, use different addresses and list varying occupations and employers, making it very difficult for the agency to track one individual’s donations.”¹⁹*

In 2006, the FEC assessed more than \$6.7 million in fines—an all-time high—for violations ranging from not disclosing campaign donors to filing mandatory campaign finance reports late. By 2012, it collected less than \$1 million in fines, one of its most meager years since 1995, according to agency records.²⁰

As stated above, SCOTUS said in the Citizen United decision that corruption or the appearance of corruption of public officials could not happen because the FEC would enforce the clear definition of federal election activity in the existing McCain-Feingold campaign finance law. Clearly, the Federal

¹⁶ Levinthal, Dave, "FEC Wants Millions in New Cash to Fix Security Woes", The Center for Public Integrity, March 7, 2014, <http://www.publicintegrity.org/2014/03/07/14371/fec-wants-millions-new-cash-fix-security-woes>, viewed 8/15/15.

¹⁷ Levinthal, Dave, "Obama budget includes \$5M for FEC offices", The Center for Public Integrity, February 2, 2015, <http://www.publicintegrity.org/2015/02/02/16683/obama-budget-includes-5m-fec-offices>, viewed 8/15/15.

¹⁸ Mathes, Michael, "US Republicans Pass \$3.8 Trillion 2016 Budget", Business Insider, May 5, 2015, <http://www.businessinsider.com/afp-us-republicans-pass-3.8-trillion-2016-budget-2015-5>, viewed 8/15/15.

¹⁹ Blumenthal, Paul, "Campaign Contribution Limits Broken Repeatedly In 2012 Election With No FEC Oversight", Huffington Post, May 3, 2013, http://www.huffingtonpost.com/2013/05/03/campaign-contribution-limits_n_3132474.html, viewed 8/15/15.

²⁰ Levinthal, "Starves Election Watchdog", Op. Cit.

Election Commission is no longer able to enforce existing campaign regulatory laws effectively. As the evidence above demonstrates, more funding of the agency may be one way to help increase the effectiveness of the FEC.

Non-partisan composition of the FEC Commission: The Federal Election Commission has six voting members who serve staggered six-year terms. The Commissioners are appointed by the President with the advice and consent of the U.S. Senate. No more than three Commissioners may belong to the same political party. The Commissioners elect two members each year to act as Chairman and Vice Chairman.²¹

At the beginning of 2008, the FEC literally could not function—only two (out of six) commissioners remained on the job. In June 2008, the Senate confirmed four commissioners.²² In April 2013, five of six FEC commissioners were serving with expired terms.²³ On September 23, 2013, the U.S. Senate approved two FEC commission members who were nominated on June 21 by President Obama. Legally, the four other commissioners were allowed to continue serving on expired terms.²⁴ As of August 5, 2015, five out of the six FEC commission members are serving on expired terms.²⁵ As the evidence above demonstrates, nonpartisan appointments with enforced term limits may be another way to increase the effectiveness of the FEC.

Recent Legislation Affecting the FEC

The following bills are examples of legislation affecting the FEC. The first one supports the FEC; the second one obstructs the FEC.

H.R. 3487: *“To amend the Federal Election Campaign Act to extend through 2018 the authority of the Federal Election ...”* was introduced Nov 14, 2013 and passed by voice vote in both House and Senate and signed into law by President. Obama. Library of Congress summarized H.R. 3487 bill as follows:

“Amends the Federal Election Campaign Act of 1971 to extend through December 31, 2018, the authority of the Federal Election Commission (FEC) to impose civil money penalties on the basis of a schedule of penalties it has established and published. Applies such penalties to violations of qualified campaign contribution and expenditure disclosure requirements. ”

²¹ "The FEC and the Federal Campaign Finance Law Brochure", Federal Elections Commission, February 2004, updated January 2015, <http://www.fec.gov/pages/brochures/fecfeca.shtml>, viewed 8/15/15.

²² Levinthal, "Starves Election Watchdog", Op. Cit.

²³ Carney, "Rules of the Game", Op. Cit.

²⁴ Levinthal, Dave. "Federal Election Commission Gets New Blood." The Center for Public Integrity, September 23, 2013,. <http://www.publicintegrity.org/2013/09/23/13454/federal-election-commission-gets-new-blood>, viewed 8/15/15.

²⁵ What Are the Terms of FEC Commissioners and Who Is Currently Serving? , "Frequently Asked Questions: Agency Questions", Federal Election Commission, <http://fec.gov/press/faqs.shtml>, viewed 8/15/15.

H.R. 672 (2011) attempted to amend the *Help America Vote Act of 2002* so as to terminate the Election Assistance Commission (EAC), the EAC Standards Board, and the EAC Board of Advisors. It would have required the FEC to: (1) study the procedures for the testing, certification, decertification, and recertification of voting system hardware and software used in federal elections, and (2) develop a recommendation on the entity best suited to oversee and carry out such procedures. The vote was taken under a procedure called “suspension of the rules” which requires a 2/3 majority. It failed. Voting yea: WA Reps. Herrera-Beutler, Hastings, McMorris Rodgers, Reichert; voting nay: Reps. Inslee, Larsen, Dicks, McDermott, Smith. The LWVUS opposed this bill.