



Testimony of Campaign Legal Center & Democracy 21

Submitted to the Committee on House
Administration; Subcommittee on Elections

“Federal Election Commission: Reviewing
Policies, Processes and Procedures”

November 3, 2011

Mr. Chairman, distinguished committee members, thank you for this opportunity to provide our views on the Federal Election Commission (FEC)—its policies, processes and procedures.

The Campaign Legal Center (CLC) is a nonpartisan, nonprofit organization founded in 2002 that works in the areas of campaign finance, elections and government ethics. The Legal Center offers nonpartisan analyses of issues and represents the public interest in administrative, legislative and legal proceedings. The Legal Center also participates in generating and shaping our nation's policy debate about money in politics, disclosure, political advertising, and enforcement issues before the Congress, the FEC, the Federal Communications Commission (FCC) and the Internal Revenue Service (IRS). The Legal Center's President is Trevor Potter, former Chair of the Federal Election Commission, and our Executive Director is Gerry Hebert, former acting head of the Voting Section of the Civil Rights Division at the Department of Justice.

Democracy 21 is a nonpartisan, nonprofit organization that works to strengthen our democracy and protect against government corruption by promoting campaign finance reforms and other government integrity measures. The organization undertakes efforts to curb the role of influence-money in American politics and to provide for honest and accountable elected officeholders and public officials. Democracy 21 has played an active role in FEC matters, including frequent participation in rulemakings, advisory opinions and enforcement matters.

More than a decade ago, Democracy 21 President Fred Wertheimer convened the Project FEC Task Force, a bipartisan blue-ribbon citizen Task Force composed of some of the nation's most experienced and respected campaign finance and law enforcement experts. Trevor Potter, President of the Campaign Legal Center and former FEC Commissioner, served as a Senior Advisor to the project and a member of the Task Force. Donald Simon, general counsel to Democracy 21, served as a Senior Advisor and a principle editor of the Task Force report. In 2002, the Task Force produced a detailed report entitled *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*.¹

The report, at nearly 150 pages, exhaustively detailed fundamental problems with the FEC and the central role the agency had played in creating and perpetuating campaign finance problems during its first nearly-three decades in existence. Given the enormous failures of the FEC in its first three decades of existence, the Task Force called for a complete overhaul of the agency—replacing the six-member, deadlock-prone commission with completely new agency headed by a single administrator and dramatically strengthening the agency's enforcement powers.

Unfortunately, the FEC has only gotten worse—much worse—in the decade since *No Bark, No Bite, No Point* was published. Today the FEC is more dysfunctional than ever. The agency's persistent 3-3 deadlock votes on important matters—enforcement actions, advisory opinions, rulemaking proceedings—have all but nullified the FEC in recent years. As the most expensive election in this nation's history kicks into high gear, fueled by corporate and union dollars injected into the system by the Supreme Court's *Citizens United* decision, the likelihood of any meaningful campaign finance law enforcement is slim-to-none. Furthermore, because of a disclosure loophole created by the FEC in 2007 that today's Commissioners refuse to fix,

¹ Available at <http://www.democracy21.org/vertical/Sites/%7B3D66FAFE-2697-446F-BB39-85FBBA57812%7D/uploads/%7BB4BE5C24-65EA-4910-974C-759644EC0901%7D.pdf>.

American voters will have less information than ever before about the identity of wealthy donors and corporate interests spending tens and perhaps hundreds of millions of dollars to sway their votes. 2012 will be a money-in-politics wild west and corruption scandals will inevitably follow.

The Supreme Court has made the campaign finance system bad, but the FEC's failure to enforce what law remains on the books, and its creation of unnecessary loopholes that undermine the disclosure that even the Supreme Court approved of, makes a bad situation very much worse.

Consequently, Democracy 21 and the Campaign Legal Center renew our longstanding call for replacement of the FEC with a new, well-funded, independent campaign finance regulatory and enforcement agency.

Examples of FEC Deadlock Dysfunction

Still No Post-Citizens United Rulemaking

In January 2010, the Supreme Court issued its landmark decision in *Citizens United*,² striking down restrictions on the use of corporate and, by extension, labor union treasury funds to influence federal elections through express advocacy political ads (e.g., "Reelect Obama," "Vote Romney"). The five-justice *Citizens United* majority assured us all that we need not worry about corruption resulting from this new unlimited corporate and union money in politics because voters would have full-disclosure of the sources of this money. In fact, eight of the Court's nine justices upheld against First Amendment challenge disclosure provisions enacted as part of the Bipartisan Campaign Reform Act of 2002 (BCRA). Justice Kennedy wrote on behalf eight members of the Court:

A campaign finance system that pairs corporate independent expenditures with effective disclosure has not existed before today. It must be noted, furthermore, that many of Congress' findings in passing BCRA were premised on a system without adequate disclosure. With the advent of the Internet, prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters. Shareholders can determine whether their corporation's political speech advances the corporation's interest in making profits, and citizens can see whether elected officials are "'in the pocket' of so-called moneyed interests." The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.³

Apparently, the *Citizens United* Court was unaware of the fact that the FEC, in a 2007 rulemaking, had eviscerated the BCRA "electioneering communication" disclosure requirements praised by the Court as "enable[ing] the electorate to make informed decisions and give proper weight to different speakers and messages." Whereas BCRA requires every person or group that spends more than \$10,000 on "electioneering communication" to disclose the names and addresses of all contributors who gave \$1,000 or more to that person or group, the FEC took it

² *Citizens United v. FEC*, 130 S. Ct. 876 (2010).

³ *Id.* at 916 (internal citations omitted).

upon itself to gut this disclosure requirement by “instead . . . requir[ing] corporations and labor organizations to disclose only the identities of those persons who made a donation aggregating \$1,000 or more specifically for the purpose of furthering [“electioneering communication”] made by that corporation or labor organization”⁴

Despite the fact that Congress in BCRA required disclosure of the identity of large donors to groups running election ads, the FEC decided not to enforce that requirement and instead it only requires disclosure if the donor specifically designated the funds to be used for electioneering communication. Of course it was entirely predictable that those wishing to evade disclosure would simply refrain from designating their funds for electioneering communications and, instead, would give for no designated purpose at all. Thus, under the FEC’s rule, there is no disclosure of who funds the electioneering communications.

In short, the FEC had legalized money laundering. Consequently, donor disclosure by groups spending tens of millions of dollars on “electioneering communication” plummeted in 2010. The U.S. Chamber of Commerce, for example, spent more than \$30 million on “electioneering communication” in the 2010 elections and did not disclose its donors; similarly the American Action Network spent more than \$20 million on “electioneering communication” in the 2010 elections and did not disclose its donors.⁵

So what is the FEC doing about the loophole it created in federal disclosure law—a loophole that guts the disclosure required by Congress in BCRA and directly undermines the *Citizens United* Court’s assurances that voters will have the information necessary “to make informed decisions and give proper weight to different speakers and messages”?⁶ It is doing nothing.

The FEC is so dysfunctional that it cannot muster the necessary four votes to even begin a post-*Citizens United* rulemaking to address this and other issues. Twice this year the FEC has deadlocked 3-3 on votes to approve a Notice of Proposed Rulemaking (NPRM), which is merely the first step of inviting public comment about what issues the Commission should and should not address through promulgation and/or repeal of regulations. The purpose of an NPRM is to announce publicly the full scope of issues that might be addressed by the Commission in a rulemaking proceeding, along with descriptions of various ways the Commission might address those issues.

Rather than invite public input on whether the FEC should revisit the disclosure loophole it created in 2007, Vice Chair Hunter, together with Commissioners Petersen and McGahn, have twice this year voted against approving an NPRM that contemplates amendment of the Commission’s disclosure rules, resulting in 3-3 deadlock votes with Chair Bauerly and Commissioners Walther and Weintraub.

Consequently, the donor disclosure loophole created by the FEC in 2007 will undoubtedly be exploited even more extensively in 2012. Incorporated nonprofit entities including the U.S. Chamber of Commerce, Republican-supporting Crossroads GPS, Democrat-supporting Priorities

⁴ FEC, Electioneering Communications, Final Rule and Explanation and Justification, 72 Fed. Reg. 72899, 72911 (Dec. 26, 2007).

⁵ For more information on outside group “electioneering communication” without disclosing donors, see Center for Responsive Politics, *Outside Spending 2010*, available at <http://www.opensecrets.org/outsidespending/index.php?cycle=2010&view=A&chart=N>.

⁶ *Citizens United v. FEC*, 130 S. Ct. at 916.

USA and many more like them, all of which are permitted to spend money on election ads as a result of *Citizens United*, will legally launder hundreds of millions of undisclosed special interest dollars into the 2012 elections while the FEC stands by idly. (Rep. Chris Van Hollen has filed a lawsuit to challenge the legality of the FEC's deficient disclosure regulations. That lawsuit is pending in the U.S. district court in Washington, DC, where the FEC is defending its loophole-creating rule.)

Another sticking point in the initiation of a post-*Citizens United* rulemaking is whether or not to invite public comment on the Commission's rules pertaining to foreign-owned domestic corporations. The Court concluded in *Citizens United* that it "need not reach the question whether the Government has a compelling interest in preventing foreign individuals or associations from influencing our Nation's political process."⁷ This means that the federal law ban on political expenditures by foreign nationals remains in effect.⁸ What remains unclear is whether or how a U.S.-based corporation with some degree of foreign ownership can make political expenditures now allowed by the *Citizens United* decision. For example, what percentage of foreign ownership would render a Delaware-based corporation a foreign national prohibited from making political expenditures? Three FEC Commissioners proposed including these issues in a post-*Citizens United* NPRM, while three refused to allow it.

We cannot stress strongly enough the absurdity of this predicament the FEC has created. The *Citizens United* decision has created ambiguity in numerous areas of campaign finance law and highlighted enormous deficiencies in the Commission's disclosure regulations. Yet the Commission is unable to even begin a rulemaking proceeding to address these issues. Inaction equals non-enforcement and non-enforcement is wholly unacceptable.

Refusal to Penalize Clear Violations of the Law

The FEC's dysfunction-by-deadlock is not limited to critical rulemakings. The FEC also frequently deadlocks on important enforcement actions. Earlier this year in *In Re Steve Fincher for Congress* (Matter Under Review (MUR) 6386), the Commission was presented with a complaint that revealed a clear violation of federal disclosure laws. A candidate admittedly misreported a \$250,000 bank loan as a loan of his personal funds to his campaign committee. All six Commissioners agreed with the Office of General Counsel's conclusion that the law had been broken. However, the Commission deadlocked 3-3 on the General Counsel's recommendation that a significant civil monetary penalty be imposed. Chair Bauerly, together with Commissioners Walther and Weintraub voted to impose the recommended civil penalty, while Vice Chair Hunter, together with Commissioners McGahn and Peterson voted against imposition of a monetary penalty for the violation. Because any Commission action requires four affirmative votes, the three Republican Commissioners blocked penalization of a clear, admitted violation of federal law.

Deadlock party-line votes on enforcement actions—with the Republican Commissioners voting to dismiss enforcement actions and the Democratic Commissioners voting to investigate and enforce the law—have become all-too-common at the FEC in recent years. Since the beginning of 2010 alone, the Commission has deadlocked on party lines in the following MURs: *In Re Aristotle International, Inc.* (MUR 5625) 3-3 vote; *In Re BASF Corporation* (MUR 6206) 3-3

⁷ *Citizens United v. FEC*, 130 S. Ct. at 911.

⁸ See 2 U.S.C. § 441e.

vote; *In Re Freedom's Watch, Inc.* (MUR 6002) 2-3 vote (Walther recused); *In Re John Gomez* (MUR 6320) 2-3 vote (Bauerly absent); *In Re David Schweikert for Congress* (MUR 6348) 3-3 vote; *In Re Friends of Christine O'Donnell, et al.* (MUR 6371) 3-3 vote; *In Re Yoder for Congress* (MUR 6399) 2-3 vote (Walther did not vote); *In Re Unknown Respondents* (MUR 6429) 2-3 vote (Walther did not vote).

The Commission's Vice Chair Hunter, together with Commissioners Petersen and McGahn, have basically shut down the FEC enforcement operation. Enforcement of campaign finance laws is essential to compliance. The FEC refuses to do its job because of intransigence by the Republican Commissioners. The Republican Commissioners' refusal to faithfully execute the powers of their office is not a question of disagreement over the finer points of law but, rather, is a calculated effort to impose on the agency their ideological goal of deregulation of campaign finance. Put simply, they fundamentally disagree with the laws they are sworn to uphold and enforce. And so they refuse to uphold and enforce them.

Recommendations for the Committee on House Administration

The FEC has convincingly demonstrated over its nearly-four decades in existence that it cannot and will not do its job. The FEC is a failed agency. We urge the committee to scrap the Commission and replace it with a new, well-funded, independent campaign finance regulatory and enforcement agency. Ten years ago, Democracy 21, the Campaign Legal Center and the Project FEC Task Force provided Congress with a blueprint for such a new agency in its report *No Bark, No Bite, No Point*. The creation of such a new agency should rest on five foundational principles:

1. The new agency with responsibility for the civil enforcement of the federal campaign finance laws should be headed by a single administrator.
2. The new agency should be independent of the executive branch.
3. The new agency should have the authority to act in a timely and effective manner, and to impose appropriate penalties on violators, including civil monetary penalties and cease-and-desist orders, subject to judicial review. A system of adjudication before administrative law judges should be incorporated into the new enforcement agency in order to achieve these goals.
4. A means should be established to help ensure that the new agency receives adequate resources to carry out its enforcement responsibilities.
5. 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.

These principles are detailed in the report and served as the basis of legislation introduced in the 110th Congress.⁹ If campaign finance laws are to accomplish their goals of preventing corruption and maintaining a well-informed electorate, it is essential to establish a new system for enforcing these laws.

⁹ H.R. 421 (110th Cong., 1st Sess.).