Symposium on the Federal Election Commission*

I. INTRODUCTION

Daniel R. Ortiz**

The FEC holds unique power. While other agencies may anger and annoy interests who, in turn, complain to Congress, the FEC often goads Congress itself. When the FEC speaks, Congress listens. Such power, of course, comes with a price. Although Congress may listen attentively to what the FEC proposes, it is still Congress that ultimately disposes. Through oversight, its informal appointment powers, budget-setting, and control of the substantive law, Congress can bring the agency to heel. The FEC's power comes as both bane and blessing.

On October 22, 1993, the Election Law Committee of the American Bar Association's Administrative Law Section mounted a panel to discuss the FEC in light of its peculiar position as an agency that both regulates candidates and is regulated by some of those same candidates. Participants representing four quite different perspectives both assessed how well the FEC has performed and argued over particular structural reforms. Representative Livingston, Chairman of the House Republican Task Force on Campaign Finance Reform and ranking member of the Commission's primary oversight subcommittee, offered a view from Congress and the Republican party. Michael Waldman, Special Assistant to the President for Policy Coordination and the person responsible for pulling together the administration's campaign finance reform proposals, provided a perspective from the executive branch and the Democratic party. Elizabeth Hedlund, Director of FEC Watch and well-known critic of the Commission, offered a public interest perspective. Finally, Clay Mulford, general counsel of United We Stand America and former

* Panel Discussion of the American Bar Association, Election Law Committee, Administrative Law Section, October 22, 1993, Washington, D.C.
** Professor of Law, University of Virginia School of Law.
general counsel to the Perot presidential campaign, weighed in from the vantage of independent candidates.

As might be expected, the participants argued heatedly over those perennial consensus-busters—public financing, spending and contribution limits, PACs, the role of the FEC General Counsel, and, of course, the intricacies of the latest wave of campaign finance reform proposals, especially the ones working their way through the legislative process right now. The comments proved keen and some surprising, if fleeting, coalitions formed on the panel between representatives of groups usually thought to hold opposed interests.

One great surprise occurred. As much as the panelists disagreed about substantive campaign finance regulation, they agreed, remarkably so, on how the Commission itself should be rethought and reformed. All sides understood the need for (i) restructuring the FEC to increase its independence, (ii) giving the FEC greater enforcement powers and, just as important, (iii) providing it with greater resources so that it can adequately enforce its current mandates, let alone any additional future ones.

Independence proved the central issue. All panelists agreed that the Commission, as presently constituted, does not enjoy sufficient independence to assure either the public or those regulated that it always acts fairly. Of course, the particular complaints and recommendations for reform differed. The closer panelists were affiliated with the major political parties, the more they worried over the Commission’s lack of independence from political players on the other side. The outsiders, on the other hand, worried more about the Commission’s lack of independence from the established parties in general. To the first group, in other words, independence meant bipartisan control, whereas, to the other group, that view represented exactly the problem. To outsiders, bipartisan control presented dangers just as great as control by a single party. Both lead to entrenching particular interests, albeit somewhat different ones, and both work against some traditionally powerful conceptions of the public good.

These different fears drove much of the panel’s discussion of structural reform. Take the appointment and reappointment process, for example. Should commissioners be appointed differently? What can be done about commissioners seeking reappointment from the very people they are auditing or
investigating? Should commissioners be limited to a single term? Should the public, independent parties, or independent candidates be guaranteed some formal representation on the Commission? If so, how and how much representation should they get? The panelists affiliated with the major political parties had quite different answers to some of these questions than the other panelists did. But, still, all agreed on the central issue—the need for greater agency independence.

These different views of independence also drove other parts of the panel’s discussion. Again, although no one defended the Commission’s built-in propensity for partisan deadlock, the panel argued much over its implication for reform. Should the General Counsel, for example, be allowed to break Commission ties in certain circumstances? Should individual parties be allowed to seek judicial enforcement when the FEC itself deadlocks along party lines? Would such schemes enhance or diminish the agency’s independence? The answers seem to depend largely on one’s position in the existing framework. Representative Livingston feared such proposals might give Democratic party interests greater control over the Commission. The outsiders, on the other hand, tended to favor these proposals as ways to break the major parties’ perceived joint control.

Of course, structural concerns are, in large part, motivated by concerns of effectiveness. Although the panelists generally agreed that the FEC should better enforce campaign finance regulations, they sometimes disagreed as to what better enforcement would entail. For example, should the FEC focus on enforcing disclosure provisions more quickly and strictly, or should it focus instead on promulgating and enforcing rules providing standards for candidates to follow? This particular issue, implicated in the FEC’s current “personal use” rule-making, raises larger issues about the agency’s role and mission. Should it act primarily to increase the transparency of the political process so that voters and interest groups can themselves effectively police it or should the FEC act to police politics directly? This strand of the discussion drew not only on participants’ different notions of which regulatory strategies work and which do not, but also on different assessments of the dangers regulatory encroachment on politics might pose.

All the panelists agreed on one point—the FEC desperately needs more resources. No one, in fact, criticized its most recent request
for a twenty-five percent budget increase. Interestingly, however, Representative Livingston suggested that the possibility of an increase might function as a carrot or stick, depending upon how one prefers to view it, for Congress to hold over the FEC. Thus, the issues of enforcement and resources deeply implicate agency independence as well. If nothing else, the panel’s conversation revealed the interdependence of many concerns usually thought separate.

To summarize the discussion any further might prove a disservice. Not only would it risk inaccurately reflecting the panel’s often nuanced positions, but it would also risk pre-empting the reader’s own curiosity and ultimate investigation. I hope you will read on to discover and enjoy a sometimes remarkable conversation.