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Perhaps it is true that the sins of this life are punished in the hereafter. Hypocrites will be forced to wear gilded cowls of lead; illicit lovers will be buffeted about in an endless storm; the violent shall be torn asunder. If Dante is right, one wonders what circle of Hell awaits those who violate campaign finance laws. Most candidates and contributors, admittedly, do not have the luxury of contemplating how their actions will affect the afterlife. But the topic of crime and punishment in the realm of campaign finance regulation is important for practitioners and scholars alike.

Most of the recent legal debate has focused on the design and justifications of campaign finance reform. The literature concerns itself first with defining and clarifying the goals of campaign finance regulation—is the harm to be remedied essentially one of corruption or one of resource inequality, and how does one balance the prevention of these evils against the threats to free speech that regulations may bring[1]—and second with offering (or refuting) various theoretical proposals as to how the system can be made to accomplish these goals more effectively.[2] Yet a surprising lacuna exists as to the subject of enforcement. Inasmuch as equality is a concern not only in how laws are written (i.e. "equity by design") but also in how they are applied (i.e. "equity of

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[1] Bruce E. Cain, Moralism and Realism in Campaign Finance Reform, 1995 U. Chi. Legal For. 111; Daniel Hayes Lowenstein, "On Campaign Finance Reform: The Root of All Evil Is Deeply Rooted," 18 Hofstra L. Rev. 301 (1989); Shapiro, Martin, "Corruption, Freedom and Equality in Campaign Financing," 18 Hofstra L. Rev. 385 (1989); David A. Strauss, "Corruption, Equality, and Campaign Finance Reform," 94 Col. L. Rev. 1369 (1994).

[2] Ian Ayres & Jeremy Bulow, "The Donation Booth: Mandating Donor Anonymity to Disrupt the Market for Political Influence," 50 Stan. L. Rev. 837 (1998); Kenneth A. Gross, "The Enforcement of Campaign Finance Rules: A System in Search of Reform," 9 Yale L. & Pol. Rev. 279 (1991); Samuel Issacharoff & Pamela S. Karlan, "The Hydraulics of Campaign Finance Reform, __ Tex. L. Rev. __ (1999); Daniel Ortiz, "Symposium on the Federal Election Commission," 10 J. Law & Pol. 369 (1994); Frank J. Sorauf, "Politics, Experience, and the First Amendment: The Case of American Campaign Finance," 94 Col. L. Rev. 1348 (1994).

implementation") we wish to provide a preliminary examination of the Federal Election Commission's enforcement of campaign finance laws. Such a task begets two questions: first, are the laws enforced in a skewed or biased fashion, and second, are they enforced in a way that effectively promotes goals such as political equality and the prevention of political corruption? Our preliminary evidence provides some support for the notion that the FEC unintentionally enforces the law in a skewed manner. More importantly, however, we question whether the present system of regulatory enforcement serves to accomplish any of the stated goals of campaign finance regulation.

In order to support our position, this paper is divided into three parts. Part One provides a brief theoretical summary of some institutional components that tend to promote effective regulatory enforcement. It then provides a brief overview of the extant discussion as to why the FEC is seen as failing in its regulatory task. Part Two describes the process by which the FEC enforces the law and provides an empirical evaluation of this enforcement by examining seventy-nine "Matters Under Review" covering just over 180 respondents. Part Three discusses the data and explains why truly effective regulatory enforcement of campaign finance regulation by the FEC would require greater infringement on first amendment rights than is presently suggested. We conclude by suggesting that the general ineffectiveness of regulatory enforcement, combined with the desire to minimize infringements on first amendment rights, supports an emphasis on disclosure and enforcement by "information"[3] rather than by regulatory enforcement grounded in administrative or civil fines.

I. Effective Regulatory Enforcement and Theories Explaining FEC Failure

A. Three Components of Effective Regulatory Enforcement

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[3] See generally Eugene Bardach and Robert Kagan, Going by The Book: The Problem of Regulatory Unreasonableness 243-270 (1982) (discussing the relative merits of traditional regulatory regimes and an "information" strategy of enforcement that relies upon consumer choice and market forces).

In order to assess the equity and efficacy of FEC enforcement practices, it is useful to begin by examining three generally recognized characteristics of effective regulatory regimes. Of course, regulatory agencies differ with respect to their formal legal powers and the degree to which agency structure invites or retards capture by the regulated industry; obviously there is no single archetype of "the effective agency." The FEC, for example, is somewhat unique in that it directly regulates the very people responsible for the agency's budget.[4] Campaign finance regulations also affect a regulated individual's constitutional rights in a decidedly direct manner that is not seen in other areas of regulatory law such as securities or environmental enforcement. Yet the FEC, like most other regulatory agencies, faces a common problem—severe resource constraints brought about by the simple fact that there are many more regulatees than regulators. In this environment of scarce resources, effective regulation often is dependent upon three factors: the ability of regulators to have long-term relationships with regulatees, the ability of regulators to impose a variety of enforcement sanctions, and the ability of regulators to compensate for the "skew" in enforcement that results from third-party enforcement.

The first key to an effective enforcement strategy within an environment of scarce agency resources is the ability to foster long-term relationships with regulatees who are repeat-players so that informal norms and predictable behavior may be established.[5]

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[4] "Colloquia: Federal Election Commission Panel Discussion: Problems and Possibilities," 8 Admin. L.J. Am. U. 223, 224 (1994).

[5] It is true that close relationships between regulators and regulatees potentially can promote the capture of the former by the latter. As such, it must be emphasized that long-term relationships, even ones based on informality and custom, need not imply that the agency has capitulated. Indeed, the viewpoint that the presence of a good working relationship between regulators and regulatees suggests that the agency is not doing its job is a distinctly American way of viewing government-business relations. See generally David Vogel, National Styles of Regulation: Environmental Policy in Great Britain and the United States 21-22 (1986) (noting that the British government actively fosters close relations between its regulators and the industries that they regulate and still achieves environmental regulation that is as effective at reducing pollution as its American counterpart). In any event, the transparency of the American regulatory process, see Bardach & Kagan, supra note 3 at 54, would help to prevent collusion.

John Scholz conceptualizes the enforcement relationship between agencies and the industries they regulate as an iterative prisoner's dilemma.[6] Regulatory agencies, according to Scholz, usually will have conflicting goals: Although ideally preferring a zero-tolerance strategy of aggressive prosecution that would most effectively deter future infractions, they also have an incentive to conserve agency resources, particularly when faced with comparatively trivial violations, by adopting a more conciliatory approach. Yet if the regulator seeks to avoid the expenditure of resources by simply obtaining the regulated firm's promise to remedy the infraction, there is a risk that the firm will seek to profit by delaying the remedial measures—or by ignoring the agency directive altogether—since the threat of legal sanctions has been diminished.

Of course, zero-tolerance regulation is the worst outcome for the regulated industry because it limits their ability to play at the margins, as well as possibly imposing the additional legal expense associated with doing battle with the agency. Given that the best outcome for the regulatee—no compliance or minimal compliance—is least preferred by the agency, an equilibrium results whereby regulators withhold draconian punishments when violations occur and even agree to accept "substantial compliance' rather than literal compliance with legal rules as long as the regulated firm acts in good faith to cure the most serious violations. To ensure that the firm declines the temptation to try to take advantage of the regulator's cooperative stance, the regulator, in Scholz's model, must develop a reputation for imposing prompt and costly legal sanctions if the regulated entity fails to keep its bargains. Similarly, the regulator must also withhold penalties if the firm does work in good faith toward compliance. Scholz labels this the "tit for tat" enforcement strategy – meeting noncooperation with punishment while meeting cooperation, even if it falls short of literal compliance in some cases, with forbearance.[7]

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[6] John T. Scholz, "Cooperation, Deterrence and the Ecology of Regulatory Enforcement," 18 L. & Soc. Rev. 601 (1984).

[7] For an empirical analysis that reaches basically the same conclusions, see chapter five of Bardach & Kagan's work, supra note 3.

Figure One: The Enforcement Dilemma

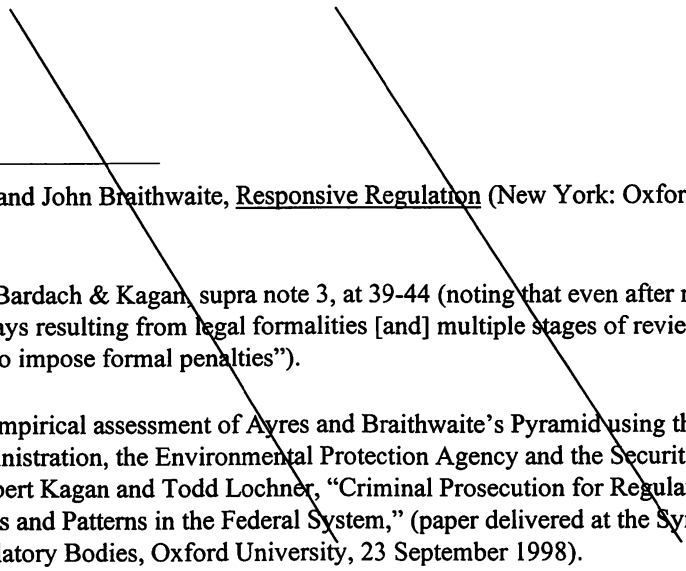
Firm's Initial Compliance Options	Agency Enforcement Options: Goal-Oriented Cooperation	Agency Enforcement Options: Rule-Oriented Strict Enforcement
Comply	Substantial Compliance	Full Compliance
Evade	Substantial Noncompliance	Legal Battles

When faced with a large proportion of regulatees who are "one-shotters," this equilibrium of substantial compliance is difficult if not often impossible to achieve due to the fact that the regulatee has no reason to concern itself with maintaining good working relationships with the agency in the future.

In addition to long-term relationships with regulatees, a second component of effective regulatory enforcement is the ability of the agency to impose—or threaten to impose—a variety of enforcement sanctions, thus ensuring that the agency is not forced to choose between low-cost, low-impact remediation and high-cost, high-impact criminal sanctions. Expanding upon the core tenants of the "substantial compliance" thesis, Ian

Ayres and John Braithwaite suggest that an agency's effectiveness depends in part on the range of enforcement tools available to regulators.[8] Ayres and Braithwaite argue that regulated enterprises typically have mixed motives: while some economic pressures may provide an inducement for them to cut regulatory corners, business managers' own ethical beliefs and the notion that a reputation as a regulatory violator will have adverse economic consequences push them toward compliance. Consequently, these authors argue that persuasion rather than punishment ought to be the regulator's initial approach to detected violations—especially given that punishment is expensive, while cooperation is cheap.[9] Ayres and Braithwaite would agree with Scholz that the threat of punishment must underlie any cooperation, lest the regulated industry shirk all responsibility. Further, they suggest, an agency must have multiple administrative and civil sanctions at its disposal. If the only meaningful sanction the agency can threaten is criminal prosecution, with all its attendant costs and negative ramifications, the regulatee often will view the threat as lacking credibility. However, if the regulators can meet a regulated enterprise's non-cooperation by incrementally increasing the severity of sanction then most of the agency's work can get done effectively by using the lower-cost sanctions.[10]

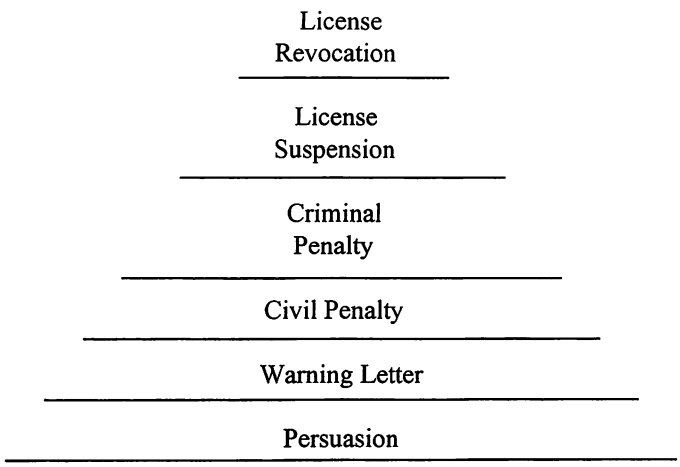
Figure Two: The Enforcement Pyramid



[8] Ian Ayres and John Braithwaite, Responsive Regulation (New York: Oxford University Press, 1982).

[9] See also Bardach & Kagan, supra note 3, at 39-44 (noting that even after regulators have found clear violations, "delays resulting from legal formalities [and] multiple stages of review can gradually weaken the impulse to impose formal penalties").

[10] For an empirical assessment of Ayres and Braithwaite's Pyramid using the case studies of the Food and Drug Administration, the Environmental Protection Agency and the Securities and Exchange Commission, see Robert Kagan and Todd Lochner, "Criminal Prosecution for Regulatory Offenses in the United States: Trends and Patterns in the Federal System," (paper delivered at the Symposium on Prosecution by Regulatory Bodies, Oxford University, 23 September 1998).



This is not to suggest, of course, that an incremental approach to enforcement is appropriate in all circumstances.[11] When regulatees exhibit a clear intent to conceal harms committed, or a clear intent to defraud or mislead the agency, immediate recourse to more stringent punishments is warranted not only as a matter of substantive justice, but also as a means of deterring potential law-breakers in the future.[12] Instead, Ayres and Braithwaite's approach recognizes an obvious reality of most regulatory environments—first, many regulations concern *malum prohibitum* offenses rather than crimes that are *malum in se*; second, many regulatees violate the law by accident or misunderstanding rather than by design; and third, without a variety of enforcement options, it becomes increasingly easy for regulatees to play strategically against agency resource constraints.

[11] Nor is this to suggest that all manner of sanctions are available to an agency. The FEC, for example, has no authority to prosecute criminal violations of federal election laws. This task is assigned to the appropriate United States Attorney's Office or, more likely, the Public Integrity Section of the Department of Justice. See generally infra pp. 19-20 and accompanying notes. Furthermore, this is not to suggest that all manner of sanctions are appropriate for a given type of violation. Many scholars share Dan Lowenstein's concern about aggressive use of criminal sanctions in the context of election law, given the potential chilling impact on free speech that such a strategy might create. See Ray La Raja & Renee Dall, "Enforcing California's Campaign Finance Laws: How Much Bark, How Much Bite for the Political Watchdog," 15 (Working Paper 98-9 of the Institute of Government Studies, University of California at Berkeley, 15 April 1998) (noting Lowenstein's concern that giving the California Fair Political Practices Commission criminal enforcement powers might encourage regulatory overkill). Further, it is difficult to conceive of how the FEC could constitutionally "delicense" a political party, candidate or political action committee. Thus, by the very nature of the activity it regulates, numerous enforcement options usually available to regulatory regimes are made problematic and, in many cases, unusable.

[12] Campaign finance law in fact makes this the central criteria for determining when criminal sanctions are appropriate. See infra notes 45-46 and accompanying text.

A final component of effective regulatory enforcement is this: To the extent that the regulatory regime allows for third-party enforcement—that is, enforcement by private citizens and groups—it must have an institutional mechanism whereby it quickly can dispose of nonmeritorious claims. Seemingly, third-party enforcement would help an agency to overcome resource constraints by effectively delegating much of the investigative task to private groups and individuals. While no doubt true in many instances, third-party regulation also can work to the disadvantage of the agency. Many complaints issued by third parties may lack merit, thus forcing the agency to expend resources responding to trivial or frivolous complaints.[13] This scenario is especially likely when regulatees have incentives to discredit or harm one another (for while the complaint may be frivolous, the innocent regulatee often will have spend time and energy responding it) or when regulatees have an incentive to force the agency to expend its resources answering questionable complaints.[14] Further, as Eugene Bardach and Robert Kagan note, when third-party complainants do discover regulatory infractions, they tend very transparent—and hence most likely trivial—violations.[15] Again, this is unsurprising. Given that third-party complainants tend to be one's competitors or one's customers—people or groups usually not privy to the more closely-held actions and decisions of their counterparts—one would expect that the violations they find would be generally within the public knowledge. Consequently, a regulatory agency that employs third-party enforcement risks having its enforcement agenda skewed by a

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[13] Bardach & Kagan, supra note 3, at 166.

[14] Thus another reason why long-term relationships between the regulator and the regulatee are important—regulatees are less able to consistently cry wolf.

[15] Bardach & Kagan, supra note 3, at 167 n.37. This criticism has been specifically levied against state agencies charged with enforcing campaign finance laws. See, e.g., La Raja & Dall, supra note 11, at 18 (noting that third-party enforcement "may skew the range of complaints towards particular categories of violations that are easy to spot by amateurs, yet miss the more imaginative financial schemes that only experts can uncover").

disproportionately large number of low-level infractions and thus must have an institutional mechanism available to compensate for such skew.[16]

Although none of the abovementioned authors would suggest that their models or observations are true in all cases, a picture begins to emerge as to what factors tend to promote economy and efficacy in regulatory enforcement: long-term, stable, and predictable relations between the regulator and the regulatee; the ability of the regulatory agency to make credible threats of meaningful sanctions; and recourse to a variety of sanctions, including administrative, civil, and criminal penalties, so that regulatees cannot manipulate an agency's resource constraints. Finally, it is generally acknowledged that regulatory reliance on third-party investigation or enforcement will tend to skew agency response towards obvious and therefore (often) trivial violations while leaving more subtle, fraudulent, and serious infractions overlooked.

B. Theories of FEC Enforcement

Inasmuch as the FEC is charged with overseeing individuals who control its operating budget, it is no surprise that its activities would provoke criticism and comment. What is surprising, however, is that although its critics differ as to the causes of the problem, almost all agree that the FEC fails to effectively enforce the law.[17] Such

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[16] Bardach & Kagan, supra note 3, at 167-68. Among the suggestions offered by Bardach and Kagan for reducing third-party enforcement skew are requiring a higher standard of proof from these complainants (such as requirements of tangible evidence of violation or requirements of multiple complaints from different sources) and by responding to these complaints in a very prompt fashion by using routinized procedures such as sending letters to both complainant and respondent outlining the infraction and calling for a 30-day response. Still, Bardach and Kagan certainly would agree that while such policies may minimize the skew, they do not completely correct it, nor do they completely solve the problem of wasted agency resources.

The FEC in 1992 instituted a program for prioritizing enforcement actions. Among the criteria used to determine whether to prosecute are the presence of knowledge and intent, the amount of money involved, the impact that the violation had on the election process, and the age and timing of the offense. Whether this system proved effective is unclear, for our data are from 1991 and 1993. What is clear, however, is that the general consensus as of the mid-1990s was that the FEC still failed in its mission. See Ortiz, supra note 2; Colloquia, supra note 4.

[17] See Ortiz, supra note 2; Colloquia, supra note 4; Gross, supra note 2. See also Brooks Jackson, Broken Promise: Why the Federal Election Commission Failed (1990) (recounting numerous instances of malfeasance by individual and groups involved in the election process).

beliefs recently were expressed at a symposium on FEC enforcement at the University of Virginia which brought together both academics and practitioners.[18] Although their solutions differed remarkably, almost all participants agreed that the FEC at present does not adequately enforce the law, does not adequately deter potential malfeasants, and requires fundamental restructuring.[19]

Yet what explains this lack of sufficient enforcement?[20] Four different hypotheses are advanced in the literature. The first argues that the FEC fails because it becomes co-opted by a particular political party and, although used as a weapon against the other political party, ignores the legal violations of its sponsors.[21] This argument, usually advanced by Members of Congress, will be termed the "Politically Partisan" Hypothesis. A second argument posits that the FEC is co-opted by both parties, and turns a blind eye towards all violations. This classic iteration of "capture theory,"[22] advanced

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[18] Ortiz, supra note 2.

[19] Id. at 369-372.

[20] This question itself obfuscates a deeper inquiry, namely "How much enforcement is 'enough?'" All of the critics of the FEC argue that it fails in its task, but none offer a benchmark by which this task may be analyzed objectively. Presumably, no one would suggest that the FEC should be expected to effectively prosecute every campaign finance regulation violation -- no regulatory enforcement program is held to this level of scrutiny. But perfect enforcement and complete ineptitude, it becomes very difficult to operationalize standards for FEC efficacy. For example, one could argue that the FEC is enforcing the law better when it wins more cases. But an increased number of legal victories also could be due to a decision to prosecute easy cases. Or one could look to see if the total value of civil penalties assessed by the FEC increases over time as proof of effective enforcement. This analysis too is flawed, for it ignores the possibility that the increased value of civil penalties simply is due to an increased incidence of campaign finance violations in the population or an increase in the magnitude of infractions themselves. (By analogy, this is akin to the argument that an increased number of executions is due to a more efficient criminal justice system, rather than simply to the fact that more people commit capital crimes.) It is enough for present purposes to note that all parties to the debate feel that the FEC does not adequately enforce the law and concentrate on determining the causes of this failure, leaving for later the separate inquiry of how efficient a given approach must be before the FEC is "fixed."

[21] See generally Ortiz, supra note 2.

[22] See Jackson, supra note 17; Colloquia, supra note 4 (noting Elizabeth Hedlund's observation that "regulatory agencies often are seen to become eventually the captive of the community they regulate. With the FEC, its fate was sealed from the start, because the community that the FEC regulates is, to a large degree, Congress, and Congress controls the FEC's authority").

by many public interest groups, may be termed the "Willful Complacency" Hypothesis. A third possibility is that the FEC possesses the desire to enforce the law stringently, but simply lacks the institutional resources to do so, thus allowing violators to play strategically against such constraints. Not surprisingly advanced by the FEC itself, this shall be termed the "Insufficient Resources" Hypothesis.[23] A final argument advanced by both academics and practitioners suggests that the FEC fails due to inherent flaws in the campaign finance regulations themselves. This shall be termed the "Inherently Flawed Legislation" Hypothesis.[24] Each is discussed briefly in turn.

1. Political Partisanship

Some critics of the FEC, especially Members of Congress themselves, often suggest that the FEC fails in its enforcement task not because it is incompetent, but because it is biased. That is, whichever party presently controls the executive will use the FEC to discredit members of the opposition. Such a belief does find theoretical support in the works of scholars such as Benjamin Ginsberg and Martin Shefter's Politics By Other Means, where the authors argue that "unable to gain control of their opponents' institutional bastion through the normal channels of electoral competition, Democrats and Republicans have learned to use allegations of impropriety to discredit and weaken one another."[25] What better way to ruin politicians than to "RIP" them by suggesting that they have broken campaign finance laws and have political ties to "big money?"[26] Certainly Newt Gingrich has maintained that the FEC investigation into GOPAC, a

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[23] Ortiz, supra note 2, at 371 (noting that "[a]ll the panelists agreed on one point—the FEC desperately needs more resources").

[24] See generally Colloquia, supra note 4 (discussing the institutional inadequacies of campaign finance law, including the inability to conduct random audits, the inability to levy fines, and the structural composition of the Commission.)

[25] Benjamin Ginsberg and Martin Shefter, Politics by Other Means 30 (1990).

[26] "RIP," as Ginsberg and Shefter state, is an acronym for revelation, investigation, and prosecution --"a major new technique of political combat." Id. at 26. Just how recent a vintage this technique enjoys remains open to question, of course.

political action committee with which Gingrich has ties, was motivated solely by a desire to personally discredit him -- and the recent dismissal of the FEC's case by a federal judge does lend at least the element of credibility to the Speaker's claims. Most likely Vice President Gore would adopt a similar view.

Yet even the anecdotal evidence raises questions about the validity of this hypothesis. When Republicans controlled both the presidency and the Senate in 1980, they did not try to use the FEC to discredit Democrats; instead they tried to abolish the FEC altogether.[27] Thus, even were one to believe that politicians do try to use the FEC to destroy their competition, one would have to balance the utility derived from this "weapon" from the utility that politicians might enjoy (or might think they would enjoy) if the FEC were abolished altogether and campaign finance laws were left unenforced.[28] And as will be discussed in Part IIB below, this Politically Partisan hypothesis does not fit the data very well. It would appear that there are times when the FEC conducts the political equivalent of a witch-hunt. Yet the institutional structure of the FEC, as well as an analysis of its enforcement process, suggests that such a practice is the exception rather than the rule. If anything, the FEC appears not so much as politically partisan as politically complacent.

2. Willful Complacency

The FEC is in essence an administrative agency charged with regulating both private sector political contributors as well as Members of Congress themselves. Thus, it should come as no surprise that many critics of the FEC -- especially groups such as Common Cause -- charge that the agency has been captured by the very institutions that they were to regulate. As Daniel Ortiz, the moderator for the FEC symposium noted,

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[27] Jackson, supra note 17, at 31.

[28] Admittedly, however, to the extent that politicians really did want to use campaign finance laws as political weapons, they still might wish to abolish the FEC in favor of another, more effective enforcement mechanism. See id. at 37 (nothing that then Democratic Congressional Campaign Committee Chair Tony Coelho argued that the FEC should be abolished so that the public would be shocked into insisting that Congress start over with a more effective enforcement agency).

> [t]he 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.[29]

Such critics note that although there have been a handful of instances where candidates themselves went to jail for violating campaign finance laws,[30] the vast majority of FECA sanctions represent punishment for rather trivial violations of FECA technicalities, while serious attempts to subvert the law often go unpunished.[31] Those observers who feel that FEC inefficacy is due to political complacency tend to blame this fact on the institutional structure of the FEC itself. Congress appoints FEC commissioners, and its enabling legislation mandates that there be six commissioners, with three from each party -- a structure that seems designed for deadlock, especially given the politically charged nature of campaign finance regulation.

Of course, the dynamics of this structure could be such that the commissioners act in a politically partisan manner, ensuring a 3-3 deadlock on every issue, or, alternatively, could be more akin to a reciprocity norm in which all of the commissioners are unwilling

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[29] Ortiz, supra note 2, at 370.

[30] Id. at 376. Further, it is worth noting that when the Department of Justice pursues criminal sanctions against individuals who have violated campaign finance regulations, it rarely prosecutes on the basis of FECA violations per se, instead choosing to pursue its criminal case under theories of bribery or conflict of interest statutes. See infra pp. 32-34 and accompanying notes.

[31] This fact is made most clear when one realizes that short of its ability to negotiate settlements, the FEC lacks authority to impose civil fines. Thus, "the whole extent of the Commission's discretion, the ultimate end it reaches after months or years of investigating, is to make a decision about whether to seek an adjudication in court, where the Commission has to prove its case from scratch. . . " Ortiz, supra note 2, at 388. See also supra note 15 (arguing that third-party enforcement may skew the enforcement policies of the California Fair Political Practices Commission).

to pursue any matter against any Member of Congress. But although the dynamics are perhaps more subtle than some realize, the data offered below will suggest that for whatever reason, Members of Congress and major political parties have little reason to fear the FEC. It is difficult to prove the Political Complacency hypothesis correct, especially when other alternative explanations of FEC inadequacy are taken into account, but by the same token the data do not allow one to reject the hypothesis outright.

3. Insufficient Resources

If the Politically Partisan and Willful Complacency hypotheses explain FEC failure in terms of motive, the Insufficient Resources hypothesis suggests that failure is grounded in the fact that the FEC simply lacks the resources to pursue a significant proportion of campaign finance violators—a fact well-known by the regulatees who adjust their behavior accordingly given a lower expectation of being "caught." It is the flesh, not the spirit, that is weak. Not surprisingly, this position is taken by the FEC itself, usually during annual appropriation requests. FEC representatives before Congress have noted that as PAC spending has increased dramatically over time,[32] and as "organized attempts to subvert the contribution limitations and the disclosure provisions of the FECA," likewise have become both more common and more sophisticated,[33] it becomes increasingly difficult for the FEC to prosecute a sufficient number of cases to effectively deter potential wrongdoers. And of the cases (or "Matters Under Review," as they are termed) that are pursued, fewer are being closed by the end of the year.[34] Add to this workload both the fact that the mandatory audits of presidential campaigns performed

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[32] Hearings Before the Subcommittee on Elections of the Committee on House Administration, U.S. House of Representatives, 102nd Cong., 2nd sess., 1992, at 9 [hereinafter, "1992 Hearings"].

[33] Id. at 12.

[34] In the late 1980s, the FEC had an increasing backlog of matters. See Federal Election Commission Annual Report 1990, at 15. Recent data are somewhat equivocal. The number of active matters pending at year's end in 1994 was 320; in 1995, 251; in 1996, 361; and in 1997 it was 207. Federal Election Commission Annual Report 1994, p. 91; Federal Election Commission Annual Report 1995, p. 91; Federal Election Commission Annual Report 1996, p. 93; Federal Election Commission Annual Report 1997, p. 93.

by the FEC now take upwards of five years,[35] as well as the fact that the FEC recently was charged with enforcing the Motor Voter Bill,[36] and the hypothesis that FEC failure is due simply to insufficient resources becomes plausible.

Yet in many senses this hypothesis borders on the truistic. Of course a decision to, for example, double the number of FEC investigators would probably assist in improving the FEC's enforcement capabilities; any regulatory agency potentially could increase its efficacy merely by increasing its resources. The more interesting question is how agencies such as the FEC choose to allocate the resources that they presently possess. And, as will be demonstrated below, the FEC does spend the bulk of its resources pursuing relatively technical or trivial violations of the campaign finance laws. Thus, while inadequate funding may be part of the story, it is a necessarily incomplete explanation -- a fact made most apparent when one considers the enforcement problems that stem from the substantive mandates of the FECA itself.

4. Inherently Flawed Legislation

Perhaps the reason that the FEC does not adequately stem the ostensible influence of money in elections is due neither to malign intent on the part of the FEC workers themselves, nor to the issue of insufficient resources per se, but instead to the fact that the FECA is an inherently flawed piece of legislation.

This critique exists on two levels. First, it could be argued that no piece of legislation that Congress could constitutionally pass could adequately control the influence of money on politics. That is, all campaign finance regulation necessarily is doomed to failure. Although perhaps true, a second, more modest critique states that while possible to have effective campaign finance regulation, the FECA itself is

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[35] Ortiz, supra note 2, at 375.

[36] Hearings Before the Subcommittee on Elections of the Committee on House Administration, U.S. House of Representatives, 103d Cong., 1st sess., 1993, at 41 [hereinafter, "1993 Hearings"].

inadequate. For example, critics note that the cumbersome multi-stage enforcement process required by the FECA tends to undermine deterrence by increasing the delay between time of infraction and time of punishment (if any).[37] Also, the FECA is unique in that its statute of limitations is three years, as opposed to the five year statute of limitation that is seen in almost every other federal regulatory enforcement statute. This shortened time-frame for prosecution often expires before complex criminal FECA investigations reach their conclusion.[38] Venue determinations for FECA violations are complicated and confusing,[39] and the FECA does not allow for random audits of congressional campaigns, a tool that most critics of the present system suggest is absolutely necessary for effective deterrence.[40] Critics also decry the need of FEC investigators to commence a judicial proceeding before being able to levy civil penalties, suggesting instead that the FEC be given the authority to levy such fines on its own initiative.[41] Finally, it could be suggested that the FEC lacks a sufficient variety of enforcement options, thus reducing its "enforcement pyramid" to an ineffectual choice between comparatively minor monetary penalties or very draconian criminal sanctions.

Inasmuch as many of these proposals are precisely that—proposals—it is an extremely problematic task to determine whether altering the FECA would produce marked increases in FEC enforcement. However, the enforcement strategies of Department of Justice prosecutors discussed below do suggest that criminal prosecutors often go out of their way to prosecute campaign finance violations under alternative

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[37] Gross, supra note 2, at 286.

[38] Craig C. Donsanto, Federal Prosecution of Election Offenses 75 (1988).

[39] Id.

[40] Ortiz, supra note 2, at 389; Gross, supra note 2, at 280; Jackson, supra note 17, at 68.

[41] Jackson, supra note 17, at 1. Other noted deficiencies of the FECA include the fact that it does not provide the FEC with its own administrative law judges as well as the fact that it does not provide the FEC with power to issue injunctions. See Colloquia, supra note 4, at 236. Given that the trend over the past twenty years has been to grant agencies the authority to authoritatively impose administrative and civil sanctions without having to go to court, See Bardach & Kagan, supra note 3, at 52, the FEC's inability in this regard is unusual.

theories. That is, a campaign finance violation often will not be prosecuted as a FECA violation, but instead as a violation of other federal laws relating to bribery, conflict of interest, or the Internal Revenue Code. This would seem to suggest that changing such items as statute of limitations or venue determinations may strengthen the FECA. Also, the frequency with which critics across the political spectrum call for random congressional audits, coupled with the fact that the FEC also makes this request at almost every annual appropriations hearing, indicates that present FEC failures may in fact be due partially to the inherent limitations of the FECA itself.

Having examined the theories of FEC enforcement and regulatory enforcement more generally, we turn now to an empirical analysis of FEC enforcement.

II. The Enforcement of Federal Campaign Finance Laws

A. The Enforcement Process

Prior to its 1976 Amendments, all FECA violations were considered criminal misdemeanors and were judged under the strict liability standard which provided for criminal punishment merely on the basis of a discovered violation itself, regardless of whether the defendant in question knew of the violation or evinced an intent to violate the statute.[42] Such a strict liability standard could prove quite draconian, particularly when the crime in question, political spending, implicated important First Amendment claims. As such, the Federal Circuit Court for the District of Columbia held this provision invalid, declaring that in order for a criminal conviction to take place under the FECA, the government would have to show general intent.[43]

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[42] Donsanto, supra note 38, at 72.

[43] Id.

In response to this holding, the 1976 FECA Amendments bifurcated the enforcement process. Unknowing and/or minor violations were to be treated as civil infractions and were to be dealt with by the FEC itself pursuant to its administrative regulatory capacity.[44] Violations involving large sums of money and committed "knowingly and willfully" were to be treated as criminal violations to be prosecuted by the Department of Justice or U.S. Attorneys' Offices.[45] To be considered "knowing and willful," it had to be shown that the defendant in question employed surreptitious means to conceal the violation, such as false documentation, or, alternatively, that the FECA violation took place as a means to a felonious end, such as the bribing of a candidate.[46]

How, then, are violations detected?[47] An investigatory enforcement proceeding, termed a Matter Under Review (MUR), is begun either when FEC investigators in their normal course of business discover a suspected violation or when outside actors—often competing candidates and parties—allege that a violation has taken place. When a MUR is initiated, the FEC's Office of General Counsel (OGC) makes a preliminary inquiry to determine whether there is "reason to believe" that a violation has taken place. The OGC makes a recommendation to the Commission itself—that is, the six FEC Commissioners—which in turn decides whether the "reason to believe" standard is met.

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[44] These provisions are codified at 2 U.S.C. § 437(g).

[45] These provisions were originally codified at 2 U.S.C. § 441(j), but were moved to 2 U.S.C. § 437(g)(d) by the 1979 FECA Amendments. A large sum of money is any transaction over $2,000. 2 U.S.C. § 437(g)(d). Thus, "if an individual contributed $1,500 to a candidate (which is only $500 over the contribution limit), no FECA crime would exist, even if the violation was [sic] knowingly and willfully done." Donsanto, supra note 38, at 74.

[46] Id. at 75. A Memorandum of Understanding, first drafted in 1977, exists between the Commission and the Department of Justice, providing that when the Commission's preliminary investigation suggests that criminal prosecution is appropriate, the FEC cedes investigative authority to the Federal Bureau of Investigation and prosecutorial authority to the Department of Justice or the respective United State's Attorney's Office. Id. at 81.

[47] For an excellent summary of the FEC enforcement process, from which this summary largely is taken, see Gross, supra note 2, at 283-86.

If four commissioners vote to proceed, the FEC initiates a full investigation; if there is an even split, the Commission must document their decision in writing.[48]

If the Commission finds reason to believe that an infraction has taken place, the MUR is returned to the OGC, which initiates a full-scale investigation—unless, of course, the Commission has found it appropriate to transfer jurisdiction of the case to the Department of Justice for criminal prosecution.[49] At this point in the process, the defendant may accept a "preprobable cause conciliation," in which it admits fault and accepts a negotiated civil penalty. If the defendant rejects this offer, the OGC returns its report to the Commission, which makes a second finding as to whether or not there is "probable cause" to believe a violation has taken place. If the Commission decides that there is not probable cause or that the matter should be declined for whatever reason, the MUR is labeled "reason to believe but no further action taken."[50] Usually in these situations, the FEC will send the defendant a letter outlining the relevant FECA regulation in question and reminding the defendant of its legal responsibilities.[51] If the Commission decides that there is probable cause, the FEC attempts to settle the dispute through a conciliation agreement.[52] If conciliation fails, the FEC brings suit in federal district court, and the dispute begins anew. As an incentive to negotiate a settlement, the

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[48] Commission refusals to initiate a full investigation may be challenged in federal court. This process of judicial oversight is designed to provide a check against possible strategic or partisan behavior on the part of the commissioners.

[49] Although the OGC may issue subpoenas, it must request that a district court judge to enforce them should a defendant refuse to produce the desired documentation. Gross, supra note 2, at 284.

[50] For an examination of the ostensible justifications offered by the Commission in declining to prosecute otherwise valid MURs, see Appendix II.

[51] As with the Commission's denial of the initial "reason to believe" claim, the rejection of the probable cause claim is subject to judicial review in federal district court.

[52] Importantly, in almost every case of conciliation, the FEC demands that the defendant acknowledge its violation of the law. The potential of a civil fine offered with a defendant's statement that they "neither admit or deny" the infraction is almost never offered. Gross, supra note 2, at 285.

FEC makes it standard practice to ask for the maximum civil penalty at trial, which usually is 100% of the amount in violation or $5,500, whichever is greater.[53]

If the case is turned over to the Department of Justice for criminal prosecution, different procedures maintain.[54] The matter first is sent to the Election Crimes Branch of the Public Integrity Section of the Criminal Division of the Justice Department. The Election Crimes Branch examines the case and decides whether to authorizes the FBI to conduct further investigation, and no federal investigation of criminal FECA violations may take place without such preclearance. Should the ECB after examining the case decide for whatever reason that victory on the merits is unlikely, it simply will refuse to preclear the case, thus ending the dispute.[55] If preclearance is given, the ECB, in conjunction with the broader Pubic Integrity Section, refers the matter to the United States Attorney in whose district the alleged violation took place. When the U.S.

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[53] In the rare instances when the FEC has alleged a knowing and willful violation but has maintained jurisdiction over the case instead of referring it to the Justice Department, it may ask for fines of 200% of the disputed amount or $11,000, whichever is greater. These sanctions were recently increased from $5,000 and $10,000 respectively. See Federal Election Commission Annual Report 1997 11 (1998). This is not to suggest that such amounts are actually awarded, or that the FEC will not substantially reduce the requested fine in order to settle the case. Evidence discussed below indicates that it is very rare for the fine to be greater than the monetary value of the alleged infraction. See infra pp.29-32 and accompanying notes.

[54] These procedures are summarized by Donsanto, supra note 38, at 3-6.

[55] It is interesting that critics who suggest that the FEC is politically partisan have given little attention to this process. Presumably, MURs are not transferred to the Department of Justice unless there is at least "reason to believe" that a violation has taken place. Thus, one could hypothesize that an ECB refusal to prosecute may be due to political pressure. This hypothesis probably is both unlikely and untestable. It is unlikely because it is well established that federal prosecutors base much of their prosecutorial discretion on the likelihood that a case is "winnable." See, e.g., James Eisenstein, Counsel for the United States: U.S. Attorneys in the Political and Legal Systems 52 (1978). Thus, the ECB lawyers simply may disagree with the Commission as to the likely merits of a case. Also, it must be remembered that cases are transferred to Justice before the probable cause hearing, making it possible that an ECB attorney could decide that while there was reason to believe a FECA violation took place, the evidence did not support a finding of probable cause. This hypothesis also is untestable for two reasons. First, there are exceptionally few FECA cases that are turned over to the Department of Justice for criminal prosecution. See Gross, supra note 2, at 292. Thus, it would be difficult to obtain statistically significant result from studying criminal FECA prosecutions themselves. Second, in those rare instances that it does prosecute FECA violations, the Department of Justice and the U.S. Attorneys' Offices usually use alternative prosecutorial theories, making it difficult to track "FEC" violations per se -- they become bribery or conflict of interest cases. See infra pp. 32-34 and accompanying notes.

Attorney's Office lacks sufficient resources to prosecute, or in "especially complex or sensitive cases,"[56] the Public Integrity Section will exercise jurisdiction and prosecute the case itself.

B. Analyzing the Enforcement Process

Yet how accurate are the four theories of FEC enforcement described in Part I, and how do they relate to the broader theories of regulatory enforcement advanced by Scholz, Ayres and Braithwaite, and Bardach and Kagan? To provide an empirical assessment of these views, we have analyzed almost eighty MURs—comprising just over 180 respondents—as well as the experiences of U.S. Attorneys in using the FECA. The methodology and tentative findings of each inquiry are discussed in turn.[57]

1. Matters Under Review

An analysis of the enforcement process would begin by asking such questions as who initiates MURs, who are the respondents in these MURs, and how do these variables affect the ultimate disposition of the MUR. Using the monthly publication Federal Election Commission Record, we randomly collected seventy-nine MURs from both 1991 and 1993 and coded each MUR as to the organization that initiated it (the FEC, the opposing political party or campaign, another outside group or individual, or another government agency); the subject of the investigation (individual contributor, political party, political action committee or other private group, campaigns, and the candidates themselves[58]); the nature of the alleged violation broken down by most serious infraction alleged and, where applicable, the monetary amount of the infraction in question; and the

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[56] Donsanto, supra note 38, at 6.

[57] Analysis of MURs is an exceedingly labor intensive endeavor, and hence our preliminary data set was limited to roughly eighty MURs due to considerations of time and expense. Inasmuch as the FEC has made attempts to improve its enforcement procedures recently, see supra note 16, we eventually plan to expand our data set to include more recent years.

[58] For purposes of this study, the category "candidates" includes not only the candidates themselves, but also members of their immediate family such as spouses and in one instance the candidate's mother.

MUR's eventual disposition, and if applicable, the reason given by the FEC for declining a potentially prosecutable crime as a "Reason to Believe But No Action Taken." Because a given MUR often involved many interrelated allegations of wrongdoing on the part of various actors, we also aggregated the data by respondent.[59] A more detailed explanation of this methodology is offered in Appendix One.

We begin by determining who brings MURs. As discussed above, MURs are initiated either by the FEC itself, another government agency such as the Department of Justice, or by outside groups or individuals[60]—these groups usually being the political opponents of the MUR's respondents. The data indicate that although only 36% of MURs (accounting for roughly 30% of the total respondents) are initiated by the FEC, 57% of MURs (accounting for roughly 63% of the total respondents) are brought by outside groups. Of these outside-initiated MURs, slightly over half are brought by the opposing political party or campaign. Given that individuals affiliated with one's political opponent may initiate a MUR and these individuals' political affiliations will not be mentioned in the FEC reports, these figures very likely understate the number of MURs initiated by "the opposition."[61]

Table One: Profile of Actions Based on Initiating Party

	Initiating Party					
Action	FEC	Other Gov.	Opposing Party	Other Outside	Sua Sponte	TOTAL
MUR	29 (36.1%)	4 (5.1%)	24 (30.4%)	21 (26.6%)	1 (1.3%)	79
Respondents	55 (29.6%)	10 (5.4%)	62 (33.3%)	56 (30.1%)	3 (1.6%)	186

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[59] Just a case may have multiple defendants, a MUR may have multiple respondents.

[60] In exceptionally rare instances, MURs may be initiated sua sponte.

[61] Having read all of the general counsel's reports in all of these matters, one comes to the impressionistic conclusion that most, if not almost all, of the "other outside" claims are initiated by a campaign or PACs political rivals.

Whether by intentional design, purposeful manipulation, or mere happenstance, the FEC seems to rely quite heavily upon third-party enforcement for the detection of campaign finance violations.

Table Two: Profile of Actions Based on Initiating Party, FEC and Outside Initiation

Group	MURs	% of Total MURs	Respondents	% of Total Respondents
FEC	29	(36.1%)	55	(29.6%)
Opposing Party and Other Outside	45	(57.0%)	118	(63.4%)

Having examined who bring claims, one may examine who, or what, tends to be the subject of investigation. Inasmuch as MURs involve multiple claims, it is best to examine this dynamic by reference to respondents rather than MURs, thus providing a more accurate representation of the enforcement dynamic.

Table Three: Profile of Actions Based on Initiating Party and Respondent

	Respondents					
Initiator	Individual	Party	PAC or Private Org.	Campaign	Candidate	TOTAL
FEC	13	10	17	11	4	55
Other Gov.	3	0	4	1	2	10
Opposing Party	7	9	14	23	9	62
Other Outside	16	2	18	15	5	56
Sua Sponte	1	0	1	1	0	3
TOTAL	40	21	54	51	20	186

These data bear discussion. First, they demonstrate that whereas 29% of all claims (54/186) are brought against PACs and other private organizations and another 27% (51/186) are brought against candidates' campaigns, or, more specifically, the treasurers or managers of these campaigns, only 11% (20/186) are brought against the candidates—Members of Congress or challengers – themselves. This suggests that the threat of an individual candidate being investigated for a FECA violation is not great, especially when one considers that it is highly unlikely that most infractions in fact result in investigation. The remainder of claims are brought against individual contributors, accounting for

21.5% of all claims (40/186) and political parties, accounting for 11% of all claims (21/186).

If we aggregate the "opposing party" group with the "other outside" group—an aggregation we believe justified after having read all of the general counsel reports in these MURs—one finds that while the FEC initiates a significant amount of claims against all respondent groups except for candidates themselves, outside-initiated claims are less likely to target parties and more likely to target campaigns and the candidate themselves.

Table Four: Breakdown of FEC and Outside Groups' Respondent Profile

	Respondents					
Initiator	Individual	Party	PAC or Private Org.	Campaign	Candidate	TOTAL
FEC	13 (23.6%)	10 (18.2%)	17 (30.1%)	11 (20.0%)	4 (7.3%)	55 (100%)
Outside	23 (19.5%)	11 (9.3%)	32 (27.1%)	38 (32.2%)	14 (11.9%)	118 (100%)

The discrepancy between FEC targeting of campaigns and candidates and outside targeting of these respondent classes is stark. Of the seventy-one instances in which a campaign or candidate was named as a respondent, fifty-two (just over 73%) were brought by outside initiators while only fifteen (or 21%) were initiated by the FEC.[62]

The fact that candidates themselves are unaware of, and do not oversee, the day-to-day activities of campaign financing probably explains both the low incidence of candidate-centered claims, as well as the proportionately larger number of claims initiated against the campaign itself. As to the disparity between FEC-initiated and outside-initiated claims against candidates, it is possible that the FEC is willfully complacent, choosing not to provoke those very people responsible for the agency's funding. Yet assuming that the FEC was purposely courting Members of Congress by ignoring their campaign finance infractions, one might also expect the FEC to engage in a related form of clientilism by actively investigating congressional challengers. That this does not

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62 The remaining 6% of these claims were brought sua sponte or by another government agency.

happen suggests a different dynamic; not that there are too few FEC claims against candidates, but instead that there are far too many outside-initiated claims against candidates. Not only is the possibility that candidates attempt to directly discredit one another by filing spurious FEC claims plausible, but it is in fact supported by data showing that these claims are overwhelmingly nonmeritorious.[63]

One may next examine the types of infractions investigated.

Table Five: Breakdown of Alleged Violations, By Offense Category

Alleged Violation	Total Respondents Named		% of All Respondents	
Excessive Contributions/ Independent Expenditures	63		33.9%	
Disclaimer	32		17.2%	
Prohibited Contributions, Corporations	30		16.1%	
Failure to Report Complete Information		23		12.4%
Failure to File/Failure to File on Time	12		6.5%	
Prohibited Contributions, Unions	7		3.8%	
Failure to Register	5		2.7%	
Transfer/Use of Prohibited Funds	5		2.7%	
Contribution in the Name of Another	4		2.2%	
Personal Use of Funds	3		1.6%	
Other (Mail List Violations)	2		1.1%	

Federal election law infractions generally can be categorized into two distinct groups: "substantive" violations, such as excessive contributions, contributions in the name of another, and transfer or use of prohibited funds; and disclosure violations where the respondent has failed to convey necessary information either to the agency, as is the case with failure to file or failure to disclose complete information infractions, or to the public, as is the case with disclaimer violations. One finds that 60% percent of the respondents were charged with a substantive violations while roughly 40% were charged with a disclosure violation.

[63] See infra p. 27 and accompanying notes.

Given the fact that numerous studies suggest that third party enforcers tend to bring complaints concerning transparent and relatively trivial indiscretions,[64] one may disaggregate the data in Table Five by initiator in order to test this hypothesis.

Table Six: Types of Violations Alleged Based on Initiator

	Initiator					
Violation	FEC	Other Gov.	Opposing Party	Other Outside	Sua Sponte	TOTAL
Failure to File/ Failure to File on Time	4	0	6	2	0	12
Failure to Report Complete Info/Failure to Disclose	6	1	12	4	0	23
Failure to Register	2	1	2	0	0	5
Disclaimer	0	0	14	18	0	32
Excessive Contributions/ Independent Expend.	29	0	22	12	0	63
Contrib. in Name of Another	0	2	0	2	0	4
Prohibited Contrib., Unions	2	0	2	0	3	7
Prohibited Contrib., Corps.	8	4	4	14	0	30
Transfer/Use of Prohibited Funds	3	0	0	2	0	5
Personal Use of Funds	1	2	0	0	0	3
Other (Mail List Violations)	0	0	0	2	0	2
TOTAL	55	10	62	56	3	186

The data support Bardach and Kagan's hypothesis. All alleged disclaimer violations were brought by outside initiators, as were 69% (24/35) of all failure to file or failure to file complete information claims. This is not to suggest that such violations, especially disclaimer violations, are necessarily trivial (although in many cases they are).[65] It does suggest, however, that third-party enforcers tend to recognize more obvious infractions such as the lack of a disclaimer on a political ad or flyer.

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[64] See supra notes 13-15 and accompanying text.

[65] Recall that respondents were coded for only the most serious crime alleged. Thus, none of these failure to file or failure to file complete information claims represent instances where the respondent attempted to conceal another infraction such as an excessive contribution violation. Were that the case, the claim would have been designated as the latter offense. Instead, these concern more technical violations

Perhaps the most interesting findings are seen when one looks to the eventual disposition of the claims.[66]

Table Seven: Profile of Respondents, By Disposition

Disposition	Number of Respondents	% of Total Respondents
No Reason to Believe	59	31.7%
Reason to Believe, But No Action	66	35.5%
Fine, 0-$1,000	20	10.8%
Fine, $1,001-$3,000	13	7.0%
Fine, $3,001-$5,000	3	1.6%
Fine, $5,001-$10,000	9	4.8%
Fine, $10,001-$20,000	2	1.1%
Fine, $20,001-$50,000	2	1.1%
Fine, $50,000-$100,000	0	
Fine, $100,000+	0	
Lawsuit, Default Judgment	4	2.2%
Lawsuit, Contested	8	4.3%
TOTAL	186	100%

Obviously, most respondents were not fined a significant amount of money. This tendency towards nonexistent or low-level penalties is exacerbated when one aggregates the data to take into account the outcomes of many of the contested lawsuits, as well as the default judgments that in each instance were unenforceable.

Table Eight: Profile of Respondents, Low-Level Sanctions

Disposition	Total Respondents	% of All Respondents
No Reason to Believe	59	31.7%
Reason to Believe But No Action, or a fine of less than $1,000 or a lawsuit ending in a nonenforceable default judgment or a fine of less than $1,000	91	49.0%
Fine of $1,000-$3,000 or lawsuit ending in fine of $1,000-$3,000	16	8.6%

such as failure to report individual donor's addresses, failure to disaggregate contribution figures when required by law, and failure to file reports on time.

TOTAL	166	89.3%

Just under 32% of all respondents had the claims against them dismissed, almost one-half of respondents had the claims against them settled with either no penalty or a penalty of less than $1,000, and approximately 9% settled the claim against them for a penalty between $1,001 and $3,000. Thus, roughly 90% of the respondents in our selection sample faced no punishment or a relatively inconsequential fine.[67]

Interpreting these data on disposition of claims is a laborious, albeit instructive process. We begin by examining who brings claims that ultimately are dismissed as having no reason to believe that an infraction in fact occurred.

Table Nine: Profile of "No Reason to Believe" Dispositions Categorized by Initiator

Initiator	Number of Respondents Found "No Reason to Believe"	Percentage of Total Number of "No Reason to Believe" Dispositions
FEC	2	3.4%
Other Gov.	5	8.5%
Opposing Party	26	44.1%
Other Outsider	26	44.1%
Sua Sponte	0	0%
TOTAL	59	100%

Outside groups, the aggregate of both the Opposing Party and Other Outsider categories, accounted for just over 88% of all claims resulting in a "No Reason to Believe" disposition. This suggests that the FEC is not likely to start an investigation, only later to conclude that there was no reason for doing so. It also suggests that many outside-initiated claims may be frivolous attempts at annoying or discrediting one's political opponents. One could argue, of course, that a Machiavellian FEC is improperly

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[67] Of course, whether the amount of fine is considered lenient depends first upon the nature of the respondent (is the individual or organization wealthy) and second upon the relative level of the fine compared to the severity of the infraction. As will be demonstrated below, however, see infra pp. 29-32 and accompanying notes, individual respondents simply were not made to pay any type of sizeable fine. Taking these factors into account, fines in the $1,000 to $3,000 were almost certainly a (minor) nuisance and nothing more.

dismissing valid outside-initiated claims; were this the case, however, one would then expect to see a large number of outside groups seeking judicial review of the FEC's decision to dismiss the MUR. Instead, the data appear more consistent with the academic theories as to the consequences of using third-party complaints as a means of initiating regulatory enforcement.

One may next examine how penalties broke down between different classes of respondents.

Table Ten: Profile of Respondents, By Disposition

	Respondent					
Disposition	Individuals	Party	PAC or Private Org.	Campaign	Candidate	TOTAL
No Reason to Believe	8	5	18	14	14	59
Reason to Believe, No Action	20	4	16	21	15	66
Fine, 0-$1,000	6	4	8	2	0	20
Fine, $1,001-$3,000	4	1	3	5	0	13
Fine, $3,001-$5,000	0	0	0	3	0	3
Fine, $5,001-$10,000	0	3	4	2	0	9
Fine, $10,001-$20,000	0	0	2	0	0	2
Fine, $20,001-$50,000	0	2	0	0	0	2
Fine, $50,000-$100,000	0	0	0	0	0	0
Fine, $100,000+	0	0	0	0	0	0
Lawsuit, Default Judgment	0	0	2	2	0	4
Lawsuit, Contested	2	2	1	2	1	8
TOTAL	40	21	54	51	20	186

Respondents who were individuals—i.e., noninstitutional actors in either the "Individuals" category or the "Candidate" category—received even lighter punishments than their institutional counterparts. Of the sixty individual respondents, 22 (or 36.7%) had their claim dismissed as "No Reason to Believe," 25 (or 41.7%) had their claim dismissed as "Reason to Believe but No Action," six (or 10%) had to pay a fine between one and $1,000; four (or 6.7%) had to pay a fine between $1,001 and $3,000; and three claims ended in contested lawsuit, whose ultimate outcomes included a $5,000 fine, a

$3,000 fine, and an injunction ordering the respondent not to violate campaign laws in the future.[68] Put differently, of the sixty individual respondents, just over 78% incurred no penalty and only one respondent had to pay a fine greater than $3,100. Given that individual candidates simply are not subject to draconian sanctions by the FEC, it would be difficult to argue that the agency allows itself to be used by political officials as a weapon against each other as the Politically Partisan hypothesis discussed above would seem to suggest. It simply is not that intimidating a weapon.[69]

The data thus far seem to support the claims of many observers that the imposition of fines under federal campaign finance laws is an unlikely deterrent to future misconduct. We close this section, then, with an analysis of how the level of fine ultimately imposed compared to the alleged amount of the initial infraction. To the extent that one may merely internalize FEC fines as the cost of doing business, one would wish to know what those costs are relative to the possible advantages achieved by violating the rules. Of course, not every infraction involved a transfer of money (disclaimer violations, for example). Further, it is very difficult to empirically assess the relationship between amount of infraction and amount of fine given the numerous and subtle ways that money may be transferred to candidates. For example, a $20,000 campaign loan by a corporation falls within the same category as a direct transfer of a like amount of cash. But the "benefits" of the loan are difficult to quantify, being dependent upon such factors as whether the loan was to be repaid, and if so, at what interest rate.

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[68] The three respondents who chose to go to court almost certainly incurred a nontrivial amount of legal fees, but such figures are not recorded by the FEC. Also, many individuals chose to hire an attorney to represent them in the initial stages of the FEC investigation. But it would be problematic indeed to argue that a system that depends on punishment via extraction of attorneys fees is grounded in sound regulatory principles, especially given that such a system negatively impacts innocent parties.

[69] Admittedly, one could argue that the true "cost" of violating campaign finance laws is not in the monetary fine, but rather in the negative publicity that the alleged violation itself generates. Such reasoning is undoubtedly true for either extremely gratuitous violations or for certain office holders such as the President or the Speaker whose every indiscretion is widely publicized. Similarly, it is always relevant who one takes money from (e.g., the tobacco lobby) or who one gives money to (right-wing evangelical groups in the case of Senate hopeful Matt Fong)—regardless of whether that money is given according to federal campaign finance law. But it has yet to be demonstrated that allegations of taking an excessive contribution or being the benefactor of an illegitimate independent expenditure per se will play an important role in most elections.

Summaries of the nine MURs with the highest fines are provided, and then a brief statistical analysis of the remaining cases is offered. While our conclusions here are necessarily are impressionistic, we did find that in almost every circumstances the cost of the fine was less than the alleged amount of the initial infraction, suggesting that fines are not "dollar for dollar" even with the amount of the excessive contributions or expenditures in question.

1. In MUR 2598, the Texas Republican Congressional Committee allegedly violated numerous FECA provisions. Among the most serious alleged violations were accepting $294,100 in individual contributions in excess of the Act's limitation, allegedly accepting $194,508 dollars in prohibited corporate contributions (although the Committee contended that the amount was far less than that, for only $25,000 of this amount were from checks drawn on accounts with the terms "Company" or "Inc." in their names), failing to aggregate and itemize contributions requiring aggregation and contributions, failing to report $23,150 in contributions earmarked for federal candidates as being so earmarked, and failing to file timely reports. The party accepted a conciliation agreement whereby it was fined $40,000 and had to move the $25,000 of "clearly" corporate funds out of its federal account.

2. In MUR 3368, the campaign for a congressional candidate from New Jersey took a loans in the amount of $266,000 from a corporation, in violation of 2 U.S.C. § 441(b), which prohibits any corporate contributions, including loans. When the loans were discovered by the FEC, the campaign paid the loan of by securing another loan (which became the subject of another MUR). The campaign and the corporation accepted a conciliation agreement and were jointly fined $17,500.

3. In MUR 2678, the American Citizens for Political Action was charged with accepting excessive contributions from five elderly individuals. The total amount that these contributions exceeded the contribution limit by was $58,868. While the FEC found that four of the respondents had indeed violated the contribution limits, it declined to prosecute them on the basis that they were elderly, infirm, and not morally culpable for their actions. The fifth individual took the FEC to court, where he lost. Although not fined, this individual was enjoined from violating the FECA in the future. The American Citizens for Political Action PAC accepted a conciliation agreement whereby it paid an $11,000 fine.

4. In MUR 2345, the Republican State Committee of Delaware allegedly violated numerous FECA provisions, due in large part to either a negligent or willful commingling of funds from both federal and nonfederal accounts. Additionally, it made excessive coordinated expenditures totaling just over $21,000 on behalf

of a candidate for the U.S. Senate. Noting that the Committee did attempt to "clean up" its accounting and reallocate impermissible funds back into non-federal accounts, the FEC accepted a conciliation agreement whereby the Committee paid a $9,000 fine.

5. In MUR 1866, a candidate for the U.S. Senate was charged with accepting an excessive contribution in the amount of $24,852 from the New York State Conservative Party State Committee. Specifically, the Committee had allowed the candidate to use its non-profit postage permit for mailing campaign literature, which saved the candidate the abovementioned amount in postage fees. The candidate accepted a conciliation agreement and paid a $5,000 fine. The Committee refused to respond to FEC attempts at negotiation and was taken to court. It finally agreed to a consent order whereby it paid a $15,000 fine.

6. In MUR 2336, the mother of a candidate for the House of Representatives gave his campaign $19,000 in what was first termed a loan and then later during the FEC investigation was recharacterized as a gift. The candidate reported the money as coming from his own funds on disclosure reports. The FEC declined to prosecute the mother, but eventually took the campaign to court. A judge determined that while the campaign (and the candidate) had not acted in bad faith when characterizing the money as coming from the candidate's personal funds, its members had not been completely candid with the FEC and showed a general "insensitivity to the election laws." The campaign was fined $5,000.

7. In MUR 3429, a congressional campaign was charged with accepting $14,400 in excessive contributions from various individuals. This money eventually was refunded, redesignated or reattributed, although not within the 60-day period required by law. The campaign accepted a conciliation agreement imposing a $4,500 fine.

8. In MUR 2841, a congressional campaign was charged with excessive contributions stemming from advertisements made by the committee supporting the candidacy of a presidential candidate. The cost of the advertisements was $12,312. The campaign entered into a conciliation agreement and paid a $5,500 fine.

9. In MUR 3518, the National Albanian American PAC allegedly made excessive contributions in the amount of $11,471 to three different federal campaigns, and also received excessive contributions in the amount of $8,500 from four individuals. The PAC entered into a conciliation agreement and paid a $12,500 fine.

With regards to the remainder of respondents that reached conciliation agreements with the FEC in matters involving financial infractions:

- Of the ten respondents whose infraction involved sums between one and $1,000, all ten were dismissed as "Reason to Believe But No Further Action."

- Of the twelve respondents whose infraction involved sums between $1,001 and $3,000: six were dismissed as "Reason to Believe But No Further Action," two faced a fine of between one and $1,000, three faced a fine of between $1,001 and $3,000, and one faced a fine of between $5,000 and $10,000.

- Of the five respondents whose infraction involved sums between $3,001 and $5,000: three were dismissed as "Reason to Believe But No Further Action," one faced a fine of between one and $1,000, and one faced a fine of $1,300.

- Of the nine respondents whose infraction involved sums between $5,001 and $10,000, six were dismissed as "Reason to Believe But no Further Action" --three because of mitigation, two because the respondent was bankrupt, and one because the respondent died—two faced fines of between $1,001 and $3,000, and one faced a fine of $3,500.

2. Criminal Prosecution of Campaign Finance Violations

Recall that should the FEC determine early in its investigation that there are reasonable grounds to believe that a FECA violation was made "willfully and knowingly," it cedes authority to the Election Crimes Branch of the Public Integrity Section of the Criminal Division of the Department of Justice. The ECB then usually directs the U.S. Attorney's Office in the district in which the infraction occurred to prosecute the case, retaining jurisdiction only in especially "sensitive" cases or those instances when the U.S. Attorney lacks sufficient resources to prosecute the case.[70] Interestingly, neither U.S. Attorneys' Offices nor the Public Integrity Section tend to litigate a criminal campaign finance violation under the FECA. Given that its venue determinations are complex, that its statute of limitations is three years rather than five,

[70] See supra notes 54-56 and accompanying text.

and that it requires proof that the defendant knew it was violating the FECA (rather than merely requiring proof that the defendant intended to improperly influence the political process), FECA violations usually are recharacterized by federal prosecutors into other criminal matters.[71] For example, an excessive contribution by an individual to a candidate, or the acceptance thereof, may be prosecuted under federal anti-bribery statutes, as was the case in the 1970s ABSCAM prosecution.[72] The falsification of campaign finance forms submitted to the FEC designed to hide a violation may be prosecuted under both the federal False Statements Act[73] and as conspiracy to defraud the United States.[74] Diversion of union funds for political purposes, a violation of the FECA, may be prosecuted as embezzlement,[75] as may diversion of bank funds.[76] Any corporate contributions that are deducted as a business expense or disguised as salaries or reimbursements would violate the Internal Revenue Code.[77]

In light of the "substantial problems" associated with pursuing violations of the FECA itself, the Department of Justice recommends that

> it is usually worthwhile for federal prosecutors to attempt to use alternative prosecutive theories to reach FECA crimes wherever possible. This task is facilitated by the fact that most criminally prosecutable FECA offenses involve some effort on the part of the prospective defendant to conceal the illegal character of the financial activity in question,

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[71] For a detailed explanation of the Department of Justice's approach to campaign finance violations, and how they can be recharacterized into other criminal claims, see Donsanto, supra note 38.

[72] Gross, supra note 2, at 295.

[73] 18 U.S.C. § 1001 et. seq.

[74] 18 U.S.C. § 371 et. seq.

[75] 2 U.S.C. § 441b.

[76] 18 U.S.C. § 656.

[77] See Donsanto, supra note 27, at 76.

> and by the fact that such concealment usually causes the recipient political committee to file inaccurate reports with the Federal Election Commission pursuant to the FECA's reporting requirements.[78]

The hypothesis that campaign finance violations are under-prosecuted due to the inherent limitations of the FECA itself appears to be validated by the explicit written policy of the Department of Justice on the subject. It is further validated by caseload statistics of federal prosecutors themselves. As Table Eleven demonstrates, FECA criminal violations are very rarely pursued by United States Attorneys' Offices:

Table Eleven: Criminal Prosecutions By United States Attorneys in Federal District Court[79]

	Cases Filed, By U.S.A.O. Classification			
Year	Federal Election Campaigns	Elections and Political Activities	Conflict of Interest	Bribery
1986	0	2	10	172
1987	1	3	7	126
1989	2	2	4	187
1990	1	2	7	189
1991	1	4	4	239
TOTAL	**5**	**13**	**32**	**913**

Not every alleged act of bribery, of course, occurred in the context of a federal campaign. Further, these data are somewhat ambiguous given that the Statistical Report does not describe its classification scheme; one thus cannot be certain as to what meaningful distinctions, if any, differentiate "Federal Election Campaigns" violations from

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[78] Id. at 75.

[79] These figures are taken from the United States Attorneys' Statistical Reports for Fiscal Years 1986, 1987, 1989, 1990, and 1991. In 1992 the Statistical Report altered its classification scheme in a manner such that one can no longer disaggregate election law violations from other types of "Official Corruption" offenses.

"Elections and Political Activities" violations. Nonetheless, the extreme infrequency of prosecutions in this area suggests that United States Attorneys do in fact eschew FECA in favor of alternative prosecutive theories.

The experience of federal prosecutors not only lends support to the contention that the problem of campaign finance law enforcement is due largely to the intrinsic limits of the law itself, but also suggests that the entire regulatory process is made more problematic by the fact that criminal sanctions—the ultimate regulatory punishment—are unavailable to regulators and prosecutors. If civil sanctions are too infrequent and too mild, and criminal sanctions essentially are nonexistent, one wonders what effective deterrent (besides punishment in the afterlife) incline would-be violators to obey the law. The Enforcement Pyramid, apparently, has collapsed.

Summary

A preliminary review of the MUR process suggests the following conclusions. First, the FEC relies heavily on third-party enforcement. Such enforcement targets candidates and campaigns more so than does the FEC itself, and, consonant with theories of regulatory behavior, these third-party complaints represent a very disproportionate share of claims that eventually are dismissed as being groundless. Second, the vast majority of claims—especially those lodged against individuals as opposed to institutional actors—are dismissed with either no penalty or low-level fines, suggesting that if the FEC is used by politicians as a political weapon, it is a comparatively ineffective one. Third, the fines that are levied do not appear to be as great as the value of the monetary infraction that gave rise to the claim in the first place. Fourth, the likelihood of being criminally prosecuted for violations of the campaign finance laws is almost nonexistent.

Having stated the problem, we turn now to a discussion of several proposed reforms and explain why they are unlikely to significantly improve the situation.

III. Efforts to Reform the FEC and the Futility of Regulatory Enforcement

As noted previously, the FEC is widely regarded as "a weak and ineffective agency" which is incapable of fulfilling its mandate to enforce federal campaign finance laws.[80] The litany of typical criticisms encompasses objections to both the agency's procedures and decisions: that it takes too long for the FEC to act on a case; that it lacks clear priorities in choosing cases to investigate; that it does not have adequate resources to do its job; that decisions are too easily deadlocked along partisan lines; and, most disturbingly, that the FEC is essentially irrelevant to many political practitioners "because of the small probability of enforcement."[81] The sum result of such problems is best described by Lawrence Noble, General Counsel for the FEC:

> The argument is that violating the law has become the cost of doing business. I can tell you in many cases this is true. I have talked to enough lawyers who represent candidates who say that the classic conversation in the campaign room consists of someone asking, "We want to do this and this. What are the consequences?" Then the lawyer responds by saying, "We cannot do that. It is illegal. After the election, the FEC will go after you." To which the questioner asks, "What is the fine?" Even if the penalty is a $20,000 fine, he is thinking, "But this action will win the election. All right, thank you. Leave the room, please." I am serious. That scenario happens, and the lawyers get up and leave the room. The next day they get phone calls, to the effect of, "Listen, we should tell you what we just did," because in a political campaign the reality—winning—often is everything.[82]

Observations such as those of Mr. Noble have prompted various proposals intended to correct flaws in the FEC's structure and procedures. One obvious problem, for instance, is that an even number of commissioners chosen along party lines greatly

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[80] See supra notes 17-19 and accompanying text.

[81] Colloquia, supra note 4, at 223.

[82] Id. at 232.

increases the odds of deadlock. Moreover, by having a rotating Chair, the FEC lacks the strong Chief Executive enjoyed by other independent agencies such as the SEC, FCC and the FTC. For although partisan deadlock is a rare occurrence for most matters that come before the FEC, the high profile of the small number of cases that do deadlock makes the problem highly salient.[83]

Having an odd number of commissioners would certainly lessen, if not eliminate, the prospects of deadlock. For instance, California's Fair Political Practices Commission (California's FEC equivalent) has five members and a full time Chair, and does not experience partisan deadlock. However, since deadlock arises infrequently in FEC matters, this reform would do little to speed up the numerous routine matters under review. To the extent that one is concerned—quite properly, we believe—with the problem that delayed enforcement by the FEC undermines any deterrent value that the campaign finance laws might otherwise possess, altering the commission structure would do little, if anything, to remedy the underlying malady.

Yet if one instead is concerned about "getting the law right" in those few instances that do spawn gridlock, the proposed reforms might actually worsen the problem. Breaking deadlocks with an odd numbered vote raises questions about the perceived legitimacy of agency decisions in politically volatile cases. Simply put, Democrats and Republicans are divided on certain issues of campaign finance, and if the FEC were to move to an odd member commission it is likely that many important interpretative decisions would be made along partisan lines. A change in the partisan makeup of the Commission might lead to a change in future legal interpretations, leading to more frequent reversals in commission policy and greater uncertainty among the political actors who must try to live within these rules. FEC actions would begin to look like "victor's justice," further undermining the perceived legitimacy of the Commission's

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[83] Id. at 252-53. Deadlock tends to be problem when the agency is asked to clarify or expand on a rule such as whether run-off funds count against general election expenditure limits, or what it means to bundle money.

actions. In short, there is a tradeoff between the ease of making decisions and the durability of choices made. An evenly bipartisan Commission raises the threshold of agreement needed for action, but lessens the probability of future reversals.

A second seemingly sensible suggestion is to develop an effective system of random auditing. The FEC originally was given the power to conduct random audits, but that power was revoked by Congress in 1979 because it was thought to be too slow and flawed. Assuming for a moment that the FEC would be given adequate resources and staff to conduct random audits more effectively—a very questionable assumption, given the incentives of incumbents—the prospect of candidates and contributors being audited more frequently and unpredictably presumably would encourage a higher level of compliance. Critics point out that the current system of "for cause" audits does not as adequately threaten potential violators, and moreover, introduces enforcement bias; groups with the most resources and sophisticated professional advice are more likely to present completed filings that appear to be correct and avoid an audit.[84] Consequently, the poorer and less sophisticated campaigns are more likely to be audited under the current system.

The case for random audits seems pretty unassailable. A number of state agencies like California's FPPC already have such powers. But however sensible the idea, random audits address only one facet of the enforcement dynamic—the likelihood of being caught. Even assuming that the audits are frequent and timely enough to catch a greater number of violations than are caught currently, they do not address the other critical component of regulatory enforcement—the punishment one receives upon being caught. As almost all regulatory theorists would note, credible regulatory enforcement necessitates that the regulator can threaten the regulatee in a way that will force the latter to alter its behavior. Without the ability of agencies to threaten, there can be no "substantial compliance." Firms will have no incentive to obey the law save their own

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[84] Amanda LaForge, Comment, "The Toothless Tiger—Structural, Political, and Legal Barriers to Effective FEC Enforcement: An Overview and Recommendations," 10 Admin. L.J. Am. U. 351 (1996).

ethical viewpoints and the moral (and economic) judgment of the community. As Noble suggests above, the utility of winning an election is so great that any reasonable fine will become an internalized cost which the party or candidate absorbs in order to achieve the all important goal of winning. Changing the odds of detection through random audits will matter little if the utility of winning and the disutility of losing are sufficiently large.

A third class of structural proposals deals with the perceived arbitrariness of FEC actions. In particular, some critics feel that FEC procedures need to be made both more public and more formal. At the present time, an FEC enforcement action is closed to the public until a case is dismissed, a conciliation agreement is reached or an enforcement action is taken to court. Parties who have complaints filed against them are shut out of the process until the conciliation phase. Further, they are not entitled to the usual due process protections given by other administrative agencies such as the right to address the Commission in person, the right to see the evidence that has been collected against them and the right to challenge the General Counsel's final recommendations to the Commission.[85] These rather opaque procedures have prompted some commentators to recommend that the FEC use administrative law judges in the fact finding stages of a case. Supporters maintain that such a policy would enable the Commission to act in a more appellate manner, introduce judicial supervision into the process, and deter rivals from making frivolous complaints.

Again, these may be perfectly sensible recommendations, but they do not address the FEC's core difficulties, and indeed they may make the situation worse. Recall that a fundamental problem of FEC enforcement is that the agency cannot act in a sufficiently timely fashion, which undermines the deterrence value of its actions. While the creation of administrative law judges would help to ensure procedural fairness, this fairness is purchased at the cost of a more formal, legal, and adversarial hearing—a hearing that

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[85] Id. at 24 n.153.

would almost certainly take longer than those of the status quo.[86] In reality, however, the point may be moot due to the fact that the most time-consuming phase of FEC enforcement tends to be the negotiation over fines. Without the power to impose these fines unilaterally, and given the incentive on the part of political actors to drag out negotiations until it is electorally safe to do otherwise, negotiations are likely to continue to be protracted. Thus, the presence of administrative law judges may have little practical effect. Nor will openness and greater due process protections alter public perception that the FEC is politically captured by Congress. If anything, the creation of additional due process protections might be viewed as a congressional attempt to "let the guilty go free" by providing them with numerous procedural loopholes from which to escape.

In sum, the problem with the first set of reform proposals is that while they might improve the agency's procedures in marginal ways, they do nothing about the what we have identified as the core problems—lack of timely, credible sanctions capable of deterring would-be violators. In contrast, a second set of proposals might address these core problems more effectively, but they introduce other serious, potentially constitutional questions at the same time.

Some commentators have suggested that the FEC be given injunctive authority to take action to stop a violation prior to an election. Certainly the ability to intervene before an election would help to solve the problem of irrelevance. When an election is in doubt, every resource and every taint of illegality can seem critical to the competing sides of an electoral contest.[87] The ability to stop an illegal contribution or prevent the distribution of mail without the proper disclaimer could make the difference between

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[86] For an excellent discussion of the costs of legalistic and procedurally-oriented approaches to administrative actions and policymaking, see Robert Kagan, Adversarial Legalism and American Government, 10 J. of Pol. Analysis & Management 369, 374-379 (1991).

[87] By the same token, however, this injunctive ability might not matter as much in relatively safe elections. Nor would it necessarily matter as much to the people giving the money—i.e. PACs, parties, and individual donors—as it would to the campaign itself. Finally, one again would have to solve the problem of detection by ensuring that infractions were likely to be discovered (presumably by a very aggressive and exceptionally well-funded system of random auditing).

winning or losing a race. Since campaigns cannot as easily absorb the penalty or prohibition at the pre-election phase as they can in the post-election period, the agency's threat is greater in the former than in the latter.

The drawback, of course, is that these are actions in the realm of first amendment political rights. Such injunctive authority could seriously infringe upon protected speech and might not survive court scrutiny, especially if the agency were to move to an odd numbered commission. Actions taken with a split vote during the election phase likely would be perceived as politically motivated. Even if they survived court scrutiny, such injunctive actions would be especially controversial. But a more fundamental problem with injunctions revolves around their practical application. Take, for example, the typical October before an election. The premise behind the injunction proposal is that the FEC both could detect and reasonably consider a matter before the election itself. Simply put, such a belief is fantastic. Most MURs presently take at minimum eleven months to conclude. To the very extent that an injunction would have real world consequences, it would become a more effective political weapon; consequently, one reasonably would expect to see an explosion of third-party complaints as each side tried to hoist the other on any number of injunctive petards. Add to this the fact that to the extent that these injunctions would prove costly, the FEC almost certainly would be forced to provide greater due process protections than it already does, again increasing the time between discovering the alleged violation and the issuance of an injunction.[88] More groups would request injunctions, all groups would virulently fight any injunction that might potentially affect them, and the FEC quickly would become overwhelmed.

Indeed, the recent experience of the FEC does suggest that increased sanctions correlate to increased intransigence on the part of regulatees. In 1991 and 1993 (the years that we study), the median civil penalty for campaign finance infractions was $1,000 and

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[88] And, equally obviously, campaigns would immediately and aggressively fight these injunctions in court, further draining agency resources.

$2,000 respectively.[89] By 1997, the median civil fine had increased to approximately $9,000.[90] During this same time period, however, the total number of conciliation agreements reached annually decreased from just over 250 in 1991 to approximately 60 by 1997.[91] Similarly, the total number of lawsuits in which the FEC was involved increased from 51 during the 1991-1993 period to 78 during the 1995-1997 period.[92]

Such is the irony inherent in regulatory enforcement. The more effective an agency becomes in threatening the regulatee, the more regulatees will fight; the more regulatees fight, the more resources the agency must expend in particular cases, and the more narrow its focus becomes; the narrower the agency's focus, the more likely that would-be violators may feel that their infractions will escape unnoticed—hence Scholz, Ayres and Braitwaite's observations that truly draconian sanctions may only be used in the most extreme cases.[93] This dynamic is especially problematic in the context of campaign finance regulation, given the high stakes involved—both from a political perspective (the election) and the constitutional perspective (first amendment rights). Additionally, the realm of campaign finance is in many ways a zero-sum game given the nature of the American party system. The more effective the FEC's actions, the more controversial it would become precisely because its actions could advantage one party or

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[89] Federal Election Commission Annual Report 1997 at 12.

[90] Id. Although possible to argue that this increase in civil penalties suggests a more effective sanction, such a conclusion seems unlikely. As practitioners themselves note, see supra note 82 and accompanying text, fines of this magnitude simply are not a concern to candidates.

[91] Id.

[92] Id. at 93; Federal Election Commission Annual Report 1991 at 15. Federal Election Commission Annual Report 1992 at 91; Federal Election Commission Annual Report 1993 at 91; Federal Election Commission Annual Report 1995 at 91; Federal Election Commission Annual Report 1996 at 93.

[93] It is somewhat disingenuous to suggest that the FEC should have injunction power, but only use it in the most serious cases, for in many instances one would not be able to determine the gravity of the offense before the election. The key difference between campaign finance regulation and, for example, environmental regulation, is that candidates can time their escape—the date of the election—and commit their violations at some point before the election where it becomes realistically impossible for the FEC to monitor and cure the problem with an injunction. Oil companies do not have such a reprieve. Generally speaking, regardless of when they commit an infraction, the full spectrum of regulatory law may be brought to bear against them.

interest over another.[94] In considering the value to be gained by injunctive action or pre-election penalties against the cost of lost political speech and possible error, this proposal just does not seem like a sensible trade.

Finally there is the proposal to restructure the process by which the FEC doles out civil penalties. Currently, if negotiations break down during attempts to create a conciliation agreement, the FEC does not have the power to unilaterally impose fines; it instead must take the matter to court and prove its case there. Such a process consumes valuable agency resources and increases the delay between infraction and sanction. One idea advanced to remedy this problem would be to give the FEC the authority to impose fines directly. This, it is argued, would strengthen the deterrent effect because it lowers the cost and labor involved in bringing actions against those who do not comply with regulations. Similarly, advocates of this proposal also suggest increasing fines to a level that makes it difficult for campaigns to dismiss FEC enforcement simply as the cost of winning the election.

In the end, we would argue that when winning an election is sufficiently important, almost any fine is worth paying. Giving the FEC the power to levy fines might lower the costs of enforcement actions and contribute on the margin to the credibility of the FEC's threat, but that threat simply will not deter under most circumstances unless the fine is both imposed in a timely fashion and sufficiently (i.e. disproportionately) large so as to give the candidates and the contributors serious pause. Thus, not only would fines have to be dramatically increased, one also would have to institute a mechanism for pre-election penalties such as the injunction suggestion discussed above—thus reaping its attendant disadvantages as well. Since many mistakes are made by those who lack sophisticated assistance from lawyers and accountants, the aggressive imposition of draconian civil penalties could have serious chilling effects on the pool of candidates who would be willing to run for office. Finally, large civil

[94] The ineffectiveness of the FEC probably shields it in part from the potential criticism it would otherwise receive.

sanctions will disproportionately affect those candidates and groups who are less affluent than their wealthy counterparts.[95] In the name of promoting political equality, the system could become even more biased.

Conclusion: The Failure of Regulatory Enforcement

In this paper, we have tried to demonstrate that the FEC encounters many of the problems that regulatory theorists would expect the agency to face. The FEC relies heavily on third-party enforcement, and this reliance skews its enforcement activities towards less serious offenses. Further, it allows regulatees to use the agency as a political weapon (even if it is an ultimately unsuccessful one) while at the same time giving these regulatees the ability to overload agency resources by bringing a multiplicity of often nonmeritorious claims. Also, the FEC does not possess a wide variety of credible regulatory sanctions. Criminal sanctions are almost never employed due to inherent limitations in the campaign finance legislation itself, and civil sanctions are, for the most part, low-level fines that easily could be internalized as campaign costs. There simply is no way to create an incremental system of sanctions that generally would encourage regulatees to voluntarily comply with the law. Finally, the penalties that are enforced are usually imposed long after both the election and the underlying underlying infraction itself, further undermining deterrence and hence, the possibility of achieving "substantial compliance."

Many of the proposals advanced to remedy the situation would, in our opinion, prove at best marginally useful and at worst counterproductive. Tinkering at the margins ignores the fundamental problem—a regime of regulatory enforcement will not work in the context of campaign finance violations. Or, to be more precise, for a regime of regulatory enforcement to work, one would have to have a system of pre-election

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[95] In the area of environmental regulation, one commentator noted that draconian civil sanctions were in many cases levied not against large corporations but rather small businesses. See [CITE.]

sanctions and random auditing coupled with exceedingly draconian civil penalties that were enforced by an FEC with vastly more resources than it presently possesses. We doubt that such a system could realistically work. But even if could, the concomitant increase in legal contestation, political controversy, and abridgment of first amendment rights suggests the ball is not worth the candle.

What then, is the solution? If politics is indeed a market, then let the market solve the problem. Consider abolishing expenditure and contribution limits and instead emphasize transparency based on immediate internet disclosure. If voters actually care about where a candidate's money comes from, or how much money is spent, let them vote based upon such distaste. Should they choose not to do so, or should they simply not inform themselves on the matter, so be it—such is the nature of living in a democracy in which voters are not in fact made in Madison's image.[96] We admit that such a system presents numerous difficulties and numerous concerns. But enforcement, by and large, is not one of them. While a disclosure regime, just as a regulatory regime, requires agency involvement, reliance third-party enforcement is ideally suited to such an environment. Further, the factual inquiry into whether a "failure to file" has occurred is more straightforward, and hence more quickly disposed of, than the more complicated questions surrounding complex schemes to hide excessive expenditures. And laws prohibiting conflict of interest, bribery, and falsification of documents would still be available as a means of punishing the most heinous offenses. Ultimately, however, we offer not so much a suggestion to adopt a disclosure regime as a request that supporters of the regulatory regime explain their reasoning as to why such a system can function fairly and effectively in the context of campaign finance laws—barring deeply-held personal fears of eternal damnation, how is this supposed to work?

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[96] For a compelling critique of the essentially elitist assumptions made by many proponents of campaign reform, see Daniel Ortiz, The Democratic Paradox of Campaign Finance Reform, 50 Stan. L. Rev. 893 (1998).

Appendix One: Methodology

We took a random sample of MURs as reported in the Federal Election Commission Reporter for the years 1991 and 1993 by drawing the first five MURs of

each month. Any MUR that listed more than seven respondents was excluded, for fear that it would disproportionately skew the sample (these, however, were a very minor percentage of the matters). Further, any MUR in which the respondents were unnamed were also excluded, given the impossibility of accurately coding such matters. We then went to the Federal Election Commission itself and reviewed the selected MURs. In several instances a MUR had not been completely catalogued by the agency; these MURs also were excluded. We finished with a sample size of seventy-nine MURs covering 186 respondents. Each MUR was then coded as follows:

A = Year, where
- 0 = 1991
- 1 = 1993

B = Respondent, where
- 0 = individual
- 1 = political party
- 2 = PAC, corporation, or other private organization
- 3 = political campaign, including treasurers in their individual capacity
- 4 = candidate or member of a candidate's immediate family

C = If Respondent is a Candidate, where
- 0 = incumbent
- 1 = challenger, later elected
- 2 = challenger, defeated

D = Initiator of MUR, where
- 0 = FEC
- 1 = Other government agency
- 2 = opposing political party or campaign
- 3 = other outside organization
- 4 = sua sponte

E = Violation Alleged, where
- 0 = Failure to File Reports/Failure to File on Time
- 1 = Failure to Report Complete Information/Failure to Disclose
- 2 = Failure to Register
- 3 = Failure to Maintain Records
- 4 = Disclaimer
- 5 = Destruction of Records
- 6 = Excessive Contributions/Inappropriate Independent Expenditures
- 7 = Contributions in the Name of Another
- 8 = Prohibited Contributions, Unions
- 9 = Prohibited Contributions, Corporations
- 10 = Transfer or Use of Prohibited Funds
- 11 = Personal Use of Campaign Funds
- 12 = Other

F = Amount of Money In Controversy, where
- 0 = not applicable
- 1 = could not be determined by data supplied
- 2 = $0 - $1,000

3 = $1,001 - $3,000
4 = $3,001 - $5,000
5 = $5,001 - $10,000
6 = $10,001 - $20,000
7 = $20,001 - $50,000
8 = $50,001 - $100,000
9 = over $100,000

G = Disposition of MUR, where
0 = Dismissed for No Reason to Believe
1 = Dismissed for Reason to Believe, but No Further Action
2 = fine, 0 - $1,000
3 = fine, $1,001 - $3,000
4 = fine, $3,001 - $5,000
5 = fine, $5,001 - $10,000
6 = fine, $10,001 - $20,000
7 = fine, $20,001 - $50,000
8 = fine, $50,001 - $100,000
9 = fine, over $100,000
10 = lawsuit, default judgment
11 = lawsuit, contested

H = Reason for Dismissal Based on Reason to Believe, but No Further Action (if applicable), where
0 = insignificance of crime
1 = evidentiary difficulties/inability to prosecute
2 = insufficient resources
3 = respondent mitigated
4 = other

I = Time from Creation of MUR to Final Disposition, where
0 = one to three months
1 = four to six months
2 = seven to nine months
3 = ten to twelve months
4 = thirteen to fifteen months
5 = sixteen to eighteen months
6 = nineteen to twenty-one months
7 = twenty-two to twenty-four months
8 = twenty-five to twenty-seven months
9 = twenty-eight to thirty months
10 = thirty-one to thirty-three months
11 = thirty-four to thirty-six months
12 = thirty-seven to thirty-nine months
13 = forty to forty-two months
14 = forty-three to forty-five months
15 = forty-six to forty-eight months
16 = more than four years

Appendix Two: FEC Declinations

Justifications for Declination

Justification	Number of "Reason to Believe But No Action" Dispositions	Percentage of Total "Reason to Believe But No Action" Dispositions
Insignificance of Crime	33	50.0%
Evidentiary Difficulties/ Inability to Prosecute	14	21.2%
Insufficient Resources	5	7.6%
Mitigation by Respondents	9	13.6%
Other*	5	7.6%
TOTAL	66	100%

*Includes three dispositions for which no reason was given.

Areas Declined, By Alleged Violation

Alleged Violation	Number of "Reason to Believe But No Action" Dispositions	Percentage of Total "Reason to Believe But no Action" Dispositions
Failure to File/Failure to File on Time	4	6.1%
Failure to File Complete Info.	6	9.1%
Failure to Register	2	3.0%
Disclaimer	13	20.0%
Excessive Contrib./Indep. Expend.	22	33.3%
Contributions in the Name of Another	2	3.0%
Prohibited Contributions, Unions	3	4.5%
Prohibited Contributions, Corporations	12	18.2%
Other (Mail List Violations)	2	3.0%
TOTAL	66	100%