

# The Enforcement of Campaign Finance Rules: A System in Search of Reform

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In the wake of the savings and loan crisis, the so-called “Keating Five” scandal, and increasing disillusionment with the electoral system, campaign finance reform is once again an issue of major national concern. As has often occurred in the past,<sup>1</sup> Congress appears poised to enact major campaign reform legislation as a response to these latest political scandals. Indeed, the United States Senate passed a campaign finance reform bill in May of this year,<sup>2</sup> and the House of Representatives is currently considering campaign finance reform legislation.<sup>3</sup>

While there have been many proposals to make substantive changes to the campaign finance laws, historically, these proposals have overlooked the need to improve procedures for enforcement of these laws. If this round of reforms is to be effective, particular attention must be devoted to the enforcement provisions in light of the critical inadequacies of the current enforcement scheme.

The current enforcement mechanism is flawed in three fundamental ways. First, individuals and campaigns accused of Federal Election Campaign Act (FECA)<sup>4</sup> violations do not enjoy many of the due process protections available to the accused in other administrative contexts. Second, the statutory enforcement scheme under the FECA constrains the ability of the Federal Election Commission (FEC) to adequately deter FECA violations—a daunting task in the face of entities that aggressively seek creative ways to evade the laws. Finally, despite the existence of a number of criminal statutes prohibiting elected officials from accepting campaign contributions for improper purposes, the criminal law has been of limited value in regulating campaign finance

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1. See *infra* Section I.

2. The Senate passed the Senate Election Ethics Act of 1991, S.3, 102d Cong., 1st Sess., on May 23, 1991. 137 Cong. Rec. S6533 (daily ed. May 24, 1991).

3. Even if Congress passes new campaign finance reform legislation during this term, it is likely that the debate will continue. On May 22, 1991, President Bush notified the Senate that he will veto any legislation that contains spending limits, public financing, or a different set of campaign finance rules for House Members and Senators. See Letter from President George Bush to Senator Mitch McConnell, *in* 137 Cong. Rec. S6271 (daily ed. May 22, 1991).

4. 2 U.S.C. §§ 431-455 (1988 & Supp.).

activity. While the criminal law plays a critical role in protecting the integrity of political campaigns and government processes, as currently written and enforced, it regulates only a relatively narrow class of the most egregious conduct. As a result, prosecutors now must either proceed with the difficult task of proving a criminal case or do nothing due to the lack of a civil enforcement alternative for violations of the law involving the electoral process outside of the jurisdiction of the FEC.

This article suggests reforms that Congress should adopt in order to address these flaws and improve the enforcement of federal campaign finance laws. Both deterrence and due process protections would be enhanced significantly by reforming the enforcement mechanisms of the FECA. Essential reforms include establishing the use of Administrative Law Judges (ALJs), reinstating random audits, opening the enforcement process to the public, and establishing and publicizing penalty guidelines. Moreover, vigorous criminal enforcement of the FECA and other laws, particularly the bribery and conflict-of-interest statutes, would enhance public trust that elected officials will act in the best interest of their constituents and the nation, rather than for selfish gain. Finally, the addition of a civil penalty provision to the conflict-of-interest statute would provide prosecutors with greater flexibility in identifying sanctions to address appropriately the severity of improper conduct.

## I. THE HISTORY OF CAMPAIGN FINANCE LEGISLATION

Historically, Congress has repeatedly enacted reforms in the wake of major scandals. Examples of such reactionary reforms date back to the origins of campaign finance regulation. However, these reform efforts have never included strong means for enforcement.

In response to public outcry over the huge corporate contributions to the presidential campaigns of William McKinley and Theodore Roosevelt, Congress enacted the Tillman Act in 1907,<sup>5</sup> the first campaign finance legislation of this century.<sup>6</sup> The Tillman Act prohibited corporations and national banks from contributing money to campaigns for federal office. In 1910 and 1911, the Act was expanded to require financial disclosure of campaign activity and to impose pre-primary election expenditure limits.<sup>7</sup>

The constitutionality of congressional campaign regulation was challenged successfully soon after its inception. In 1921, the Supreme Court upheld the conviction of Truman Newberry, who defeated Henry Ford in 1918 in the

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5. Act of Jan. 26, 1907, ch. 420, 34 Stat. 864.

6. ROBERT I. MUTCH, *CAMPAIGNS, CONGRESS AND COURTS: THE MAKING OF FEDERAL CAMPAIGN FINANCE LAW* 1-8 (1988); THOMAS J. SCHWARZ & ALAN G. STRAUSS, *FEDERAL REGULATION OF CAMPAIGN FINANCE AND POLITICAL ACTIVITY* § 1.02[1] (1985).

7. Act of June 25, 1910, ch. 392, 36 Stat. 822; Act of August 19, 1911, ch. 33, 37 Stat. 25, 26-28.

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Republican primary in Michigan. Mr. Newberry was convicted for making excessive expenditures prior to the primary election. The Supreme Court held that Congress did not have the authority to regulate the primary and nomination election process.<sup>8</sup> Although the Court ultimately reversed that decision in 1941,<sup>9</sup> Congress did not again enact legislation regulating the primary and nomination process until the passage of the FECA in 1971.

The Teapot Dome scandal, which focused on the grant of noncompetitive oil leases to Harry F. Sinclair by the Secretary of the Interior during the Harding Administration, led to the next round of major campaign finance legislation. An investigation conducted by the Senate revealed that large contributions made by Sinclair to the Republican Party had not been reported because the campaign finance disclosure law only covered contributions made in an election year.<sup>10</sup> Congress subsequently enacted the Federal Corrupt Practices Act of 1925,<sup>11</sup> thereby strengthening the disclosure provisions and expanding the definition of an illegal contribution.<sup>12</sup>

Similarly, concern about union political contributions to President Franklin Roosevelt's 1936 re-election campaign, especially from the United Mine Workers and the Congress of Industrial Organizations, precipitated the Smith-Connally Act of 1943<sup>13</sup> and the Taft-Hartley Act of 1947.<sup>14</sup> The former was a temporary wartime measure that amended the Federal Corrupt Practices Act of 1925 to prohibit union contributions to federal campaigns. The Taft-Hartley Act, enacted in a climate of anti-union hostility after World War II, made permanent the Smith-Connally prohibition.

Despite these efforts to reform the campaign finance laws, the repeated failure to enforce them rendered those efforts ultimately ineffective. In addressing the lack of enforcement prior to the enactment of the FECA, John Warren McGarry, now Chairman of the FEC and former Chief Counsel for the Special Committee to Investigate Campaign Expenditures, stated that "at the time the Federal Election Campaign Act of 1971 was adopted, reporting and disclosure laws had been on the books for well over half a century. However, there was little or no enforcement of these laws, and little or no disclosure."<sup>15</sup>

Congressman Wayne L. Hays, who, as Chairman of the House Administration Committee, reluctantly permitted the establishment of the FEC, also

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8. *Newberry v. United States*, 256 U.S. 232 (1921).

9. *United States v. Classic*, 313 U.S. 299 (1941).

10. See MUTC, *supra* note 6, at 24-25.

11. Ch. 368, tit. III, 307, 43 Stat. 1070, 1072 (codified in scattered sections of Titles 2 and 18 of the U.S.C.).

12. *Id.*

13. Ch. 144, 57 Stat. 163.

14. Ch. 120, § 304, 61 Stat. 136, 159.

15. John Warren McGarry, Remarks Before Citizens Research Foundation Conference at Georgetown University Law School (April 2-3, 1981) in HERBERT ALEXANDER & BRIAN HAGGERTY, *THE FEDERAL ELECTION CAMPAIGN ACT AFTER A DECADE OF POLITICAL REFORM 19* (1981).

acknowledged the lack of enforcement under the Federal Corrupt Practices Act of 1925:

Pressure became fairly intense in the Congress to do something because the Corrupt Practices Act was honored more in the breach than it was in any other fashion. I don't recall that there was ever a provocation or even that anybody raised an eyebrow about anybody's campaign expenditures and it seemed to a good many people that they were getting out of hand. A lot of things were going on that shouldn't go on.<sup>16</sup>

Perhaps the best known and most substantial and influential change in campaign regulation came in the wake of the Watergate scandal, in which the Committee to Reelect the President (CRP) was discovered to have 'laundered' illegal corporate contributions and used them to fund illegal campaign-related activities. In addition, CRP had failed to disclose the receipt of certain legal contributions.<sup>17</sup> In an attempt to prevent the recurrence of such misdeeds and to reconstruct faith in the electoral system, Congress enacted the 1974 amendments to the Federal Election Campaign Act.<sup>18</sup> In 1976, the FECA was again amended to address the portions of the 1974 amendments that were struck down in *Buckley v. Valeo*.<sup>19</sup> This statute, the basis for the current law, regulates campaign finance and created the FEC, which has exclusive jurisdiction over the civil enforcement of the FECA.

Commentators have suggested that the recently completed Senate hearings concerning contributions to five Senators by Charles Keating will provide the incentive necessary to complete the process, resulting in the passage of campaign finance reform legislation.<sup>20</sup> Indeed, the Senate Ethics Committee included a call for bipartisan campaign reform in its interim report on the Keating matter. The Committee noted that over eighty percent of the funds at issue in the Keating case were not subject to the limitations of the FECA because they were raised for independent expenditures, for political party funds raised outside of the limits and prohibitions of federal law (so-called "soft money"), and for a non-federal political action committee. The Committee stated that "[a]ny campaign finance reform measure will have to address these mechanisms for political activities, as well as campaign fundraising and expenditures directly by candidates, in order to deal effectively with the issues presented in these cases."<sup>21</sup>

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16. Wayne L. Hays, Remarks Before Citizens Research Foundation Conference at Georgetown University Law School (April 2-3, 1981) in ALEXANDER & HAGGERTY, *supra* note 15, at 19.

17. See MUTCH, *supra* note 6 at 47-49.

18. Pub. L. No. 93-443, 88 Stat. 1272 (codified as amended at 2 U.S.C. §§ 431-455 (1988)).

19. 424 U.S. 1 (1976) (upholding the disclosure, public financing and contribution limitation provisions, but invalidating the limitations on independent expenditures and candidates' use of personal funds and the method of appointing FEC Commissioners).

20. See, e.g. Andrew Bates, *The Keating 535*, WASH. MONTHLY, April 1991, at 35; Mary McGrory, *Keating, Cheating and Pols*, WASH. POST, Nov. 18, 1990, at C1; Fred Wertheimer, *Restoring the Health of Our Democracy*, COMMON CAUSE MAG., May-June 1991.

21. See Senate Select Committee on Ethics, 102d Cong., 1st Sess., *Statement of the Committee Following Hearings Involving Senators Cranston, DeConcini, Glenn, McCain and Riegle* 6 (1991).

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The Senate Ethics Committee did not discuss the enforcement of campaign finance reforms, nor did the legislation passed by the Senate address the issue. This is particularly unfortunate for two reasons. First, as described below, the current campaign finance enforcement mechanism has serious deficiencies. Second, should the reform legislation become law, the lack of an effective enforcement scheme would leave the promise of reforms unfulfilled, and thus increase the public cynicism that now surrounds the whole campaign finance system. The current campaign finance law enforcement structure and a series of proposals that would address its major deficiencies are discussed below.

### II. THE CIVIL ENFORCEMENT OF CAMPAIGN FINANCE LAWS—THE FEDERAL ELECTION COMMISSION

#### A. Overview

Understanding the structural causes of the problems with campaign finance regulation requires a familiarity with the current enforcement tools and methods of the FEC. The 1974 Amendments to the FECA created the FEC as a civil enforcement agency. In response to the landmark Supreme Court ruling in *Buckley v. Valeo*, however, the 1976 amendments to the FECA reconstituted the FEC as an independent executive branch agency with exclusive jurisdiction over civil enforcement of the FECA.<sup>22</sup>

The FEC is composed of six voting members, each serving a six-year term.<sup>23</sup> Each member is appointed by the President and is confirmed by the Senate.<sup>24</sup> In addition to the six voting members, the Secretary of the Senate and the Clerk of the House of Representatives serve on the Commission as nonvoting *ex officio* members.<sup>25</sup> Of the six voting members, no more than three may be affiliated with the same political party.<sup>26</sup> The voting membership is currently composed of three Democrats and three Republicans. All substantive decisions of the FEC require at least four affirmative votes. Given this requirement and the party-line split of the voting membership, it is often hard for the FEC to reach decisions on controversial issues.

Each year the Commission elects a chairman and vice chairman, who may not be affiliated with the same political party. To ensure that the chairman does not become a dominant figure, the law requires that the position of chairman rotate among members each year, with no commissioner serving as chairman

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22. Although rarely done, if the FEC determines that there is probable cause to believe that a knowing and willful violation of the FECA has occurred, it may refer such apparent violation to the Attorney General for criminal prosecution. 2 U.S.C. § 437g(a)(5)(C) (1988).

23. 2 U.S.C. § 437c(a) (1988).

24. *Id.*

25. *Id.*

26. *Id.*

more than once during the six-year term.<sup>27</sup> The chairman has no more power than the other Commissioners. This maintains the political balance of the Commission but results in a weak chairman—an outcome that many argue leaves the FEC rudderless and ineffective.<sup>28</sup>

Under the FECA scheme, an enforcement proceeding, called a Matter Under Review (MUR), may be initiated in two ways—either on the basis of (1) a complaint filed with the Commission, often by opposing candidates or by the opposing political party (complaint-generated), or (2) information ascertained by the Commission in the normal course of its business (internally-generated).<sup>29</sup> In either case, the Office of General Counsel (OGC), the Commission's lawyers, prepares an analysis and a recommendation as to whether there is "reason to believe" a violation has occurred or is about to occur. The Commission votes on the recommendations in a closed meeting. If four of the six Commissioners vote to find reason to believe a violation has occurred, the Commission initiates an investigation. If the Commission deadlocks, then it must prepare a statement explaining its disagreements.

The findings of the Commission, deadlocks included, are subject to judicial review in the United States District Court for the District of Columbia.<sup>30</sup> Such a deadlock was challenged when the Commission split along party lines in a case involving a National Republican Senatorial Committee effort to funnel \$2.7 million in excessive contributions to Senatorial candidates in twelve states. The Democratic Senatorial Campaign Committee sought judicial review of the FEC's failure to reach a decision. The Court agreed with the FEC's legal staff and the Democrats on the Commission that the method used to funnel contributions, sometimes called "bundling," was illegal, and remanded the case to the FEC to order the prohibition of the bundling activities and award appropriate penalties.<sup>31</sup>

After the Commission has found "reason to believe," it may exercise broad investigative powers. The FEC has the authority to take depositions of witnesses, subpoena documents and answers to questions, and enforce the subpoenas in U.S. District Court. Upon completion of its investigation, the OGC makes its recommendation to the Commission. The respondent has an opportunity to respond in writing only. The FEC then attempts to settle the matter through a conciliation agreement, which routinely includes a detailed recitation of the facts, conclusions of law, an admission of a violation, and a civil penalty. If the respondent does not voluntarily enter into a conciliation agree-

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27. 2 U.S.C. § 437c(a)(5) (1988).

28. See BROOKS JACKSON, *BROKEN PROMISES: WHY THE FEDERAL ELECTION COMMISSION FAILED* 63 (1990).

29. 2 U.S.C. §§ 437g(a)(1) and (2) (1988).

30. 2 U.S.C. § 437g(a)(8) (1988).

31. *FEC v. National Republican Senatorial Committee*, 761 F.Supp. 813 (D.D.C. 1991).

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ment with the FEC, the Commission may bring an action on a trial de novo basis in a United States district court.<sup>32</sup>

As a result of congressional action in 1979, the Commission began to use a short-cut procedure referred to as “preprobable cause conciliation” to reach early agreements with respondents.<sup>33</sup> If the respondent requests preprobable cause conciliation the Commission will, upon completion of the OGC’s investigation, offer the respondent a draft conciliation agreement as a basis for settlement. If reached, an agreement has the same effect as an agreement reached after probable cause has been found. The preprobable cause conciliation provision has improved the enforcement process by allowing the Commission to handle cases more expeditiously. Respondents can save legal costs and time in cases where the violation is not disputed, and the FEC can better utilize limited staff resources on more complex issues and cases.

The Commission has consistently taken the position that every conciliation agreement must include a full recitation of the facts, an admission of a violation, and a civil penalty, regardless of whether the agreement is entered into before or after probable cause is found. The Commission will retreat from those requirements only in rare instances and, while it will negotiate the “admission language,” the Commission is averse to entering into an agreement that contains “neither admit nor deny” language.

If a case cannot be resolved through conciliation, the Commission will sue the respondent and seek the statutory maximum penalty, which is 100% of the amount in violation or \$5,000, whichever is higher.<sup>34</sup> If the Commission alleges that the violation is knowing and willful, it will ask the court to impose a penalty of 200% of the amount in violation or \$10,000, whichever is higher.<sup>35</sup> Respondents have a significant incentive to settle; once the matter is in litigation, there is a substantial risk that the court will impose a higher penalty than what the Commission offered to settle the matter during the administrative conciliation process.<sup>36</sup>

The Commission is generally successful in getting respondents to admit to violations in conciliation agreements. Most respondents prefer to quietly settle through the MUR process rather than subject themselves to litigation, its

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32. 2 U.S.C. § 437g(a)(6)(A) (1988).

33. 11 C.F.R. § 111.18(d) (1991).

34. 2 U.S.C. § 437g(a)(6)(A) (1988 & Supp.).

35. 2 U.S.C. § 437g(a)(6)(C) (1988 & Supp.).

36. The highest amount a respondent in an FEC action has ever agreed to pay the U.S. Treasury in a conciliation agreement was \$398,140. That amount, agreed to by the Mondale for President Committee, included a civil penalty of \$18,500, a repayment of \$29,640, and an additional payment of \$350,000, representing the amount of funds the Committee received from improper sources. In the Matter of Mondale for President, Inc., Federal Election Commission Matter Under Review 1704 (November 30, 1984). The Mondale Committee had attempted to skirt contribution and expenditure limitations by utilizing delegate committees to conduct political activities on its behalf. The FEC found that the activities of the delegate committees had to be attributed to the Mondale Committee.

related publicity, and the potentially higher civil penalties. Generally, the Commission files suit in less than ten percent of the MURs and in some years, in less than five percent of the MURs.<sup>37</sup> This small percentage reflects the belief of many respondents that litigation should be avoided at all cost.

### *B. Problems With The Enforcement Process*

The complexities and eccentricities of the FECA impede the effective enforcement of the law. Regardless of how stringent the substance of new campaign finance reform may be, certain basic enforcement problems must be addressed if the goals of reform are to be realized. The FECA's enforcement procedures have been criticized by the press and other commentators since the creation of the Commission.<sup>38</sup> Most of the criticisms relate to two problems: lack of due process for respondents (i.e., the political committees and individuals who are subjected to an investigation) and lack of deterrence for violators of the law.

First, several aspects of the enforcement process impinge upon the due process rights of respondents. For instance, respondents are not permitted to address the Commission in person; instead, the respondents may only provide written responses to the OGC, which then provides the Commission with summaries of those responses. Furthermore, respondents are unable to see all of the evidence against them or to challenge the OGC's final recommendations to the Commission.

Second, the FECA as currently written does not adequately deter violations of the statute. Many participants in the political process believe that the election laws need not be heeded. The chance is slim that violations will be detected, party-line deadlocks reduce the chance that the Commission will investigate violations of the law, and any resulting penalty will probably come long after the election.

The lack of deterrent force of the FECA can be traced in great part to its cumbersome multi-stage enforcement process, under which many matters are not resolved in a timely manner. As a result, continuing violations may give the respondent an unfair advantage in the election. Delayed civil penalties

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37. For example, in Fiscal Year 1990 the Commission opened 222 internally-generated MURs, and 141 complaints were filed, 67 of which became MURs. In Fiscal Year 1991 (through February 1, 1991), 99 complaints were filed, of which 49 became MURs. In Fiscal Years 1990 and 1991 (through February 1, 1991) the Commission voted to institute suit in only seven matters (three of which were settled before the complaint was filed). Many of those matters resulting in suits in Fiscal Years 1990 and 1991 are based on MURs that were initiated in previous years. Federal Election Commission, Responses to Questions Submitted by the Subcommittee on Elections of the Committee on House Administration in Connection with Fiscal Year 1992 Budget Request, March 12, 1991 (on file with the author).

38. See, e.g., COMMON CAUSE, STALLED FROM THE START (1981).

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create little deterrent effect, as many view a civil penalty imposed after a successful campaign as a small price to pay for winning the election:

Moreover, the present enforcement structure does not lend itself to the effective or efficient administration of cases involving difficult factual and legal disputes. In handling factually disputed cases, the Commission encounters procedural problems that undermine the Commission's ability to effectively and expeditiously enforce sophisticated violations of the FECA. Specifically, because they are not subject to any statutory deadlines or judicial supervision, investigations of factually complex cases take too long and the respondent's rights to be heard are muted by inaccessibility to the decisionmakers. In short, the process could be handled more efficiently and fairly in a trial-like setting because the investigation would be overseen by a judge and the respondent would have direct access to the decisionmaker.<sup>39</sup>

Because the enforcement process is ill-designed to handle difficult and complex cases, the Commission tends to concentrate its efforts on routine cases or clear-cut violations of the law. Those cases often involve respondents whose infractions of the FECA were simple and inadvertent. Consequently, the concentration of resources marshalled against those respondents sometimes results in the overzealous pursuit of unwitting violators. Ironically, a respondent who intentionally evades or operates on the fringes of the law may escape prosecution or emerge from the process unscathed.

Finally, under the present procedures, if the FEC and the respondent are not able to settle a case through the conciliation process, the trial court cannot rely upon findings of fact from the investigation during the administrative enforcement process. Limited Commission resources are expended twice to establish the same violations because the court cannot defer to FEC administrative findings.

### C. Reforms To Enhance Enforcement

Five reforms could help alleviate many of these problems and facilitate the enforcement of the campaign finance laws.<sup>40</sup>

1. *Use Administrative Law Judges.* Congress could ameliorate the problems of insufficient due process protections, lack of judicial supervision and duplica-

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39. The discussion accompanying the recommendations of the American Bar Association (ABA) points out that "[a]t the point where the General Counsel has recommended in his brief that the Commission find probable cause to believe a violation has occurred, the position of the General Counsel and that of the respondent are clearly adversarial. In deciding whether the arguments of the General Counsel or those of the respondent should be given more weight, the Commission is in effect exercising a judicial function." *Report on Reform of the FEC's Enforcement Procedures*, 1982 A.B.A. SEC. AD. L. 5.

40. A number of these reforms are discussed in Kenneth Gross, *Enhancing Enforcement*, in MONEY, ELECTIONS, AND DEMOCRACY 225 (Margaret L. Nugent and John R. Johannes, eds., 1990). See also, JACKSON, *supra* note 28; Note, *The Federal Election Commission, the First Amendment, and Due Process*, 89 YALE L.J. 1199 (1980).

tive fact-finding processes by amending the FECA to provide for adjudicatory proceedings conducted by ALJs. Under such a plan, cases would first be brought before an ALJ and handled under adjudicative procedures, rather than through the investigative procedures described above. In this way, the cumbersome "reason to believe" stage would be eliminated in complaint initiated actions. Moreover, the Commission would serve an appellate function thereby alleviating its involvement in details of the compliance process. For example, the Commission would not be involved in the formulation and approval of interrogatories propounded under subpoena.

Using ALJs to preside over the investigation and briefing process is a common method that enforcement agencies use to adjudicate facts, in accordance with the Administrative Procedure Act.<sup>41</sup> An FEC ALJ would oversee the development of an accurate and complete record of the facts relevant to the proceeding and render a fair and equitable decision on the merits and on the record.

Many of the due process related concerns raised by the current enforcement system would be addressed through the use of ALJs. While the OGC would conduct the investigation and bring the evidence before the ALJ, the complainant could provide additional evidence during the course of the investigation. In addition, the enforcement process would be structured in a trial-like fashion with deadlines for the investigative period. An ALJ would determine deadlines on a case-by-case basis. The respondent would have an opportunity to present oral argument and witnesses before the ALJ. Finally, the respondent could request documents from the Commission during the investigation, and once the investigation is complete, disagreements between the OGC and the respondent over investigative documents could be resolved quickly. This also would reduce the need for the Commission to bring subpoena enforcement suits in court.

Under the above plan, ALJs would not make final agency determinations; all decisions would be appealable to the Commission. Because the ALJ proceeding would create a record for review by the Commission and the court, the duplicative nature of the current system would be reduced. Given the availability of a record of the administrative proceedings, Commission decisions based on those proceedings would be appealable to the United States Court of Appeals for the District of Columbia Circuit. De novo review by a trial court would be unnecessary. Nothing in this proposed procedure would prevent the respondent from settlement through the conciliation process.

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41. There are numerous successful models for the functioning of ALJs throughout the executive branch including the National Labor Relations Board, the Social Security Administration, the Federal Communications Commission, the Federal Trade Commission, the Environmental Protection Agency, and the Occupational Safety and Health Administration.

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The use of ALJs would benefit the system in several additional ways. It would eliminate the cumbersome “reason to believe” stage in the enforcement process. Instead, the ALJ would decide whether a complaint had any merit after hearing both sides argue their positions. Most cases could be resolved through a Summary Judgment-like procedure under the Federal Rules of Civil Procedure.<sup>42</sup> In appropriate cases an ALJ could evaluate a matter on an expedited basis (similar to an application for a temporary restraining order), develop a factual file for Commission review, and recommend relief.

The use of ALJs would also eliminate deadlocks in initiating and conducting investigations. The disturbing trend toward an increased number of party-line deadlocks has, in some instances, stymied the Commission’s ability to investigate cases that appear to involve serious violations of law.<sup>43</sup>

2. *Open The Process To The Public.* The entire FEC enforcement process is currently closed to the public until a case is dismissed, a conciliation agreement is entered into between the parties, or a suit is filed.<sup>44</sup> The complainant can make public his complaint, but the Commission can say nothing about an action that may be pending for years, and likely will not be resolved prior to the next election. In 1976, when it added a confidentiality requirement to the FECA,<sup>45</sup> Congress had a specific objective, namely, protecting candidates from groundless complaints and adverse publicity arising from FEC investigations.<sup>46</sup>

Maintaining the secrecy of the Commission’s deliberations on complaint generated cases does not protect candidates from harm as a result of a groundless complaint. In fact, open deliberations may provide a great disincentive to filing complaints with little or no substance. If a frivolous complaint is filed on the eve of an election, it will quickly become apparent that the complaint has no substance even before the election occurs. Similarly, if Congress adopts the ALJ approach, the ALJ proceedings should be held in open session.

3. *Use Summary Procedure for Routine Cases.* Even without making a statutory change in the enforcement process, which would be required to adopt the ALJ approach, the Commission could implement its own reforms to improve its efficiency and effectiveness. For instance, the processing of routine cases could be accelerated if the Commission revised its procedures to expand the use of preprobable cause conciliation. If the Commission finds reason to believe a violation has occurred in a case involving a readily apparent violation—found, for example, in a review of the public record or on the face of

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42. FED. R. CIV. P. 56.

43. *See, e.g., supra* note 31 and accompanying text.

44. 2 U.S.C. §§ 437g(a)(4)(B) and (12)(A) (1988).

45. 2 U.S.C. § 437g(a)(12)(A) (1988). In the 1979 amendments to the FECA, Congress added to the secrecy of the process by prohibiting the public release of information related to the conciliation process. 2 U.S.C. § 437g(a)(4)(B) (1988).

46. H.R. REP. NO. 1057, 94th Cong., 2d. Sess. 50 (1976).

a document—it should offer a proposed conciliation agreement along with the “reason to believe” notice. Cases that would be suitable for this expedited process are matters which do not raise factual disputes. Examples include late-filings, failure to include proper disclaimers in campaign materials, and excessive corporate contributions.<sup>47</sup>

Routine MURs could be settled within thirty days of a “reason to believe” finding if a conciliation agreement were offered simultaneously with the “reason to believe” finding. Resolution of routine cases in this fashion will allow limited staff resources to be focused on more complex cases.

4. *Conduct Random Audits.* Until the 1980s, the FEC conducted audits of randomly-selected campaigns. This practice proved useful, albeit overzealous in some cases, in monitoring FECA compliance. Congress should reinstate the FEC’s authority to conduct such random audits.

Congress took action in the 1970s to curtail this FEC power. In 1977, when the FEC Commissioners testified before the House Administration Committee, the FEC’s congressional oversight committee, Representative Theodore M. Risenhoover, whose campaign finances had been audited under the random audit program, stated to the Commissioners that “Congress meant well when we passed the [FECA]. But it may have created a monster. You may see the legislation completely gutted. If you think we can’t change this legislation, or repeal it, you’re wrong.”<sup>48</sup> Similarly, Representative Frank Thompson, former Chairman of the House Administration Committee, joined his colleagues in criticizing the random audits.<sup>49</sup> Soon thereafter, the FEC’s random audit authority was effectively destroyed.<sup>50</sup> By removing the FEC’s random audit authority, Congress eliminated an effective enforcement tool.<sup>51</sup> The FEC has come a long way since the overzealous nitpicking practices in the audits in 1976 and 1977. The FEC now pursues only the more serious violations; less serious infractions are merely cited in an audit report without further action.

With the demise of random audits, the FEC now audits only “for cause.” A “for cause” audit is based on a review of campaign finance reports filed by a political committee that reveal systematic reporting violations. Unfortunately,

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47. The Commission amended its procedures to provide for the offering of a conciliation agreement simultaneously with the reason to believe notice in late-filer matters. This procedure should be expanded to other routine violations.

48. CAMPAIGN PRACTICES REPORTS, Oct. 17, 1977, at 4.

49. *Id.*

50. In approving the FEC’s Fiscal Year 1979 budget request, the House Administration Committee conditioned the approval with a proviso that none of the money could be used to finance random audits. Although the full House upheld the Committee position on a voice vote, it dropped the anti-audit provision in conference with the Senate. After this episode, the FEC dropped the random audit program in a party-line vote on a Republican proposal to continue random audits. CAMPAIGN PRACTICES REPORTS, Apr. 17, 1978, at 1.

51. 2 U.S.C. § 438(b) (1988). The current audit authority for non-presidential committees requires a demonstration of cause before the FEC can conduct an audit.

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the present “for cause” audit provision, implemented by Congress in the 1979 Amendments to the FECA,<sup>52</sup> does not necessarily result in audits of the committees that are most likely to have serious compliance problems. As long as its FEC filings are complete and in order, a political committee could be engaging in serious misconduct and never be audited. The less sophisticated committees that lack the resources to ensure that their reports do not have careless errors are the committees most likely to be audited. This is unfair. Restoring the FEC’s power to conduct random audits would eliminate this bias.

5. *Penalties.* Random audits can only provide part of the incentive needed to assure compliance with the law. In order to create an effective deterrent, an increased likelihood of being caught must be coupled with higher penalties for serious offenses.

Of course, the FEC could be criticized for unfairly departing from past practices if it dramatically increased its civil penalties without proper notice and justification. Therefore, in raising penalties, the FEC should publish civil penalty guidelines for most violations as well as the criteria for calculating the penalties. The guidelines could allow for adjustments depending on aggravating and mitigating factors.

Most of the shortcomings of the FEC enforcement process will require statutory changes. Congress has designed a unique and complex scheme that makes it very difficult for the FEC staff to carry out its mission of expeditious and effective enforcement. This author, as the former Associate General Counsel in charge of OGC’s enforcement division and currently an attorney in the private sector who defends entities charged with violations of the FECA, has worked with the FEC staff on a regular basis and can attest to their high degree of competence. Plainly, the problems with the enforcement process are not the result of staff deficiencies. Nor are they the result of the performance of the Commissioners, who have acted in the way that Congress intended an evenly balanced, bipartisan Commission to act. Indeed, if there is any surprise in the way the Commissioners vote, it is that there are not more party-line splits resulting in deadlocked votes. Instead, the problem lies with the law. Significant statutory structural changes in the enforcement process must be made if Congress truly intends to improve the electoral and campaign finance processes and restore the public’s faith in the system.

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52. *Id.*

## III. THE ENFORCEMENT OF CAMPAIGN FINANCE LAWS THROUGH THE CRIMINAL LAW

The criminal law serves a valuable function in regulating the most egregious violations of campaign finance laws. Knowing and willful violations of the FECA are subject to criminal prosecution.<sup>53</sup> Other criminal laws, primarily the bribery and conflict-of-interest statutes, regulate the connection between campaign contributions and official action by members of Congress. However, since the criminal law reaches only the most blatant forms of misconduct, it plays a limited, albeit important, role in enforcing campaign finance laws.

This limited reach of the criminal law is appropriate; however, those very limits underscore the need for a wider range of enforcement options—criminal, civil, and administrative—to ensure compliance with campaign finance laws. To create such a comprehensive enforcement scheme, the law must provide enforcement officials with a wide array of potential sanctions, so that the punishment is commensurate with the offense. This flexibility is too often lacking in the existing statutory framework; a law that can be enforced only with harsh criminal penalties is often limited in application because prosecutors, judges, and juries are unwilling to prosecute and convict individuals if the criminal sanction seems to them to be disproportionately severe. In those cases, the addition of a civil penalty would not only allow greater flexibility in enforcement, but also would enhance deterrence by making penalties more likely. For example, if Congress added a civil penalty provision to the conflict-of-interest statute,<sup>54</sup> prosecutors would be afforded greater latitude in their efforts to protect the integrity of the electoral process.

The role and limits of the criminal law in regulating campaign activity were most recently explicated by the Supreme Court in *McCormick v. United States*.<sup>55</sup> McCormick, a member of the West Virginia House of Delegates, had received cash payments from several foreign doctors interested in legislation allowing foreign physicians to obtain permanent medical licenses in the state. McCormick, who failed to report the payments either as personal income or campaign contributions, helped orchestrate passage of the bill after his successful re-election campaign. Two weeks later, he received another cash payment from the doctors. McCormick, who asserted that the payments were campaign contributions, was convicted of violating the Hobbs Act,<sup>56</sup> which prohibits extortion under the color of official right.<sup>57</sup>

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53. 2 U.S.C. § 437g(d)(1)(A) (1988). See also, PUBLIC INTEGRITY SECTION, U.S. DEP'T OF JUSTICE, FEDERAL PROSECUTION OF ELECTION OFFENSES 80-81 (5th ed. 1988).

54. 18 U.S.C. § 203(a) (1988).

55. 111 S.Ct. 1807 (1991).

56. 18 U.S.C. § 951 (1988).

57. *McCormick*, 111 S.Ct. at 1809-12.

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The Supreme Court reversed McCormick's conviction, holding that contributions violate the Hobbs Act only if they "are made in return for an explicit promise or undertaking by the official to perform or not to perform an official act."<sup>58</sup> Justice White, writing for the Court, explained that "[t]o hold otherwise would open to prosecution not only conduct that has long been thought to be well within the law but also conduct that in a very real sense is unavoidable so long as election campaigns are financed by private contributions or expenditures, as they have been from the beginning of the Nation."<sup>59</sup> The decision highlights the limitations of the criminal law in regulating the connection between official actions and campaign financing by making clear that, at least under the Hobbs Act, a criminal conviction will only stand if the government proves a quid pro quo between the contribution and the act of the public official.<sup>60</sup>

The following sections discuss various criminal statutes regulating the conduct of elected officials and contributors in regard to campaign contributions. The extent of their use and usefulness in campaign finance enforcement will be surveyed. Finally, recommendations are made to integrate these criminal statutes into a comprehensive spectrum of election law enforcement.

### A. Federal Election Campaign Act

The perpetrator of a "knowing and willful" violation of the FECA may be punished by a prison term of up to one year and fined the greater of \$25,000 or three times the amount of the contribution or expenditure involved in the violation.<sup>61</sup> As a specific intent offense, this crime is committed only if the defendant intended to violate a specific provision of the law with the knowledge that the conduct was prohibited. Such intent may be difficult to prove.

The Department of Justice—which controls the prosecution of FECA criminal matters—considers the criminal provisions of the FECA difficult to use in federal criminal prosecutions because of the difficulty of proving that the perpetrator intended to violate the law.<sup>62</sup> Under Department of Justice policy, criminal prosecution for FECA violations is generally considered only

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58. *Id.* at 1816.

59. *Id.*

60. In the coming term, the Supreme Court will hear arguments in *United States v. Evans*, 910 F.2d 790 (11th Cir. 1990), *cert. granted*, 111 S.Ct. 2256 (1991), another Hobbs Act case. The Court may provide further guidance on the use of the criminal law in regulating campaign finance rules. The issue before the Court is whether the Hobbs Act requires that the public official must initiate the transaction leading to the charge of extortion.

61. 2 U.S.C. § 437g(d)(1)(A) (1988). Under the recently enacted Sentencing Guidelines, the criminal fines may be even higher than specified under the FECA. For example, persons committing violations after November 1, 1987, can be imprisoned for not more than one year and fined the greatest of (1) \$100,000; (2) three times the contribution or expenditure involved in the violation; or (3) twice the gross pecuniary gain or loss resulting from the offense. *See* 18 U.S.C. §§ 3559, 3566 and 3571(b) (1988).

62. DEP'T OF JUSTICE, *supra* note 53, at 75.

when a large sum of money in violation of FECA is involved, "clandestine means or subterfuge" were used to conceal the violation, and any relevant transactions were not reported by the receiving political committee in their FECA filings.<sup>63</sup>

These guidelines appropriately focus on more egregious violations of the FECA. Examples of conduct which would be prosecuted under these guidelines include the use of conduits to funnel corporate funds into a political campaign or a campaign contribution which actually is a bribe with corporate funds.<sup>64</sup> Because of difficulties in enforcing the statute, the Department of Justice encourages prosecutors to use alternative theories (false statement, conspiracy to defraud, tax evasion, and embezzlement) to prosecute violations of the FECA.<sup>65</sup>

In the last several years, the Department of Justice has increased the number of FECA prosecutions. The so-called "Ill-Wind Investigation," involving defense procurement practices by large corporations, uncovered schemes where corporate officers were making illegal campaign contributions with corporate funds.<sup>66</sup> Other cases stemmed from the savings and loan scandal, particularly in Texas. In a case involving contributions to Congressman Jim Wright's campaign, two savings and loan officials were convicted of committing several fraudulent acts and one of the defendants was sentenced to fifteen years in prison (later reduced to five years) plus five years probation and ordered to pay \$104,000 in restitution.<sup>67</sup> This increased activity, combined with the addition of more severe sanctions under the sentencing guidelines, may well serve to enhance compliance with the FECA laws.

### B. Bribery

The criminal provisions of the FECA focus primarily on enforcing the contribution limitation and disclosure provisions of that Act. They do not, however, address another fundamental problem that results from a system of privately-financed campaigns—the possibility that campaign contributions may be impermissibly connected to an official act by the elected official.

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63. *Id.* at 78.

64. *Id.* at 73-74.

65. *Id.* at 75-76.

66. See *United States v. Roberts*, C.A. No. 90-322-NN (E.D. Va. Aug. 13, 1990) *aff'd per curiam*, 924 F.2d 1053 (4th Cir. 1991). In *Roberts*, a former Unisys Corporation official was sentenced to a year in prison, a two-year term of supervised release after the prison term, and a \$10,000 fine for conspiring to make illegal campaign contributions and obstructing the Federal Bureau of Investigation's probe of Pentagon procurement fraud. The defendant also admitted that he arranged for the filing of false statements with the FEC to conceal illegal corporate contributions to several Congressmen and Senators. See *Unisys Figure Sentenced in Pentagon Case*, WASH. POST, Feb. 11, 1990, at A18.

67. *United States v. Hopkins*, 916 F.2d 207, 211 (5th Cir. 1990).

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Such conduct is covered by the bribery statute,<sup>68</sup> which prohibits a public official from corruptly accepting anything of value in exchange for being influenced in the performance of an official act.<sup>69</sup> Offering a bribe is also punishable under the statute.<sup>70</sup> Although the statute does not define “corruptly,” the legislative history for the 1962 amendment to the statute states that the term was intended to mean “with wrongful or dishonest intent.”<sup>71</sup> Corrupt intent is evidenced by demonstrating a connection between the receipt of a thing of value and an official act.<sup>72</sup> Notably, some courts have held that campaign contributions can constitute bribes.<sup>73</sup>

The statutory requirement of a corrupt intent is appropriate because of the severe penalties that may be imposed for violation of the bribery statute, particularly under the new sentencing guidelines. An individual convicted of bribery may be fined the greater of (1) three times the monetary equivalent of the thing of value, (2) twice the gross gain or loss resulting from the violation,<sup>74</sup> or (3) \$250,000.<sup>75</sup> The individual is also subject to imprisonment for up to fifteen years. Finally, the individual “may be disqualified from holding any office of honor, trust, or profit under the United States.”<sup>76</sup> Significantly, this disqualification apparently does not extend to the right of convicted individuals to serve in Congress because qualifications for congressional office are established by the Constitution and cannot be altered by statute.<sup>77</sup>

One of the most recent and well-known uses of the bribery statute against Members of Congress occurred during the ABSCAM investigation of the late 1970's. Six Members of the House of Representatives were convicted of

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68. 18 U.S.C. § 201(b)(2) (1988).

69. The statute covers a public official who:

directly or indirectly, *corruptly* demands, seeks, receives, accepts or agrees to receive or accept anything of value personally or for any other person or entity, in return for:

(A) being influenced in the performance of any official act;

(B) being influenced to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or

(C) being induced to do or omit to do any act in violation of the official duty of such official or person.

18 U.S.C. § 201(b)(2) (1988) (emphasis added).

70. 18 U.S.C. § 201(b)(1) (1988).

71. H.R. REP. NO. 748, 87th Cong., 1st Sess. 18 (1961).

72. See *United States v. Strand*, 574 F.2d 993, 996 (9th Cir. 1978) (“the requisite corrupt intent consisted of the defendant’s *knowing* acceptance of money for *financial gain*, in return for violation of his official duty with the *specific intent* to violate the law.”); *United States v. Brewster*, 506 F.2d 62, 72 (D.C. Cir. 1974) (“The bribery section makes necessary an explicit *quid pro quo* . . .”).

73. See, e.g., *United States v. Head*, 641 F.2d 174, 180 (4th Cir. 1981), *cert. denied*, 462 U.S. 1132 (1983) (upholding district court’s rejection of proposed jury instruction that a campaign contribution could never be a bribe).

74. 18 U.S.C. § 201(b)(4) (1988).

75. 18 U.S.C. § 3571(b) (1988).

76. 18 U.S.C. § 201(b)(4) (1988).

77. See *Burton v. United States*, 202 U.S. 344, 369-70 (1906); *Powell v. McCormack*, 395 U.S. 486 (1969).

bribery for receiving cash payments in exchange for introducing or promising to introduce private immigration bills for an FBI agent posing as an Arab sheik.<sup>78</sup> Senator Harrison Williams was convicted of bribery for an agreement to assist the "sheik" in obtaining government contracts for their mining venture in which Senator Williams and the "sheik" had an interest.<sup>79</sup> Senator Williams later resigned from the Senate just prior to a Senate vote on whether to expel him.

The bribery statute plays a significant, yet limited, role in enforcing campaign finance laws. Since 1853, when the first bribery statute was enacted, most prosecutions have involved personal gain to Members of Congress in exchange for official action. As the Supreme Court has noted, the bribery laws deal with only the most blatant and specific attempts to use money to influence governmental action.<sup>80</sup>

### C. *Conflict-of-interest*

Campaign contributions also may implicate the criminal conflict-of-interest statute,<sup>81</sup> which is violated by a Member of Congress or other government official who accepts payment in return for representational services in any matter in which the United States has an interest.<sup>82</sup> Individuals offering or promising Members of Congress or other government officials such compensation may also be prosecuted under the statute.<sup>83</sup> Courts have recognized that the statute is designed to protect government agencies and officials from the special pressures that Members of Congress can bring to bear on them: "governmental departments, agencies, etc., are dependent upon Congress for support, and therefore these bodies are readily susceptible to pressures from individual Senators and Representatives."<sup>84</sup>

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78. See *United States v. Jenrette*, 744 F.2d 817 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1099 (1985); *United States v. Kelly*, 707 F.2d 1460 (D.C. Cir.), *cert. denied*, 464 U.S. 908 (1983); *United States v. Myers*, 692 F.2d 823 (2d Cir. 1982) (affirming bribery convictions of Representatives Murphy, Myers, Thompson and Lederer), *cert. denied*, *Lederer v. United States*, 461 U.S. 961 (1983).

79. See *United States v. Williams*, 705 F.2d 603 (2d Cir.), *cert. denied*, 464 U.S. 1007 (1983).

80. See *Buckley v. Valeo*, 424 U.S. 1, 28 (1976).

81. 18 U.S.C. 203(a) (1988).

82. 18 U.S.C.A. § 203(a)(1) (1969 & West Supp. 1991).

83. 18 U.S.C.A. § 203(a)(2) (1969 & West Supp. 1991).

84. *United States v. Johnson*, 337 F.2d 180, 195 (4th Cir. 1964) (interpreting 18 U.S.C. § 281 (repealed 1962), a direct predecessor to the current conflict-of-interest statute, 18 U.S.C. 203(a)), *aff'd*, 383 U.S. 169 (1966). Similarly, the Supreme Court stated of an earlier conflict-of-interest statute:

the statute has for its main object to secure the integrity of executive action against undue influence upon the part of members of that branch of Government whose favor may have much to do with the appointment to, or retention in, public position of those whose official action it is sought to control or direct.

*Burton v. United States*, 202 U.S. 344, 367-68 (1906). See also *United States v. Mississippi Valley Generating Co.*, 364 U.S. 520, 562 (1961) (conflict-of-interest legislation is "directed at an evil which

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An elected official does not violate the conflict-of-interest laws without “knowledge of the nature or purpose” of the compensation.<sup>85</sup> The majority of courts have held that the statute does not require proof of the Member’s intention to influence the agency in favor of the payor.<sup>86</sup> One court explained that the statute may be violated “without regard to the question of whether the officer intended to have his action influenced in any way by the compensation or agreement to it.”<sup>87</sup> The services rendered include formal appearances before government agencies and informal, so-called “constituent service” contacts with those agencies.<sup>88</sup>

No Member of Congress has ever been convicted under this statute for receiving compensation solely in the form of campaign contributions given because of services rendered or to be rendered.<sup>89</sup> Convictions have generally involved personal financial gain. However, the legislative history and purpose of the statute demonstrate that it should be used to prosecute the receipt of campaign contributions as compensation for services rendered. Today, as

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endangers the very fabric of a democratic society, for a democracy is effective only if the people have faith in those who govern, and that faith is bound to be shattered when high officials and their appointees engage in activities which arouse suspicions of malfeasance and corruption.”).

85. See *United States v. Johnson*, 419 F.2d 56, 60 (4th Cir. 1969), *cert. denied*, 397 U.S. 1010 (1970).

86. See *May v. United States*, 175 F.2d 994, 1009 (D.C. Cir. 1949) (upholding district court refusal to admit evidence of Representative May’s intent in contacting the War Department), *cert. denied*, 338 U.S. 830 (1949); *United States v. Eilberg*, 507 F. Supp. 267 (E.D. Pa. 1980) (noting that intent to influence is not an element of § 203); 9 *Department of Justice Manual*, § 9-85A.302 at 9-1938.92 (1988-2 Supp.) (“[W]hether or not the official is actually influenced is immaterial. The statute is designed to avoid even the risk of such influence.”). *But see Burton*, 202 U.S. 344 (approving a jury instruction that the jury ascertain if the official intervened with the agency to influence it to act favorably to the individual who provided compensation to the official).

87. *United States v. Booth*, 148 F. 112, 118 (D. Or. 1906).

88. For example, Representative Andrew May, then Chairman of the Committee on Military Affairs, was convicted of violating the conflict-of-interest statute for receiving \$58,000 from contractors during the time he wrote letters and made telephone calls to the War Department regarding the contractors’ obtaining government contracts. See *May* 175 F.2d 994. Representative Thomas Johnson violated the statute by receiving payments for asking Justice Department officials to “review” the indictment of officials of a savings and loan institution. See *Johnson*, 419 F.2d 56.

89. Although the government has never prosecuted a conflict-of-interest case based solely on campaign contributions, in two cases campaign contributions constituted a portion of the illicit compensation. In 1974, Representative Bertram Podell was tried for violating bribery, conspiracy and conflict-of-interest laws, having received three checks from a company seeking, among other things, permission to operate an airline route between Florida and the Bahamas. While two of the checks were payable to Podell’s law firm, the other check, in the amount of \$29,000, was payable to his campaign committee. Podell had appeared on behalf of the company before various government agencies. During his trial, Podell decided to plead guilty to the conspiracy and conflict-of-interest charges. He was fined \$5,000 on the latter count and sentenced to a two-year imprisonment, all but six months of which were suspended, on the former. See *United States v. Podell*, 572 F.2d 31 (2d Cir. 1978); *United States v. Podell*, 519 F.2d 145 (2d Cir.) (rejecting claim that guilty plea was involuntary), *cert. denied*, 423 U.S. 926 (1975).

Campaign contributions also constituted part of the compensation Representative Thomas Johnson received from a Maryland savings and loan institution in violation of Section 203. Johnson had approached the Attorney General and Assistant Attorney General in charge of the Criminal Division and urged them “to review” the indictment of the savings and loan and its officers who had provided him with more than \$20,000 in legal fees and campaign contributions. See *Johnson*, 419 F.2d 56; *United States v. Johnson*, 337 F.2d 180 (4th Cir. 1964) (remanding for new trial), *aff’d*, 383 U.S. 169 (1966).

Congressional and Senate campaigns become increasingly expensive, campaign contributions clearly can influence or appear to influence Members of Congress.

Unlike the gratuity statute,<sup>90</sup> the conflict-of-interest statute is not qualified by a statutory requirement that the compensation be received "personally."<sup>91</sup> This distinction takes on even greater significance because Congress considered the bribery, conflict-of-interest, and illegal gratuity statutes as a package.<sup>92</sup> Thus, it can be argued, Congress intended the bribery and conflict-of-interest statutes, which have no personal benefit requirements, to reach campaign contributions, which generally go to campaign committees and not the candidate personally.

The purpose and past use of the conflict-of-interest statute demonstrates its applicability to campaign contributions made as improper forms of compensation, and it should be vigorously enforced by federal prosecutors. Furthermore, Congress should expand the flexibility of the prosecutors by adding civil penalties to the spectrum of applicable sanctions under the statute. In this way, the Department of Justice could more freely pursue prosecution of violations that, while serious, do not warrant harsh criminal sanctions.

#### D. Other Criminal Statutes

Several other statutes potentially are related to the integrity of campaign financing. As discussed above,<sup>93</sup> the Hobbs Act<sup>94</sup> is one of the major weapons used by federal prosecutors against state and local corruption. It prohibits the "obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence or fear, or under color of official right." Extortion under color of official right occurs "when a public official makes wrongful use of his office to obtain money not due him or his office."<sup>95</sup> The statute has been applied to the extortion of campaign contribu-

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90. See 18 U.S.C. § 201(c)(1)(B) (1988 & Supp. 1991).

91. See 18 U.S.C.A. § 203(a)(1) (1969 & West Supp. 1991).

92. See H.R. REP. 748, 87th Cong., 1st Sess. 1 (1961). The illegal gratuity statute prohibits a "public official, former public official, or person selected to be a public official" from "directly or indirectly demand[ing], seek[ing], receiv[ing], accept[ing], or agree[ing] to receive or accept anything of value personally for or because of any official act performed or to be performed by such official or person." 18 U.S.C. § 201(c)(1)(B) (1988). The legislative history of the statute makes clear that any illegal gratuity must be of direct personal financial benefit to a Member of Congress: "Only payments directly to a public official . . . and not to other persons or entities in whose welfare the public official . . . may be interested, are forbidden." H.R. REP. NO. 748, 87th Cong., 1st Sess. 19 (1961). Consequently, campaign contributions can not constitute an illegal gratuity.

93. *Supra*, notes 55 - 60, and accompanying text.

94. 18 U.S.C. § 951 (1988).

95. *United States v. Margiotta*, 688 F.2d 108, 130 (2d Cir. 1982), *cert. denied*, 461 U.S. 913 (1983).

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tions;<sup>96</sup> however, it has generally been used only against state and local officials. Further, as discussed above, a violation occurs only when an explicit quid pro quo exists between an official act and a contribution.<sup>97</sup>

The federal criminal conspiracy statute prohibits two or more people from conspiring “to defraud the United States, or any agency thereof in any manner or for any purpose.”<sup>98</sup> The Supreme Court has ruled that the statute includes “any conspiracy for the purpose of impairing, obstructing or defeating the lawful function of any department of Government.”<sup>99</sup> Members of Congress have been convicted of conspiracy to defraud after receiving or agreeing to receive money to influence government agencies on behalf of the payor.<sup>100</sup>

Representative Andrew May was convicted of defrauding the United States “of its right to have its business conducted honestly and impartially, to have its officials free to transact that business unhampered by dishonest influence, and to have the duties of May as Congressman performed honestly and impartially.”<sup>101</sup> Representative May’s contacts with the War Department on behalf of a company from which he received money resulted in conviction for violating the conflict-of-interest and conspiracy to defraud statutes. Representative May’s case demonstrates the limitations of the conspiracy to defraud statute in regulating campaign financing. The statute generally applies to conduct that also violates other statutory prohibitions.<sup>102</sup> A conspiracy to defraud charge provides many tactical advantages to prosecutors in presenting their case and increases the penalties for illegal conduct but does not expand the type of conduct prohibited.<sup>103</sup> Again, the Hobbs Act and conspiracy to defraud stat-

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96. *See, e.g.,* United States v. Dozier, 672 F.2d 531 (5th Cir.) (prosecuting state Agriculture Commissioner who routinely required payments in exchange for favors), *cert. denied*, 459 U.S. 943 (1982); United States v. Butler, 618 F.2d 411 (6th Cir.) (prosecuting town public works commissioner who solicited money from real estate developers and agreed to give favorable treatment to the developer if the payments were made), *cert. denied*, 447 U.S. 927 (1980).

97. *See supra* notes 58 - 60 and accompanying text.

98. 18 U.S.C. § 371 (1988).

99. Dennis v. United States, 384 U.S. 855, 861 (1966) (quoting Haas v. Henkel, 216 U.S. 462, 479 (1910)).

100. *See* United States v. Brasco, 516 F.2d 816 (2d Cir.), *cert. denied*, 423 U.S. 860 (1975). Representative Frank Brasco was convicted of defrauding the United States by depriving it of the “faithful and honest services” of himself and a postal employee he contacted. Brasco had intervened with the postal employee to gain a contract for a company in return for payment.

101. May v. United States, 175 F.2d 994, 999 (D.C. Cir. 1949).

102. *See, e.g.,* United States v. Passman, 460 F. Supp. 912 (W.D. La. 1978) (indictment of Representative Passman for bribery, illegal gratuity and conspiracy to defraud); United States v. Garmatz, 445 F. Supp. 54 (D. Md. 1977) (indictment of Representative Garmatz for illegal gratuity and conspiracy to defraud).

103. Similarly, the Travel Act, 18 U.S.C. § 1952 (1988 & Supp. 1991), may be applicable to misconduct involving campaign finance. The Travel Act prohibits travel or use of any facility in interstate commerce to “distribute the proceeds of any unlawful activity” or “otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity.” Since another crime is the predicate to a Travel Act prosecution, the statute simply increases the penalty for certain conduct that is proscribed already. *See, e.g.,* United States v. Biaggi, 853 F.2d 89 (2d Cir. 1988), *cert. denied*, 489 U.S. 1052 (1989).

ute demonstrate the limited reach of the criminal law in the context of campaign finance enforcement.

### E. *Reforms*

The criminal law provides a useful tool for policing flagrant violations of the FECA and the most egregious connections between campaign contributions and improper official action. The requirement of criminal intent and the other safeguards defendants have in the criminal process makes difficult the use of criminal sanctions to regulate campaign finance. A committed effort by law enforcement officials, however, can have an effect on campaign finance law enforcement. The Department of Justice has been targeting successfully state and local corruption in the past several years. In 1989, the Department of Justice obtained convictions of 1,149 federal, state, and local officials, a three-fold increase in annual convictions since the Department's Public Integrity Section was founded in 1976.<sup>104</sup>

Congress should consider adding civil provisions to the conflict-of-interest statute. This would give prosecutors more options in enforcing campaign finance rules. The infrequent use of the current conflict-of-interest statute may result from the requirements of demonstrating criminal intent under a heavy burden of proof and from penalties that are often too severe to be imposed on minor violations. Prosecutors now have only harsh criminal statutes available. Civil provisions would provide greater flexibility in dealing with cases of misconduct that may not deserve criminal sanctions.

## IV. CONCLUSION

Effective enforcement of campaign finance rules requires a comprehensive administrative, civil, and criminal enforcement scheme that can detect and sanction wrongdoing. Such a comprehensive scheme would allow a variety of enforcement methods and penalties to be used to regulate compliance with the law. This enforcement flexibility would give the government a greater opportunity to find a sanction appropriate to the violation. This flexibility could enhance deterrence by leading to increased enforcement. Congressional attempts to improve campaign finance laws, without a commensurate increase in the effectiveness of the enforcement of those laws, will make those improvements a hollow victory for advocates of reform.

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104. *Justice Department's Public Integrity Section Convicted Record Number of Public Officials and Associates in 1989, Annual Report Shows*, CORPORATE CRIME REPORTER, Dec. 17, 1990, at 1. See also, *Scandals Cast New Light on Statehouse Ethics*, WASH. POST, Feb. 24, 1991, at A3.