

**Testimony of
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Commission on Federal Election Reform
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President Carter, Secretary Baker and Members of the Commission:

I am pleased to have the opportunity to present testimony to you regarding the importance of nonpartisan election administration. In particular, I would like to discuss lessons we have learned from the experience of the Federal Election Commission about the deficits of establishing a bipartisan agency to administer the election laws. These lessons teach the importance of nonpartisanship as a first principle of election administration, and have application to the question of how to structure election administration at the state level, and the need to restructure the Election Assistance Commission at the federal level.

For 25 years, I have been a close student of the Federal Election Commission, an agency that is widely viewed as failing to fulfill its mandate to provide effective enforcement of the Nation's campaign finance laws.

In 2002, I served on a task force of campaign finance experts, attorneys and former prosecutors convened by Democracy 21. In a report entitled "No Bark, No Bite, No Point," the task force documented multiple problems in the structure and operation of the FEC, that collectively have resulted in a chronic failure to administer and enforce the campaign finance laws effectively. Indeed, the soft money system that for many years rendered the federal campaign finance laws virtually meaningless was not a result of any statute or court decision, but of the FEC's passivity in the face of progressively bolder efforts by political parties, candidates and donors to evade or ignore the law. In upholding the statute enacted in 2002 that finally closed these loopholes, the Supreme Court repeatedly took note of the fact that the soft money system was created and facilitated by the FEC itself.

The failure of the FEC is a stark case study of the hazards of the bipartisan model of an administrative agency. Most federal agencies have an odd number of members, and thus a majority from one party or the other. But because the FEC regulates money in the political process, it is one of only two agencies that Congress created on a bipartisan model – the FEC has six members, and must have no more than three from any one party. A vote of four members is required for the agency to act, so every action requires a bipartisan agreement of the members.

The theory of the bipartisan model is that the two parties will "check" each other, so that neither party can take advantage of the other in enforcing the law. But the reality has often been just bad law enforcement. On key issues in the past, the FEC's decision-making has devolved into either a 3-3 partisan deadlock that meant the agency could not act at all, or a "lowest common denominator" solution that served the interests of both parties in maximizing their fundraising opportunities, but failed to serve the public interest in law enforcement.

Central to this dynamic has been the operation of the appointments process, whereby the President has largely deferred to the congressional leadership and the political parties to choose FEC commissioners. Not surprisingly, those who are selected tend to identify with their party and thus to "represent" its interests. The very fact that the agency is overtly structured to be bipartisan

reinforces the idea that the job of each Commissioner is to be a partisan. Perhaps this approach has achieved its goal of blocking partisan enforcement of the law by one party against the other, but it has come at the unacceptably high cost of compromising effective enforcement of the law at all.

This problem is compounded by others in the case of the FEC. Congress denied to the agency basic law enforcement powers, such as the ability to determine that a violation has occurred and to impose sanctions. It saddled the agency with a complicated and cumbersome statutory enforcement process, which means that cases stretch on for years. And Congress at times has abused its budget and oversight authority to hobble and harass the agency's operations.

In short, as *The Washington Post* once observed editorially, the FEC – an agency directly charged with enforcing the law regulating the activities of Members of Congress – is actually one of the great Washington success stories, because it is the weak and ineffective agency that Congress intended it to be.

Our task force recommended that the administration of the campaign finance laws be changed from a bipartisan model to a nonpartisan model.

We recommended that Congress create a new agency headed by a single administrator with responsibility for civil enforcement of the campaign finance laws. The administrator should have a lengthy term of office, such as 10 years, to help remove the position from partisan politics. The administrator should be given enhanced enforcement powers. And measures should be enacted to bolster the independence of the agency, in order to protect it from interference by Congress, and to ensure that it has adequate budgetary resources.

Reform legislation that was subsequently introduced modified these recommendations to provide for a three-member agency instead of a single administrator, with no more than two members from the same party, but with a strong chairman with enhanced powers who would serve a 10-year term and effectively operate as an administrator.

The key dilemma in establishing a system of nonpartisan law enforcement is how to ensure the selection of an administrator who is in fact nonpartisan, instead of partisan. Ultimately, this comes down to picking the right person – someone who, by dint of his or her professionalism and integrity, will discharge the duties of office without partisan bias.

It was our view that the best chance for choosing such a person comes by raising the stakes on the appointment process. Because of the importance of the position, because authority would be consolidated in a single person instead of diffused over a multi-member agency, and because of the length of the term of office, we believed that public attention and scrutiny would be more acutely focused on the appointment. The public's expectation that the nominee should be a person of stature and nonpartisan credibility would serve as an essential check on the appointment of a partisan.

Equally important, the Senate confirmation process would normally require a super-majority approval that would necessarily entail at least some bipartisan support for the appointment, and thus require a nominee who could command the confidence of members of both parties.

And the prominence of the job itself should attract highly qualified and publicly credible candidates.

Our report cited the director of the FBI, who has a 10-year term, the members of the Federal Reserve board of governors, who have 14-year terms, and the Comptroller General, who has a 15-year term, as examples of important Federal officers whose stature and visibility have contributed to a culture of nonpartisan appointment and whose terms are structured to take the office beyond partisan politics and the presidential election cycle.

The recommendations made with regard to the FEC, and the rationale behind those recommendations, are not confined to enforcement of the campaign finance laws, but are readily transferable to the administration of elections generally, both at the Federal as well as the State and local levels. At all levels, administration of the election process that is, or appears to be, based on partisan considerations will lack public credibility and will radically undermine public confidence in the electoral results.

But as the experience with the FEC demonstrates, the solution to the problem of partisanship is not bipartisanship, for that remedy threatens to result in either stalemate or accommodation that sacrifices robust enforcement.

Rather, the solution is nonpartisanship, based on legal structures that encourage independence, professionalism and partisan neutrality. The best example, internationally, of the virtues of this approach is Canada, whose Chief Electoral Officer is widely regarded as operating independently of the government and the political parties, and who has fostered a culture of effective and impartial administration of the law.

The principle of neutrality and nonpartisanship is almost too obvious to state. In our sporting events, we don't allow the home team to choose all of the referees. Nor do we allow each team to pick half of the referees, and then hope that they agree on which penalties to call. Rather, sensibly, we insist on the umpires being neutral, and not favoring either team. Although we may not agree with all of the calls made, and we certainly don't like it when our team loses, we typically have confidence that the officials made the best calls they could and that, even if they were occasionally wrong, it was due to error, not bias.

We should expect no less of those who administer our elections. Public confidence in electoral outcomes depends on public confidence in electoral processes. Fairness, objectivity, neutrality and professionalism should be the essential qualifications of those who are charged with administering elections. Although there are no guarantees, much can be done structurally in the design of election administration systems and agencies to maximize the chances that those who are selected will embody these standards, and to then insulate them against pressures to deviate from these standards.

Nonpartisanship as the first principle of election administration is a vitally important goal. Federal, state and local governments should be encouraged to seek it.