

NOMINATION HEARING

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WEDNESDAY MAY 21, 2008

United States Senate, Committee on Rules and Administration, Washington, D.C.

The Committee met, pursuant to notice, at 2:03 p.m., in Room SR-301, Russell Senate Office Building, Hon. Dianne Feinstein, Chairman of the Committee, presiding.

Present: Senators Feinstein, Schumer, Pryor, Bennett, and Cochran.

Staff Present: Howard Gantman, Staff Director; Veronica Gillespie, Elections Counsel; Adam Ambrogi, Counsel; Natalie Price, Professional Staff; Matthew McGowan, Professional Staff; Lynden Armstrong, Chief Clerk; Carole Blessington, Assistant to the Majority Staff Director; Justin Perkins, Staff Assistant; Mary Jones, Republican Staff Director; Shaun Parkin, Republican Deputy Staff Director; Matthew Petersen, Republican Chief Counsel; Michael Merrell, Republican Counsel; and Rachel Creviston, Republican Professional Staff.

OPENING STATEMENT OF CHAIRMAN FEINSTEIN

Chairman Feinstein. I am happy to call the meeting to order. I am delighted the Ranking Member is here. We are joined by Senator Klobuchar, and I will recognize you at an appropriate time to introduce one of our nominees, if that is agreeable.

Good afternoon, everyone. Since the end of December, the Federal Elections Commission has had only two Commissioners, two short of the quorum needed for the Commission to do business. During this time--in the middle of a Presidential election year--the FEC has been effectively unable to carry out some very important functions. But now, finally, we have an opportunity to move forward and restore at least a working quorum to the FEC.

On May 6, 2008, the President nominated the following three individuals: Cynthia Bauerly, of Minnesota, for appointment to a term expiring April 30, 2011, for the seat held by Robert Lenhard; Caroline Hunter, of Florida, for appointment to a term expiring April 30, 2013, for the seat held by Michael Toner; and Donald McGahn, of the District of Columbia, for appointment to a term expiring April 30, 2009, for the seat held by David Mason. I would like to welcome all three of them here today.

On June 13, 2007, the Rules Committee held a confirmation hearing to consider four FEC nominations: Bob Lenhard, Hans von Spakovsky, Steven Walther, and David Mason. All four nominees were reported out of Committee en bloc without recommendation. The Senate has taken no further action on these nominations. Both Mr. Lenhard and Mr. von Spakovsky have withdrawn their nominations. Only Mr. Walther remains pending on the Senate Executive Calendar.

If all the nominees are confirmed by the Senate, the FEC will have five members and will be back in business. This is a critical election year, and it is not a moment too soon. We are currently confronting a major problem over the functionality of the Commission. This is the first time in the Commission's history that only two members are serving, albeit "hold-over", as Chair and Vice Chair with four vacancies.

Under the Federal Election Campaign Act, the Commission needs four affirmative votes to take action--whether to pursue litigation, audits, regulatory changes, or administrative changes to the agency.

Because the Commission is now hamstrung without the majority votes, it cannot protect and preserve the integrity of our campaign and public financing system for Federal elections in 2008. It is effectively barred from acting on the following core functions: issuing advisory opinions; conducting audits, both mandatory and discretionary; pursuing enforcement matters; engaging in litigation, both defensive and offensive; conducting investigations; holding public hearings; engaging in rulemakings, particularly those related to the new ethics law which we passed as S. 1; making referrals of potential criminal conduct to the Department of Justice; and, finally, certifying over \$85 million in Presidential public financing for the general election and millions more for qualifying candidates in the 2008 primaries.

As you can see, this is a serious situation, and it could be a real recipe for disaster if the Senate fails to confirm these nominees.

The raising and spending of money in Federal elections is unprecedented in the 2008 Presidential and congressional election cycle. There is record campaign spending.

According to the FEC's statistics from March 6th of this year, the three national committees of the Democratic Party reported raising a total of \$191.3 million in the first 13 months of the 2008 election cycle. The three Republican national party committees reported raising \$186.2 million during the same period.

Clearly, we need a functioning Commission to ensure the integrity of our system of raising and spending campaign funds. My goal, Mr. Ranking Member, my distinguished colleague Senator Bennett, is really to ensure that the three nominees before us are considered at this hearing and then voted out by this Committee. I am happy to vote for them individually or vote for them en bloc I will leave that up to your good offices. But I think it is extraordinarily important that we move these nominees.

I have been able to meet with each one of them and talk a little more with the nominees. I am going to ask them, in addition to the opening remarks they make, to please give us their vision of how they can function in a truly nonpartisan manner on this Commission.

I really believe the time has come to break this partisan hold on the Commission. People should perform as good, spirited, common-sense public servants as they evaluate regulations and laws.

My intention would be at the conclusion of this hearing to call for a markup meeting. We need ten Members for a quorum. Hopefully that would occur around 3 o'clock and hopefully the staffs here can alert their Members to come and we can do the markup directly following this hearing.

If that is not possible, it will be my intent to recess at the call of the chair and convene a markup meeting after the first floor vote, if that is agreeable with you, sir.

I will now turn the floor over to Senator Bennett.

OPENING STATEMENT OF SENATOR BENNETT

Senator Bennett. Thank you, Madam Chairman. You have been gracious and accommodating as usual, and I agree with you that we should act as quickly as possible on the three nominees before us. I would prefer that they be confirmed en bloc because it has always been the tradition that FEC nominees come out of the Committee en bloc.

I know that there are people from the White House who are in the audience and I would hope they would send us the fourth name as quickly as possible so the entire six-person committee can be filled.

Senator Reid when he wrote to Josh Bolten, the Chief of Staff of the White House, said that he wants to, "Ensure that a fully constituted six-member Commission is quickly put in place."

Now, his provision as to how that might happen may or may not be the way the President wants it to happen, but it is the goal that we should all pursue. So anything we can do to move these three as quickly as possible we should do, and I would hope that with some help from the executive branch, we will get the fourth nominee as quickly as possible and get all six on the FEC as quickly as possible.

I appreciate your anxiousness to see to it that the FEC, even though it is the only agency where the law specifically says people should be either Republicans or Democrats, should be as nonpartisan as possible. And I have commented before, but I think we need to reemphasize here again, the experience with the agency.

When I first became a Senator, it was bitterly divided between Republican and Democratic appointees. Virtually everything was a 3-3 vote. There was actually a proposal made to say that whenever there was a 3-3 vote, the General Counsel of the FEC should be the deciding vote. And I worked as vigorously as I could against that solution because that would give an appointed bureaucrat, who would never be subject to confirmation, the virtual power to decide everything as one individual, and I did not think that was a good idea.

I was heartened in the hearing we held before with the four people that we reported out en bloc to have the history of the current Commission laid out before us. Virtually every significant decision made by that Commission was unanimous. It was a 6-0 kind of cooperative activity, and I would join you in urging these three members to do their best to accommodate--or to duplicate the more recent history rather than go back to the old history.

I have a particularly strong view of that because I had a charge made against me that came before the FEC under the old history, and automatically all three Democratic members of the Commission voted against me, and automatically, gratefully, all three Republican members voted for me. It was deadlocked, and the intended action against me was not taken.

That sort of partisanship calls into question virtually every complaint. If the complaint has merit, it should be upheld 6-0. If it does not have merit, it should not require a partisan vote to keep it from going forward.

So I hope we can maintain the degree of cooperation that has been the pattern for the last several years.

Chairman Feinstein. Thank you very much, Senator.

We will now go to the nominees, if that is agreeable, and Senator Klobuchar has asked to say a few words about Cynthia Bauerly, and you may want to, as well, Senator Schumer, since she is sort of split down the middle between the two of you.

So let's begin with Senator Klobuchar.

STATEMENT OF HON. AMY KLOBUCHAR, A UNITED STATES SENATOR FROM THE STATE OF MINNESOTA

Senator Klobuchar. Well, thank you very much, Madam Chair, and I am pleased to be here today to introduce a talented Minnesotan, who I am fortunate to know: Cyndi Bauerly. Cyndi grew up in central Minnesota, the daughter of a nurse and a Vietnam veteran. I think her parents are right behind her, with her sister.

Cyndi graduated from Concordia College in Moorhead, Minnesota, with highest honors and later earned her J.D. and Master's in Public Affairs from Indiana University.

While she has worked as an attorney in private practice, including at the prestigious law firm of Fredrikson & Byron, she has spent most of her career in public service. From her first job out of college with the National 4-H Center here in Washington, teaching young people about government, she has shown a dedication to working on behalf of the American people for the advancement of our democracy, and I will let Senator Schumer talk about the great work she did with the Judiciary Committee.

I have been fortunate to know Cyndi personally for a number of years and have always valued her expertise on policy matters, as have a number of our colleagues. And as a former prosecutor, I always have a place in my heart for people who care about the facts and get the facts right and are fair in their judgment. And I believe that is something that we should also value in an FEC Commissioner.

I do not presume to speak for Senator Schumer. Let the record reflect that Senator Schumer will speak enough for himself.

[Laughter.]

Senator Klobuchar. But I believe that he shares my--

Chairman Feinstein. Would you like a point of personal privilege as to how quiet you are?

Senator Schumer. Not from my former good friend Senator Klobuchar.

[Laughter.]

Senator Klobuchar. But I believe that he shares my assessment of Cyndi's great abilities.

Cyndi's family roots in Minnesota and her background provide her with a firm foundation as she enters what I hope will be the next phase of her public service on the Federal Election Commission.

Thank you very much, Madam Chair.

Chairman Feinstein. Thank you very much, Senator. Senator Schumer?

STATEMENT OF HON. CHARLES E. SCHUMER, A UNITED STATES SENATOR FROM THE STATE OF NEW YORK

Senator Schumer. Well, thank you, Madam Chair, and I am glad I can follow the diffident Senator Klobuchar in my remarks. And I, too, want to join in thanking you for holding this hearing, first of all, as a member of the Committee. And I want to thank you for moving efficiently after the names were presented by the President. I know how hard you have worked to try and get a functioning FEC, and it looks like we are getting close, and thank you for your strong efforts in that regard.

I look forward to hearing the testimony of Ms. Hunter and Mr. McGahn as well, and certainly of Ms. Bauerly. But we most of all look forward to a functioning FEC after many months when it was not able to function.

But my purpose here today is to say a few words about one of the nominees, and that is Ms. Cyndi Bauerly. As Amy mentioned, she is joined by Sharon and Mike, her parents; and Nicole, her sister. I welcome them back to Washington. Nice to see you all again. Maybe they want to stand so people will know who they are. I know how proud they have been of Cyndi, and they are even prouder today.

And it is not in her written testimony, but I want to stress that so much of Cyndi's character comes from her parents. They are wonderful people. It is a very close family. In fact, she left working for me to go back home to her family, much to my regret, for a period of time and then she came back. But they are great people.

Cyndi's Dad, Mike, served his country proudly and honorably in Vietnam, has always put his country before himself. He grew up in central Minnesota, had eight siblings enlisted in 1968 in the SeaBees, the Navy SeaBees, and then ended up serving two tours in Vietnam. And Cyndi and Mike just traveled to Vietnam together on the 40th anniversary of his enlistment, and I know how proud Cyndi was of her Dad at that point, as always. His service is an example to all of us, and Cyndi learned well from him.

And Sharon, Cyndi's Mom, is another example of what we hope our citizens can achieve. Upon graduating from high school, her father told her that that was enough and that a woman should not pursue any more education. Sharon did not let that deter her. She worked her way through nursing school so she could care for others and so that she could serve others. She continues to do so today. She still volunteers in the Catholic grade school that Cyndi attended. Both she and Mike volunteer at the local hospice that they founded in St. Cloud. And I bring this all up because, after all, we are all affected by her parents and their influence.

These values are evident in Cyndi. Independence, fairness, and a deep burning sense for justice for all are evident in Cyndi. And as we can see by her resume and by the fact that she is here today, like her parents, she has inherited from them--she has a great strong sense of duty, the sense of duty to family, country, and fellow citizens. And I saw every one of these talents, Madam Chairperson, when Cyndi served my office, my Senate office, first as counsel, as I said, then she went home back to Minnesota, and I begged her to come back. When she left, I said, "I want you to come back one day as my Legislative Director. And God was good. She did, and served so well.

Chairman Feinstein. And then what happened?

[Laughter.]

Senator Schumer. Then some very influential person in Harry Reid's office suggested, unbeknownst to me, Cyndi would be a good FEC Commissioner.

Chairman Feinstein. Yes, we all believe that.

[Laughter.]

Senator Schumer. It is the truth. As Cyndi, a person of great truth will tell you, it is the God's honest truth. And I went to her and I said, "Look what you are doing to me." But I said to Cyndi, "Do you want to do this?" And she said she would, and here she is.

The one thing I want to assure the Committee is this: What you need on the FEC is, of course, intelligence, and many nominees are intelligent. But you need a sense of independence and fairness. And I can assure this Committee, from all the times that Cyndi argued with me and would not just necessarily go along with what I wanted to do, but was able to persuade me that my way in many regards--that there was a better way to do it or I was wrong, that she has a real--not only a strong sense of independence, but an ability to convince others to her point of view. She will be a great FEC Commissioner. She will serve our country and this Commission well, and I know it will be in a fair, down- the-middle, and truly bipartisan way, because that is how she is. I say that both to our Chair and to our Ranking Member. And I look forward to hearing not only Cyndi's testimony, but those of the other nominees.

Chairman Feinstein. Well, thank you very much, both of you, Senator Schumer and Senator Klobuchar. After that send-off, I will introduce the two other nominees, and then we will quickly hear from each of you.

Ms. Caroline Hunter, of Florida, began her legal career at the Republican National Committee, where, as Deputy Counsel, she provided guidance on election law and the Help America Vote Act. Ms. Hunter then served in

several positions in the current administration, including Deputy Director of the White House Office of Public Liaison. In 2007, she was confirmed as a Commissioner for the Election Assistance Commission, where she currently serves as Vice Chair.

Mr. Donald F. McGahn, of the District of Columbia, has worked for the law firm of Patton Boggs with a specialty in election law. While at Patton Boggs, he was recognized for his pro bono legal work with the Lawyers' Committee for Civil Rights. Since 1999, Mr. McGahn has served as General Counsel to the National Republican Congressional Committee and has appeared before the FEC on behalf of numerous elected officials, parties, and others involved in the political process.

With that, I will place the witnesses under oath. May I ask the nominees to stand and raise your right hand? Do you swear that the testimony you are about to give is the truth, the whole truth, and nothing but the truth, so help you God?

Ms. Bauerly. I do.

Ms. Hunter. I do.

Mr. McGahn. I do.

Chairman Feinstein. Thank you and sit down.

Mr. McGahn, since Ms. Bauerly had most of the limelight here with these introductions, why don't we begin with you and go down the table the other way. We will put men first.

TESTIMONY OF DONALD F. MCGAHN, OF THE DISTRICT OF COLUMBIA, TO BE A MEMBER OF THE FEDERAL ELECTION COMMISSION

Mr. McGahn. Thank you. I think. Chairman Feinstein, Ranking Member Bennett--

Chairman Feinstein. Could you press the button? Thanks.

Mr. McGahn. Sorry. Chairman Feinstein, Ranking Member Bennett, and members of the Committee, thank you for inviting me to appear here today. It is a great honor to be nominated to the Federal Election Commission and a great responsibility to serve as a Commissioner. I appreciate the confidence President Bush has shown in me by this nomination.

Since 1974, the Federal Election Commission has served a critical role in our democracy. It is the primary repository of information regarding the financing of Federal elections and has served as a national clearinghouse for information available to the general public. Ultimately, the Commission's core constituency is the general public.

Over the years since its inception, the Commission has consistently become more and more independent. Its structure has changed over the years, due in part to Federal courts taking issue with earlier incarnations of the Commission. Regardless, the Commission was and is the primary mechanism for the enforcement of the Federal Election Campaign Act as well as the Bipartisan Campaign Reform Act. The Commission's enforcement of the law must be impartial and nonpartisan. After all, the composition and procedures of the Commission are designed to preclude one political party from having a controlling majority over its decisions. Despite being equally divided, it is remarkably rare today for the Commission to deadlock when voting on matters before it. I view both the Commission's increased independence and its ability to act in a nonpartisan way as healthy developments. Regarding my own ability to act in a nonpartisan manner, I ask the Committee to consider the comments made by those of the Democratic Party. Attorney Bob Bauer, counsel to many Democrats, including Senator Obama's Presidential

campaign, as well as former Democratic Chair of the Fed, Bob Lenhard, have both said very complimentary things about my fitness for office, my impartiality, fairness, integrity, and the like. Proving a negative about being partisan is tough, so I rely on their words. They speak and write much more eloquently than I ever could.

Moreover, I also point the Committee to my work. I have on several occasions filed joint comments and advisory opinions before the Commission. My view is that when parties have common interests, they ought to work together. And, again, those comments were filed with Mr. Bauer on behalf of one of my clients, the National Republican Congressional Committee, as well as the Senatorial Committee, and the Democratic Senatorial Campaign Committee as well as the DCCC. That was in 2005.

In recent years, there have been many other positive developments at the Commission in addition to its increased independence. To the extent that success can be measured in terms of dollars and cents, the Commission has exceeded expectations. There has been a significant increase in the amount of fines and penalties collected. Similarly, the Commission has made great strides with respect to how information is presented to the public. It was not long ago that obtaining information about the Commission and its precedents and its other activities required a trip to its public records room. Today, the Commission places a wealth of information on its website and has endeavored to make it user-friendly, specifically by making it easier to search for particular information.

Procedurally, the Commission's pilot program regarding the ability to actually appear before the Commission in certain enforcement matters has been met with positive reviews. The same is true of the Commission's modification of its advisory opinion process which allows for a quicker response to certain time-sensitive requests.

Despite these developments, much work remains. The oral hearing procedure is merely a pilot program. Although some advisory opinion requests can now be expedited, a significant number of requests take a significant period of time to resolve. Such delay could serve to discourage otherwise well-intentioned political actors to forego requesting an advisory opinion and, thus, maybe choose not to participate in the political process.

The Commission's record of defending its actions in court has been spotty at best, particularly with respect to the defense of regulations promulgated pursuant to the Bipartisan Campaign Reform Act. To be fair, this is a relatively new statute, and the Commission has been challenged in court by some saying it went too far and others saying it did not go far enough. Regardless, court decisions will continue to play a significant role in the Commission's implementation and enforcement of the statute.

The public interest is best served when the law is made to work better by way of clear rules and standards formulated in a way that survives judicial review. Ultimately, my hope is that my past experience and professional background will be an asset to the Commission in the execution of its mission.

Thank you again for the opportunity to appear before you. I am happy to answer any questions.

Chairman Feinstein. Thank you very much, Mr. McGahn.

Ms. Hunter.

TESTIMONY OF CAROLINE C. HUNTER, OF FLORIDA, TO BE A MEMBER OF THE FEDERAL ELECTION COMMISSION

Ms. Hunter. Madam Chair, Ranking Member Bennett, members of the Committee, it is an honor and privilege to be here with my fellow nominees before you today.

Chairman Feinstein. Is your mic on?

Ms. Hunter. I believe so.

Chairman Feinstein. Maybe we should turn it up slightly. Please proceed.

Ms. Hunter. Thank you. I am honored that President Bush nominated me to serve as a Commissioner on the Federal Election Commission. I would like to thank my family for their support. My husband, Justin Hunter; my daughter Helena; my mother, Christine Critchfield; and my father-in-law, Ferg Hunter, are here with me today. In addition, my daughter, Vivian, and my father, Richard Critchfield, are watching from home.

There are many important issues and a backlog of work before the Federal Election Commission. If confirmed, I look forward to working with my fellow Commissioners and the FEC staff to resume the work of the agency.

I would also like to acknowledge with me here today are two of my fellow Commissioners from the Election Assistance Commission: our Chairwoman, Rosemary Rodriguez, and Commissioner Donetta Davidson. I have very much enjoyed working with my fellow Commissioners on both sides of the aisle, and I plan to do so, if confirmed, at the FEC.

Thank you.

Chairman Feinstein. Thank you very much.

Senator Schumer just whispered to me, "Whose child is that beautiful little girl in the first row?"

Ms. Hunter. That is my daughter Helena.

Chairman Feinstein. Now, we know. Welcome, Helena. We are pleased to have you here.

Ms. Bauerly?

TESTIMONY OF CYNTHIA L. BAUERLY, OF MINNESOTA, TO BE A MEMBER OF THE FEDERAL ELECTION COMMISSION

Ms. Bauerly. Thank you, Chairman, Ranking Member Bennett, and members of the Committee. It is a pleasure to appear before you today. It is an honor to be nominated by the President to serve on the Federal Election Commission and to be considered by the Senate in its advice and consent role. I would like to express my deep gratitude to Majority Leader Reid for his confidence and his recommendation to the President.

I would like to thank Senator Klobuchar for her kind introduction. It was a pleasure to work for her and to watch her become the first woman elected to the Senate from Minnesota.

I would also like to thank Senator Schumer from whom I have learned so much and for giving me the opportunity to serve in his office in the Senate, both on the Judiciary Committee and as his Legislative Director.

Chairman Feinstein. May I interrupt you for a moment? Would you verify that you actually changed his mind on some subjects?

[Laughter.]

Chairman Feinstein. Because, candidly, I am not sure I believe it.

Ms. Bauerly. Madam Chairman, I think it would be unwise for me to disclose any of the internal workings of Senator Schumer's offices.

[Laughter.]

Chairman Feinstein. A good response.

Ms. Bauerly. But I would hesitate to question the veracity of any statement of a member of this body.

Senator Schumer has an incredibly talented staff, and it was an honor to serve with them both on behalf of New York and the entire Nation.

I am proud to have my parents and my sister here with me today. I have other members of my family who could not be here from Minnesota, but I know they are with me in spirit: my brother Dean, and his wife, Rita, and my brother-in-law Chad. And I appreciate their love and support through all of this.

Chairman Feinstein. Would they please stand.

Ms. Bauerly. I believe that the Federal Election Commission serves an essential purpose in our democracy, and in response to your notation at the outset, Chairman, I agree with you that the integrity of the entire system rests upon the impartiality and the independence of the Commission itself.

The Commission's mission of preventing corruption in the Federal campaign process by administering and enforcing and formulating policy with respect to campaign finance law can only be accomplished if the public knows and believes that the Commissioners are acting based on the law as established by this body, by Congress as it passes the law, by the courts as they interpret the Constitution and with respect to those laws, by FEC precedents and its own rules, and not by any external factors. So I take that very seriously. I take the oath that--if we are confirmed, I am sure my fellow nominees would agree we would take that oath incredibly seriously and follow it to the best of our ability.

Given the opportunity to serve on the Federal Election Commission, I will look forward to working with my fellow Commissioners and the Commission staff to work on the backlog that has accrued, to continue to make strides for furthering the disclosure function that is so very important at the Commission, to find innovative ways to provide that information to the public, and to work very hard to ensure that all of the decisions of the Commission are reached in a consensus manner to ensure that the public's confidence is earned throughout that process.

I again thank you for holding this hearing. I look forward to any of your questions. Thank you.

Chairman Feinstein. Thank you very much. I will begin the questions.

When I spoke with each one of you privately, I mentioned to you specifically how important I thought it was to break this partisan grip that exists and to function in a nonpartisan way. You all assured me that you would, and I very much appreciate that. I have one question for each of you. Let me put it before you and then begin with Mr. McGahn and go down the line.

Each of you has had some level of involvement with national political parties and candidate committees. I would like to ask that you explain your involvement with political or candidate committees and the degree to which you were involved, and please tell the Committee what you intend to do to avoid any charges of conflict of interest. Mr. McGahn, we will begin with you.

Mr. McGahn. Thank you. I have had extensive involvement with political parties and campaigns. I have served as a General Counsel for the National Republican Congressional Committee for approximately 10 years. I was

an outside counsel to that committee before that. I have represented numerous campaigns, both in day-to-day advice and in connection with FEC matters. The public record on this is readily available on their website. Simply search my name and the scope of my representation has appeared--will appear with one keystroke.

As far as going forward, obviously any matter that comes before the Commission where I had some involvement, either as a counsel in that particular matter or for a client, I would have to recuse. There is an ethics agreement that I have already executed that lays this out in detail. Moreover, being a former judicial law clerk, I come at this more from that point of view where you need to avoid not just the technical--whatever the technical rules are, but the overall appearance.

I will balance that with the need to ensure that at least the Commission can move forward on certain matters, but I think given my high profile with my party clients, it is well known and I am going to endeavor to make sure that, to the extent there is a perception, that will be addressed.

So that is how I will conduct myself. When in doubt, recuse; and when in doubt, make it clear that I am acting in the public's interest, not in my prior client's interest.

Chairman Feinstein. Right. Thank you.

Ms. Hunter? Sorry. Mrs. Hunter?

Ms. Hunter. Thank you, Madam Chair. I served as counsel to the Republican National Committee for 4 years and advised the party on a number of different issues. I don't anticipate any conflict-of-interest issues with respect to my work, if confirmed at the Federal Election Commission. None of the matters on which I worked at the Republican National Committee remain pending at this moment, so I don't anticipate any issues in that regard.

Chairman Feinstein. Thank you very much.

Ms. Hunter. Thank you.

Chairman Feinstein. Ms. Bauerly?

Ms. Bauerly. I have had involvement with a number of different campaigns. First, several years ago, I worked on Vice President Gore's Presidential campaign as a volunteer policy staff. I worked for Senator Klobuchar's campaign in a volunteer capacity as her policy director at the outset of her campaign. And then for approximately 1 month in October-November of 2006, as part of--I terminated my employment with the Senate for that month, went to work for the DSCC on her campaign as a policy adviser, and then returned to the Senate after that.

As Mr. McGahn noted, there are Federal statute and FEC policy that will guide us and impose certain requirements upon any required recusals with respect to prior employment. And the FEC has an ethics officer and a screening program that I will take full advantage of to ensure that any cases with respect to prior employers or any other financial interests would be properly screened and discussed prior to my involvement in them.

Chairman Feinstein. Thank you very much.

Senator Bennett, would you like to go next?

Senator Bennett. Thank you very much.

The Chairman has probed in the question of your reaction--your experience in a partisan way, and I think it is appropriate to have that clearly before us. But there is no area in America that is more heavily charged with emotion than the area of election law. And there are a variety of groups that have been organized in an effort to influence the way election law is handled outside of parties.

The parties know what they are supposed to do. The parties exist to elect people to office. And you exist to see that they do it in accordance with the law. And if they don't, they get fined. That is fairly straightforward.

There are advocacy groups that organize to influence you. They don't deal with the law. They deal with pressure. We have seen some examples of that surrounding some of these nominations. We have seen examples of that in previous nominations. And I would, following the Chairman's example ask the question and then ask you to all three answer the same one, how you would respond to pressure for the way you do your job coming not from a political party but from an advocacy group that wants to get you to change the law by regulation in accordance with that particular group's ideology. You all know what I am talking about. Give me a sense of how you would respond to that kind of pressure.

Mr. McGahn. Thank you, Senator, for your question. My short answer is I would not respond to that sort of pressure. To the extent there is a rulemaking or matter before the Commission where there would be a public hearing or some input, those groups would be more than within their rights to submit comments. They would be considered just as any other comments. To the extent they represent the public interest, I would certainly consider them, but I would not respond to pressure.

My experience as a lawyer, I think, has toughened my skin to the point where I don't mind seeing my name in the paper or having people saying things that may or may not be true. I would endeavor to do the right thing depending on where the facts and law lead, and that is really the best answer I could give. I would not be swayed by what you call "pressure." I would try to do what is right.

Ms. Hunter. Thank you for the question. I agree that there is an opportunity for public notice and comment for all of the rulemaking and other procedures with respect to the FEC, and I will carefully consider all of the public comments that come before the Commission, if confirmed, as well in the public hearings.

I intend to follow the letter of the law and proceed with rulemaking and other things as objectively as I can base on the law and the will of Congress as embodied in the law. So to the extent that an advocacy group has a position that I don't believe is in line with what Congress intended, I will not be persuaded to follow that path.

Ms. Bauerly. Thank you, Senator Bennett. I agree with my fellow nominees that what guides the FEC and my view of an FEC Commissioner is the law itself, the precedent from the courts, and the agency itself. Yes, there is an opportunity for notice and comment. Any matter before—many matters before the Commission does provide an opportunity for the public to comment, and that is a very important part of the process, just as it is with respect to groups weighing in with this body when it is considering legislation. But once this body passes that legislation, it is the FEC's duty to implement new rules, if that is directed by Congress or implementation that law with respect to the regulated community.

So, again, there is a role for public comment, but the duty of the Commissioners and my duty, if confirmed, would be to the law itself.

Senator Bennett. Thank you very much. I have nothing further.

Chairman Feinstein. Senator Schumer?

Senator Schumer. No questions, Chairman.

Chairman Feinstein. We are joined by Senator Cochran.

Welcome.

Senator Cochran. Madam Chairman, thank you for conducting the hearing, and I appreciate the candor and the seriousness of purpose that these Commissioner-to-be's are bringing to this hearing. This is a very important responsibility, and I am hopeful that we can proceed to a confirmation vote here in the Committee as soon as a quorum can be mustered, whether that is here or over on the floor after a vote. I would--

Chairman Feinstein. If I could respond to you I didn't think we would be finished before 3:00, but now I believe we will be. So perhaps the staff here can call their members and see if they can't report here as soon as possible, and we will have a vote.

Senator Cochran. As I understand it, we have only two Commissioners serving at this point.

Chairman Feinstein. That is correct.

Senator Cochran. And four people are needed to make a decision and operate.

Chairman Feinstein. That is exactly right.

Senator Cochran. So I think it is a matter of some urgency that we get these three nominees, who appear to me to be very well qualified and have made impressive appearances and comments here to our Committee.

Chairman Feinstein. I think you are right, and I am going to ask another question in the interim. But as soon as we have--

Senator Bennett. We can surely filibuster 15 minutes.

[Laughter.]

Chairman Feinstein. Yes. As soon as we have the required number of members, we will proceed to a vote.

Let me ask this question: I am interested in your approaches to campaign finance as an FEC Commissioner to the extent you would like to discuss it here or even have it formulated in your own mind. How might you consider a campaign finance regulation as a Commissioner compared to how you have approached these issues when representing candidates, parties, or administration interests? In other words--and it is particularly for the two people that have represented candidates. How do you see yourself being different? You have expressed that to some extent, Mr. McGahn, but perhaps you would like to elaborate on it a bit.

Mr. McGahn. Thank you. Certainly. On the one hand, the analysis would be very similar, but there would be one major difference between being an advocate for a position and deciding that position. There is a common lawyer joke about, "They don't pay us to decide them. They only pay us to try them." And as a lawyer, that is what you do. You make arguments. You try to make good arguments. You try to anticipate the other sides' arguments to address the concern, and then you make your best shot, whether you know it is a winner or not. Sometimes you make arguments and you know this really isn't the right way it should go, but you still make that argument.

As far as the process, though, I would begin with the statute itself. Statutory language is critical. That is actually what the Congress has passed, the President has signed, and it has become the law. I would also look to court cases to see how the statutory language has been interpreted. From there, you get into the rulemaking situation; pass regulations and the like; if it is a new rulemaking, certainly the comments that are made.

I also read the explanation and justifications for rules that I cite and use even in my private practice, but certainly as a Commissioner. I have been known to pull transcripts of the actual rulemakings even if the rule was promulgated 20 years ago. I would do the same thing as a Commissioner, and I would certainly look at as much information as I could possibly get before making a decision.

But as far as regulations go, the last step is the comments, and then you would probably have testimony. I would listen very carefully to the testimony. I would like to probably ask some questions of those making comments to feel out their issue and really try to listen to as many sides of the argument as I can.

Whereas, as a lawyer, you are much more in a bubble, and you are much more focused on your client's particular issue. Ethically, you have to represent the client to the best you can. Once you are on the Commission, it is an entirely different role, although I think the analytical framework will remain similar.

Chairman Feinstein. Thank you very much.

Ms. Hunter?

Ms. Hunter. Those are two different roles, as has been acknowledged: one as an advocate on a position of a political party, and the other as a Commissioner, as an objective person who is taking a hard look at the law and the regulation. So I think there are two very different ways of approaching that type of issue, and I know that my experience at the Election Assistance Commission will help me through that process to understand that just because something may be beneficial to a client that you may have worked in the past or a certain State official or something along the way, of course, the most important determination is to be objective and to read the law as objectively and fairly as possible.

Chairman Feinstein. Thank you.

Ms. Bauerly?

Ms. Bauerly. Well, my perspective is slightly different, having served in this body on the policy end of creating the campaign finance law. So I think I might have a deep appreciation for the text of the statute and how they get to be that way and any instructions to the Commission itself to promulgate new rules pursuant to those statutes. And the way that I would begin is, again, with the text of the statute and then with any legislative history that may exist with respect to it. Commission precedent, the law as stated by the courts, obviously also plays a role in that, but I think that as we have all acknowledged, the role of the Commissioner is to be the objective determiner of what the policy should be or the implementation of the policy as set by Congress.

Chairman Feinstein. Thank you very much.

Senator Bennett, do you have another question?

Senator Bennett. Just to go a little further, I like what you have all said in response to the question. But there are those who are disappointed in what Congress has done and would like to see you repair it, would like to see you fill in the gaps, like to see you go a little farther. This is obviously part of the theme of my first question, and I am not sure you can say anything more than you have said about that. But I just want to underscore it again.

Ms. Bauerly, as you say, you were here and you watched how the thing got written in the first place. And almost inevitably it is never 100 percent right. I quote my father, who said we legislate at the highest level at which we can obtain a majority, and sometimes a majority is not available for the best solution, but a majority is available for something short of that. And there will be those who say, well, we know what the best solution should have been, and if we could not get the Congress to do it, we want you to do it.

One of the problems we face generally throughout this town, moving aside from just the FEC, is that the Congress legislates like this and then the regulations are written like this, and then the people in the field apply them like that, and the constituents come to our offices in our home States and say, "Why did you do this to us?" And we have to say, "Well, this is what we wrote." "Yes, but this is what is being done to us."

I don't know how that is ever going to come out in the text of the report of the Committee when I gesture that way.

[Laughter.]

Senator Bennett. But we will worry about that later.

So I don't have anything profound to add to what has already been said other than a concern which you have all addressed and which I think you will all take into consideration properly that you do indeed act as the watchdogs of the process within the parameters that the Congress has set.

Now, if something comes up where you think the Congress needs to revisit this, is it appropriate for them to make any comments to us? I don't know the answer to that because I am unburdened with a legal education so I don't know where the guidelines are. But I would think it might be appropriate for the Commission, if they felt there was some major abuse that had been called to their attention that they did not have the power to address, to perhaps make a comment to the Congress. I am thinking of Chief Justice Roberts when he came up for his confirmation, there was some criticism for a decision that he rendered until they read his opinion. In his opinion, he said this is a really stupid consequence--obviously, he used better language than that, but fundamentally, he said this is a really stupid consequence, but I have to rule this way because that is what the law is, and I urge the Congress to change the law. And they did in response to the opinion that came out of then-Circuit Court Judge Roberts' opinion.

So you may well be within your rights--if something comes along that you feel is an egregious abuse, don't try to fix it yourself if it is not within the law, but feel free to coordinate with us, and we will do what we can to try to update it.

Chairman Feinstein. Senator, and actually the staff has informed me that they are required to report to us annually with any legislative changes they might recommend. So that is a clear venue. I notice that--oh, we were joined by Senator Pryor.

Senator Bennett. He is there.

Chairman Feinstein. Is he there? Oh, there you are. I did not see you behind the chair.

Senator Bennett. We have high chairs. He was hiding behind one of them.

Chairman Feinstein. I would like to recognize you, Senator, for any questions.

Senator Pryor. I do not have any questions, but thank you, and thank you both for doing this. I thank the panel for being here.

Chairman Feinstein. Let me tell you what the situation is here. We have obviously Senator Bennett, myself, Senator Cochran, and Senator Pryor. Senators Dodd, Schumer, Murray, and Nelson have said they would come back if there are others that would be willing to come on over. Is there a chance that we can get additional members here, or should I--shall I just--or do I recess it? All right.

Senator Bennett. We have polled the Republicans, and there are two possibles.

Chairman Feinstein. Two possibles?

Senator Bennett. That is as tentative as I can--

Chairman Feinstein. That still does not get us ten Member quorum. Since it appears that the Committee will not attain a live quorum of ten, I am going to recess this meeting subject to the call of the chair and indicate that we will reconvene after the first vote on the floor in Room 219.

I will recess the hearing and reopen an executive session. We will recess to the call of the Chair, which will be after the first vote.

Thank you. The meeting is adjourned. Thank you all very, very much. I think your comments were excellent.

Thank you.

[Whereupon, at 2:54 p.m., the Committee was adjourned .]