

Center for Competitive Politics

January 04, 2007

Mr. Mark D. Shonkwiler
Assistant General Counsel
Enforcement Division
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

Re: Comments on Proposed Policy Statement Establishing a Pilot Program for Probable Cause Hearings

Dear Mr. Shonkwiler:

These comments are filed on behalf of the Center for Competitive Politics in regard to the Commission's proposed policy statement establishing a pilot program for probable cause hearings, released on November 30, 2006. The Center urges the Commission to adopt these modest changes in Commission procedure, which will provide respondents with significantly greater procedural protection at a negligible cost.

At the Federal Election Commission, respondents have no right to see the evidence against them or to cross examine, or even know the identity of, witnesses. When the Commission makes its final decision and decides on a penalty, the Commission's General Counsel, who makes the recommendation to proceed against the respondent, is present to answer questions for the Commissioners, but respondents are not represented. As far back as 1983, a committee of the American Bar Association criticized these procedures as violating fundamental principles of due process. Committee on Election Law, Section of Administrative Law, American Bar Association, *Report on Reform of the FEC's Enforcement Procedures* (1982).

The Commission can deny respondents these fundamental elements of due process because respondents are entitled to *de novo* review of Commission determinations in a court of law. But forcing respondents into courts of law, particularly when their complaint is lack of process, raises two concerns.

First, when respondents can afford to proceed at trial, that path is not necessarily in the Commission's best interest. Litigation is expensive, time consuming, and a strain on the Commission's resources.

Second, and more troubling, is that most respondents *cannot* afford to proceed at trial. As the Commission is aware, 99% of all cases before the FEC and over 96% of those in which the Commission finds a violation are adjudicated without going to court. *Hearing on Federal Election Commission Enforcement Procedures: Hearing Before the Comm. on H. Admin.*, 108th Cong. 13 (2003) (statement of Vice Chairman Bradley A. Smith, Federal Election Commission). Losing political committees have no resources to go to court. Even winning committees rarely

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have the funds to go to court, and cannot afford the bad publicity in the midst of their next campaign. The cost of a court action far exceeds the annual budget of the vast majority of PACs, union locals, local and county party committees, and even that of a great many state party committees. And this cost comes on top of the tens or even hundreds of thousands of dollars that go into defending the action at the FEC, before ever going to court. As William Allen, Chair of the Administrative Law Committee of the ABA at the time of the Committee's 1983 study of the Commission's enforcement practices noted:

"The fact is that the overwhelming majority of election law cases are resolved administratively...The cost of going to court is prohibitive in a lot of cases, and a lot of entities that are subject to regulation are mere temporary enterprises and their useful lives limited to a single election, and litigation is simply not worthwhile in those circumstances."

Committee on Election Law, Section of Administrative Law, American Bar Association, *Report on Reform of the FEC's Enforcement Procedures* (1982).

Because so few respondents proceed in court, the Commission's determination that the law has been broken is almost always respondents' first and only opportunity to be afforded due process protection. The adversarial nature of Commission proceedings preclude respondents from relying on the General Counsel for this protection. Under the Commission's enforcement procedures, the General Counsel ultimately recommends that the Commission find "probable cause" that the law has been violated. When the Commission debates this recommendation, the Counsel is present to answer questions. The Counsel, no matter how fair he tries to be and how professional he is in fact, simply cannot be expected to make the defense that the respondent's own representative would make. This is an elementary insight of the entire U.S. adversarial system. It is not in the Commission's interest to use this procedural disadvantage to coerce settlements; unlike a private legal representative, the Commission's role in enforcement is not merely to obtain victory for its "client," but also to reach just results for respondents.

While providing welcome protection for respondents, the pilot proposal is, at the same time, quite modest. In addition to being of a limited, eight month duration, the Commission retains sole control over the length of any hearing, or even whether to allow a hearing in any given case. In other words, the proposal actually creates no "right" to a hearing at all. All the proposal does is provide that in some cases, when the Commission "concludes that a hearing would help resolve significant or novel legal issues, or significant questions about the application of the law to the facts," and if at least two Commissioners agree, a respondent may appear in person, or through counsel, before the Commission. This is not a mini-trial—the respondent still has no rights to introduce evidence, or to present or cross-examine witnesses.

Nor will these hearings unnecessarily delay enforcement proceedings. Under the proposal, hearings may be as long or short as the Commission desires. The proposal adds no new layer of hearings to the process. Typically, under the current system, the Commission will spend anywhere from 5 minutes (on an easy case, the type least likely to result in a hearing) to several hours evaluating and debating a probable cause recommendation. Adding a 30 minutes

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or one hour appearance by the respondent or his counsel, with no witnesses or new evidence, should hardly slow the process.

Moreover, it is not clear that many respondents will seek a hearing. For one thing, that means the respondent must be prepared to go all the way through the process to "probable cause." Many will choose not to do this, as the Commission, when it has a strong case, typically offers to settle for less at the "pre-probable cause" stage, thus conserving resources. And an oral hearing will itself be costly to respondents. If a small number of respondents chose to avail themselves of a hearing, any delay will be even more minimal—likely nonexistent. This conclusion is consistent with existing Commission precedent for oral hearings in the Presidential Taxpayer Funded System, *See* 11 CFR 9038.2(c)(2)(ii), which the Commission has not found unreasonably burdensome.

The FEC must not operate, as the ABA said back in 1982, as a "star chamber." If hearings do not alter results, it is doubtful that respondents will seek them in large numbers, and any delay that does result will be insignificant. On the other hand, if many respondents seek a hearing, it will suggest that such hearings are beneficial to the Commission, and therefore, to proper justice. Accordingly, we urge the Commission to adopt the Proposed Policy Statement Establishing a Pilot Program for Probable Cause Hearings.

We appreciate the opportunity to comment on this matter and respectfully request the opportunity to comment further, should the Commission chose to hold oral hearings on this matter.

Sincerely,

/s/ Paul M. Sherman

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/s/ Stephen M. Hoersting

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