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NOTES

FEDERAL ELECTION REFORM: AN EXAMINATION OF THE CONSTITUTIONALITY OF THE FEDERAL ELECTION COMMISSION†

I. Introduction

In 1974, the United States Congress passed the Federal Election Campaign Act Amendments of 1974,¹ the most comprehensive election law in American history. For the first time Congress established an independent body, the Federal Election Commission (FEC), to oversee election legislation.²

In its haste to comply with the public's demand for efficient and honest election supervision, Congress arguably created a commission with numerous constitutional deficiencies. Accordingly, a discussion of the possible unconstitutional elements of the Federal Election Commission's enabling statute and the appropriate remedies needed before the 1976 election is appropriate. In a recent decision, *Buckley v. Valeo*,³ the federal Circuit Court for the District of Columbia considered the constitutionality of the FECAA of 1974, passed on several constitutional issues with respect to the FEC, and found several other constitutional questions unripe for consideration. While the *Buckley* court concluded that the FECAA of 1974 was constitutional, the decision must be examined with respect to the constitutional issues it decided,⁴ as well as some issues which the court found unripe⁵ or did not address at all.

The principal issues concerning the constitutionality of the FECAA of 1974 which must be resolved are: (1) the constitutionality of the appointment of FEC members by Congress; (2) the FECAA's satisfaction of the constitutional requirement that election rules and regulations be promulgated "by law"; (3) the constitutionality of the FECAA's additional requirement of filing campaign reports for those seeking federal office; and (4) the constitutionality of the enforcement powers of the FEC. These issues must be examined and resolved to determine the soundness of the *Buckley* court's decision and to determine the validity of the FEC.

† On January 30, 1976, the United States Supreme Court announced its decision in *Buckley v. Valeo*. The Court held the Federal Election Commission unconstitutional, finding the congressional appointment of FEC members to be a usurpation of the Presidential appointment power. The Court, however, ruled that the Commission's civil enforcement powers were constitutional.

1 Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (codified in scattered sections of 2, 5, 18, 26, 47 U.S.C.A.) [hereinafter cited as FECAA of 1974], amending Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (codified in scattered sections of 2, 18, 47 U.S.C.) [hereinafter cited as FECA of 1971].

2 2 U.S.C.A. § 437c (Pamphlet 1, 1975).

3 *Buckley v. Valeo*, Civil No. 75-0001 (D.C. Cir., filed Aug. 15, 1975). The case came to the circuit court pursuant to 2 U.S.C.A. § 437h (Pamphlet 1, 1975). This is a special review provision of the FECAA of 1974. The case was remanded to the district court for the formulations of constitutional issues.

The issues were first determined by *Buckley v. Valeo*, 387 F. Supp. 135 (D.D.C. 1975), when plaintiffs sought a declaratory judgment holding key provisions of the FECAA of 1974 as unconstitutional.

4 *Buckley v. Valeo*, Civil No. 75-0001, at 1572 (D.C. Cir., filed Aug. 15, 1975).

5 *Id.* at 1576.

II. The Constitutionality of the Appointment of the Federal Election Commission

Generally, members of an administrative agency are appointed by the President with the advice and consent of the Senate, pursuant to article II, § 1 of the Constitution.⁶ The FECAA of 1974 establishes an eight-member Commission; four members are appointed by Congress,⁷ two members by the President,⁸ and two, the Secretary of the Senate and the Clerk of the House,⁹ are nonvoting members. A statutory attempt to create a congressional power of appointment must be carefully scrutinized, since article II, § 1 unequivocally confers such powers on the President: "The President shall nominate with the advice and consent of the Senate." An obvious problem thus arises with the separation of powers since, under the FECAA, Congress is both creating a commission and appointing its members.

The *Buckley* court held that the appointment process was constitutional, reasoning that the FEC is not an administrative but a legislative agency which does not require appointment by the President pursuant to article II, § 1.

A. The Federal Election Commission: A Legislative Agency

The United States Code contains no statutory definition of a legislative agency,¹⁰ and despite numerous references to the FEC as a legislative agency,¹¹ the *Buckley* court never defined the term. The court relied principally on *Springer v. Philippine Islands*¹² in characterizing the FEC as a legislative agency. In *Springer*, the defendants were members of a national management board appointed by the Philippine Legislature.¹³ The Governor General¹⁴ of the Philippines challenged these appointments, arguing that the doctrine of separation of powers constitutionally limited a legislative body to performing legislative functions, thus prohibiting the Philippine Legislature from making appointments. The *Springer* court agreed with the Governor General, holding that appointment was beyond the scope of a legislative body, a body described as a governmental unit whose primary purpose is making law, and only incidentally involved in the duties of the executive or judicial branches of government.¹⁵ This distinction has been accepted and reiterated in subsequent Supreme Court decisions.¹⁶ This judicial description of a legislative body is the closest analogue

6 Administrative agencies are normally appointed by the President with the advice and consent of the Senate. *E.g.*, 15 U.S.C. § 41 (1970); 47 U.S.C. § 154(a) (1970); 49 U.S.C. § 11 (1970).

7 2 U.S.C.A. § 437c(a)(1)(A)-(B) (Pamphlet 1, 1975).

8 *Id.* § 437c(a)(1)(C).

9 *Id.* § 437c(a)(1).

10 The U.S.C. General Index lists no general definition for a legislative agency.

11 *Buckley v. Valeo*, Civil No. 75-0001, at 1573-76 (D.C. Cir., filed Aug. 15, 1975).

12 277 U.S. 189 (1928).

13 The Philippine Legislature is equivalent to the United States Congress.

14 The Philippine Governor General is equivalent to the President of the United States.

15 277 U.S. at 201.

16 *See O'Donoghue v. United States*, 289 U.S. 516 (1933); *Williams v. United States*, 289 U.S. 533 (1933).

to a legislative agency, and therefore is logically applicable in determining whether the FEC is actually a legislative agency.

Under *Springer*, a legislative agency would have first to exhibit a primary involvement¹⁷ in legislative activity. The FEC does perform various legislative functions, including developing a filing and reporting system for candidates and serving as a clearinghouse for all election reports.¹⁸ These functions, however, must be compared with the nonlegislative functions to ascertain whether the FEC is primarily legislative. The FEC's organizational structure emphasizes enforcement and administration rather than legislation. The FEC has the power to issue advisory opinions,¹⁹ to initiate suits,²⁰ to formulate general policy with respect to the provisions of the Act and of the criminal law,²¹ and to conduct investigations.²² Moreover, an examination of legislative history underscores the conclusion that the FEC is not primarily legislative.²³

The second attribute of a legislative agency, according to the *Springer* definition, is that it be only incidentally involved in executive or judicial functions. Since the FECAA itself enumerates several nonlegislative duties for the FEC, it is clear that the agency is more than incidentally involved in executive and judicial functions. The *Buckley* decision then improperly relied on *Springer*, since it did not satisfy either of *Springer's* criteria of a legislative body or, alternately, modify these criteria.

B. The Federal Election Commission: An Administrative Agency

Since *Springer* indicated that the FEC does not meet the basic definitional requirements of a legislative agency, the Commission could be properly classified as an administrative agency.²⁴ Bernard Schwartz²⁵ suggests that "present day administrative agencies are vested with authority to prescribe generally what shall or shall not be done in a given situation; to determine whether the law has been violated in particular cases and to proceed against the violators. . . ."²⁶ In other words, an administrative agency is a hybrid of the separate branches of government which allows it to promulgate rules, to determine if the rules have been violated, and to proceed against the violators.

Clearly, the rulemaking power is present under the FEC's ability to make, amend, and repeal such rules as are necessary to carry out the provisions of the

17 Similarly, an agency will not be categorized as legislative simply because it is involved in some legislative activity. Yet, the *Buckley* court adopted this very reasoning when comparing the the FEC with the Comptroller General. The *Buckley* court reasoned that since the FEC conducted audits like the Comptroller General, the FEC was also legislative. In reaching this conclusion, the court's reasoning contradicts the test of primary involvement as enunciated in *Springer*.

18 2 U.S.C.A. § 438(a)-(b) (Pamphlet 1, 1975).

19 *Id.* § 437d(a)(7).

20 *Id.* § 437d(a)(6).

21 *Id.* § 437d(a)(9).

22 *Id.* § 437d(a)(11).

23 See text accompanying notes 33-35 *infra*.

24 An administrative agency is defined by statute in the Administrative Procedure Act, 5 U.S.C. § 551 (1970).

25 Professor at New York University's School of Law, and noted authority in administrative law.

26 B. SCHWARTZ, AN INTRODUCTION TO AMERICAN ADMINISTRATIVE LAW 8 (1958).

Act.²⁷ The FEC's power to issue subpoenas,²⁸ to administer oaths,²⁹ and to conduct investigations³⁰ fulfills the second definitional requirement of an administrative agency, which is to determine whether the law has been violated. Finally, the FEC is vested with statutory power to initiate, defend, or appeal any civil action in the name of the Commission for the purpose of enforcing the general provisions of the Act.³¹ Accordingly, the FEC fulfills all the definitional requirements of an administrative agency; indeed its powers resemble the powers of other administrative agencies.³² The ICG and the FTC possess similar powers, including the powers to formulate rules and regulations, issue subpoenas, administer oaths, conduct investigations, and seek enforcement of various provisions of their respective acts. It is unlikely that Congress intended the FEC to be a legislative agency when other agencies with similar powers have been defined as administrative.

The legislative history substantiates the conclusion that Congress, in creating the FEC, intended to establish an administrative agency. Both the House Committee on Administration³³ and the Senate Committee on Rules and Administration³⁴ referred to the establishment of an "independent" agency. The Committees' emphasis on the FEC's independence indicates that Congress did not intend that the FEC answer directly to any one of the three branches of government. Having rejected these possibilities, it must be concluded that the Congress³⁵ created the logical alternative—a Commission vested with overlapping executive, judicial, and legislative powers which, at least according to the Schwartz definition, is an administrative agency. Thus, with the nature of the FEC better established, the constitutionality of appointments to the FEC can be properly analyzed.

C. *An Examination of Article II, § 1*

Any examination of a constitutional provision must begin from a historical perspective. In this regard, as early as 1837 the Attorney General determined that the Senate lacked constitutional power to initiate appointments.³⁶ The first judicial precedent supporting this proposition can be found in *Myers v. United States*;³⁷ the plaintiff there, an employee of the executive branch, was removed from his post by the President. The plaintiff argued that he could not be re-

27 2 U.S.C.A. § 437d(a) (8) (Pamphlet 1, 1975).

28 *Id.* § 437(a) (3).

29 *Id.* § 437d(a) (2).

30 *Id.* § 437(a) (11).

31 *Id.* § 437d(a) (6).

32 *See, e.g.*, 15 U.S.C. §§ 15, 45, 46 (1970); 47 U.S.C. §§ 11, 303 (1970); 49 U.S.C. § 12 (1970).

33 H. R. REP. NO. 1239, 93d Cong., 2d Sess. 8 (1974).

34 S. REP. NO. 689, 93d Cong., 2d Sess. 4 (1974).

35 As further evidence that the FEC was meant to be an administrative agency, House debate on the FEC included these comments: "An independent commission would eliminate the present conflicts of interest, reverse the long history of non-enforcement, and achieve proper integration of the administrative and enforcement mechanisms of the law." 120 CONG. REC. 7831 (daily ed. Aug. 7, 1974).

36 3 OP. ATT'Y GEN. 188 (1837).

37 272 U.S. 52 (1926). *See also* Kilbourn v. Thompson, 103 U.S. 168 (1880).

moved unless the Presidential order was issued with the advice and consent of the Senate. Because appointment and removal are so closely intertwined, the *Myers* Court found it necessary to explore the historical precedents of appointment. The Court found that both the executive and legislative branches had the power to make appointments under the Articles of Confederation. Since this process proved unsuccessful, the Founding Fathers reacted by drafting article II, § 1 of the Constitution, vesting exclusive appointment powers in the President. The *Myers* Court reasoned that the doctrine of separation of powers was designed to prohibit Congress from determining the powers, honors, and salaries of an office while also selecting the officer. Based on this analysis, the Supreme Court concluded in *Myers* that "Article II excludes the exercise of legislative power to provide for appointments and removals."³⁸

The *Myers* holding—that Congress should not be allowed to both create an office and name its officers—is equally applicable to the FEC. The potential power of the FEC demands the application of separation of powers. The Founding Fathers feared the lodging of inordinate power in any one branch, and any attempt to vest the appointment of officers in the legislative branch demands the invocation of the *Myers* principle. In *Humphrey's Executor v. United States*,³⁹ the Supreme Court considered a plaintiff's challenge to the Presidential power of removal. The only distinction between *Humphrey's* and its predecessor, *Myers*, is that the plaintiff in *Humphrey's* was a member of an administrative agency, whereas in *Myers* he was a member of the executive branch. Although *Humphrey's* modified the *Myers* holding,⁴⁰ the *Humphrey* Court agreed with *Myers* that the executive should exclusively exercise the power of appointment.⁴¹

Both *Myers* and *Humphrey's* concerned the Presidential removal power, and therefore may not seem to control the appointment process of the FEC. The Supreme Court, however, has reached similar conclusions in appointment cases. In *Shoemaker v. United States*,⁴² the plaintiff challenged the constitutionality of the Federal Parks Commission because two of the commissioners were appointed under the Act. The Supreme Court reasoned that appointment power belonged solely to the President, but since the commissioners designated in the Act had been previously appointed by the President, the constitutional requirement had been satisfied.⁴³ The statute was not unconstitutional merely because it increased the duties of officers already appointed.

Since some FEC members are not appointed by the President, the rationale of *Shoemaker*—that the President must make appointments—would suggest that the FEC appointment process is unconstitutional. Nor does the statute

38 272 U.S. 52, 163-64 (1926).

39 295 U.S. 602 (1935).

40 The *Myers* Court had vested removal power in the President, but *Humphrey's* held that removal power should not belong to the President with respect to administrative agencies. The *Humphrey* Court reasoned that if the President possessed removal powers he could effectively limit administrative agency independence with the threat of dismissal. *Id.* at 630-32.

41 The very words of the Court support this contention, "a body [referring to the FTC] which shall be independent of executive authority, *except in its selection*" (emphasis added by the Court). In choosing to emphasize the words "except in its selection," the *Humphrey* Court underscored the necessity of Presidential appointment. *Id.* at 625.

42 147 U.S. 282 (1893).

43 *Id.* at 301.

create new duties for previously appointed officers, because § 437c(a)(3) expressly prohibits those who are currently serving as Presidential appointees from being appointed to the FEC.⁴⁴

*Springer v. Philippine Islands*⁴⁵ also casts suspicion on the constitutionality of the FEC's appointment process. As previously noted, *Springer* considered the Philippine Legislature's appointment of members to a national management board. The *Springer* Court noted that *Myers* had established that the executive branch has exclusive power to make appointments. The *Springer* decision on this issue is merely a reassertion of the *Myers* reasoning, in an appointment context. However, the real importance of *Springer* is that the Court held that a legislative body's power of appointment is unconstitutional.⁴⁶ Thus, Congress' power to appoint members of the FEC is unconstitutional.

Myers offers historical evidence that the Founding Fathers intended the appointment power of the President to be exclusive. That decision was held applicable to administrative agencies in *Humphrey's*. Although both cases involved removals, the Court reached similar decisions in *Shoemaker* and *Springer*, both appointment cases. This historical and judicial precedent indicates that Congress should repeal those sections of the bill that provide for four congressional appointments to the FEC. Congress should then require that all six voting members of the FEC be appointed by the President with the advice and consent of the Senate. Congress would retain a modicum of control over the appointments through such a process. If Congress desires to reserve more control over the appointment process, it could require the President to make his appointments from a list of names submitted by Congress. However, such a proposal may also be unconstitutional since it may still involve the legislative branch in the appointment process to an extent that effectively usurps the Presidential appointment power and that far exceeds the constitutional scope of "advice and consent."

III. The Power of the Federal Election Commission to Make Rules and Regulations

The FEC's power to issue election rules and regulations raises another constitutional issue. The FEC, like other administrative agencies,⁴⁷ has statutory authority to issue rules and regulations.⁴⁸ The validity of this authority, however, is questionable since article I, § 4 dictates that "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations. . . ."⁴⁹ The FEC's power to issue rules and regulations conflicts with the Constitution, since its administrative rules and

44 2 U.S.C.A. § 437c(a)(3) (Pamphlet 1, 1975).

45 277 U.S. 189 (1928).

46 *Id.* at 202-04.

47 *E.g.*, 47 U.S.C. § 17(3) (1970); 49 U.S.C. § 154(i) (1970). The power of administrative agencies to make rules and regulations has been constitutionally upheld. *See generally* ICC v. Goodrich Transit Co., 224 U.S. 194 (1912); *Buttfield v. Stranahan*, 192 U.S. 470 (1904).

48 2 U.S.C.A. § 437d(a)(8) (Pamphlet 1, 1975).

49 U.S. Const. art. I, § 4 (emphasis added).

regulations do not appear to satisfy the requirement that election regulations be made "by Law."⁵⁰

For the FEC regulations to meet this requirement, it would have to be under one of two theories: first, that the mere passage of the FECAA of 1974 meets the "by law" requirement and therefore any rules promulgated by the FEC are constitutional; or second, that Congress has the power to veto FEC regulations,⁵¹ and by not exercising this power Congress has acted sufficiently on the regulation to meet the "by law" requirement.

There are no cases defining "by law" as used in the election clause of the Constitution. However, "by law" is used in other sections of the Constitution,⁵² including article II § 2, which prescribes the process by which inferior officers are created: "[T]he Congress may *by Law* vest the appointment of such inferior officers, as they think proper in the President alone, in the Courts of Law, or in the Heads of Departments."⁵³

The courts have ruled on the type of congressional action necessary to vest the appointment of inferior officers "by law" in the heads of departments. In *Burnap v. United States*,⁵⁴ the plaintiff contended that he was an officer of the United States because a general appropriations bill had created his office "by law." The Supreme Court reversed, reasoning that the general appropriations bill would not meet the "by law" requirement. "Whether the officer is an officer or an employee is determined by the manner in which Congress has specifically provided for the creation of the position."⁵⁵

The federal District Court for the Northern District of Illinois confronted the same issue in *Cain v. United States*.⁵⁶ The plaintiff there sought back wages from the Government. In response, the Government cited a special statutory provision that maintained that if the plaintiff was an officer of the Government, the district court did not have jurisdiction of the plaintiff's claim. The Government argued that the passage of a general appropriations bill made the plaintiff an officer of the Government, thus leaving the court without jurisdiction. The court rejected this argument, however, and reasoned from *Burnap* that "by law" within the context of article II, § 1 meant specific legislation, as opposed to a general appropriations bill.⁵⁷ The specific nature of the FECAA of 1974 should not be confused with the general nature of the FEC's power to make rules and regulations. The statute dictates that the FEC has the "power to make, amend, and repeal such rules . . . as are necessary to carry out the provisions of the

50 The distinction between election regulations and other regulations can be demonstrated by comparing two clauses of the Constitution. Election regulations are controlled by article I, § 4: "The Congress may at any time *by Law* make or alter such regulations. . . ." (emphasis added). In contrast are commerce regulations controlled by article I, § 8: "Congress shall have the power to regulate commerce." There is no restriction in article I, § 8 that commerce regulations be made "by Law." The "by Law" provision of article I, § 4 makes election law regulation *sui generis*.

51 2 U.S.C.A. § 438c(1)-(2) (Pamphlet 1, 1975).

52 See U.S. CONST. art. I, §§ 4, 6; art. II, §§ 1, 2; art. III, § 3; amend. VI; amend. XIV, § 4; amend. XX, §§ 2-4; amend. XXV, § 4.

53 U.S. CONST. art. II, § 2 (emphasis added).

54 252 U.S. 512 (1920).

55 *Id.* at 516.

56 73 F. Supp. 1019 (N.D. Ill. 1947).

57 *Id.* at 1021.

Act";⁵⁸ the statute, then, appears to fail the specific legislation test of *Cain* and *Burnap*.

Since "by law" in article I, § 4 has not been interpreted by the courts, the precedential value of *Cain* and *Burnap* must be considered controlling. In both *Cain* and *Burnap*, courts rejected the argument that a general appropriations bill would satisfy the "by law" requirement. The precedent would arguably apply to any congressional attempt to satisfy the "by law" requirement of creating election regulations with a general statute providing for the FEC to issue rules and regulations. *Cain* and *Burnap* also suggest that if a general statute would not satisfy the "by law" requirement, the regulations of an administrative agency, which are not statutory in nature, would likewise fail to satisfy the "by law" requirement.

Even though the regulations of the FEC do not meet the "by law" requirement, the requirement might be satisfied by a congressional failure to exercise its legislative veto. Under this section of the statute,⁵⁹ each FEC regulation is sent to Congress for its examination. If Congress does not veto the regulation within 30 days, it becomes effective. It could be argued that Congress has studied the regulations and in choosing not to veto has acted "by law."

Aid in determining whether failure to exercise a legislative veto satisfies the "by law" requirement can be found in *Springer v. Philippine Islands*.⁶⁰ *Springer* dealt with a legislature's power to constitutionally appoint members of a national management board. The defendants argued that, since Congress had not vetoed the appointment process, it must have ratified it. The Court reasoned that if Congress consented to this appointment process, something more than inaction was necessary, since the fundamental principle of separation of powers was at issue.⁶¹ The same argument could be applied when considering the fundamental issue of election regulations under article I, § 4. *Springer* would require something more than mere inaction on the part of Congress for the "by law" requirement of the Constitution to be satisfied.

The legislative veto process is at best a backhanded way of approving legislation.⁶² It is certainly insufficient to meet the requirements of specific legislation required by *Burnap* and *Cain*. *Springer* suggests that in important constitutional matters, congressional inaction cannot be equated with congressional approval. Congress should repeal § 438c(1)-(2), which provides for a regulation to become effective unless Congress vetoes it. Instead, Congress can provide that the FEC submit an annual report of legislative recommendations. The Congress could then act by specific statute in adopting the regulations it deems necessary for effective election legislation.

58 2 U.S.C.A. § 437d(a)(8) (Pamphlet 1, 1975).

59 *Id.* § 438c(1)-(2) (Pamphlet 1, 1975).

60 277 U.S. 189 (1928).

61 *Id.* at 209.

62 For a detailed analysis of the legislative veto, see J. HARRIS, CONGRESSIONAL CONTROL OF ADMINISTRATION (1964).

IV. The Power of the Federal Election Commission to Disqualify Candidates

The FECAA of 1974 specifies that a candidate who fails to file the appropriate campaign reports will be disqualified from seeking the federal office for which he is a candidate.⁶³ The statute, in creating the additional qualification of filing campaign reports, raises the difficult constitutional question of whether Congress can add to the qualifications for federal office, which are limited by the Constitution to age, citizenship, and residency.⁶⁴

Article I, § 2 lists the qualifications for the House Representatives, article II, § 3 for the Senate, and article II, § 1 for the Presidency. The historical background of these sections indicates that the Founding Fathers intended the constitutional qualifications to remain exclusive. Justice Story, in his *Commentaries on the Constitution*, wrote: "It would seem but fair reasoning upon the plainest principles of interpretation, that when the Constitution established certain qualifications as necessary for office, it meant to exclude all others as prerequisites."⁶⁵ *The Federalist* offers equally valuable historical evidence that the qualifications were designed to be exclusive. "The qualifications of the person who may be . . . chosen . . . are defined and fixed in the Constitution and are unalterable by the legislature."⁶⁶

The recent Supreme Court decision in *Powell v. McCormack*⁶⁷ illustrates why the Founding Fathers intended that the qualifications for federal office be exclusive. In *Powell*, the plaintiff was prohibited from taking his seat in the House of Representatives by a congressional resolution that charged him with abusing the judicial process and misappropriating public funds. The plaintiff challenged this exclusion, arguing that the Constitution provided exclusive qualifications for holding federal office, and therefore the charges lodged against him were not germane to his right to hold office.

In reaching its decision, the Court thoroughly considered qualifications in general under article II, § 1:

No person shall be a Representative who shall not have attained the Age of twenty-five Years, and been seven Years a citizen of the United States and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

The Court noted that England, at the time of the drafting of the Constitution, had been plagued by Parliament's imposition of additional qualifications for

63 2 U.S.C.A. § 456(a) (Pamphlet 1, 1975).

64 The congressional rationale for passing the disqualification provision may be related to the Ohio court upholding the constitutionality of an Ohio disqualification statute, OHIO REV. CODE ANN. §§ 3517 (10)-(11) (Page 1972), in *State ex rel. Lukens v. Brown*, 34 Ohio St. 2d 257, 298 N.E.2d 132 (1973). The case is not controlling on the constitutionality of the FEC's disqualification powers because the Ohio statute only disqualified candidates for state office. There was no statutory infringement on the constitutional qualifications for seeking federal office.

65 1 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 625 (4th ed. 1873).

66 THE FEDERALIST No. 60, at 340 (J. Madison ed. 1826) (A. Hamilton).

67 395 U.S. 486 (1969).

office, thus eliminating all but a select few from participating in representative government. The specific constitutional qualifications for office were designed to avoid a recurrence of this problem in America. The *Powell* Court concluded that Congress is powerless to exclude any person who is duly elected by his constituents, and who meets all the requirements for office expressly prescribed by the Constitution.⁶⁸

The historical analysis of *Powell* appears to render any attempt at imposing an additional qualification of filing reports upon those seeking federal office unconstitutional. While the *Powell* decision considered the seating of a Representative, this does not distinguish it from the question presented by the FEC legislation adding candidacy as a qualification. Both cases involve the right to hold federal office, for a person cannot hold federal office unless he is first a candidate and second is seated. While *Powell* considered the right to hold federal office from a postelection perspective, other cases have considered pre-election qualifications affecting the right to hold office.

Pre-election qualifications were considered in *State ex rel. Sundfor v. Thorson*,⁶⁹ where a North Dakota statute read: "[A]ny person who was a candidate for nomination for office at any primary election in any year and who was defeated for said office shall not be eligible as a candidate for the same office at the ensuing election."⁷⁰ The North Dakota supreme court found the statute unconstitutional, reasoning that the statutory language explicitly barred a candidacy, and consequently imposed an unconstitutional qualification for seeking a federal office.

The North Dakota statute is distinguishable from the California statute⁷¹ considered by the Supreme Court in *Storer v. Brown*.⁷² The California statute provided that an independent candidate could not be placed on the general election ballot if he had voted in the preceding primary election, or had been registered with a qualified political party for up to one year prior to election day. The *Storer* Court noted that under the California statute, an independent candidate was only refused a place on the ballot; it did not totally bar his candidacy.⁷³ The statute was held constitutional because, unlike the North Dakota statute, it did not prohibit a candidacy but rather limited a candidate's access to the ballot. A requirement that must be met to obtain a place on the ballot does not impose an additional qualification on those seeking to be candidates; they may conceivably run as write-in candidates.

The *Storer* Court's holding was the first indication that the exclusivity of the constitutional qualifications may be modified by the Court. The Court held that since the candidate could still run as a write-in, no additional qualifications were imposed. Yet no campaign for federal elective office can realistically be waged through a write-in. The *Storer* Court appeared to draw a tenuous distinc-

68 *Id.* at 522.

69 72 N.D. 246, 6 N.W.2d 89 (1942).

70 N.D. CODE ANN. ch. 141, § 1 (1939), *as amended*, N.D. CODE ANN. § 16-06-06 (1960). It is important to note that the North Dakota statute as amended parallels the California statute which was upheld in *Storer v. Brown*, 415 U.S. 724 (1974).

71 CAL. ELECTION CODE §§ 6830(c)-(d) (West Supp. 1975).

72 415 U.S. 724 (1974).

73 *Id.* at 746.

tion when relying on the possibility of a write-in to overcome an added burden in running for office. This holding may signal that the Supreme Court is willing to find constitutional those statutes which impose additional *procedural* requirements for those seeking federal office.

But the FECAA's disqualification provision more closely resembles the North Dakota statute declared unconstitutional in *Thorsen*. Section 456 of the FECAA of 1974, like the North Dakota statute, totally bars a federal candidacy if its requirements are not met. In contrast, the California statute considered in *Storer* only limits a candidate's access to the ballot. These cases, coupled with the historical precedent of *Powell*, suggest that the congressional attempt under the FECAA to enact a disqualification provision is void. It is also clear from an analysis of both *Thorsen* and *Storer* that the nature of the disqualification provision under FECAA imposes a new qualification that could totally bar those seeking federal office, a bar impermissible under the Constitution.

V. The Power of the Federal Election Commission to Enforce the Law

The process of FEC law-enforcement consists of these powers which were constitutionally challenged by Judge MacKinnon's dissent in *Buckley*.⁷⁴ Those powers are: (1) to investigate violations of the FECAA of 1974;⁷⁵ (2) to formulate general policy with respect to the criminal provisions of the Act;⁷⁶ and (3) to initiate civil proceeding for the enforcement of the Act.⁷⁷ A determination of the constitutionality of each power requires individual consideration.

A. The Power of the Federal Election Commission to Conduct Investigations

Generally, administrative agencies have investigative powers,⁷⁸ and the FEC is no exception. However, the scope of these powers merits constitutional scrutiny. In his dissent, Judge MacKinnon argued that the FECAA of 1974 vests the FEC with investigatory powers designed to elicit information which will result in civil or criminal action. He argued that article II limits enforcement power to the executive branch and does not allow an agency to exercise such a power.⁷⁹ However, Judge MacKinnon's interpretation of the proper scope of agencies' investigative powers is not consistent with current case law.

The first decision on the scope of agency investigation powers was *Harri-man v. ICC*.⁸⁰ The defendant there refused to answer certain questions during an ICC investigation, contending that the investigation was beyond the scope of the ICC's investigatory powers. The statute allowed the ICC to investigate "for the purposes of this Act."⁸¹ The Supreme Court reasoned from the legislative

74 *Buckley v. Valeo*, Civil No. 75-0001 (D.C. Cir., filed Aug. 15, 1975) (MacKinnon, J., dissenting).

75 2 U.S.C.A. § 437d(a)(11) (Pamphlet 1, 1975).

76 *Id.* § 437d(a)(9).

77 *Id.* § 437d(a)(6).

78 *E.g.*, 15 U.S.C. § 46(a) (1970); 49 U.S.C. § 13(3) (1970).

79 *Buckley v. Valeo*, Civil No. 75-0001, at 1619 (D.C. Cir., filed Aug. 15, 1975) (MacKinnon, J., dissenting).

80 211 U.S. 407 (1908).

81 *Id.* at 418.

history that the purpose of the Act was to regulate and enforce interstate commerce, and therefore only such investigations were proper. The Court agreed with the plaintiff that the ICC's investigation did not encompass a statutory violation and was thus beyond the purpose of the Act. *Harriman* indicated that an agency would be limited to investigate only when an apparent violation of the statute had occurred. The MacKinnon dissent was erroneous even under *Harriman*, the earliest and, as will be demonstrated, narrowest holding regarding agencies' power to investigate. Under *Harriman* the FEC would clearly be allowed to conduct investigations of possible violations of the Act that elicit information which could be used in either a civil or criminal action.

The *Harriman* rule was expanded in *United States v. Morton Salt Inc.*⁸² In *Morton Salt*, the Federal Trade Commission began conducting investigations that were beyond the scope of the *Harriman* limits of investigating only for express statutory violations. The Court examined the background of the *Harriman* decision and found that its narrow ruling stemmed from earlier Court decisions which had held that since the judiciary could not investigate, neither should an agency. The Court held that this judicial limitation did not apply to administrative agencies, thus rejecting the narrow holding of *Harriman*. Instead, the *Morton Salt* Court adopted a broader policy for administrative agency investigations by reasoning that such agencies were developed to assist in law enforcement which creates "a power of inquisition . . . not derived from the judicial function."⁸³ The *Morton Salt* Court policy allows an administrative agency to investigate even when there is no evidence that any possible statutory violation has occurred.⁸⁴

Since the FEC is an administrative agency and its purpose is enforcement-oriented, the precedent of *Morton Salt* is applicable. The MacKinnon dissent suggests no reason for abandoning *Morton Salt*, nor does it cite any distinguishing factors.

B. *The Federal Election Commission's Power to Enforce the Criminal Law*

In *Ponzi v. Fessenden*,⁸⁵ the Supreme Court ruled that article II of the Constitution requires the enforcement of federal criminal law to be exclusively vested in the Attorney General. The *Ponzi* decision held that any attempt to remove the power of criminal law enforcement from the executive branch violates article II. In his dissent,⁸⁶ Judge MacKinnon argued that two provisions⁸⁷ of the FECAA of 1974 allow the FEC to enforce criminal sanctions, thus rendering these sections unconstitutional. However, a thorough development of legislative materials supports the majority holding that the FEC does not enforce

82 338 U.S. 632 (1950).

83 *Id.* at 642.

84 *Id.* at 642-43.

85 258 U.S. 254 (1922). See *Kern River Co. v. United States*, 257 U.S. 147 (1921); *In re Neagle*, 135 U.S. 1 (1890); *United States v. San Jacinto Tin Co.*, 125 U.S. 273 (1888).

86 *Buckley v. Valeo*, Civil No. 75-0001, at 1617 (D.C. Cir., filed Aug. 15, 1975) (MacKinnon, J., dissenting).

87 2 U.S.C.A. § 437c(b), d(a)(6) (Pamphlet 1, 1975).

criminal sanctions, and therefore does not violate the *Ponzi* interpretation of article II.

The original Senate bill that later became the FECAA of 1974 would support Judge MacKinnon's argument that the FEC possesses unconstitutional enforcement powers.⁸⁸ The bill defined the FEC as the primary civil and *criminal* enforcement agency of the FECAA of 1974.⁸⁹ Unlike its House counterpart,⁹⁰ the Senate bill contained no provision for referring criminal violations to the Attorney General. The Senate's objectives in drafting the bill, as explained in the report of the Committee on Rules and Administration, also exhibit an intent to vest the FEC with criminal enforcement powers: "The Commission is given broad powers including the power to . . . prosecute criminal cases."⁹¹ The Senate bill, then, is an attempt to vest an unconstitutional criminal enforcement power in the FEC.⁹² The House bill, however, leads to a significantly different conclusion.

The original House bill,⁹³ later adopted in conference, directs the Supervisory Board, the House's predecessor to the FEC, to refer apparent criminal violations of the act to appropriate agencies.⁹⁴ The legislative history of this section supports that conclusion: "The Board is authorized to encourage voluntary compliance through informal means and refer appropriate apparent violations to the Justice Department for civil or criminal action."⁹⁵ Thus, Congress rejected the provisions of the original Senate bill that purported to give the FEC unconstitutional criminal enforcement powers.⁹⁶

C. *The Federal Election Commission's Power of Civil Enforcement*

The final constitutional question concerning the FEC's enforcement power emanates from that section which allows the FEC to initiate civil suits to force

88 S. 3044, 93d Cong., 2d Sess. (1974).

89 *Id.* § 309(d) (emphasis added).

90 See text accompanying notes 93-95 *infra*.

91 S. REP. NO. 689, 93d Cong., 2d Sess. 16 (1974).

92 Further evidence for this conclusion is found in S. 3044, 93d Cong., 2d Sess. § 309(a)(6) (1974), which allows the FEC to "initiate, prosecute, defend or appeal any civil or criminal action in the name of the Commission. . . ."

93 H.R. 16090, 93d Cong., 2d Sess. (1974).

94 *Id.* § 311(c)(1)(C)(i).

95 H.R. REP. NO. 1239, 93d Cong., 2d Sess. 8 (1974).

96 Another criminal enforcement problem was raised by Judge MacKinnon. In his dissent in *Buckley*, he argued that the FECAA of 1974 infringed upon the Attorney General's power of prosecutorial discretion. His argument was based on the specific wording of the statute which reads, "[U]pon the request of the Commission the Attorney General on behalf of the United States, shall institute a civil action for relief. . . ." MacKinnon argued that the word "shall" means that the Attorney General must institute suit at the direction of the FEC, consequently voiding his power of prosecutorial discretion. *Buckley v. Valeo*, Civil No. 75-0001, at 1612-18 (D.C. Cir., filed Aug. 15, 1975) (MacKinnon, J., dissenting).

This argument is not persuasive in light of the Fifth Circuit's decision in *United States v. Cox*, 342 F.2d 167 (5th Cir.), *cert. denied*, 381 U.S. 935 (1965). The court stated, "It follows, as an incident of the constitutional separation of powers, that the courts are not to interfere with the free exercise of the discretionary powers of the attorneys of the United States in their control over *criminal* prosecutions." *Id.* at 171 (emphasis added). Since the word "shall" is used in the FECAA of 1974 only with reference to civil actions, the *Cox* principle does not apply. *Cox* illustrates that the constitutional problems with infringement prosecutorial discretion arise only in criminal cases.

compliance with the FECAA of 1974.⁹⁷ In his dissent, Judge MacKinnon argued that this civil enforcement power is unconstitutional because article II reserves all enforcement power to the executive branch.⁹⁸ Although an initial analysis might support the dissent, closer scrutiny of the statute and recent case law dictates that the provision is constitutional.

The dissent reached an incorrect result because it failed to distinguish between civil and criminal enforcement. Criminal enforcement must be exercised by the Executive,⁹⁹ and the FEC complies with this requirement. Civil enforcement, contrary to the dissent's assertion, need not rest exclusively in the executive branch. Instead, current case law has held that civil enforcement powers may constitutionally be exercised by administrative agencies.

The Supreme Court's initial decision in this area was *Texas & Pacific Railroad v. ICC*.¹⁰⁰ The ICC initiated a civil suit to enforce provisions of the Interstate Commerce Act; the Court ruled that the suit was proper. The ICC's right to initiate the suit was not decided on a constitutional basis, but on the basis of a congressional intent to give the ICC this power.¹⁰¹ Implicit in the Court's decision, however, was the assumption that the ICC's enforcement powers were constitutional.

The Court more directly confronted an administrative agency's power of civil enforcement in *United States v. Morton Salt Inc.*¹⁰² The defendant there had been ordered by the circuit court¹⁰³ to file a detailed set of reports regarding sales practices in the salt industry. In addition, the FTC issued its own order requiring that the defendants submit additional reports. The defendants' refusal to comply with the FTC order resulted in a civil suit. The *Morton Salt* Court noted that the purpose of the Federal Trade Commission Act was to prevent unfair practices within interstate commerce. The Court reasoned that an administrative agency could only make this policy effective by exercising initiative and flexibility¹⁰⁴ in the legal process. The Court concluded its opinion by stating that the FTC had a staff to institute proceedings and was properly vested with the responsibility to initiate actions.

The Court's reasoning seems to apply to the FEC. The congressional objectives of the FEC are to prevent unfair election practices. This is certainly analogous to the purpose of the FTC noted in *Morton Salt*. Undeniably, the FEC's purpose would be partially frustrated if it had no civil enforcement power, a concern behind the *Morton Salt* decision that allowed the FTC to exercise civil enforcement powers. Therefore, *Morton Salt's* holding has a broad application to the power of the FEC to initiate civil suits.

The most recent decision in this area is the Seventh Circuit's holding in *ICC*

97 2 U.S.C.A. § 437d(a)(6) (Pamphlet 1, 1975).

98 *Buckley v. Valeo*, Civil No. 75-0001, at 1614 (D.C. Cir., filed Aug. 15, 1975) (MacKinnon, J., dissenting).

99 See cases cited in note 85 *supra*.

100 162 U.S. 197 (1896).

101 *Id.* at 204.

102 338 U.S. 632 (1950).

103 *Salt Producers Ass'n v. FTC*, 134 F.2d 354 (7th Cir. 1943).

104 338 U.S. at 640. *Accord*, *Moog Industries, Inc. v. FTC*, 355 U.S. 411 (1958).

v. Chatsworth Cooperative Market.¹⁰⁵ In *Chatsworth*, the ICC sought a permanent injunction against the defendants for violations of the Interstate Commerce Act. The defendants admitted the violations, but appealed to the circuit court, arguing that the section of the Act¹⁰⁶ which allowed the ICC to seek a civil injunction was unconstitutional. The defendants argued that all enforcement powers belonged to the Executive and that since the statute gave the ICC civil enforcement powers, it was unconstitutional. The court ruled the statute constitutional because it did not encroach on the Executive's power of enforcement. The court reasoned that the ICC was merely exercising an executive function which was constitutionally acceptable.¹⁰⁷ The distinction between executive power—power explicitly reserved to the Executive in the Constitution—and executive function—power that is not explicitly reserved—was developed by the Supreme Court in *Humphrey's Executor v. United States*.¹⁰⁸ Since the power to initiate civil litigation to enforce an Act is not explicitly reserved to the Executive in the Constitution, it is an executive function which the ICC can constitutionally perform.

In the early decision of *Texas & Pacific Railroad*, the Court found congressional intent to allow an administrative agency to initiate civil suits. The Court looked more specifically at the constitutional issues in *Morton Salt*. The *Morton Salt* reasoning that an administrative agency needs civil enforcement powers to carry out its legislative purpose clearly applies to the FEC. In *Chatsworth*, an even more specific holding found that it was constitutional for the ICC to seek a civil injunction. *Chatsworth* leaves little doubt that the FEC's power of civil enforcement is constitutional.

VI. Conclusion

During the Great Depression, Chief Justice Hughes wrote: "Extraordinary conditions do not create or enlarge constitutional power."¹⁰⁹ Yet when faced with a serious political crisis, Congress by passing the FECAA of 1974 failed to heed the warning of the Chief Justice.

The legislative history of the Act resounds with debates and statements about election reform, but an atmosphere of political crisis underlay all of the rhetoric. As a result, Congress ignored the Constitution when establishing certain provisions with respect to the FEC. The appointment process violated one of the most basic constitutional tenets—appointments are to be made by the President with the advice and consent of the Senate. The Commission's power to make rules and regulations does not conform to the constitutional requirement that all election regulations be made "by law." The FEC's power to disqualify candidates undermines the exclusive qualifications found in the Constitution.

It is hoped that Congress will act in an expeditious manner to change the FECAA of 1974 to comply with the Constitution. Once the Act is so reformed,

105 347 F.2d 821 (7th Cir.), cert. denied, 382 U.S. 938 (1965).

106 49 U.S.C. § 322(b) (1970).

107 347 F.2d at 822.

108 295 U.S. 602, 628 (1935).

109 *Schechter Poultry Corp. v. United States*, 295 U.S. 495, 528 (1935).

it can begin its formidable task of overseeing the election process in a manner that is consistent with the Constitution.

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