Chapter Five

Regulatory Decision-Making at the FEC

How are decisions made at the Federal Election Commission? Do policy outcomes correspond to the "norm" established by Congress and the President when they enacted the Federal Election Campaign Act, and amended it over the succeeding years?

This chapter of the dissertation adopts Matthew Holden, Jr.'s model of regulatory decision-making outlined on page ten of the introduction to this dissertation. Holden's hypothesis, which this dissertation accepts as its own, states that the Federal Election Commission will "tend to engage in some loose interchange (bargaining) with regulated parties until they find a settlement which is tolerable..."[1] The data for this analysis are gathered from materials and observations on the Federal Election Commission. Consistent with Holden, this dissertation will examine manifestations of bargaining, which will include standard setting, who to regulate and who to ignore, how long agencies wait before regulating, and what to accept as compliance. Included in this area are examinations of the incentives and limitations on regulatory bargaining, and reasons for bargaining. Within reasons for bargaining, four variables that Holden offers - the technological character of the problem, social values and myths, alternative points of access for reaching a more positive outcome, and the nature of repeat versus single interactions - are explained.

The Manifestations of Bargaining:

[1] Matthew Holden, Jr. "Pollution Control as a Bargaining Process: An Essay on Regulatory Decision-Making." (Ithaca, New York: Cornell University Water Resources Center, pub. no. 9, Oct. 1966), p. 11.

Standard Setting. The existing federal campaign finance system developed out of regulatory powers granted to the Federal Election Commission, as a regulatory agency, in the Federal Election Campaign Act. In order to facilitate the implementation of this act, and its subsequent amendments, the Federal Election Commission has established formalized procedures for regulatory policy-making: rule-making, issuing Advisory Opinions, analysis and auditing, and adjudication.

Formal rule-making authority rests with the Commission, itself. Kenneth Meier describes rule-making as, "a quasi-legislative process whereby an agency issues rules with the force of law that apply to all persons under the agency's jurisdiction. These rules specify more clearly the public policy that was announced by Congress."[2] Rule-making affords the Commission the opportunity to further refine its interpretation of federal campaign finance law. Individuals may petition the Federal Election Commission for the "issuance, amendment, or repeal of a rule implementing"[3] any portion of the federal campaign finance law that the agency is charged with administering. Formal petitions must identify the individual petitioning, identify the petition as an effort to have the Commission issue a new rule, amend an existing rule, or repeal an existing rule. Petitions must also include the reasoning as to why the petitioner believes that the Commission should take action. After the proper disclosures in the Federal Register have been issued, the agency can invite individuals to submit arguments in favor and in opposition to the proposed rule-making. Upon their receipt, the petitions

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[2] Kenneth Meier, Politics and the Bureaucracy: Policymaking in the Fourth Branch of Government, (New York: Harcourt College Publishers, 2000), p. 73.

[3] Ibid.

for rule-making are reviewed by the Office of the General Counsel.

Requests for rule-making are made public in the Public Records Division one week prior to their consideration by the full Commission. Public comments are accepted up until noon on the Wednesday prior to the meeting on which a rule-making action is being considered. After the comment period has expired, the Commission can consider the petition for rule-making. Petitions for rule-making are generally handled at public meetings held the Thursday following the close of the comment period. An affirmative vote of four Commissioners is required for rule-making to take place. Should the agency decide not to undertake rule-making, then the agency will publish a "Notice of Disposition" in the Federal Register.

Each month the Office of the General Counsel provides the Commission with a memorandum outlining the "Status of Regulations." This monthly update provides the Commission with a status report on individual acts of rule-making concluded by the Commission that have been sent to the Congress, the status of ongoing rule-making efforts, the status of other projects, and a list of projects that have been held in abeyance.

The rule-making workload of the FEC varies by year. An examination of the number of rule-making acts completed for the period from 1975 through October 1999 shows that one hundred eighteen acts of rule-making have been completed since the agency's creation. The number of rule-making acts completed in a given year varies from none completed in 1983 to thirteen completed in 1975. On average, the agency completes 4.72 acts of rule-making in any given year. A closer examination of the data, however, reveals that the Commission undertook 1.55 times the amount of rule-making in the past ten years of the agency's

existence than it undertook in the first ten years of the agency's existence.[4]

The issuance of Advisory Opinions affords the Commission another means by which to set standards detailing how the regulatory agency will implement its legislative authority. Advisory Opinions occur when individuals, campaign committees, or organizations, request formal interpretations of the federal campaign finance law. Advisory Opinions provide the agency with the opportunity to clarify points of the federal campaign finance law. According to the agency, "[t]hese opinions, which respond to formal requests from anyone involved in activity subject to federal election law, clarify the law for the requester and anyone else in the same situation as the requester."[5]

Once a formal request for an Advisory Opinion has been received, the matter is referred to the Office of the General Counsel. The Office of the General Counsel then researches the matter and provides the Commission with a proposed draft of the opinion. The discussion of the draft opinion is then placed on the agenda for a public meeting of the Commission. Any redrafting of the proposed opinion is completed by the Office of the General Counsel.

The draft Advisory Opinion comes to the Commission as a part of a memorandum from the Office of the General Counsel. Advisory Opinions are assigned an identification number consisting of the year and the next sequential number for Advisory Opinions issued in that year. For instance: the 10th

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[4] These calculations were based upon data contained in the index to the Federal Election Commission's binder on rule-making located in the Federal Election Commission's Office of Public Records.

[5] FEC Annual Report, FY1991, p. 12.

Advisory Opinion issued in 2001 would be assigned the identification number: 2001-22.

The draft Advisory Opinion contains factual background information, references to the FECA and FEC regulations, and a response to the application proposal from the individual or organization requesting the advisory opinion.

In terms of workload, the Commission issued between 25 and 147 Advisory Opinions in any given year from 1975 through October 1999. On average, the Commission has issued slightly more than fifty-nine Advisory Opinions per year since 1975. When one looks at the data, however, one finds that the agency issued significantly more Advisory Opinions early in its existence than it issues today. The average number of Advisory Opinions issued from 1989 through 1999 is approximately thirty-six. This compares with an average number of Advisory Opinions issued per year of slightly over 92 from 1975 to 1984. Therefore, the data indicate that more than 2.5 times as many Advisory Opinions were issued in the first ten years of the agency's existence, as were issued in the ten years proceeding 1999.[6]

Agency rule-making and the issuance of Advisory Opinions provide the Federal Election Commission with the means for defining what is and what is not acceptable in the area of federal campaign finance. As no other regulatory body is charged with the civil enforcement of federal campaign finance law, the Federal Election Commission is generally free to utilize its authority to establish standards of behavior for actors in the political process. The Federal Election

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[6] These calculations were based upon data contained in the index to the Federal Election Commission's binder on Advisory Opinions located in the Federal Election Commission's Office of Public Records.

Commission's exercise of its rule-making authority and its ability to issue Advisory Opinions amount to the use of legislative authority by a regulatory agency. As with all regulatory agencies, however, the Federal Election Commission must turn legislation into a functioning and manageable program designed to implement and enforce federal campaign finance law.

Standard setting also takes place through the analysis and audit process discussed in Chapter Three. The analysis of campaign finance filings and the determination of whether to conduct audits allow the FEC to apply pre-established standards for determining if campaign finance filings are substantially within compliance. The Commission can then determine if a committee or candidate filing is within the requirements of the act or the filing is substantially out of compliance.

Adjudication of federal campaign finance law affords the agency with another means through which to establish standards in the area of federal campaign finance. Kenneth Meier describes adjudication as, "a quasi-judicial process whereby each individual suspected of violating a law is charged and administratively tried to determine violations... adjudication affects only the single case being adjudicated."[7] The manner in which the Federal Election Commission enforces federal campaign finance law allows the agency to determine who and what to enforce, when to enforce the law, and what types of penalties to assess. When discussing policy-making as law enforcement, Meier states that, "[p]olicymaking through law enforcement means simply the selective application of laws; certain laws are vigorously enforced while others are ignored... [s]ome laws may be enforced against certain classes of people while others

[7] Kenneth Meier, Politics and the Bureaucracy: Policymaking in the Fourth Branch of Government, (New York: Harcourt College Publishers, 2000), p. 74.

are unaffected."[8] A fuller discussion of the compliance process demonstrating what portions of the law the FEC vigorously enforces, and what portions of the law the agency tends to ignore, can be found in the next chapter.

Bargaining for Compliance. Federal Elections are held every two years, but the raising, allocating, and expending of political funds for these elections is a ongoing part of political life for many Members of Congress, the President, political action committees, and the numerous members of the regulated community. Funds that are raised, spent, or allocated, must conform to the contribution limitations and reporting requirements outlined in Chapter Two of this dissertation. Because the campaign finance process is an ongoing part of political life, the process of examining, auditing, and enforcing these laws and regulations is an ongoing activity for the Federal Election Commission.

Holden's model of regulatory decision-making as bargaining states that the regulatory agency must consider three basic questions: "(1) Whom to regulate and whom to ignore, (2) how long to wait before imposing regulations, and (3) what to accept as compliance with the regulatory objective."[9]

Who to regulate and who to ignore. The Federal Election Commission seeks to compel voluntary compliance by telegraphing enforcement intentions to the component parts of the agency's regulated constituency. Consistent with Holden's argument, the Federal Election Commission appears to enforce Federal Campaign Finance law in either a punitive or distributive manner.

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[8] Ibid.

[9] Matthew Holden, Jr. "Pollution Control as a Bargaining Process: An Essay on Regulatory Decision-Making." (Ithaca, New York: Cornell University Water Resources Center, pub. no. 9, Oct. 1966), p. 22.

Distributive enforcement efforts by the Federal Election Commission generally are aimed at routine allegations, such as the late filing of campaign finance statements, corporate contributions, excessive contributions, and the like. The next chapter contains single allegation profiles detailing Federal Election Commission enforcement. Through these profiles, the reader will gain a more thorough understanding as to who and what the Federal Election Commission has chosen to regulate. Also contained in these enforcement profiles are data detailing the types of penalties that the Federal Election Commission imposed and how long the agency took to resolve the allegations at issue.

When the Federal Election Commission decides to undertake stricter enforcement in a specific area of the law or when the Commission seeks to make an example out of a respondent's blatant failure to follow the law or blatant abuse of the process, then the Commission may impose a punitive penalty. Consistent with Holden's argument, the first option is one designed to send a message to other members of the agency's constituency, as to what will or what will not be tolerated. The second enforcement option generally involves what Holden terms, "...choosing one [violator] 'so bad' that the victim cannot secure allies, which serves the purpose of showing that 'something' is being done, with the implicit promise that other less 'bad' will be permitted indefinitely to continue operations if they do not become 'bad enough' to be a visible embarrassment to the agency."[10]

How long to wait before imposing regulations or undertaking enforcement. First, the Federal Election Commission may utilize its rule-making authority to institute

[10] Ibid., pp. 23-24.

regulations in an area of federal campaign finance that the agency views needs to be clarified. A recent example of this was the agency's rule-making efforts designed to define the parameters of online fundraising through use of the internet. Second, the Federal Election Commission may wait until public pressure becomes so strong that action of one form or another takes place out of necessity. Third, the Federal Election Commission may delay action out of concern that this action might upset Members of Congress, as every Member of Congress is also a member of the Federal Election Commission's regulated community. In some instances, the Commission may need to be pressured by Members of Congress in order to understand what is and is not an acceptable direction for the Commission to pursue in a particular rule-making area. In this manner, Commissioners can avoid over-reaching the boundaries of what is acceptable to Members of Congress and the President.

Typically, the Federal Election Commission acts on regulatory rule-making when a consensus can be reached among the Commission level Regulations Committee, and through the informal consultations between Members of the Regulations Committee and their fellow political party members on the Commission. Without the reaching of a consensus among the Regulations Committee and the other Members of the Federal Elections Commission, it does not appear likely that significant enactment of regulations will occur.

Enforcement action by the Federal Election Commission necessarily takes place after alleged violations occur simply because violations must occur for enforcement action to be required. Oftentimes, enforcement action, as is profiled in Chapter Six, takes place within two years of the alleged violation.

What does the agency accept as compliance and how are decisions made on the Commission?

Determining what the Federal Election Commission will accept as "enough" compliance rests with the Commission. As was outlined in Chapter Three, the Federal Election Commission utilizes the Reports Analysis Division, the Audit Division, and the Office of the General Counsel, to examine allegations of campaign finance law violations. It is through the examination of campaign finance filings and audits of members of the agency's regulated community that the agency, itself, identifies possible violations. Allegations of campaign finance violations can also be brought to the Commission by individuals outside the agency. A fuller discussion of the compliance process is discussed in Chapter Six of this dissertation. In every instance, however, the Office of the General Counsel prepares recommendations that are brought to the full Commission for consideration. Commissioners must then decide how they will vote on these allegations.

Kenneth Meier has written that, "A regulatory body's structure also reveals something about the agency's method of policymaking."[11] Formal decision-making or policy-making authority for the regulatory agency rests with the Commission itself. In order for formal action to be taken, four members of the Commission must vote in favor of taking said action. The combination of the political composition of the Commission and the four vote requirement means that bi-partisanship is required for the agency to take any formal action. This means that strongly partisan deadlocks will result in no action being taken by the Commission. In all instances, the agency's administrative, budgetary, legal, rule-making, issuing of

[11] Kenneth Meier, Politics and the Bureaucracy: Policymaking in the Fourth Branch of Government, (New York: Harcourt College Publishers, 2000), p. 78.

advisory opinions, enforcement actions, and all other formal decision-making authority rest with the six members of the Commission.

If formal decision-making authority rests with the majority of the Commission, then the next two important questions become how do members vote and how are decisions reached. To be clear, the statutory structure of the Commission requires that all actions taken by the Commission have a formal vote. That said, formal votes are taken by the Commission in two ways. The first form of voting on the Commission is by "tally." The "tally" vote system is utilized for decisions relating to compliance matters that have been placed under review. Under the "tally" vote system utilized for compliance matters, memorandums are sent to each Commissioner. The memorandum contains a cover ballot, a factual background, analysis, and recommendation by the General Counsel for each Matter Under Review. Commissioners are asked to mark their ballot if they have an objection to the recommendation of the General Counsel. The ballots are then returned to the Commission Secretary. When an objection is noted on the ballot of any Commissioner, then that compliance matter is placed on the agenda for the next "executive session" or closed meeting of the Commission. When no objection by a Commissioner is recorded on a "tally" vote, then the recommendation of the General Counsel is adopted as the Commission's formal analysis, fact pattern, and action for that Matter Under Review. Several current and former Commissioners indicated that the vast majority of items under consideration are passed on "tally" vote. But, at least one Commissioner stressed that the fact that most matters pass through the process on tally does not mean that they are bound to accept the General Counsel's recommendations. On average, Commissioners consider between

five and ten matters on a tally vote basis every day, each with any number of respondents, allegations, dispositions, and actions to be taken.

A second form of voting, a standard vote, occurs when a matter is placed on either a closed or open meeting agenda. During these meetings, motions are offered and seconded by Commissioners. The motions are then voted upon with motions receiving four or more votes being adopted.

When the Commission fails to adopt the recommendation of the General Counsel, or when the Commission disagrees with the recommendation of the General Counsel, then Commissioners may draft a "Statement of Reason." A "Statement of Reason" is designed to explain why the Commission took a specific action. The statement generally explains the differences in logic, a differing interpretation of the facts or law, such that the Commission was either not able to reach a decision or reached a decision in opposition to the General Counsel's recommendation. The author of the "Statement of Reason" is generally the individual who offers a motion in opposition to the recommendation of the General Counsel. That said, however, one Commissioner indicated that Commissioners generally can do just about anything they want to do, thus a Commissioner could likely author a "Statement of Reason" any time they chose to do so.

How do Commissioners reach their decisions? Compliance Matters Under Review appear to constitute the most common form of decision Commissioners are faced with making. Therefore, I asked several Commissioners how they reached their decisions on compliance matters, what role partisanship played in their decisions, and if internal or external lobbying take place. The most common response to the first question was that the Commissioners looked to the law, then to the regulations, and

then to the specific facts of the individual compliance matter under examination. Clear differences, however, were evident in how individual Commissioners viewed the role of the law. For instance, one Commissioner viewed that the law is the law. Even the smallest technical violation of the law was to be viewed as a violation of the law. This Commissioner viewed that the relief stage was where factors such as whether the violation was an isolated occurrence or was "willful and knowing" should be considered. Another Commissioner thought that the Commission should be more lenient in order to encourage more voluntary compliance.

The role played by partisanship in regulatory decision-making of the Federal Election Commission is open to debate. Several current Commissioners preferred to characterize the differences between Commissioners as more philosophically based, rather than partisan in nature. The differences were generally viewed as those favoring strong regulation versus those opposing strong regulation. Those favoring strong regulation of the federal campaign finance laws generally favor a more aggressive enforcement posture. Those favoring a less active regulatory enforcement of the federal campaign finance laws generally were found to favor a less aggressive enforcement policy. One present Commissioner indicated that what often appears to be partisan differences are more philosophical differences: regulators versus non-regulators. They indicated that some Commissioners would view the same thing as ignorance versus individuals being careless. This same Commissioner stated that it is a matter of the degree of enforcement — "strict" versus "reasoned enforcement." According to this Commissioner, one encourages participation in the process, while the other has a chilling impact on the process. In fact, one Commissioner indicated that the more

tightly the Commission enforces the law, the more clearly the Commission serves to define what is and what is not going to be tolerated.

But, partisanship does have its place. At least one current or former Commissioner indicated that partisanship plays a role to see that the Act is enforced even-handedly. This individual indicated that it was up to each party to look out for their own. They also indicated that they tried to make their decisions even-handedly. By and large, philosophical differences appear to coincide with the partisan breakdown on the Commission. Democratic Commissioners generally appear to be more regulatory inclined than Republican Commissioners.

Another factor I examined was the role of internal and external lobbying. Internally, lobbying does appear to take place on the Commission level. When I asked several current and former members of the Commission if lobbying took place, all indicated that lobbying either took place or that Commissioners sometimes asked each other how they voted. That said, several current or former Commissioners were quick to answer: "sure." One even responded that there is lots of lobbying!

At a minimum, the positions of Commissioners are usually presented at a Monday meeting held by the Executive Assistants. Then-Chairman Thomas indicated that over the years, Commissioners have come to rely on the Executive Assistants at their Monday meetings to find out the objections that other Commissioners have about compliance Matters Under Review. Thus, an Executive Assistant is able to convey these concerns to the other members of the Commission.[12] Several Commissioners indicated that they tell their Executive Assistant everything about each compliance matter. In other instances, it is the

[12] Notes from an interview with then FEC Chairman Scott Thomas, October 29, 1999.

Executive Assistant who will go through the compliance cases, highlight the key points, and write up a memorandum for their Commissioner. One Commissioner indicated that they used the "EA" system because they did not like to be surprised when they got to Commission meetings. Additionally, they indicated that they wanted their arguments to be known before they arrived at the Commission meetings. Some Commissioners, however, appear to share more information with their Executive Assistant than others, thus resulting in a disparity in the level of their Executive Assistant's participation. Several Commissioners indicated that this disparity in Executive Assistant participation had a negative impact on Commission meeting deliberation. One current or former Commissioner indicated that members may not be comfortable taking another Commissioner's word at formal Commission meetings, where they are unable to do their own research on a point of fact under consideration or other similar matters. Therefore, the discussions held by the Executive Assistants generally serve to open the discussions and to get the arguments of Commissioners out in the open. Based upon the information that Commissioners receive from the meetings of the Executive Assistants, Commissioners can then decide how much of a fight they wish to make over a specific allegation.

That said, there are no prohibitions against Commissioners getting together and meeting. A total of three Commissioners can get together to visit and talk. As Commissioner Mason stated, "three members can meet and not have a majority, so it's legal."[13] Commissioner Mason indicated that the Republican Commissioners meet regularly — once or twice a

[13] Notes from an interview with FEC Commissioner David Mason, November 1, 1999.

week.[14] He also indicated that he might meet with one or two of the Democratic Commissioners, if he thought that there was the potential for an agreement on how to proceed.[15] Not to be outdone, the Democratic Commissioners also appear to hold meetings, but the frequency of these meetings was unclear.

So, when there is a difference of opinion, how do the Commissioners reach a consensus, such that a majority is formed? The answer appears to be through bargaining. In some cases the Commissioners may be able to reach an agreement that a violation took place. The challenge then is to assess a penalty. The Commission has penalty guidelines that it utilizes to assess penalties. From my discussions with current and former Commissioners, it appears that the penalty phase is where much of the compromising takes place. If one side gives a little to agree on a violation, that may lead to an agreement on a penalty. When deals are struck, it appears that the strict application of the penalty guidelines appears to break down with much of the debate centering over what is an "equitable" administration of the Act. In these instances, Commissioners may ask the Office of the General Counsel what the Commission did in another similar case or a Commissioner may state that in a certain case the Commission assessed a certain penalty. As Commissioner Mason indicated, the Office of the General Counsel will come out with the Office of General Counsel's guidelines, and the fight will begin.[16] The result, however, is that give and take does occur, and compromises or bargains can sometimes be reached. This conclusion is similar to one that Meier cites on pollution enforcement in which,

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[14] Ibid.

[15] Ibid.

[16] Ibid.

"[b]argaining and individual flexibility were the major mechanisms of enforcement."[17]

External lobbying does not appear to take place. If an outside party were to speak with a Commissioner, then that Commissioner is required to write a memorandum explaining the *ex parte* communication. The memorandum is then filed with the Commission Secretary. It appears that several Commissioners routinely do not take phone calls, such that this has not been a problem. Most individuals involved in compliance cases appear to communicate through the Office of the General Counsel and do not approach the Commissioners directly.

The result of the Commissioners' own decision making processes, political philosophies or biases, and the impact of internal lobbying, can cause slight variations in the manner in which individual Commissioners seek to enforce the law, and ultimately the manner in which the Commission enforces the law. The bargains that Commissioners and the Commission as a whole reach in one set of allegations become the precedent for future bargains. This means that bargains between Commissioners can become precedent used by one Commissioner to compel another Commissioner into taking a specific position. And, this means that the final bargains that the Commission reaches in its decisions also become precedents from which future bargains are negotiated. The overall result is that the Commission makes the federal campaign finance law manageable from administrative agency perspective, while deviating from the "norm" that the Congress and President intended when the federal campaign finance law was enacted, and subsequently amended.

All of the decisions that Commissioners undertake, however, are also constrained by the policy tools that were

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[17] Kenneth Meier, Politics and the Bureaucracy: Policymaking in the Fourth Branch of Government, (New York: Harcourt College Publishers, 2000), p. 65

outlined in Chapter Four. The bargains that Commissioners make, and the decisions that they reach, are constrained by the ability of the Congress and President to sanction and reward the agency and those who make decisions within the agency. Commissioners must either implicitly or explicitly consider the ramifications of their actions. As all Members of Congress are included in the agency's regulated community, the agency's actions can have immediate and direct effects on those charged with overseeing the agency, its statutory authority, structure, and budget. As a result, the decisions of the regulatory agency are constrained both on the inter-agency level, and on the intra-agency level.

Incentives and Limits to Regulatory Bargaining.

Commissioners at the Federal Election Commission have a legislative charge to interpret, implement, and enforce, the federal campaign finance law. Because Commissioners come to the Commission with their own political biases, not all Commissioners will look at the law from the same perspective. The difficult question then becomes, what can the Commissioners agree on? If agency Commissioners do not enforce the law, then the agency looks bad in the eyes of the public. Public ire can place undue pressure on Members of Congress because it may appear that they are not doing their jobs. Too much action on the part of the Federal Election Commission, however, can also have a negative impact on the agency. If the Federal Election Commission enforces the law in a manner that "cracks down" too tightly on violators, then the Commission risks turning the Congress and President into enemies.

The result is that the Federal Election Commission is forced to walk a careful line. As Holden states, "Failure has adverse consequences for the organization, its program, and

those individuals who are responsible for the agency and its program."[18] In order to avoid the appearance of failure, Federal Election Commissioners will generally work to find some acceptable balance of enforcement in which "enough" enforcement is taking place, but where the consequences of failure or over-action are avoided.

Reasons for Bargaining.

Bargaining for compliance between the Federal Election Commission and members of the agency's regulated constituency takes place on nearly a daily basis. Efforts to reach conciliation agreements between the Federal Election Commission and individual respondents serves as just one example of the agency's efforts at bargaining. Bargaining, Holden states, "is the only way to maneuver the agency successfully through the environing web of constituency relations..."[19]

According to Holden's model, decision-makers may be aware of the consequences of their actions. Holden states, "[t]he bargains made or avoided reflect the decision-makers' level of awareness of these consequences, and the clues to these consequences..."[20]

Technological Character of the Problem.

The Federal Election Commission is charged with regulating federal campaign finance law. Tracking the flow of money within this political economy is a complex task that can involve sometimes hundreds of respondents, numerous

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[18] Matthew Holden, Jr. "Pollution Control as a Bargaining Process: An Essay on Regulatory Decision-Making." (Ithaca, New York: Cornell University Water Resources Center, pub. no. 9, Oct. 1966), p. 30.

[19] Ibid., p. 31.

[20] Ibid.

transactions, and what probably seems like an endless paper-trail. Beyond simply looking at the financial transactions to understand what is occurring, the Federal Election Commission must then apply the law. And, understanding and applying this complex campaign finance system requires knowledge!

The technical complexity and knowledge of federal campaign finance law serves as a source of bureau power. Kenneth Meier cites four sources of this power: (1) "political elites are concerned with making good public policy"; (2) bureaus possess better information for dealing with the policy problems; (3) politicians are "generalists, while agency officials are specialists; (4) the daily operations of the agency provide agency officials with "insight into policy problems that cannot be gained from a casual inspection of program budgets once a year."[21] The Federal Election Commission gains bureaucratic power because it has developed a wealth of knowledge about how to administer federal campaign finance law. Over the years, the agency has learned how to address both the political, administrative, and policy issues that face the agency.

The requirements for administering federal campaign finance law require a technical knowledge that Members of Congress, as policy generalists, lack. Determining what is and what is not legal sometimes becomes a grey area that Commissioners must define. As Federal Election Commission General Counsel Noble once indicated, there is an extent to the degree that one can define words. Such is the case of what constitutes and does not constitute "coordinated." As a result, the Federal Election Commission is often forced to undertake rule-making in order to define the limits of the law. But, ultimately, the agency must enforce these rules and

[21] Kenneth Meier, Politics and the Bureaucracy: Policymaking in the Fourth Branch of Government, (New York: Harcourt College Publishers, 2000), p. 59.

regulations through adjudication. As Chapter Six will demonstrate, given the sheer number of respondents, contributors, financial transactions, and allegations of possible wrong doing, it would be virtually impossible for the agency to act on all of these matters. The agency can not have the personnel, fiscal resources, or time to act in a manner that enforces the law equally and across the board in every instance — the result is bargaining for compliance.

The Social Values and Myths Associated With the Problem.

How the federal campaign finance system is perceived impacts the manner in which Federal Election Commissioners can enforce the law. In Chapter One of this dissertation, it was explained how some individuals view money as a corrupting influence upon lawmakers. There is also the image that money buys access, if not votes, elections, and politicians. This same chapter, however, pointed out that other individuals hold the view that political contributions amount to a First Amendment Constitutionally guaranteed right to free speech and expression of one's views. To these individuals, the campaign finance system is the problem, not the influence of money.

Federal Election Commissioners come to the Commission with their own perspectives of these myths. They also come to the Commission with their own perspective of the law. This appears to show up in the tension between Commissioners who seek "strict" compliance ("Regulators") and those who seek "reasoned" compliance (Non-Regulators). As was previously explained, this division generally falls along the political party division on the Commission. The Commission, as a whole, is constrained by these perspectives. Added to these constraints of myth and value is the simple fact that many members of the agency's regulated constituency would probably

prefer not to have enforcement action taken against them or their allies, just taken against their opposition. On this point, Matthew Holden states that, "[t]he greater the tension between a mythology which demands 'action' and a constituency resistance which makes it clear that compliance will come at high costs, the more important will become tacit bargaining through manipulation of the technical issues."[22] In order to present the perception, if not the reality, that the Commission is undertaking "enough" enforcement action, some "non-regulators" must vote for enforcement. In order for the Commission to appear not to be taking too broad of an enforcement action, some "Regulators" must vote for less stringent enforcement. Two key factors appear to drive these actions. First, the Commission must discharge its statutory charge to interpret, implement, and enforce federal campaign finance law, while not drawing the ire of either the public or Congress's demand for more or less enforcement. Second, the statutory requirement that the Commission have four affirmative votes in order to act demands bi-partisan action.

The above myths and values act as constraints upon Federal Election Commissioners. These myths and values serve as parameters defining the boundaries that guide decision-makers. In his model, Matthew Holden, Jr. argues that, "[t]he importance of this constraint is not that it precludes bargaining, but only that public myths and values so define the boundaries of the permissible and the impermissible in such a way as to structure the bargaining process which he [the Commissioners] may follow."[23] Within these parameters,

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[22] Matthew Holden, Jr. "Pollution Control as a Bargaining Process: An Essay on Regulatory Decision-Making." (Ithaca, New York: Cornell University Water Resources Center, pub. no. 9, Oct. 1966), pp. 36-37.

[23] Ibid., p. 36.

Commissioners are forced to make bargains in order for the Commission to accomplish "enough" of its legislative charge. As Holden states, "[i]n pursuing an actual policy, the regulatory decision-makers have to come to terms with these myths and values which both push them toward bargaining and impose constraints on the kinds of bargains they can make and the ways in which they make them."[24]

The Largeness or Smallness of the Alternative Points of Decision.

[24] Ibid., p. 35.

Simply stated, do the parties regulated by the Federal Election Commission have anywhere else where they can appeal or "exert influence when unsatisfied with the manner in which the regulatory agency itself is proceeding."[25] In the case of the Federal Election Commission, complainants involved in allegations of campaign finance wrong doing can appeal inaction on the part of the Commission to the federal courts. Respondents in compliance cases can also take their fight to the federal courts seeking a court ruling against the Federal Election Commission. Individuals can also file suit in federal court seeking to either enforce or overturn restrictions imposed by the federal campaign finance laws. In all instances, however, the cost of litigating in the federal court system acts as a potential barrier for those who would consider this option. And, as Kenneth Meier notes, "...suing an agency in court may not guarantee a citizen any relief."[26]

The possibility that respondents may resort to the federal courts in order to resolve their compliance case encourages the Federal Election Commission to move in the direction of a bargain for compliance. While Federal Election Commissioners may consider what they accepted previously as precedent in the area of compliance, the federal courts may not. Additionally, where the agency may rely on previous Rule-Making and Advisory Opinions, the Constitutionality of these agency lawmaking activities may come under formal review by the courts. Another problem that the Federal Election Commission faces when it goes to court is that previous compliance cases are not admissible as precedent in federal courts. While the federal courts rely

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[25] Ibid., p. 37.

[26] Kenneth Meier, Politics and the Bureaucracy: Policymaking in the Fourth Branch of Government, (New York: Harcourt College Publishers, 2000), p. 141.

upon previous cases as precedent, the actual number of cases that the Federal Election Commission could come to rely upon is relatively few. This was a point that Staff Director James Perhkon noted in a recent interview. Furthermore, the technical nature of federal campaign finance law would not bode well for the agency in court. If the law is unclear or vague, then the court may be more likely to side against the agency. Additionally, the legal process in the federal courts is a slow one. Motions and hearings can take months, if not years. As a result, the agency would face the long drawn out cost of litigating in the federal courts and a level of uncertainty over the possible outcome.

In order to avoid the uncertainty of the federal courts, and in order to preclude a legal review of the manner in which the Federal Election Commission enforces the law, the agency will tend to act in a constrained matter. The agency will generally seek to resolve compliance and other matters before they would reach the courts. On this point, Holden indicates that the possibility of an issue ending up in court, itself, acts as a constraint on the agency's regulatory decision-making.[27]

Another point of appeal is to the court of public opinion. Both the regulatory agency and members of the agency's regulated constituency can resort to the use of the media and public opinion in order to bring attention to their concerns. The agency can issue press releases, release studies, and provide testimony before the Congress detailing the agency's successes, needs and desires. In doing so, the agency can attempt to sway support among the public and lawmakers - two constituencies important to the agency's continued existence!

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[27] Matthew Holden, Jr. "Pollution Control as a Bargaining Process: An Essay on Regulatory Decision-Making." (Ithaca, New York: Cornell University Water Resources Center, pub. no. 9, Oct. 1966), p. 38.

Again, however, the agency's appeals to the court of public opinion must be tempered due to the fact that a large portion of the agency's constituency consists of lawmakers in the Congress. By resorting to the court of public opinion, members of the regulated constituency can bring attention to what they may perceive to be inaction of the agency, or, conversely, what they believe to be the over zealous or unjust enforcement activities of the agency. Because agency regulators likely will desire to avoid unnecessary negative public attention or unnecessary appeals to the Congress for statutory and budgetary authority, the agency will likely work to minimize actions which will draw unwanted or negative public attention. The result: the agency will likely attempt to satisfy both their congressional and public constituencies by not over- or under-enforcing the federal campaign finance law.

The Nature or Extent of Continuous Relations.

The political process is one replete with repeat interactions. Because individuals make careers in politics, and because political action committees are generally ongoing enterprises, the processes guiding federal campaign finance are ongoing. And one of these constants is the interaction of members of the agency's regulated community with agency staff and other officials at the Federal Election Commission. Whether the interaction is the filing of a campaign finance report, the review of this report, requests for additional information, an audit or the earning of an audit point, or the investigation of a compliance case, there are ample opportunities for the two parties to come into contact. This interaction could take place once or on multiple occasions.

Members of the regulated community have the incentive to find settlements and alleviate any concerns that the Federal

Election Commission may have. This raises the possibility that the member will earn good will with the agency. After all, it is generally in the best interests of all Members of Congress to cooperate and avoid the appearance of impropriety.

Continuous relations also occur due to the entire Advisory Opinion process in which individuals or committees make a specific request of the Commission for a ruling on a specific course of action that that they intend to take. By interacting with the Commission in advance, that individual or committee is given the equivalent of protection under the law if they follow the Commission's language in the Advisory Opinion. By contrast, if the individual or committee went out and undertook a questionable action without the guidance of the Commission through an Advisory Opinion, then the member would be subject to possible enforcement action.

The Commission must also consider the nature of repeat interactions from a second perspective. All members of Congress are members of the Federal Election Commission's regulated constituency. This means that the Commission may need to consider possible legislative and budgetary retributions that could occur if the agency took too strong of an action. In the model, Holden speaks of alienated polluters "throwing up obstacles to cooperation."[28] This can easily be equated to Members of Congress calling Commissioners before Congressional hearings to ask questions about the agency's operations. Members of Congress could also call for audits of the agency's operations. Or, Members of Congress could impose new restrictions on the tenure of Commissioners, the tenure of the Staff Director, and the tenure of the General Counsel. Term limitations on Commissioners were recently enacted, while tenure limits on the Staff Director and General Counsel were

[28] Ibid., p. 39.

also considered, but not enacted. The result is that Commissioners have incentives to pursue bargaining, rather than possibly paying a high price for heavy-handed enforcement.

Repeat interactions between lawmakers and agency officials also needs to be considered from a third perspective — that of agency tenure. Tenure on the Federal Election Commission has generally been long. The length of service on the Commission can best be illustrated through an examination of the retirements from the Commission that took place in 1998. On July 30, 1998, several long-time Commissioners retired. Those retiring included John Warren McGarry and Joan D. Aiken.[29] Mr. McGarry had served on the Commission since 1978 or for twenty years.[30] Ms. Aiken was the last of the original appointees to the Commission to retire. Originally appointed in 1975, Ms. Aiken served on the Commission for twenty-three years.[31] Continuing on the Commission at the time were Lee Ann Elliott and Danny L. McDonald. Ms. Elliott was first appointed to the Commission in 1981.[32] Ms. Elliott finally retired from the Commission in the year 2000. Mr. McDonald, who was also appointed in 1981, continued to serve on the Commission.[33] Therefore, it seems reasonable to conclude that the Commission, itself, has historically had very little turnover. Only recently have the term limitations enacted for Commissioners bought new membership to the Commission.

As the discussion on the structure of the agency outlined, the two key agency staff positions within the FEC are the Staff

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[29] FEC Annual Report, FY 1997, p. 3.

[30] Ibid.

[31] Ibid.

[32] Ibid.

[33] Ibid.

Director and the General Counsel. Recent tenure among individuals in both the Staff Director and General Counsel positions has tended to be long. For instance, in 1998, John C. Surina resigned his position as FEC Staff Director. Mr. Surina first joined the FEC in 1983.[34] He had been with the agency for fifteen years. The new Staff Director, James Pehrkon, has been with the FEC since 1975. So, while Mr. Pehrkon is new to his position as Staff Director, one Commissioner felt free to describe him as "new, but an old friend to us."[35] The present General Counsel of the FEC is Lawrence M. Noble. Mr. Noble first came to the FEC in 1977.[36] He has served as General Counsel for the past fifteen years.[37]

Because tenure at the agency has tended to be long for Commissioners and senior agency officials, as well as for congressional lawmakers, the likelihood of repeat interactions between these Commissioners, agency officials, lawmakers, and members of the regulated community is not only possible, but highly likely.

Chapter Discussion and Conclusion

Decision-making within the Federal Election Commission is political. The process by which individuals come to the Commission precludes the process from being anything, but political. As politics is about "the distribution of advantages and disadvantages,"[38] clearly agency decision-making

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[34] Ibid., p. 82.

[35] Interview with FEC Commissioner Lee Ann Elliott, October 25, 1999.

[36] FEC Annual Report, FY 1997, p. 82.

[37] Ibid.

[38] Matthew Holden, Jr. "Pollution Control as a Bargaining Process: An Essay on Regulatory Decision-Making." (Ithaca, New York: Cornell University Water Resources Center, pub. no. 9, Oct. 1966),

also falls into this same realm. Individuals appointed to the Commission do not come to the Commission with a *Tabla Rasa.* Commissioners, like most individuals, bring their own biases (political and other) and preconceived notions into their decision-making processes. Commissioners make choices allocating these advantages and disadvantages within the political system that is federal campaign finance, but they do so in a manner that is constrained.

Matthew Holden, Jr.'s model of regulatory decision-making is as applicable to the Federal Election Commission as it is to state pollution control agencies. Regulatory decision-making and the allocation of advantages and disadvantages by the Federal Election Commission is a process that is constrained both by the policy tools available to lawmakers and the four factors examined by Holden. Clearly, the technical character of our nation's complex federal campaign finance laws plays a role in the regulation of federal campaign finance. Added to this constraint are the impact on the Commission and agency administrators of the myths and values associated with the issue of federal campaign finance in the United States. Further, there are only a few avenues of alternative points where individuals can resort in their search for a more favorable decision than the decision they might receive from the Federal Election Commission. Lastly, the political process is one replete with repeat interactions — both between the Federal Election Commission and members of the regulated constituency, and between the Federal Election Commission and Members of Congress and the President, all of whom are members of the regulated constituency. The result is that the Federal Election Commission is constrained by the law, by the public,

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p. 40.

by the regulated constituency, and by the United States Congress and the President.

When the Federal Election Commission makes decisions within the parameters established by the policy tools available to lawmakers and the above four variables, decisions are made in a rationally constrained manner. The result is that the Federal Election Commission must bargain in order to reach decisions. The "regulators" and "reasoned-enforcers" must find some balance in order to take action. The Federal Election Commission must bargain with the regulated community in order to achieve compliance. The Federal Election Commission must bargain with the public in order to quell discontent that the agency is not doing "enough." But, the Federal Election Commission must also bargain with those in the Congress, so that the agency does not risk losing statutory authority, have its budget cut, or face some other sanction.

When the Federal Election Commission and lawmakers, or when the Federal Election Commission and members of the regulated community, reach a decision through bargaining, that bargain serves as the basis for the next bargain. One commissioner indicated that the Commissioners look to identify what is an equitable solution for a similar violation. Precedent among bargains, in essence, is what guides the decisions of Commissioners. What the Commission did in one instance serves as the precedent for what the Commission may do in the future. Holden states, "[e]ach such bargain is predicated upon the previous state of fact and the previous complex of bargains. By the same token, each new bargain is assimilated to the existing complex of bargains and becomes a predicate for future decisions."[39] The result, over time, is that bargains and the precedents that Commissioners establish

[39] Ibid., p. 43.

become the guide for enforcement actions and future bargains, rather than the "norm" of the law that the Congress and President may have held when the law was enacted or amended. Holden says, "[f]rom the point of view of a broad policy..., such decisions introduce inconsistencies which limit, if they do not explicitly repeal, the larger decisions..."[40]

While Holden notes that the view of decision-making within regulatory agencies as bargaining may be difficult for some to accept, from a soft-methodological perspective, it does appear to hold up rather well. The next chapter of this dissertation examines actual enforcement decisions by the Federal Election Commission in order to understand what the Commission is and is not enforcing, against whom they are enforcing or not enforcing the law, and the types of penalties involved. In the process the next chapter will demonstrate how the agency utilized its prosecutorial discretion to adopt an Enforcement Prioritization System designed to improve agency efficiency and enforcement efforts. The results, however, indicate exactly what one would expect to find if one were to quantify Holden's theory of regulatory agency decision-making as being a bargaining process. The implementation of the Enforcement Prioritization System improved the agency's ability to efficiently dispose of allegations of campaign finance violations, while not greatly improving enforcement. Bargaining continues to provide the basis for regulatory decision-making on the Federal Election Commission, such that enforcement continues to diverge from the ideal "norm" that the Congress and President intended when they enacted, and amended, the Federal Election Campaign Act.

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[40] Ibid., p. 44.