

Fixing the Federal Election Commission

By Dan Jacobson

In 1972, Frank Wills was a security guard at a huge complex of hotel rooms, condominiums and offices in Washington, D.C. In the early morning hours of June 17 of that year, he noticed tape covering the latches on doors leading from the upstairs office suites to the underground parking structure, so that when those doors would not latch when they closed. No one had told Wills of any planned moves or late-night office parties. Feeling, suspicious he called the police — and changed the world.

The complex that Wills was guarding was the Watergate Building. The police arrested those who came to be known as the Watergate burglars. But that was only the beginning: the president of the United States resigned, law students and lawyers were forever burdened with ethics classes, the U.S. attorney general and many other government officials went to prison, and Congress gave birth to the Federal Election Commission.

That birth was by way of significant amendments to the 1971 Federal Election Campaign Act, which itself had just been signed into law two years earlier, ironically, by the president who was forced to resign because of Watergate, Richard Nixon.

"The Supreme Court has held that the FEC is vested by Congress with primary and substantial responsibility for administering and enforcing FECA and that the Commission is provided with extensive rule making and adjudicative powers." *Federal Election Com. v. Ted Haley Congressional Committee*, 852 F.2d 1111 (9th Cir. 1988). The statutes that the FEC enforces are generally found at 52 U.S.C. Sections 30101, et seq. The FEC's rules are codified in the Code of Federal Regulations at Title 11, Chapter 1. The commission's mission statement mirrors its legal re-



New York Times News Service

President Richard Nixon resigns during a speech to his Cabinet and staff at the White House on Aug. 9, 1974.

quired duties: "To protect the integrity of the federal campaign finance process by providing transparency and fairly enforcing and administering federal campaign finance laws."

The word "finance" in the FEC's mission statement is important because it reflects that 52 U.S.C. 30101, et seq. deal with the money used to bankroll a campaign. For instance, campaign contributions and campaign expenditures are well-regulated by 52 U.S.C. 31116, political action committees come under the rubric of 52 U.S.C. 31102, and "soft money" is the subject of 52 U.S.C. 30125. But for one to study, say 52 U.S.C. 31116, and think that knows all there is to know about contributions and expenditures would be a big mistake. Other statutes, rules and legions of cases touch on the subject matter contained in individual statutes. And, all of it is governed by the FEC. See *Federal Election Com. v. Ted Haley Congressional Committee*, 852 F.2d 1111 (9th Cir. 1988).

To state the obvious, the structure of the FEC is important. When fully staffed, the commission is composed of six commissioners, no more than three of which can be of the same po-

litical party. Each commissioner is appointed by the president, subject to Senate confirmation. Four members are required for a quorum. 52 U.S.C. 30106(c). That's logical and — until the 2020 election cycle — seemed workable.

But, what if attrition brought the commission membership down to below the four-member quorum requirement? Further, what if the president chose not to appoint a fourth commissioner, so that there could be a quorum so the commission could act? Unthinkable? Think again.

During much of 2019 and 2020, while the nation revved up for and conducted the 2020 election, attrition caused the commission to indeed have less than four commissioners. That rendered the agency toothless during much of that vital election.

In her September 2019 testimony before the House Committee on Administration, then-FEC-Chair Ellen Weintraub complained about the commission having only three members, and thus not having a quorum. Weintraub testified, "We cannot launch investigations. We cannot issue advisory opinions. We cannot

promulgate rules. We cannot render decisions on pending enforcement actions."

A sinister theory has developed concerning a total of over \$841,000 in bills for police and other municipal costs expended to support President Donald Trump's campaign rallies. In June 2019, the Center for Public Integrity reported that 10 local governments had submitted bills to the Trump campaign for such costs. The bills came from local governments from varying regions of the country. The campaign simply ignored the bills. Representative Bill Pascrell, D-N.J., and co-chair of the bipartisan Congressional Law Enforcement Caucus, filed a complaint with the FEC, asking it to "open an investigation into this impropriety." But when that complaint was filed, the commission did not have a quorum. So, in November 2019, Chair Weintraub wrote Rep. Pascrell, "[A]ny complaints filed since [the commission lost its quorum] cannot be acted upon by the Commission." The Center for Public Integrity opined, "Bottom line? It's not inconceivable that Election 2020, with its billions of dollars political actors will spend, will simply be staged without the FEC playing any meaningful law enforcement role."

We now know that it was not only conceivable that the 2020 election would be conducted without the FEC playing any meaningful law enforcement role; but that the 2020 election was indeed conducted without the FEC playing any meaningful law enforcement role. The crucial 2020 election simply paraded by the three-member, quorumless FEC. If there was a scheme to defang the FEC during that extremely important election, that scheme was a rousing success.

Just over a month after Election Day 2020, a Washington Post headline read, "Senate confirms three FEC commissioners, restoring full slate for the first time since 2017"

(Dec. 9, 2020). The story began, "The Senate on Wednesday confirmed three members to the Federal Election Commission, restoring the agency's ability to conduct official business after months without a voting quorum and bringing the panel to its full slate of six members for the first time since 2017." Two of those three ultimately confirmed nominees were announced in late October 2020 and the third was nominated sometime after that. Thus, there was not enough time for background checks, hearings and confirmation votes before Election Day.

One of the three commissioners confirmed by the Senate after the election was Sean Cooksey, whose immediate pre-appointment job was deputy chief counsel for Sen. Ted Cruz; his job before that was as Sen. Josh Hawley's general counsel. Cooksey was appointed to the uncompleted term of a retired commissioner. So, for purposes of the longevity of his tenure on the commission, Cooksey stands in the shoes of the retired commissioner. That term expired April 30, 2021. But, "[a] member of the Commission may serve on the Commission after the expiration of his or her term until his or her successor has taken office as a member of the Commission." 52 U.S.C. 30106 (a)(2)(B). Thus, Cooksey can serve until President Joe Biden, with the advice and consent of the Senate, replaces him.

After the January 6 riot at the Capitol, when Congress and the vice president re-convened to finish the ministerial formal tallying of the electoral college votes, both Sens. Cruz and Hawley objected to the certification of already state-certified votes. Although the FEC generally governs the finances of federal elections, the tallying of Electoral College votes and the finances of federal elections both concern the sanctity of those elections. It is difficult not to wonder if one of the chicken coop guards is a fox.

Part of the For the People Act (H.R. 1) would attack the problem of not having a quorum. As mentioned, currently a quorum consists of four commissioners. 52 U.S.C. 30106(c). H.R. 1 would change that. Under Section 6002(a)(1) of the act, "A majority of the number of members of the Commission who are serving at the time shall constitute a quorum." (Emphasis added.) H.R. 1 would bring a number of other changes to the FEC, including lowering number of commissioners from six to five; thus, preventing a deadlock when the commission is fully staffed. No more than two commissioners could be of the same political party.

Frank Wills passed away on September 27, 2000, in Augusta, Georgia. The legacy that he left behind was a vastly improved political system, with guardrails that include the FEC, an FEC with a structure that may change, and with a mission that will remain. "To protect the integrity of the federal campaign finance process by providing transparency and fairly enforcing and administering federal campaign finance laws." ■

Dan Jacobson is an attorney in Tus-tin. He is a member of the California Board of Accountancy, which licenses and polices California's CPAs; he is the immediate past chair of the Democratic Foundation of Orange County he is an adjunct professor at Pacific West College of Law; and, he is a consultant/expert witness in insurance bad faith cases.

