

No IRS-like abuse at ELEC

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By Jeff Brindle

Since the release of an inspector general's audit in May, concerns have arisen over alleged partisan witch-hunts by staff members of the Internal Revenue Service.

More recent allegations have surfaced about potential staff abuses at the Federal Election Commission, the national counterpart to the New Jersey Election Law Enforcement Commission (ELEC).

While Congressional committees and others sort out the extent and accuracy of these allegations, New Jersey candidates and voters should be assured that ELEC has clear rules- and a long tradition- that guard against such abuses.

When staff becomes aware of a potential violation of New Jersey campaign law, an investigator from the Review and Investigation Section is assigned to determine if it deserves a full investigation.

These reviews are initiated three ways at ELEC - by a member of the public filing a complaint with the agency, by news articles, and by general report reviews that uncover chronic violations by filers, such as a repeated failure to list the name or address of a contributor's employer.

Upon completion of the review, a recommendation is made to the bi-partisan commission to either open or close an investigation.

The Commission then authorizes, if warranted, a full-fledged investigation. Once the investigation is completed, the commission decides whether a complaint is to be issued.

Adherence to this policy is absolutely essential to the integrity of the investigatory process. Every effort must be made to prevent even the appearance of any politicization of investigative procedures.

In their wisdom, the founding fathers included provisions in the Constitution to shield the judicial system from political influence. For instance, federal judges may serve for life for good behavior and their salary cannot be reduced.

While ELEC commissioners may not enjoy these protections, they do perform quasi-judicial roles, and they equally strive for fairness and impartiality.

Like the Constitutional protections for federal judges, ELEC policy requiring commissioners to approve investigations helps keep the investigative process free from political abuse.

As the Four Circuit Court of Appeals declared in *North Carolina Right to Life v. Leake* (2008), “Unguided regulatory discretion and the potential for regulatory abuse are the very burdens to which political speech must never be subject.”

For staff to initiate an investigation without Commission authorization would be a serious breach of policy, one that would undermine trust in government.

In the case of the FEC, Congressional Republicans earlier this month released emails between IRS official Lois Lerner and FEC attorney William Powers involving the status of two conservative independent groups- American Future Fund and American Issues Project.

During a May hearing about separate allegations that IRS employees targeted conservative groups, Lerner invoked her Fifth Amendment right against self-incrimination. Lerner, who is on leave from the IRS, also is the FEC’s former senior enforcement officer.

The House Oversight committee has demanded by Wednesday (August 21) all communications between the IRS and FEC dating back to 2008.

American Issues Project drew attention during the 2008 presidential campaign by running negative campaign advertisements that linked Barack Obama to a 1960s radical. What made the group’s ads particularly galling to Democrats was the fact that the group was financed by a Texas billionaire who also was a major backer of the Swift Boat Veterans for Truth committee that assailed Democrat John Kerry in his unsuccessful 2004 presidential bid. In response to the 2008 attacks, a prominent Democratic attorney filed an FEC complaint against American Issues Project.

According to Kimberly A. Strassel, whose column *Potomac Watch* appears in the *Wall Street Journal*, the emails suggest that “staff at the Federal Election Commission have engaged in their own conservative targeting.”

FEC Chairwoman Ellen Weintraub, a Democrat, has said she was unaware of the emails between FEC and IRS employees. “If there was any evidence or targeting based on ideology, that would be extremely serious, but I have not seen any evidence of that,” she told CNN on August 6.

Others have cautioned about a rush to judgment until more details are known. “There are many legitimate or at least innocuous reasons for the FEC and the IRS to be sharing information about politically active nonprofits. The two agencies share regulatory oversight authority,” said James P. Joseph of Arnold & Porter LLP in an August 7 article by the *Tax Analysts*, a tax news group.

But outgoing FEC Commissioner Donald McGahn, a Republican, also told CNN that contacts between FEC and Lerner are “probably out of the ordinary.” The situation, he said, “creates the appearance that people are being selectively targeted. And that’s something that should never happen.”

On May 9, McGahn and two other Republican FEC members overrode two Democratic commissioners to dismiss the complaint against American Issues Project.

In a “Statement of Reasons” issued July 25, the three commissioners gave a 26-page rationale for why they decided the group was not a political committee subject to FEC regulation. Their basic finding—that the nomination or election of candidates was not its major purpose. Some believe the ruling could lead to even greater use of 501(c) non profit groups, which do not disclose their contributors, for political campaigns.

The three FEC Commissioners also have proposed changes to the agency's enforcement manual to tighten control over investigations; this despite the fact that FEC investigations have declined from 612 in 2007 to 135 in 2012, according to a recent Boston Globe article. The reduction could be due in part to the partisan split on the Commission, according to the article.

There may be a good explanation for the charge that FEC staff members exceeded their authority. Through the years, FEC staff generally has acted responsibly and professionally, and should be given the benefit of the doubt in this matter.

However, any rogue activity, if proven, would be a serious blow to the integrity of the elections process at the federal level.

As regulators charged with the responsibility to oversee campaign finance law, the credibility, reliability, and integrity of investigative procedures are key to the ongoing effort to keep the electoral process beyond reproach.

Jeff Brindle is the Executive Director of the New Jersey Election Law Enforcement Commission. The opinions presented here are his own and not necessarily those of the Commission.