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**Civics 101**

**Episode 96: The Federal Election Commission**

**Virginia Prescott:** [00:00:00] I'm Virginia Prescott and this is Civics 101, the podcast refresher course on the basics of American democracy.

[00:00:29] The concept of free and fair elections is a hallmark of democracy. And let's face it: elections and campaigns cost money. With billions of dollars pouring into politics, how do we know where that money comes from and where it goes? Today we're talking about the Federal Elections Commission, or FEC, the watchdog of federal election funding, with Bob Biersack. Bob used to work for the FEC. He's now senior fellow at the Center for Responsive Politics.

[00:00:54] Bob, welcome to Civics 101.

**Bob Biersack:** [00:00:57] Thanks very much, happy to be here.

**Virginia Prescott:** [00:00:58] So what's the primary role of the FEC? Big picture.

**Bob Biersack:** [00:01:02] It's really designed to provide information that gets reported by candidates and PACs and political parties about where their money comes from and how it gets spent. And also to monitors some of the basic elements in the law that restrict how much money can be given directly to candidates for federal office. We're only talking about Congress and presidential campaigns here every state has its own system but basically it's supposed to enforce the provisions that exist in the law for limitations and restrictions on how money is raised and spent and then also importantly to disclose that information to the public.

**Virginia Prescott:** [00:01:36] So not polling places or voting machines, just money.

**Bob Biersack:** [00:01:39] That's right we don't count votes we only count money.

**Virginia Prescott:** [00:01:42] So when was this established?

**Bob Biersack:** [00:01:44] It was in the mid 1970s the Watergate experience the scandal that happened in the Nixon administration caused Congress to try to separate the mechanics of monitoring campaign finance away from itself before that. Basically the reports were sent to an office in the Congress and the General Accounting Office looked over things a little bit but it was pretty much ignored by most everyone and there wasn't good certainly wasn't good independent compliance or disclosure. With Watergate Congress decided that they needed a little bit more robust system a little separation from the monitoring and enforcement process away from Congress itself. And so they created this independent agency to do that.

**Virginia Prescott:** [00:02:29] Was funding of elections regulated before that before?

**Bob Biersack:** [00:02:33] It was to some extent. Certainly there were reports that were supposed to be filed. There was a little bit of oversight. There were limitations on contributions that began with a law that was passed in 1971 that actually may have triggered some of the problems of Watergate because the president's re-election campaign tried very hard to get as much money into the system as it could before that law took effect at the beginning of 1972 that led to lots of cash being distributed and deposited or or stored in safes around the White House and other places. And it really started the ball rolling that became the Watergate scandal. There were some restrictions but but they were largely ignored.

**Virginia Prescott:** [00:03:14] Was that the Federal Election Campaign Act?

**Bob Biersack:** [00:03:17] It was. Yes that's right.

**Virginia Prescott:** [00:03:19] So that act was passed in 1971. How has it been amended or changed over the years?

**Bob Biersack:** [00:03:25] There were a series of amendments especially in the early years there were amendments in 1974 that actually created the FEC some more in 1976 and 79 to fine tune the system a little bit and to adapt to court cases and Supreme Court decisions that were made in that time period. To me it's kind of an evolutionary process that goes on today.

**Virginia Prescott:** [00:03:48] The agency is called the Federal Election Commission, so how many commissioners are on the FEC?

**Bob Biersack:** [00:03:53] It's very odd. And not by mistake. There are six members of the commission by design and the law says that not more than three can be members of the same political party. And that to do anything to start an investigation to allow it to instruct the staff to go out and and run an audit to do anything requires four votes. So you have to cross party lines in order to conduct the business of the institution.

**Virginia Prescott:** [00:04:22] So it's meant to be a nonpartisan agency.

**Bob Biersack:** [00:04:24] Well I mean the difference between bipartisan and nonpartisan I'm not sure. Typically in the early days the members of the commission were retired members of Congress. Congress really they wanted something independent but they didn't want something too independent. They wanted to be able to to make it clear to those people that political priorities were not irrelevant. They just didn't necessarily drive the process.

**Virginia Prescott:** [00:04:50] So let's look at how the FEC actually works and monitors for violations. Did they conduct audits for example?

**Bob Biersack:** [00:04:58] They can. One thing Congress limited is they can't audit anyone randomly. There has to be a reason to conduct an audit.

**Virginia Prescott:** [00:05:07] So a charge or suspicion from another candidate or party or watchdog group, that kind of thing?

**Bob Biersack:** [00:05:13] It can be more typically though there are reports that come into the Commission that show how much money was raised who gave that money how it was spent are examined by people inside the FEC to see if there are mathematical errors things that don't add up things that look like they might violate the law reporting of contributions that might exceed limits for example or something like that. If there is enough of that sort of problem then the commission can on its own say well there's reason for us to really look at the books of this campaign or this committee and so we're going to conduct an audit. But the other mechanism for compliance is that anyone can look at those reports and if they see something that they think violates the law they can file a complaint with the FEC that they would then look into anyone.

**Virginia Prescott:** [00:05:58] Because the FEC makes these records public?

**Bob Biersack:** [00:06:01] That's right. The whole concept from the beginning was was what they call voluntary compliance which is people are trying to do the right thing. They want to comply with the law but then also everybody is able to look over their shoulder. And so in the old days when when the reports came on paper there would be crowds of people in the Public Records Office at the FEC when those reports were due.

[00:06:23] So they could go through them page by page and look at specific contributions who was giving how much. And obviously among the people who look closely are news reporters and also opponents who keep track of things and aren't shy about making complaints if they think there's something problematic in what they see.

**Virginia Prescott:** [00:06:48] So the FEC as far as its powers go can it arrest people, can it prosecute people or does it sue individuals or companies for violations?

**Bob Biersack:** [00:06:57] It's actually fairly extraordinarily limited in its enforcement powers. People used to remind me when I was there that it's not really an enforcement agency. They can't do much of anything unilaterally when they think they found a violation on the face of the reports or some other way if they've done in on it. They go into this conciliation process which is basically negotiating with the other party we think you made this violation. Here's the evidence we have. We suggest you confess basically say you violated the law and pay a civil penalty typically a kind of a fine. If they can't agree if the other side's says no I don't think this was against the law or I didn't do it or whatever. Ultimately the only recourse that the FEC has is to sue that organization in federal court and then a judge actually can can independently enforce the law. But the commission can't do it on its own.

**Virginia Prescott:** [00:07:49] How about if a donor or a donation exceeds the contribution limit or violates one of the FEC prohibitions. Can it take the donation away from the candidate or party or PAC or received it?

**Bob Biersack:** [00:08:02] It can require the committee to refund the contribution or if it was part of a kind of a larger or even more more complicated conspiracy where sometimes people decide they don't like the contribution limits and so they pass money around to their friends or their employees and they instruct them to make to pay that money to specific candidate or committee. If that sort of thing happens you don't want to reward the original violator by giving the money back to them. And so the commission or as part of these conciliation agreements would say that you need to pay the money to the U.S. Treasury instead of taking it back yourself.

**Virginia Prescott:** [00:08:39] OK so what if the FEC discovers a violation when a candidate's already taken office? Is there anything they can do to penalize that individual?

**Bob Biersack:** [00:08:48] Well you can't certainly undo an election. So there are no real consequences in terms of taking them off of the ballot if they found out before the election or removing them from office afterwards. What you do though is is in the process of coming up with these conciliations charging them a civil penalty that all becomes public too. Not until it's finished but once once the case is complete everybody sees that violation. And what happened and what the consequences were. And so that has political implications for people. Campaigns are not really excited about being in trouble with the FEC because of the public relations problem.

**Virginia Prescott:** [00:09:26] Well you mentioned that there has to be a reason for the FEC to look into a campaign finances. But do candidates, parties, PACs do they regularly disclose or report the money that they raise to the FEC?

**Bob Biersack:** [00:09:39] They do. They have to. Large committees and party organizations file every month. So do presidential campaigns. Most of the time congressional campaigns file on a quarterly basis but then additional reports close to an election. So there is there is transparency and openness is really a fundamental part of this process. If it's going to work at all it's going to be because people can see what's happening.

**Virginia Prescott:** [00:10:02] And you said the FEC makes this information public. So if I wanted to know how much money Hillary Clinton raised for her 2016 campaign and from whom, I could get that information from the FEC?

**Bob Biersack:** [00:10:14] Absolutely. You can get it from a variety of sources. You can get it from the FEC. You can get it from a nonprofit organization that I work with now, the Center for Responsive Politics, through OpenSecrets.org. But yes that that information is publicly available as soon as it's filed. And now that most everybody except senatorial candidates file their reports electronically that means it's available literally as soon as it's filed. Within minutes after that the FEC gets a report.

**Virginia Prescott:** [00:10:43] I also read that the FEC administers the presidential public funding program. Now what's that?

**Bob Biersack:** [00:10:50] Yeah it's easy to forget because it's not really very relevant that much anymore. In the 1970s Congress decided that that in the context of presidential campaigns it was important to provide some public funding to the process so that maybe more candidates would run. There might be more competition more equal kind of competition. And so that system originally had three parts. Basically it provided a small grant to the two parties to conduct their their presidential nominating conventions. It provided matching funds for primary election candidates trying to get the nomination to the party. So long as you agreed to other kinds of restrictions like limiting how much you spent in each state when you were carrying on the primary campaign in the general election once the two parties nominated their candidates in late summer they would get specific grants. They were equal amounts of money.

[00:11:42] And that was all the money the candidates were supposed to use for the general election. As time went on and fundraising changed and the dynamics of campaigns changed, it first became desirable for candidates to not take those matching funds in the primary season because then they could spend as much as they wanted in those early states like New Hampshire and Iowa. So people began to drop out of the primary system. It was always voluntary. You didn't have to do it. Then later, even the nominees of the two parties began to recognize that they could raise a lot more money outside the system than they could get in those grants.

**Virginia Prescott:** [00:12:22] Now this is the thing like on your income tax form you check a box if you want to donate to the presidential public funding?

**Bob Biersack:** [00:12:30] Exactly right. Yes. So up to three dollars of the taxes that you already paid. It's not in addition to your taxes would go into this fund. And it could be used to make these payments.

**Virginia Prescott:** [00:12:40] Candidates recognized they can raise a lot more money without that and then they won't have any restrictions at all.

**Bob Biersack:** [00:12:48] That's right. The grants everyone thought were pretty big. The last ones that were used effectively I think in 2004 and even 2008 for for John McCain were 80 million dollars, and 80 million dollars between September 1st and the first Tuesday in November when the election happens sounds like a lot of money. Everybody thought it was.

[00:13:09] If you had told me when I was at the commission that Barack Obama was going to raise seven hundred million dollars in limited contributions from individual people I would have said you were nuts. But he did. And that pretty much changed the process forever. No one was going to take the chance of staying within the public funding system when someone could outspend them that much.

**Virginia Prescott:** [00:13:33] So in some ways since the Citizens United decision I think that's what you're referring to, you know the court case that opened up a shift in campaign finance limits and regulations, so the FEC in effect has less to do now.

**Bob Biersack:** [00:13:49] They certainly have less influence over the process so much of what happens in federal elections now happens in social welfare organizations these tax advantaged groups that have sprung up in or existed before who are now much more overtly involved in campaigns. The fact that corporations or anyone else any other kind of institution can spend money freely as long as it's independent of the candidates and parties has really fundamentally changed the process it's diminished the impact of those kinds of restrictions and limitations on contributions and things like that that still exist and they're still true directly for the candidates or the political parties. But they're much less important because of these outside groups. And to me it puts a much bigger onus on and impact on the simple disclosure itself. And that also becomes more problematic. Some of these groups are at least arguing that they're outside the bounds of disclosing their donors for example. So a lot of the activity that happens now even in presidential campaigns or congressional races is spending where the group that makes the expenditure might be disclosed but where the money actually came from is harder to know.