ELIMINATING THE FEC: THE BEST HOPE FOR CAMPAIGN FINANCE REGULATION?

The Federal Election Commission has an unenviable task. It regulates the financing of federal elections, pursuant to authority[1] delegated by the very officials whose reelections depend in part on how the FEC regulates. Members of Congress control the FEC's budget, structure, and scope of authority, and can help or hinder its work as they see fit.

In recent years, the FEC has come under increasingly harsh criticism for a perceived inability to monitor and to protect the nation's campaign finance system.[2] Some of the agency's most vocal detractors have been FEC Commissioners themselves. Former Commissioner Ann Ravel has, on multiple occasions, accused her Republican colleagues in print of refusing to enforce violations or to apply sufficient penalties to deter bad behavior.[3] Former Commissioner Trevor Potter has taken similar stances.[4] Commissioner Ellen Weintraub wrote an op-ed attacking former Commissioner Don McGahn, quoting him as saying, "I'm not enforcing the law as Congress passed it."[5] Republican commissioners have defended themselves against these claims of partisanship and said that the agency functions properly,[6] but ideological disagreement among commissioners seems to have turned personal, even leading, famously, to conflict over "whether to serve bagels or doughnuts" at a celebration of the FEC's fortieth anniversary in 2015.[7]

---

[1] 52 U.S.C. §§ 30106–30109 (Supp. 2016), among other provisions.

[2] *See, e.g.*, Editorial, *The Feckless F.E.C., Rebuked*, N.Y. TIMES (Sept. 23, 2016), https://nyti.ms/2pxe862 [https://perma.cc/RKF3-6FB8] ("[M]ost campaign professionals treat the F.E.C. as an impotent joke . . . ."); sources cited *infra* notes 3–5, 7.

[3] Ann M. Ravel, Opinion, *Dysfunction and Deadlock at the Federal Election Commission*, N.Y. TIMES (Feb. 20, 2017) [hereinafter Ravel, *Dysfunction*], https://nyti.ms/2lZRV1P [https://perma.cc/A6PZ-V78F]; Ann M. Ravel, Opinion, *How Not to Enforce Campaign Laws*, N.Y. TIMES (Apr. 2, 2014), https://nyti.ms/2moet2y [https://perma.cc/CQS7-TFTT]; *see also* OFFICE OF COMM'R ANN M. RAVEL, FEC, DYSFUNCTION AND DEADLOCK: THE ENFORCEMENT CRISIS AT THE FEDERAL ELECTION COMMISSION REVEALS THE UNLIKELIHOOD OF DRAINING THE SWAMP (2017) [hereinafter RAVEL, ENFORCEMENT CRISIS], https://www.fec.gov/resources/about-fec/commissioners/ravel/statements/ravelreport_feb2017.pdf [https://perma.cc/8RVE-4MNN]; Ann M. Ravel, *The Work and Responsibilities of the Federal Election Commission*, *in* AMERICA VOTES! 3 (Benjamin E. Griffith ed., 2016) [hereinafter Ravel, *Work and Responsibilities*].

[4] *See, e.g.*, Trevor Potter, *Money, Politics, and the Crippling of the FEC: A Symposium on the Federal Election Commission's Arguable Inability to Effectively Regulate Money in American Elections*, 69 ADMIN. L. REV. 447 (2017).

[5] Ellen L. Weintraub, Opinion, *Trump's Pick for White House Counsel Is Wrong for the Job*, WASH. POST (Dec. 9, 2016), http://wapo.st/2htVaIG [https://perma.cc/XG3G-E3K8].

[6] Lee Goodman, *The FEC's Problems Aren't with the GOP*, POLITICO MAG. (May 10, 2015), http://www.politico.com/magazine/story/2015/05/the-fecs-problems-arent-with-the-gop-117798 [https://perma.cc/7NJ9-CRSM].

[7] Eric Lichtblau, *F.E.C. Can't Curb 2016 Election Abuse, Commission Chief Says*, N.Y. TIMES (May 2, 2015), https://nyti.ms/2ljx4mI [https://perma.cc/YY3M-XTN6].

A dysfunctional FEC has implications beyond the breakfast table. The Commission is empowered primarily to conduct administrative rulemaking relating to campaign finance, to issue advisory opinions, and to enforce campaign finance laws.[8] It also administers and coordinates required campaign finance disclosures.[9] The FEC performs adequately in carrying out existing, fairly basic disclosure requirements,[10] but often fails to reach the consensus required for it to pursue an enforcement action or to undertake administrative rulemaking to update disclosure requirements.[11] When it fails to make rules, campaign finance regulations become out of date — unable to keep up with new technologies[12] or shifting Supreme Court precedent. When it fails to enforce the campaign finance laws already on the books, they weaken through desuetude as violations go unpunished and the law bends to accommodate more aggressive practices.[13] These are serious oversights in an election system increasingly awash in untraceable spending.[14]

American political parties are further apart than ever before.[15] The bipartisan FEC's inability to reach consensus is, no doubt, due in part to this context, but structural criticisms of and proposed solutions for

---

[8] 52 U.S.C. §§ 30107(a)(6)–(8), 30109 (2016 Supp.).

[9] *See id.* § 30104.

[10] BROOKS JACKSON, BROKEN PROMISE 1 (1990).

[11] *See generally, e.g.*, Potter, *supra* note 4.

[12] *See, e.g.*, Checks and Balances for Economic Growth, MUR 6729 (FEC Oct. 24, 2014) (statement of Vice Chair Ann M. Ravel), http://eqs.fec.gov/eqsdocsMUR/14044363872.pdf [https://perma.cc/7NK9-7GUU] (urging the Commission to take seriously the role of online political advertising). Despite a lack of consensus on the Commission, some limited progress was made on this issue in late 2017. *See* Rick Hasen, *"Facebook Political Ads Get Bare-Bones Guidance from FEC,"* ELECTION L. BLOG (Dec. 14, 2017, 8:06 PM), http://electionlawblog.org/?p=96443 [https://perma.cc/2G3U-HHKV].

[13] *See* Potter, *supra* note 4, at 460 ("Because it is now broadly understood that the FEC will likely split 3–3 . . . super PACs bend the few rules that do exist with little fear of recourse.").

[14] *Citizens United v. FEC*, 558 U.S. 310 (2010), did not lead to the vast increase in direct spending by corporations that many feared. *See* Robert Yablon, *Campaign Finance Reform Without Law*, 103 IOWA L. REV. 185, 210–14 (2017). Soon thereafter, though, *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010), enabled "super-PACs" and ostensibly charitable "social welfare organizations" to engage in nearly unlimited and largely untraceable election advocacy. Michael S. Kang, *The End of Campaign Finance Law*, 98 VA. L. REV. 1, 34 (2012); *id.* at 33–35. Money played less of a role in the 2016 presidential election than expected, *see* Isaac Arnsdorf, *Trump Won with Half as Much Money as Clinton Raised*, POLITICO (Dec. 8, 2016, 11:53 PM), http://politi.co/2h3goA2 [https://perma.cc/VH8X-BRDA], but mega-donors still poured vast sums into down-ballot races. JANE MAYER, DARK MONEY, at xvi–xvii (Anchor Books 2017) (2016); *see* WESLEYAN MEDIA PROJECT, CLINTON CRUSHES TRUMP 3:1 IN AIR WAR 22–23 (2016), http://mediaproject.wesleyan.edu/wp-content/uploads/2016/11/2016Release7_FINAL.pdf [https://perma.cc/B9JA-7WLH].

[15] *See, e.g.*, PEW RESEARCH CTR., THE PARTISAN DIVIDE ON POLITICAL VALUES GROWS EVEN WIDER 7–13 (2017), http://www.people-press.org/2017/10/05/the-partisan-divide-on-political-values-grows-even-wider/ [https://perma.cc/YLB2-TPTL]. For a more historical perspective, see THOMAS E. MANN & NORMAN J. ORNSTEIN, IT'S EVEN WORSE THAN IT LOOKS 43–58 (paperback ed. 2016).

the agency have been around since the 1970s.[16] Many recent criticisms of the FEC point to the same flaws identified decades ago: agency capture, enforcement failure, deadlocked commission votes, and partisan loyalty.[17] These have only been exacerbated by increased partisanship.[18] Writing in 1988, Professor Robert Mutch was able to survey significant criticisms of the FEC, but could report that on the Commission "[i]deological conflict [was] rare," and that disagreements between commissioners were typically over interpretive questions and not partisan loyalties.[19] Today, by comparison, the agency itself has identified serious morale problems, including a "[t]one and attitude" among commissioners that was "perceived as poor."[20] The partisan climate and the absence of an obvious standard for analyzing agency inaction make it difficult to judge impartially who is most to blame for today's increase in hostility,[21] but, regardless, the agency is not functioning well.

Though it is an "independent agency," the FEC is hardly independent from congressional influence, and Congress has shown minimal interest, for forty years, in bolstering the agency's ability to regulate campaign finance. It does not fulfill the role that politicians claimed it would when it was created. By failing to do its job, it exacts a high opportunity cost, occupying a space in the regulatory landscape that could be filled by more motivated and functional actors and serving as an exonerating

---

[16] *See, e.g.*, H.R. REP. NO. 93-1239, at 115–60 (1974) (reporting minority views of legislation creating the FEC from the Committee on House Administration); *id.* at 131 ("Clearly, the Congress has a strangle-hold on enforcement and supervision of its own elections. Not only is the fox in charge of the chicken coop, he is living in the farm house and managing the farm."); Statement on Signing the Federal Election Campaign Act Amendments of 1976, 2 PUB. PAPERS 1529, 1530 (May 11, 1976) ("[T]hese amendments jeopardize the independence of the [FEC] . . . .").

[17] *See, e.g.*, JACKSON, *supra* note 10; ROBERT E. MUTCH, CAMPAIGNS, CONGRESS, AND COURTS 83–117 (1988); Amanda S. La Forge, Comment, *The Toothless Tiger — Structural, Political and Legal Barriers to Effective FEC Enforcement: An Overview and Recommendations*, 10 ADMIN. L.J. AM. U. 351 (1996); Colloquy, *Federal Election Commission Panel Discussion: Problems and Possibilities*, 8 ADMIN. L.J. AM. U. 223 (1994).

[18] A 2009 empirical analysis of FEC activity by Professor Michael Franz found "an FEC more functional than many often claim." Michael M. Franz, *The Devil We Know? Evaluating the Federal Election Commission as Enforcer*, 8 ELECTION L.J. 167, 185 (2009). If the agency was moderately successful in prior decades, despite its flaws, this increases the likelihood that increased partisanship has played a role in the past decade's breakdown. *See* PEW RESEARCH CTR., *supra* note 15, at 7–13 (reporting continued increases in partisanship since 2009).

[19] MUTCH, *supra* note 17, at 104; *id.* at 103–04.

[20] OFFICE OF INSPECTOR GENERAL, FEC, INSPECTOR GENERAL STATEMENT ON THE FEDERAL ELECTION COMMISSION'S MANAGEMENT AND PERFORMANCE CHALLENGES — 2016, at 2 (2016), https://transition.fec.gov/fecig/documents/IGStatementonFECManagementandPerformanceChallenges-2016-Final.pdf [https://perma.cc/E8DC-4GD9].

[21] *See* R. SAM GARRETT, CONG. RESEARCH SERV., R44318, THE FEDERAL ELECTION COMMISSION: OVERVIEW AND SELECTED ISSUES FOR CONGRESS 13 (2015) [hereinafter GARRETT, OVERVIEW]; R. SAM GARRETT, CONG. RESEARCH SERV., R44319, THE FEDERAL ELECTION COMMISSION: ENFORCEMENT PROCESS AND SELECTED ISSUES FOR CONGRESS 10 n.45 (2015) (collecting attempts at analyzing deadlock data that "vary based on methodology, time period, and the types of votes studied," *id.* at 10).

idol for opponents of reform, who can argue that a lack of action demonstrates that all is well in our campaign finance system.

All is not well, and reformers would be better off giving up on the FEC. Others have argued for eliminating the FEC on the ground that political spending should be less regulated.[22] This Note argues instead that eliminating the FEC may be the best way to save such regulation. After describing the agency's original mission and design in Part I, and explaining how that mission has failed in Part II, this Note suggests that eliminating the agency might be the best way to achieve its ostensible goals. Potter has claimed that "[t]he FEC . . . is too important to our democracy to let wither away."[23] This Note agrees that the FEC's work is important, and that the agency should not be left to wither, but recommends instead that it be ripped out at the root.

I. CREATION OF THE FEC

A. Mission

The original version of the Federal Election Campaign Act[24] (FECA), passed in 1971, was Congress's first attempt at giving real teeth to campaign finance regulation.[25] The original Senate version of FECA would have established an FEC significantly more insulated from congressional influence, but it was watered down in the House by influential opponents of thorough reform including, especially, Representative Wayne Hays, "the House Democrats' chief fund-raiser."[26] Hays's version of FECA, which tasked three "supervisory" legislative officers with administering campaign disclosures, was an improvement over the even-less-potent prior regime, but it too proved ineffectual, plagued by recalcitrant legislative officials and by executive laxity in following up on potential enforcement actions referred by the three officers.[27]

Signing FECA, President Nixon had claimed that it would "guard against campaign abuses and . . . build public confidence in the integrity of the electoral process."[28] By 1974, disclosures about his own campaign finance violations and, more famously, a hotel break-in, had shattered

---

[22] *See, e.g.*, MARY MEEHAN, CATO INSTITUTE POLICY ANALYSIS NO. 42: THE FEDERAL ELECTION COMMISSION: A CASE FOR ABOLITION (1984), https://object.cato.org/sites/cato.org/files/pubs/pdf/pa042.pdf [https://perma.cc/DD2A-DUY9].

[23] Potter, *supra* note 4, at 466.

[24] Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972) (codified as amended in scattered sections of 26 and 52 U.S.C.).

[25] MUTCH, *supra* note 17, at 83–84.

[26] JACKSON, *supra* note 10, at 23; MUTCH, *supra* note 17, at 83–84.

[27] MUTCH, *supra* note 17, at 83–86.

[28] Statement on Signing the Federal Election Campaign Act of 1971, PUB. PAPERS 165, 165 (Feb. 7, 1972). On the irony of this statement, see generally, for example, RICK PERLSTEIN, NIXONLAND 635–39 (1st paperback ed. 2009).

what remained of that public confidence and reinvigorated reform efforts.[29] The Senate Select Committee tasked with investigating the 1972 Nixon campaign saw the creation of an FEC as "[p]robably the most significant reform that could emerge from the Watergate scandal."[30] The Committee endorsed a then-pending bill which would have created a commission with "substantial investigatory and enforcement powers," which, it was expected, would "insure that misconduct would be prevented in the future, [and] that investigations . . . would be vigorous and conducted with the confidence of the public."[31]

Congress soon created what was meant to be such an agency, the FEC, by passing the Federal Election Campaign Act Amendments of 1974.[32] Already, though, the FEC was not quite what the Select Committee had recommended. The Senate version of the 1974 FECA Amendments, which the Committee had endorsed, provided for seven voting members nominated by the President; but the House passed an amended version with only four, all nominated by Congressional leadership.[33] The final bill settled on six, with a variety of nominators.[34]

The bill's conference committee did not explain how it settled on this clear step away from an independent FEC.[35] President Ford's signing statement echoed the Select Committee's optimistic rhetoric, stating that the FEC would "see that the provisions of the act [were] followed."[36] Those provisions established contribution and spending limits, provided for public financing, set reporting and disclosure requirements, and "outlaw[ed] campaign dirty tricks."[37] Signing the bill, the President teased Hays about his role in crafting it.[38] But Hays had treated the 1974 amendments no better than he treated the original 1971 FECA.[39] His jocular presence at the signing ceremony was, perhaps, a bad sign.

---

[29] *See* MUTCH, *supra* note 17, at 86–87; *see also* Bernard Gwertzman, *G.A.O. Report Asks Justice Inquiry into G.O.P. Funds*, N.Y. TIMES (Aug. 27, 1972), https://nyti.ms/2xP2xUl [https://perma.cc/LA8Z-MLQZ] (detailing the violations).

[30] S. REP. NO. 93-981, at 564 (1974).

[31] *Id.*; *id.* at 564–65. The Committee also proposed limits on expenditures and contributions, *id.* at 567–68, 569–71, among other reforms. *Id.* at 567–77.

[32] Pub. L. No. 93-443, 88 Stat. 1263 (codified as amended in scattered sections of the U.S. Code), *invalidated in part by* Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam).

[33] *See* H.R. REP. NO. 93-1438, at 309–11 (1974) (Conf. Rep.).

[34] Sec. 208(a), § 310(a)(1), 88 Stat. at 1280–81, *invalidated by Buckley*, 424 U.S. 1.

[35] *See* H.R. REP. NO. 93-1438, at 311.

[36] Statement on the Federal Election Campaign Act Amendments of 1974, 2 PUB. PAPERS 303, 303 (Oct. 15, 1974).

[37] *Id.*

[38] Remarks on Signing the Federal Election Campaign Act Amendments of 1974, 2 PUB. PAPERS 302 (Oct. 15, 1974) (noting laughter after President Ford's reference to "hard working members of [Congress]" and aside, "I guess you were part of that, weren't you, Wayne").

[39] Nathan J. Muller, *Reflections on the Election Commission: An Interview with Neil O. Staebler*, REGULATION, March/April 1979, at 33, 34 ("[Hays] was against the act to begin with . . . .").

B. Powers and Structure

The original design of the FEC reflected the success of Hays's efforts to limit the Commission's independence from Congress.[40] The Senate version of the Amendments would have given the President control over appointments.[41] In the House, Hays successfully pushed for revisions that gave Congress control over nominations.[42] The appointments power would be shared: six commissioners would be appointed, two each by the President, the President Pro Tempore of the Senate, and the Speaker of the House.[43] For-cause removal protection for commissioners was not explicitly provided,[44] but such protection is so central to most conceptions of agency independence that courts have assumed it is included in the design of the FEC and other independent agencies.[45]

As the House redesigned the FEC away from presidential control, it tightened the agency's ties to the legislature.[46] This appointments scheme would soon be upended by the Supreme Court in *Buckley v. Valeo*,[47] but for the moment each commissioner would need the approval of a majority of both the House and the Senate, and a nominator could not put forward two members of the same political party.[48] The Secretary of the Senate and Clerk of the House of Representatives would also serve on the Commission, as nonvoting members.[49] After the formative nominations, appointments would be staggered such that each nominator would make one appointment every three years.[50] Commissioners were not required to have any particular qualifications or expertise, but

---

[40] *See* MUTCH, *supra* note 17, at 87–88.

[41] H.R. REP. NO. 93-1438, at 309–10 (1974) (Conf. Rep.).

[42] *See* 120 CONG. REC. 27,507 (1974) (statement of Rep. Broyhill) (crediting Hays with helping to craft the House version of the appointments structure); MUTCH, *supra* note 17, at 87.

[43] Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, sec. 208(a), § 310(a)(1), 88 Stat. 1263, 1280–81, *invalidated by* Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam).

[44] Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769, 786 tbl.1 (2013).

[45] *See, e.g.*, FEC v. NRA Political Victory Fund, 6 F.3d 821, 826 (D.C. Cir. 1993) (holding "the Commission is likely correct" that FEC commissioners are removable only for cause), *cert. dismissed*, 513 U.S. 88 (1994); MFS Sec. Corp. v. SEC, 380 F.3d 611, 619 (2d. Cir. 2004) (holding that for-cause removal protections are "commonly understood" to exist for SEC commissioners, despite a lack of explicit statutory protection (quoting SEC v. Blinder, Robinson & Co., 855 F.2d 677, 681 (10th Cir. 1988))). In *Free Enterprise Fund v. Public Co. Accounting Oversight Board*, 561 U.S. 477 (2010), the Supreme Court was willing to assume that SEC commissioners enjoyed for-cause removal protection. *Id.* at 487. Others have argued that reading protection into statutes from which it is absent is a mistake. *See* Datla & Revesz, *supra* note 44, at 833–35 (2013); Note, *The SEC Is Not an Independent Agency*, 126 HARV. L. REV. 781 (2013).

[46] Limiting the President's influence over an agency can yield either closer congressional control or greater insulation and independence from political forces in general. *See* Brian D. Feinstein, *Designing Executive Agencies for Congressional Influence*, 69 ADMIN. L. REV. 259, 273–75 (2017).

[47] 424 U.S. 1 (1976); *see infra* pp. 1428–29.

[48] Sec. 208(a), § 310(a)(1), 88 Stat. at 1280–81.

[49] *Id.*, 88 Stat. at 1280, *invalidated by NRA Political Victory Fund*, 6 F.3d 821.

[50] *Id.* § 310(a)(2), 88 Stat. at 1281.

instead were "[to] be chosen on the basis of their maturity, experience, integrity, impartiality, and good judgment."[51]

The FEC's powers and ability to exercise those powers also reflected, from the outset, Congress's hesitancy to create a powerful regulator. The FEC was given the power to investigate campaign finance violations, to pursue or defend civil actions, to issue advisory opinions, to conduct rulemaking in accordance with the Administrative Procedure Act, and to shape relevant general policies.[52] Enforcement powers were relatively robust, at least compared to their later form,[53] while rulemaking was subject to a veto by either house of Congress.[54] The choice to allow policymaking by these methods rather than through adjudication may itself have been a means of limiting the FEC's ability to pursue violators. Informal rulemaking explicitly requires input from interested parties through the review of and response to comments, while outside contacts are prohibited in adjudication.[55] Rulemaking is forward-looking, effective for formulating policies and for guiding future actors, but less effective for policing past action and remedying past wrongs.[56]

II. PROBLEMS

In 1975, around the time that the FEC was created, Professor Richard B. Stewart described an ongoing "Reformation of American Administrative Law" in which Congress shifted from "restricting administrative actions to those authorized by legislative directives" to, instead, an "interest representation model."[57] Under this model, rather than hope for purely objective agencies, Congress tried to facilitate "the full and fair participation" of "an array of interest groups" in agency decisionmaking, in the hopes that they would check administrative discretion.[58] The thinking behind this model, which waned in popularity around 1980,[59] is seen in the design of the FEC, which, especially in its

---

[51] *Id.* § 310(a)(3), 88 Stat. at 1281. Additionally, they could not be elected or appointed federal officials when appointed to the FEC. *Id.*

[52] *Id.* § 311(a)(1)–(11), 88 Stat. at 1282–83 (codified as amended at 52 U.S.C. § 30107(a)(1)–(9)).

[53] *See infra* pp. 1429, 1432–34.

[54] Sec. 209(b)(2), 88 Stat. 1287–88, *invalidated by* INS v. Chadha, 462 U.S. 919 (1983). Hays wanted even more control and attempted, at one point, "to change specific regulations" on his own, without going through the full legislature. Muller, *supra* note 39, at 34.

[55] *See* 5 U.S.C. § 553(c) (2012); *id.* § 554(d)(1).

[56] *See* STEPHEN G. BREYER ET AL., ADMINISTRATIVE LAW AND REGULATORY POLICY 525–28 (7th ed. 2011) (describing an agency's choice of policymaking procedures). The power to issue advisory opinions is similarly forward-looking as it allows the FEC to designate a potential action at the margins of campaign finance law as legal or illegal.

[57] Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1669 (1975); *see also* Merrick B. Garland, *Deregulation and Judicial Review*, 98 HARV. L. REV. 505, 510–12, 581–86 (1985).

[58] *See* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2253 (2001).

[59] *See id.* at 2253–54.

original structure, served as a microcosm of the overall political landscape. While interest representation might work as a means of arriving at policy compromise between groups with opposing stakes in regulation, it is uniquely ineffective as a method of regulating politics.

In good interest representation–model fashion, Congress designed an agency that, rather than authorizing independent experts to set policy, gave regulated parties a say in decisionmaking. For the FEC, though, the regulated parties were competitors in federal elections — the senators and representatives themselves. Even those who felt serious reforms were needed after Watergate thus had at least some vested interest in a weak FEC. Interest representation works best when opposing interest groups are interested primarily in having the outputs of agency decisionmaking be as favorable as possible to their own interests.[60] But this only works if the agency is committed to doing *something*. When a represented interest group stands to gain from regulatory inaction, and when that group can push the agency toward inaction, the agency's mission is likely to be undermined.[61] Such would be the case for the FEC.

The FEC was created out of heightened public engagement with good-government reforms,[62] but it has never been a neutral arbiter of campaign finance. The FEC has been unable to deliver on the promise of post-Watergate reforms, due in part to external setbacks and congressional influence and in part to structural obstacles which have stymied effective regulation and have grown harder to overcome as partisanship has increased. Neither the agency nor Congress seems capable of responding to popular will. This Part discusses what has gone wrong.

A. External Challenges

1. Trouble in the Courts. — In 1976, *Buckley v. Valeo* partially invalidated the FEC's complex appointments scheme. The Court held that FEC commissioners, if they were to exercise the powers granted to them under FECA, must be either "Officers of the United States" or "inferior officers."[63] In either event, it was unconstitutional for FECA to allow these officers to be nominated by anyone other than the President and to require their confirmation by the House; commissioners

---

[60] *See id.* at 2359 ("[I]nterest representation . . . establishes the structure and conditions for potentially affected parties to strike bargains . . . .").

[61] *See id.* at 2264 (presenting the "classic view" that an outside force "positioned both to receive feedback about the administration and to exert pressure on it" is an effective means of avoiding administrative torpor).

[62] *See* Lauren Eber, Note, *Waiting for Watergate: The Long Road to FEC Reform*, 79 S. CAL. L. REV. 1155 (2006) (arguing that Watergate led to the FEC because it "demonstrated three necessary elements for propelling a low visibility issue like adequate enforcement of campaign finance laws to the top of the policy agenda:" public focus, media attention, and advocacy, *id.* at 1159).

[63] Buckley v. Valeo, 424 U.S. 1, 125–26 (1976) (per curiam) (quoting and citing the Appointments Clause, U.S. CONST. art. II, § 2, cl. 2).

appointed subject to these provisions could no longer exercise the powers of the FEC.[64] Despite some initial uncertainty about whether the FEC would be retained in the wake of *Buckley*,[65] Congress passed another round of amendments,[66] now providing that the six voting members would be nominated by the President and subject to approval only by the Senate.[67] The bipartisan membership requirement was revised to dictate that no more than three commissioners could be from the same party.[68] The decrease in legislative control of appointments placed the FEC on a somewhat longer leash from members of the legislature, like Hays, who preferred a tightly controlled agency, but — to the extent that the FEC was a response to presidential malfeasance[69] — the *Buckley*-prompted switch to presidential control of nominations was an early and prominent departure from the agency's proclaimed goals.

Buckley also marked the beginning of a line of cases that placed constitutional limitations on the ability of the FEC to regulate political speech, or that otherwise made the FEC's job harder to carry out.[70] While *Buckley* upheld contribution limits, disclosure requirements, and public financing,[71] it struck limits on expenditures as violative of the First Amendment.[72] In the 1990s, the FEC suffered an additional setback in the Supreme Court in *FEC v. NRA Political Victory Fund*,[73] where the Court dismissed a petition for certiorari filed by the FEC on the grounds that the agency generally lacked independent authority to petition the Supreme Court for review without the Department of Justice's assent.[74] The ruling would hamper the ability of even an active FEC to pursue a boundary-pushing enforcement action that might re-

---

[64] *See id.* at 125–26, 140–41.

[65] Stephen Isaacs, *End Seen Near for Commission*, WASH. POST, Jan. 31, 1976, at A1, A4 (noting general uncertainty about the future of the commission); *see also id.* at A1 ("[T]he key man in the House who could save the commission, [Hays], said yesterday that he intends to abolish it.").

[66] Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, 90 Stat. 475 (codified as amended in scattered sections of 52 U.S.C. (Supp. 2016)).

[67] § 101(a)(1), 90 Stat. at 475 (codified as amended at 52 U.S.C. § 30106(a)(1)). The nonvoting members survived *Buckley* and were retained, *id.*, but would later be ruled unconstitutional. FEC v. NRA Political Victory Fund, 6 F.3d 821 (D.C. Cir. 1993), *cert. dismissed* 513 U.S. 88 (1994).

[68] § 101(a)(2), 90 Stat. at 475.

[69] *Cf., e.g.*, 120 CONG. REC. 27,508 (1974) (statement of Rep. Drinan) ("[A]s the scandal-ridden Nixon Presidency reaches its anguished conclusion, the job of this Congress to restore the integrity of our political system has only just begun.").

[70] One notable exception to this trend was *INS v. Chadha*, 462 U.S. 919 (1983), in which the Court declared the legislative veto of agency action to be unconstitutional, *id.* at 959.

[71] Buckley v. Valeo, 424 U.S. 1, 23–38 (1976) (per curiam) (contribution limits); *id.* at 60–84 (disclosure); *id.* at 85–109 (public financing).

[72] *Id.* at 39–59.

[73] 513 U.S. 88 (1994).

[74] *See id.* at 99. The FEC may still petition for review in tax cases, thanks to more specific statutory language establishing its litigating authority there. *See id.* at 93–94.

quire Supreme Court approval. The following decade began promisingly, as the Bipartisan Campaign Reform Act of 2002[75] (BCRA) limited outside contributions, and received a favorable ruling from the Court in *McConnell v. FEC*.[76] In 2007, though, the Court effectively invalidated some of BCRA's prohibitions on electioneering communications.[77] Then, finally, in 2010's *Citizens United v. FEC*,[78] the Justices ruled in favor of a First Amendment right for corporations to engage in political speech[79] and, in doing so, created a highly salient flash point for campaign finance reform advocacy.[80]

Constitutional constraints are not, of course, issues of agency design, but an agency with a mission that is likely to run up against such constraints needs to be able to adapt its policies in light of adverse court rulings if it is to act successfully within constitutional bounds. For reasons that will be described below,[81] the FEC has not been able to do this. The string of adverse rulings thus exacerbated some of the problems caused by underlying design choices.

2. Conflict with Congress. — From the start, the FEC faced congressional backlash when legislators felt threatened by the agency's action. In the FEC's first year, Congress vetoed two regulations put forward by the agency — one that would have required reporting legislators' "constituent service funds" or "slush funds," and another that would have required that disclosure reports be sent directly to the FEC rather than be processed through congressional leadership.[82] In opposing the slush fund rule, one co-sponsor of the 1974 FECA Amendments explained Congress's sharp reversal on the FEC: "[N]obody understood what was in [the 1974 FECA Amendments]. But at that time we were running like scared rats for some reason."[83] Hays was similarly dismissive of the Commission as he orchestrated the second veto, making aggressive legislative maneuvers to deny the FEC an opportunity to

---

[75] Pub. L. No. 107-155, 116 Stat. 81 (codified as amended in 36 U.S.C. § 510 (2012) and scattered sections of 52 U.S.C. (Supp. 2016)), *invalidated in part by* FEC v. Wis. Right to Life, Inc., 551 U.S. 449 (2007).

[76] 540 U.S. 93 (2003).

[77] *Wis. Right to Life, Inc.*, 551 U.S. at 481.

[78] 558 U.S. 310 (2010).

[79] *Id.* at 319.

[80] *See, e.g.*, Dan Eggen, *Poll: Large Majority Opposes Supreme Court's Decision on Campaign Financing*, WASH. POST (Feb. 17, 2010, 4:38 PM), http://www.washingtonpost.com/wp-dyn/content/article/2010/02/17/AR2010021701151.html [https://perma.cc/AV2P-YJVG].

[81] *See infra* sections II.B.1–2, pp. 1431–35 (identifying structural challenges).

[82] MUTCH, *supra* note 17, at 89; *see id.* at 88–89.

[83] David S. Broder, Opinion, *Post-Watergate Reform Law Is Questioned*, PHILA. INQUIRER, Oct. 20, 1975, at 9-A (calling these comments "an epitaph for the spash [sic] of post-Watergate morality that produced [FECA]").

make its case at a hearing.[84] A program of random audits met with equal hostility — it was quickly defunded, and then banned altogether.[85] In 1981, less than a decade after Watergate, deregulation-minded Senate Republicans mounted a serious, though ultimately unsuccessful effort to eliminate the agency, or at least to seriously tighten the reins on its budget.[86]

The agency internalized the lessons of these early reprimands, and commissioners learned to be conciliatory toward Congress. Former staff members recalled the FEC giving up its staff of investigators in the late 1970s: "They made the commissioners very nervous," said one.[87] "They did not want investigators accumulating evidence that might harm political allies," said another.[88] Potter was warned in the early 1990s to "remember random audits" when considering agency action.[89] He connects the agency's "reticence toward taking on powerful political players" with the increasing fecklessness of the agency.[90]

B. Structural Challenges

In drafting and amending FECA, Congress made choices that may not have resulted in an agency ideally designed for its mission. These choices, as much as external setbacks, have complicated the agency's work.

1. Four-Vote Threshold. — Perhaps the most frequently cited reason that the FEC was doomed to failure from the start is the fact that it has an even number of members — typically three from each party.[91] This facilitates the Commission's often-criticized 3–3 deadlocks and creates an institutional bias in favor of inaction. Since a four-member majority is required for the Commission to perform most significant actions,[92] a three-member bloc is enough to prevent action.

Across agencies, bipartisan membership requirements do appear to effectively limit Presidents' ability to bring agencies in line with their

---

[84] *See* Warren Weaver Jr., *Wayne Hays Today Will Again Tackle Election Board on Rule*, N.Y. TIMES (Oct. 20, 1975), https://nyti.ms/2xTeM27 [https://perma.cc/N4PX-6QGS].

[85] *See* MUTCH, *supra* note 17, at 96–99.

[86] *See id.* at 91–92.

[87] JACKSON, *supra* note 10, at 7–8 (quoting an interview by the author).

[88] *Id.* at 9 (quoting an interview by the author).

[89] Potter, *supra* note 4, at 454; *see id.* at 448.

[90] *Id.* at 455.

[91] *See, e.g.*, GARRETT, OVERVIEW, *supra* note 21, at 8, 11; Editorial, *supra* note 2. *But see* Goodman, *supra* note 6 (endorsing 3–3 splits as a "prudential" design feature).

[92] *See* 52 U.S.C. § 30106(c) (Supp. 2016) (requiring "the affirmative vote of 4 members of the Commission" for actions taken under 52 U.S.C. § 30107(a)(6)–(9) or I.R.C. chs. 95–96 (2012)); 52 U.S.C. § 30107(a)(6)–(9) (establishing FEC powers under FECA with regard to civil actions, advisory opinions, rulemaking, and investigations); I.R.C. chs. 95–96 (establishing FEC powers under the Internal Revenue Code).

ideological and policy preferences.[93] But separation from the President does not entail independence from party-focused thinking.[94] FECA's vague instructions on commissioner selection[95] do not provide a firm enough standard to prevent the nominations of commissioners "who are both partisan and closely tied to congressional party leaders."[96]

Congress's decision, in the 1976 post-*Buckley* amendments, to require "the affirmative vote of [four] members" for all rulemaking, enforcement, and even advisory opinions[97] has made it much easier for commissioners to end an action than to take one, though internal agency design choices contribute to this bias toward inaction as well.[98] Considering the four-vote threshold alongside the bipartisan membership requirement, the opportunity for partisan obstruction becomes obvious — only three members may come from the same political party, but committed partisans would need only three seats to shield their party from FEC action. When a bloc of three commissioners prevents action, a reviewing court will treat those voting against action as the "controlling group" whose reasoning represents that of the agency, even though just as many commissioners reasoned differently.[99]

Commissioner Lee Goodman has asserted that "[i]n setting up a six-member body, Congress fully contemplated" the possibility of tie votes, and that these are "not a flaw of the agency but rather one of its most prudential features,"[100] but the legislative intent behind the choice to have an even number of members is difficult to determine. At least in the recorded legislative history, discussions about membership largely

---

93 *See* Daniel E. Ho, Congressional Agency Control: The Impact of Statutory Partisan Requirements on Regulation (Feb. 12, 2007) (unpublished manuscript), http://law.bepress.com/cgi/viewcontent.cgi?article=2219&context=alea [https://perma.cc/5SFY-TAUS] (finding "solid empirical evidence that partisan requirements do in fact constrain" Presidents, *id.* at 35).

94 *See* Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2364 (2006) ("[P]arty more than branch competition structures the administrative state . . . .").

95 *See supra* p. 1427.

96 MUTCH, *supra* note 17, at 105; *id.* at 104–06 (describing FEC confirmation battles of the late 1970s and the 1980s).

97 Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, § 101(c)(3), 90 Stat. 475, 476 (codified as amended at 52 U.S.C. § 30106(c)); *see also* 52 U.S.C. § 30107(a)(6)–(9) (establishing certain FEC powers under FECA).

98 *See* MAURICE C. SHEPPARD, THE FEDERAL ELECTION COMMISSION 64–71 (2007) (noting "a number of points . . . at which . . . staff and appointees may slowdown or end an investigation," *id.* at 71); *see also* Jennifer Nou, *Intra-Agency Coordination*, 129 HARV. L. REV. 421, 422 (2015).

99 FEC v. Nat'l Republican Senatorial Comm., 966 F.2d 1471, 1476 (D.C. Cir. 1992). Litigation is ongoing over whether the views of the controlling "no" votes are entitled to *Chevron* deference, as some courts have held. *See* Plaintiffs' Reply Memorandum in Support of Their Motion for Summary Judgment at 2–9, Pub. Citizen v. FEC, No. 14-cv-00148 (D.D.C. Mar. 9, 2016), 2016 WL 1446252.

100 Goodman, *supra* note 6.

ignored the question of whether to have an even or odd number of voting members, instead focusing on how the structure of nominators could guarantee commissioners' independence.[101] The membership of the Commission was not seen as a major issue in the legislative debate over the amendments.[102] The addition of the four-vote threshold in 1976 may also signify that the Congress that created the FEC in 1974 did not seriously consider the problem of tied votes.

Supporting Goodman's claim, though, is the fact that at the start of 1975, when amending the statutory authority of another six-member independent agency, the International Trade Commission (ITC), Congress explicitly provided that a 3–3 split could, in some situations, be interpreted by the heads of executive agencies as authorizing either outcome.[103] The very same Congress that created the FEC was thus attentive, only a few months later, to the fact that 3–3 splits in an independent agency could limit its effectiveness. Congress showed a capacity to think creatively about how to avoid too much inaction in the ITC context. This might suggest Goodman is correct that erring on the side of inaction in the case of deadlocks was a conscious choice from the start. Certainly by 1976 Congress knew that the four-vote requirement would tilt the scale toward inaction and would reduce the FEC's ability to act.[104]

The political valence and significance of deadlocks is disputed.[105] The lack of clear parameters for analyzing deadlocks has made it difficult to identify objectively the size of the problem.[106] But, even assuming the best of intentions on the part of the past decade's commissioners, it is undoubtedly the case that the design of the agency would *hypothetically* allow three members devoted to rolling back or stalling the development of campaign finance laws to seriously impede the FEC and to push the boundaries of acceptable campaign finance practice.[107]

---

[101] *See, e.g.*, 120 CONG. REC. 27,238 (1974) (statement of Rep. Badillo) (arguing for "[a] commission composed of six full-time public members nominated by Congress and appointed by the President"); *id.* at 27,473 (statement of Rep. Hays) ("I think it is unlikely that the Speaker of the House and the present Vice President . . . are going to appoint people of [high] caliber . . . ."); *see also* JACKSON, *supra* note 10, at 63–64.

[102] *See* Richard L. Madden, *Issue and Debate*, N.Y. TIMES (Aug. 5, 1974), https://nyti.ms/2yIr6Bl [https://perma.cc/8P4U-J746] (identifying public funding and enforcement mechanisms as "major battles").

[103] *See* Trade Act of 1974, Pub. L. No. 93-618, sec. 263(b), 88 Stat. 1978, 2035 (1975); *id.* sec. 331, § 303(b)(2), 88 Stat. at 2050; *see also* Jennifer Nou, *Sub-Regulating Elections*, 2013 SUP. CT. REV. 135, 147 n.68. Today, the executive branch retains flexibility in how it responds to divided votes by the ITC. *See* 19 U.S.C. § 1330(d) (2012).

[104] *See* H.R. REP. NO. 94-917, at 3 (1976) ("The four-vote requirement serves to assure that enforcement actions, as to which the Congress has no continuing voice, will be the product of a mature and considered judgment.").

[105] *Compare, e.g.*, Weintraub, *supra* note 5, *with* Goodman, *supra* note 6.

[106] *See* sources cited *supra* note 21.

[107] *See supra* note 13 and accompanying text.

2. Methods of Agency Action. — The FEC has both enforcement and rulemaking authority,[108] though the four-vote requirement has complicated the exercise of both powers. For a potential enforcement action to make it to court, the four-vote threshold must be met at no fewer than three stages.[109] Requiring an agency to make a conscious decision to proceed multiple times before litigation begins might make sense for an agency that does not have such a high potential for deadlock, but for the FEC, it means near-constant opportunities for a proceeding to be shut down.[110] These procedures "make it difficult — if not impossible — for the Commission to resolve a complaint in the same election cycle in which it is brought."[111] Before even reaching the third vote, though, the agency must pursue a conciliation agreement through "informal methods."[112] This might help avoid costly litigation, but, viewed less generously, it is a congressionally mandated opportunity for additional delay[113] and for the subjects of investigations to talk their way out of enforcement actions before the charges against them become public.[114]

Rulemaking, and the litigation that typically follows it, is a slow process for most agencies,[115] and the FEC is no exception. A rulemaking that began in response to a 2007 Supreme Court decision led to litigation that did not conclude until late 2016.[116] The Commission has been equally lethargic in its response to the higher-profile *Citizens United* decision, despite the Court's suggestion that disclosure rules would be an important check on political spending going forward.[117]

Although complaints by private citizens initiate many FEC proceedings,[118] the authority to adjudicate claims brought by private citizens is conspicuously absent from the FEC's powers. Of the traditional methods of agency policymaking, formal adjudication of this sort would pro-

---

108 *See* 52 U.S.C. § 30107(a)(6)–(9) (Supp. 2016) (establishing powers of FEC).

109 *See id.* § 30109(a)(2), (4), (6).

110 SHEPPARD, *supra* note 98, at 71; *see* 52 U.S.C. § 30109(a)(1)–(6). See generally SHEPPARD, *supra* note 98, at 60–71, 74–75, for a description of this process and *id.* at 71–74 for examples.

111 Scott E. Thomas & Jeffrey H. Bowman, *Obstacles to Effective Enforcement of the Federal Election Campaign Act*, 52 ADMIN. L. REV. 575, 584 (2000).

112 52 U.S.C. § 30109(a)(4)(A)(i).

113 *See* SHEPPARD, *supra* note 98, at 71; Thomas & Bowman, *supra* note 111, at 586–87.

114 *See* 52 U.S.C. § 30109(a)(4)(B).

115 BREYER ET AL., *supra* note 56, at 527.

116 Van Hollen v. FEC, 811 F.3d 486 (D.C. Cir. 2016), *reh'g en banc denied*, No. 15-5016, 2016 U.S. App. LEXIS 17528 (D.C. Cir. Sept. 26, 2016); *see* Ravel, *Work and Responsibilities*, *supra* note 3, at 7–8 & 14 n.53 (describing rulemaking in response to *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007)).

117 *See* Citizens United v. FEC, 558 U.S. 310, 370–71 (2010); Ravel, *Work and Responsibilities*, *supra* note 3, at 8–10.

118 SHEPPARD, *supra* note 98, at 66–67; *see also* Thomas & Bowman, *supra* note 111, at 584–85.

vide the least opportunity for political interference, thanks to the "detailed and precise rules" that govern proceedings, and the statutory limits on third-party contacts with agency officials.[119] Cases brought by citizens would have to be disposed of one way or the other, and could not simply be closed without any action.[120] By focusing on individuals, adjudication may also facilitate low-profile policymaking that avoids political attention.[121]

These structural weaknesses hinder the FEC's ability to rise to the unique challenges of regulating the electoral process. Other independent agencies control important segments of the economy through rulemaking, but elections pose unique challenges as a result of their cyclical nature and importance. Federal courts have recognized this in their jurisprudence and make exceptions to typical justiciability doctrine to facilitate the review of election law claims.[122] Speed and flexibility — both of which the FEC lacks — are equally crucial to effective regulation of campaign finance as they are to effective adjudication of election-related disputes.

3. Budgetary Control. — The FEC's budgetary authority is less fundamentally insurmountable as a design defect, but is no less indicative of Congress's intention to keep the agency on a short leash. In the executive branch, the nexus of budgetary control is in the Office of Management and Budget (OMB). For an independent agency, an exception from the typical process of centralized budget review conducted by OMB is typically seen as a means of reducing presidential control and, consequently, of increasing agency independence.[123]

The FEC has such an exception — its statute requires that it submit budget requests to Congress at the same time it submits them to OMB.[124] This limits, somewhat, the President's control by guaranteeing that Congress sees the agency's assessment of its budgetary needs before

---

119 Datla & Revesz, *supra* note 44, at 810 (quoting David L. Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921, 926 (1965)); *see id.* at 810–11. Early agencies were given the power to adjudicate in order to make them more like courts, in hopes that Article III courts would uphold their decisions as a result. *Id.* at 777–78.

120 *Cf.* GARRETT, OVERVIEW, *supra* note 21, at 11 (noting that FEC deadlocks often lead to votes to close matters, which "leav[e] questions of law, regulation, or enforcement unresolved").

121 Datla & Revesz, *supra* note 44, at 812 ("[T]he more overt the policymaking, the more endangered the agency's independence [is]." (alterations in original) (quoting Symposium, *Independent Agencies — Independent from Whom?*, 41 ADMIN L. REV. 491, 516 (1989))); *see also* Paul R. Verkuil, *The Purposes and Limits of Independent Agencies*, 1988 DUKE L.J. 257, 259–62 (arguing that independent agencies are well structured for adjudication, in that they model the appellate courts, but are insufficiently accountable for the quasi-legislative work of rulemaking).

122 *See* Recent Case, Missourians for Fiscal Accountability v. Klahr, *830 F.3d 789 (8th Cir. 2016)*, 130 HARV. L. REV. 753, 758–60 (2016) (noting the unique treatment of mootness in election-related disputes).

123 Datla & Revesz, *supra* note 44, at 805–06.

124 52 U.S.C. § 30107(d) (Supp. 2016).

that information is filtered through an administration that may have different priorities.[125] Considering, though, that the FEC's budget will be spent largely on the regulation of Congress itself, it's reasonable to wonder whether congressional involvement in the budgeting process truly furthers independence. Here, Congress might be less focused on detachedly evaluating agency needs and more concerned with guarding against any steps by the FEC toward serious enforcement. Past moves by Congress to limit FEC spending in the face of aggressive action[126] are perhaps the best evidence that the legislature may not be motivated by a desire to help the FEC avoid presidential control.

III. ELIMINATION?

The FEC's flaws alone do not prove that it should be eliminated. Certainly many parts of the government could be better designed. Ideally, no matter how flawed the FEC's structure and procedures may have been from the start, a thorough set of reforms could reshape it along lines that others have suggested into the sort of energetic agency that was needed in the aftermath of Watergate. But the choice between today's FEC and such an ideal FEC is not realistically before us. The real choice is between today's FEC and no FEC at all. If a better FEC is not possible, advocates of campaign finance regulation ought to recognize that they are better off without one.

A. Abandoning Reform

The reality of the FEC never lived up to rhetoric surrounding campaign finance reform. In the 1970s, President Nixon promised change when he signed FECA;[127] the Watergate commission recommended serious reforms;[128] President Ford suggested that the 1974 amendments represented a historic shift.[129] Reformers have claimed that the FEC was "designed to be the people's advocate in our elections,"[130] or that features like the bipartisan membership requirement were the result of

---

[125] David E. Lewis, *The Adverse Consequences of the Politics of Agency Design for Presidential Management in the United States: The Relative Durability of Insulated Agencies*, 34 BRIT. J. POL. SCI. 377, 389–90 (2004); Datla & Revesz, *supra* note 44, at 806 & n.206 (citing Lewis, *supra*, at 389–90). When the opportunity for an independent agency to bypass OMB in this manner was first instituted in 1972, President Nixon was opposed to the idea. Datla & Revesz, *supra* note 44, at 807.

[126] *See supra* section II.A.2, pp. 1430–31.

[127] Statement on Signing the Federal Election Campaign Act of 1971, PUB. PAPERS 165 (Feb. 7, 1972).

[128] S. REP. NO. 93-981, at 564 (1974).

[129] Statement on the Federal Election Campaign Act Amendments of 1974, 2 PUB. PAPERS 303 (Oct. 15, 1974).

[130] Press Release, Rep. Jim Renacci, Kilmer, Renacci Reintroduce Bipartisan Bill to Fix America's Election Watchdog (Apr. 6, 2017), http://renacci.house.gov/index.cfm/2017/4/kilmer-renacci-reintroduce-bipartisan-bill-to-fix-america-s-election-watchdog [https://perma.cc/X3MA-5GL5].

Congress's desire that the FEC "enforce the law fairly."[131] The FEC has not matched these ambitions. Rather, it has played the role intended for it by the Congresses of the 1970s, as reflected in the frank statements of representatives like Wayne Hays who never wanted an FEC as strong as reformers might have hoped.

The agency was designed under the interest representation model,[132] yielding an agency fundamentally unsuited to the task it was assigned. Even a well-designed body would have a difficult time policing federal elections under the fear that Congress might reject its recommendations or limit its jurisdiction. But Congress designed the FEC under a framework that "conceived of agency rulemaking as an essentially political process"[133] and then delegated to it the task of deciding how and when it would regulate that political process. In doing so, it failed to separate the regulators from politics. From the perspective of the FEC's designers, the long-recognized impediments to FEC action — an unwillingness to meaningfully challenge elected representatives and an inability to adapt quickly to a changing campaign landscape — were always intended as core features of the agency.

The observation that the FEC is flawed and dominated by Congress is not new. A 1979 interview with a former commissioner began: "From the start, the Federal Election Commission has been criticized for being a 'captive province' of the Congress[.] Is it?"[134] In 1988, Mutch saw the FEC as a captured agency, one that had "acquiesced in the widening of loopholes that [were] undermining the integrity of [the] law . . . prevent[ing] scandal less by eliminating the practices which give rise to it than by defining it away."[135] In the 1990s, many of the same reforms that are popular today were suggested: a stronger chair, an odd number of members, budgetary protections, and automatic fines, to name only a few.[136] Ideas that have been suggested in recent years were thus recognizable and even suggested at a time when "[i]deological conflict [was] rare" among commissioners,[137] and partisanship throughout government was significantly lower.[138]

Good ideas are not enough to get things done, and with rancor on the FEC and increased partisanship throughout government, FEC re-

---

131 Ravel, *Dysfunction*, *supra* note 3.

132 *See supra* pp. 1427–28.

133 Garland, *supra* note 57, at 511 (describing the interest representation model).

134 Muller, *supra* note 39, at 33.

135 MUTCH, *supra* note 17, at 115.

136 *See* JACKSON, *supra* note 10, at 62–71 (recommending these and other changes); *see also* Colloquy, *supra* note 17, at 235–39 (reform advocate Elizabeth Hedlund making similar critiques).

137 MUTCH, *supra* note 17, at 104.

138 *See, e.g.*, PEW RESEARCH CTR., *supra* note 15.

form is perhaps less realistic than ever. The FEC's failure to track popular opinion is not justified by its status as an independent agency.[139] Its problems and potential solutions have been available for years, and there has been a public consensus in favor of limiting the role of money in politics for just as long.[140] When an agency has failed for forty years to accomplish the widely supported goals that were set for it at its creation, it might be time to conclude that that agency is *too* insulated to be capable of changing from within or worth changing from without.[141]

B. The Costs of the FEC

If reform is impossible, it is worth considering whether keeping the FEC in place might do more harm than good. The FEC's presence in the regulatory landscape distorts democratic accountability. Whenever Congress delegates rulemaking power to an administrative agency, members may benefit from the reduced accountability that comes from avoiding tough decisionmaking.[142] This standard problem of administrative law is exacerbated by the FEC's uniquely complex principal-agent relationship with Congress, which further obscures where policies are truly being determined. The diffusion of responsibility allows the FEC to be at once dominated by political actors in Congress and yet insulated from the political pressure of constituents pressing for reform.

Presidential influence is similarly disguised through the independent agency structure. Although the pre-*Buckley* appointments scheme did not represent a genuine attempt by Congress to insulate decisionmaking from political forces, the case might still be read as standing for the proposition that the Constitution limits how insulated from politics an executive agency can be. So long as the power to regulate campaign

---

139 *See* Verkuil, *supra* note 121, at 259–60 (explaining the independence from politics that flows from the structure of an independent agency).

140 *See, e.g.*, Eggen, *supra* note 80 (reporting eighty percent opposition to the *Citizens United* decision); David W. Moore, *Widespread Public Support for Campaign Finance Reform*, GALLUP (Mar. 20, 2001), http://news.gallup.com/poll/1885/widespread-public-support-campaign-finance-reform.aspx [https://perma.cc/V42X-FS65] (reporting seventy-six percent support for new campaign contribution limits); *Americans' Views on Money in Politics*, N.Y. TIMES (June 2, 2015), https://nyti.ms/2kajjpi [https://perma.cc/7YAD-QV3W] (reporting that eighty-four percent of Americans think "money has too much influence" in American political campaigns). *But cf.* Nathaniel Persily & Kelli Lammie, *Perceptions of Corruption and Campaign Finance: When Public Opinion Determines Constitutional Law*, 153 U. PA. L. REV. 119 (2004) (arguing that public perception does not reflect the effectiveness of the campaign finance system).

141 Legislation introduced by Democrats in 2017 implicitly conceded the futility of FEC reform by proposing that the FEC be eliminated and replaced with a new agency. *See* Press Release, Rep. David E. Price, Price Introduces Comprehensive Democracy Reform Legislation (July 28, 2017), https://price.house.gov/newsroom/press-releases/price-introduces-comprehensive-democracy-reform-legislation [https://perma.cc/7X3S-YZDE] (announcing the We the People Act of 2017, H.R. 3537, 115th Cong. (2017), which would replace the FEC with a new agency, *see id.* pt. IV).

142 Neomi Rao, *Administrative Collusion: How Delegation Diminishes the Collective Congress*, 90 N.Y.U. L. REV. 1463, 1478–79 (2015).

finance remains in an executive agency, "independent" or not, it cannot be exercised entirely separately from the President's control through, at least, the appointments power.[143] An ostensibly independent agency with no meaningful independence from either the President or Congress merely encapsulates the gridlock that pervades the federal government — a logical consequence of interest representation design — but does so on a smaller scale by limiting and disguising political accountability.

Relatedly, the FEC's presence may provide the public with a false sense that campaign finance laws are being appropriately administered. The FEC's website states that it "was created to promote confidence and participation in the democratic process,"[144] but any confidence that it promotes is only palliative, reassuring the public that elections are regulated without truly addressing the underlying problems caused by money in politics. It is dangerously misleading for the federal government to project confidence and regularity where neither exists, as opponents of regulation can argue that tighter controls are not needed while pointing to a weak agency (which they will characterize as effective or even overbearing).[145] Eliminating the FEC and its unexercised capacity to promulgate regulations would leave lawmakers with one fewer excuse for their own inaction.[146]

Even if retaining a nonfunctional FEC simply meant no change for good or ill in the content of campaign finance regulation,[147] its mere existence reduces opportunities for meaningful change. To the extent that it does regulate at a minimal, insufficient level, any partial or incremental regulation may obstruct reformers' goals, as regulatory half measures can become impediments to stronger regulation in the future by increasing the political and organizational costs of subsequent regulatory changes.[148] It is easy to see how this might play out in the context

---

143 *See* Buckley v. Valeo, 424 U.S. 1, 140–41 (1976) (per curiam); STEVEN G. CALABRESI & CHRISTOPHER S. YOO, THE UNITARY EXECUTIVE (2008) (arguing that all executive branch officials are "subject to the [P]resident's powers of direction and control," *id.* at 4).

144 *About*, FEC, https://www.fec.gov/about/ [https://perma.cc/MUD7-CB2C].

145 *See, e.g.*, Goodman, *supra* note 6 (defending the agency's gridlock).

146 *See, e.g.*, 156 CONG. REC. 14,017 (2010) (statement of Sen. Roberts) (opposing a reform bill in part because it would add "another layer of Byzantine requirements" on top of the "complexity" of existing FEC regulations).

147 This is unlikely since underenforcement allows practices of questionable legality to go unpunished, pushing the boundaries of what is acceptable. *See supra* note 13 and accompanying text.

148 *See* Rachel Brewster, *Stepping Stone or Stumbling Block: Incrementalism and National Climate Change Legislation*, 28 YALE L. & POL'Y REV. 245, 250–52 (2010). Professor Saul Levmore has argued, conversely, that incrementalism may lead to overregulation, as newly regulated interest groups will support regulation of remaining unregulated rivals. Saul Levmore, *Interest Groups and the Problem with Incrementalism* (John M. Olin Program in Law & Econ., Working Paper No. 501, 2009). He views incremental regulation as most likely to beget further regulation when regulated parties view new regulation as irreversible. *Id.* at 9–11. Given this dynamic, incremental reform of the FEC is not promising, since Congress could quickly undo any progress.

of the FEC: Already, some in Congress have proposed replacing the FEC with a new, stronger agency.[149] Proposals for a strong agency might find more support if the FEC were eliminated. If, instead of today's weak agency there were no agency at all, it would be harder for opponents of regulation to defend the status quo.[150]

Strategically, reform advocates might also consider that opponents of strict campaign finance regulation seem to be doing just fine within the current system. Victories at the Supreme Court and successful nominations of FEC commissioners with antiregulatory views[151] have produced positive results for those who — to put it generously — see political corruption as a low regulatory priority. Having seen results under the current system,[152] these opponents of strong campaign finance regulation have little reason to fight the existing system. Considering how few victories good-government advocates have to point to under the current regulatory regime, they might begin to consider whether it is worthwhile to continue playing a losing game.

C. Beyond the FEC

A full picture of a post-FEC landscape is beyond the scope of this Note. For one thing, campaign finance regulation would be shaped to a large extent by what provisions of FECA were retained or eliminated along with the agency. Some limitations might be kept in place even without an agency to enforce them. Regardless, a preliminary survey of what campaign finance without the FEC might look like reveals several potential means of avoiding chaos and disorder.

First, administration at the federal level might be reorganized in a post-FEC world. To start, some of the FEC's less controversial tasks might be placed in agencies that do not carry the FEC's reputation for congressional fealty. There is general consensus that the FEC succeeds adequately at the noncontroversial ministerial tasks of facilitating the disclosure required by outdated rules that are already on the books.[153] Without the FEC, the disclosure rules we currently have — ineffective,

---

[149] *See supra* note 141.

[150] Retaining an FEC without enough commissioners to form a quorum would result in a "de facto shutdown" of the agency that could somewhat invigorate reform, but this would not fully eliminate the illusion of regulation or provide a blank slate for redesign. Dave Levinthal, *New Hope, New Problem: Will the Federal Election Commission Shut Down?*, CTR. FOR PUB. INTEGRITY (Dec. 20, 2017, 5:00 AM), https://www.publicintegrity.org/2017/12/20/21410/new-hope-new-problem-will-federal-election-commission-shut-down [https://perma.cc/KAM7-P8TX].

[151] *See, e.g.*, Matea Gold, *Trump's FEC Nominee Has Questioned the Value of Disclosing Political Donors*, WASH. POST (Sept. 15, 2017), http://wapo.st/2y3YYbQ [https://perma.cc/5QKA-CJND].

[152] *See generally* MAYER, *supra* note 14 (recounting the success of libertarian billionaire "political philanthropists," *id.* at 462, most famously Charles and David Koch, in influencing national politics and the ideology of the Republican Party from the 1970s through 2016).

[153] *See* JACKSON, *supra* note 10, at 1.

but perhaps better than *absolutely* nothing — could perhaps be administered by a legislative agency, as they were in early versions of FECA.[154]

If enforcement must reflect political dynamics in the federal government, a clear connection to the Executive might be an improvement over today's indirect and subtle domination by the legislature. Placing enforcement authority in an agency, like the Department of Justice, with less ostensible "independence" than the FEC might not lead to abuse of this power, at least in theory.[155] Shifts in enforcement priorities between administrations are expected in other areas,[156] and it is not clear that sporadic enforcement of the law by only some administrations would be worse than constant laxity. Political considerations should — one hopes — guard against partisan targeting of enforcement actions.[157] Looking beyond donation limits and disclosure requirements, "ex post regulation of campaign finance"[158] by means of reforms relating to bribery and lobbying might also be taken up as a priority.[159]

Finally, some methods of diluting the effect of money in politics need not even involve any branch or level of government.[160] Media entities might be encouraged to report more thoroughly on sources of campaign spending, and to play a larger role in shaping the advertising that they air,[161] or norms surrounding campaign donations or spending might be

---

154 *See* MUTCH, *supra* note 17, at 83–87.

155 Admittedly, the current Administration is less worthy than most of the trust in good-faith election administration that this transfer would require, given its championing of demonstrably false claims about voter fraud and creation of a voter fraud commission widely viewed as a sham, *see, e.g.*, Editorial, *The Bogus Voter-Fraud Commission*, N.Y. TIMES (July 22, 2017), https://nyti.ms/2tzFD4q [https://perma.cc/5VTT-ZCE8].

156 *See* Kate Andrias, *The President's Enforcement Power*, 88 N.Y.U. L. REV. 1031, 1034 (2013); *see also id.* at 1055–69 (providing a historical overview).

157 For example, the Obama Administration faced significant criticism in 2013 when the IRS was accused of targeting politically conservative groups for closer scrutiny. *See* Jonathan Weisman & Matthew L. Wald, *I.R.S. Focus on Conservatives Gives G.O.P. an Issue to Seize On*, N.Y. TIMES (May 12, 2013), https://nyti.ms/2yJJo5z [https://perma.cc/RW4D-E3PG]. These accusations led to resignations and congressional scrutiny, even though they turned out to be false. *See* Mike DeBonis, *Liberal Groups Got IRS Scrutiny, Too, Inspector General Suggests*, WASH. POST: POWERPOST (Oct. 4, 2017), http://wapo.st/2xVareE [https://perma.cc/2L6S-DB4N].

158 Kang, *supra* note 14, at 60.

159 *See id.* at 56–60 (urging such reforms in contrast to ex ante regulation of spending and donation). *But see* McDonnell v. United States, 136 S. Ct. 2355, 2372–73 (2016) (demonstrating that constitutional limits might hamper ex post regulation also); Kang, *supra* note 14, at 60–61 (same).

160 Currently, FECA and its amendments preempt state regulation of the financing of federal campaigns. 52 U.S.C. § 30143(a) (2016 Supp.). If FECA were repealed, state regulation might beget novel approaches. Nationwide consistency in federal campaign regulation might seem an obvious choice, but it inherently raises principal-agent concerns by allowing winning candidates to set the rules for their reelection. *See* Sam Levor, Note, *The Failures of Federal Campaign Finance Preemption*, 20 N.Y.U. J. LEGIS. & PUB. POL'Y 523, 546–49 (2017).

161 Yablon, *supra* note 14, at 223–25.

changed.[162] Such norms may indeed be developing, as populist candidates in both parties criticized their rivals' reliance on moneyed interests in the 2016 presidential election.[163] To the extent that regulation and deregulation simply redirect outside financing among channels that are more or less direct and more or less transparent,[164] such norms may be the most effective means of curbing their influence.

CONCLUSION

At least in the near future, advocates of improved disclosure would have little to lose from the elimination of the FEC, considering the current Administration's penchant for appointing agency heads who appear ideologically opposed to the traditional roles of their agencies,[165] and the recent submission of a nominee for the FEC who "has challenged the principle that the public benefits from the disclosure of political donors, arguing that voters could be distracted from the content of political messages if they focus on who is financing ads."[166]

The FEC has never been the independent and effective arbiter that advocates of reform were promised in the wake of Watergate. It's likely that no law could ever have met the standard set by President Ford's claim that the 1974 FECA Amendments would "remov[e] whatever influence big money and special interests may have on our Federal electoral process,"[167] but the outcry over Watergate necessitated a more vigorous response than the FEC has been able to provide. We cannot wait for a similar focusing event to produce outcry sufficient to force FEC reform, and, indeed, such an event might have deleterious consequences for our government that would far outweigh the benefits gained from any reforms it inspired. By eliminating the FEC, we could eliminate the conveniently agreed-upon lie that it is meaningfully regulating campaign finance, hopefully forcing the issue and facilitating real reform.

---

[162] *Id.* at 229–33 (suggesting activists work to develop norms against large expenditures, *id.* at 230–31, or in favor of small ones, *id.* at 231–32).

[163] *See* MAYER, *supra* note 14, at xi–xii; Yablon, *supra* note 14, at 217–20.

[164] *See* Kang, *supra* note 14, at 40–41 (citing Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705 (1999)) (suggesting such a view of campaign finance). Weaker contribution limits might direct money away from outside groups and toward candidates and parties whose uses of funds might be less inflammatory. *See id.* at 48, 55.

[165] *See* Gillian E. Metzger, *The Supreme Court, 2016 Term — Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 10 & n.30 (2017).

[166] Gold, *supra* note 151.

[167] Statement on the Federal Election Campaign Act Amendments of 1974, *supra* note 129.