

Fixing the FEC: An Agenda for Reform

By Daniel I. Weiner

Introduction

The campaign finance system charged with safeguarding our elections has itself become a threat to democracy. This is thanks not only to *Citizens United*, but also to a dysfunctional campaign finance agency in Washington, the Federal Election Commission. Evenly divided and perpetually gridlocked, FEC dysfunction has made it more difficult for candidates trying to follow the law, and easier for those willing to break it. Over the last decade the FEC has abandoned serious allegations of lawbreaking without investigating because its commissioners have divided along party lines. Further, the agency has often failed to provide candidates and other political actors with guidance on key issues and has neglected to update regulations to reflect major changes in the law, media, and technology.

This paper sets forth a new blueprint to make the FEC work again. It proposes reforms to curtail gridlock, foster more accountable agency leadership, and overhaul the Commission's civil enforcement process. A number of these changes are part of H.R. 1, the historic For the People Act of 2019 that recently passed the House of Representatives.¹ They deserve to be a bipartisan priority.

The FEC was created in 1975 to administer and enforce the system of post-Watergate campaign finance rules designed to prevent corruption.² It is composed of six commissioners; no more than three can be from the same party. The Commis-

sion cannot enact regulations, issue guidance, or even investigate alleged violations of the law without four votes.³ While the Commission does have a nominal chair, the office rotates and carries no real power; even purely administrative matters related to budgets, staffing, and other management decisions generally require four commissioners to agree.⁴

Today, that rarely happens on matters of significance. By long-standing practice, FEC commissioners are usually hand-picked by Democratic and Republican leaders in Congress,⁵ who increasingly disagree not only about the need for new reforms but also about how to interpret existing laws.⁶ The evenly split Commission often cannot agree even on personnel and other administrative matters, with critical posts often sitting vacant for years.⁷

Since 2010, the FEC's partisan stalemate has allowed more than \$1 billion in dark money from undisclosed sources to flood into U.S. elections.⁸ Enforcement of rules that limit cooperation between candidates and lightly regulated super PACs has been stymied, making it possible for super PACs to spend billions working hand in glove with campaigns. Presidential candidates too often have become the equivalent of racehorses backed by rival billionaires.⁹ And gridlock has prevented any meaningful FEC response to revelations that Russia sought to manipulate the U.S. electorate in 2016.¹⁰ A requirement for disclaimers on the sorts of online ads that

Russian operatives used to influence American voters has been stalled for more than a year.¹¹ Given this history, if any of the more ambitious reforms in H.R. 1 were to be enacted, it is doubtful that FEC commissioners could effectively carry out a new mandate.

FEC dysfunction thwarts even Commission members who oppose stronger rules. They can block enforcement on an evenly divided FEC, but they do not have the votes to change rules they find irrational or outdated. For instance, a proposal to loosen rules that govern political party fundraising has languished since 2015.¹²

For candidates and others, gridlock at the FEC creates risk and uncertainty that doesn't need to be there. "Most political operatives, whether on the right or the left, want clarity. What can I do and what can I not do," says former Republican commissioner Michael Toner. "They might not always be thrilled with the answers, but they want to know."¹³ Instead, those seeking advisory opinions from the FEC on novel or controversial issues often go away empty-handed.¹⁴ The resulting gray areas can have real consequences: In recent years both Republican and Democratic officeholders have been accused of criminal offenses that might have been avoided with the help of clearer FEC guidance.¹⁵

FEC dysfunction harms candidates and political parties, who are under the brightest spotlight and who have traditionally relied on the Commission to create clear, uniform rules.¹⁶ The lack of clarity is a problem even for supposed beneficiaries of *Citizens United*, like politically active business interests, who put a similar premium on "everyone[] playing by the same rules."¹⁷ Political outsiders without the resources to hire expensive election lawyers to parse ambiguous or out-of-date regulations are particularly disadvantaged. With a paralyzed FEC, something as simple as filling out a form can be fraught, since many of the Commission's forms and accompanying guidance are incomplete and/or out-of-date. For example, more than nine years after *Citizens United*, there is still no FEC form for creating a super PAC. Instead, filers must fill out the form for creating a traditional PAC, and then send the FEC a separate letter. That process is set forth in "interim" guidance the Commission issued more than seven years ago.¹⁸ It also would not be apparent from checking the Commission's official guide for nonconnected PACs, which was last updated in 2008.¹⁹

In short, as a bipartisan group of members of Congress wrote to President Trump in February 2018, a dysfunctional FEC "hurts honest candidates who are trying to follow the letter of the law and robs the American people of an electoral process with integrity."²⁰

Congress needs to fix this problem, but in a way that preserves safeguards against partisan abuse of the Commission's power and bureaucratic overreach that could stifle political

expression. In crafting proposals to achieve this balance, the Brennan Center consulted with more than a dozen experts who served as FEC commissioners or high-level staffers, or who have regularly advocated before or studied the agency. On the basis of their input and our own expertise (including that of the author, who worked at the FEC from 2011 to 2014), we recommend the following reforms:

- 1. Change the number of commissioners, with at least one political independent:** To reduce gridlock and allow for decisive policymaking, Congress should change the Commission's structure to give it an odd number of five commissioners, with no more than two from each of the major political parties. Congress should specify that at least one commissioner be a political independent who has neither been affiliated with nor worked for one of the two major parties or their officeholders or candidates in the five years preceding their appointment.
- 2. Establish an inclusive, bipartisan process to vet potential nominees.** As an added safeguard, Congress should require the president to convene a blue-ribbon advisory panel to help vet potential nominees. The panel should have representation from both major parties. Congress should also require reasonable steps consistent with the Constitution to ensure that people of color and other underrepresented communities have a voice in the selection process.
- 3. Give the agency a real leader who is accountable to the president.** To ensure clearer lines of accountability for the Commission's management, Congress should provide that the president will designate one commissioner to serve as the agency's chair during the president's term. The chair would have the power to supervise Commission staff, approve its budget, and otherwise act as the agency's chief administrator, but with sufficient checks to prevent partisan abuse of the office and ensure the Commission's continued independence from the White House.
- 4. End the practice of allowing commissioners to remain in office indefinitely as holdovers.** To ensure that the Commission has regular infusions of fresh leadership with an appropriate degree of independence, Congress should limit commissioners to two statutory terms and end the practice of letting them serve indefinitely past the expiration of their terms until a successor arrives.
- 5. Overhaul the Commission's civil enforcement process:** Finally, Congress should take several steps to make the Commission's civil enforcement process timelier and more effective, while maintaining safeguards to protect the rights of alleged violators. These changes should include:
 - Creating an independent enforcement bureau within the Commission, whose director would be selected by a bipartisan majority of commissioners and have

authority to initiate investigations and issue subpoenas (subject to override by a majority of commissioners);

- Providing an effective legal remedy for both complainants and alleged violators to obtain legal clarity if the Commission fails to act on an enforcement complaint within one year;
- Limiting the Commission's use of prosecutorial discretion to avoid pursuing serious violations;
- Restoring the Commission's authority to conduct random audits of political committees;
- Reinforcing the Commission's system of "traffic ticket" administrative fines for reporting violations by making it permanent and requiring the Commission to expand the program to cover all reports; and
- Increasing the Commission's budget to allow it to hire additional qualified staff to ensure timely, effective resolution of enforcement matters.

These reforms will allow an important federal agency to enforce the law as written and provide much-needed clarity on a host of issues that affect officeholders and others across the political spectrum. How much transparency does the law require for those who engage in campaign spending? How closely may candidates work with like-minded super PACs? When are certain payments — say, those made on President Trump's behalf to the adult film star Stormy Daniels to hide an alleged affair²¹ — considered campaign contributions? How should decades-old statutory law be applied to the internet? A less-gridlocked FEC could provide real answers. And to the extent that those answers do not sit well with the American people, there will be much clearer lines of accountability than the current stalemate affords.

If there is any lesson from the FEC's recent history, it is that while strong checks and balances are essential for any entity that regulates the political process, efforts to insulate the Commission entirely from swings of the political pendulum simply have not worked. The time has come for a different approach.

The FEC in the Age of Partisan Polarization

To fix the FEC, it is important to understand how it got to this point.

The FEC's evenly divided structure was born from political compromise. In the aftermath of Watergate, Congress bowed to the overwhelming public demand for stronger campaign finance laws to protect the integrity of our government. But congressional leaders also worried that an agency specifically

designed to police politics would be weaponized by whichever party was in control.²² No doubt many were also wary of having an aggressive watchdog oversee their own campaigns.²³

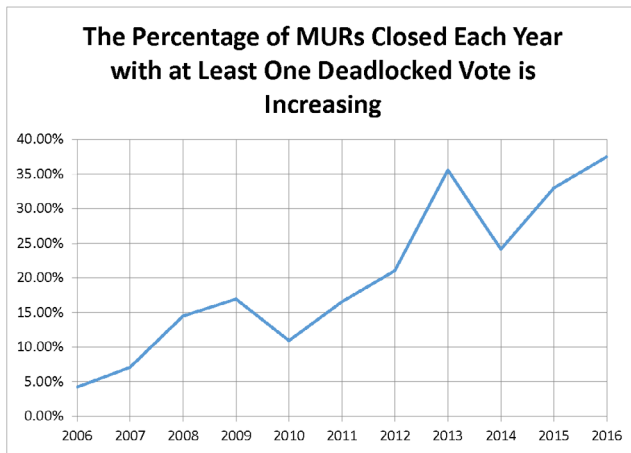
They came up with a six-member commission as the solution. On paper, the agency has significant authority to interpret federal law and pursue civil enforcement.²⁴ But it cannot exercise its most important functions without the assent of a majority of four commissioners, only three of whom can be from one party.²⁵ And while legally all commissioners must be nominated by the president and confirmed by the Senate,²⁶ in practice party leaders handpick who occupies the Commission's seats.²⁷

Historically, the Commission's even divide did not preclude coherent policymaking or completely stymie enforcement because ideological fault lines over the role of money in politics did not closely track party affiliation. Both Republican and Democratic party leaders had a diversity of views on campaign finance regulation, and the commissioners whom they selected were usually able to hammer out compromises across party lines.²⁸ That did not keep reformers from decrying the FEC for promulgating lax rules.²⁹ But whatever the validity of these criticisms, the agency was functional.³⁰

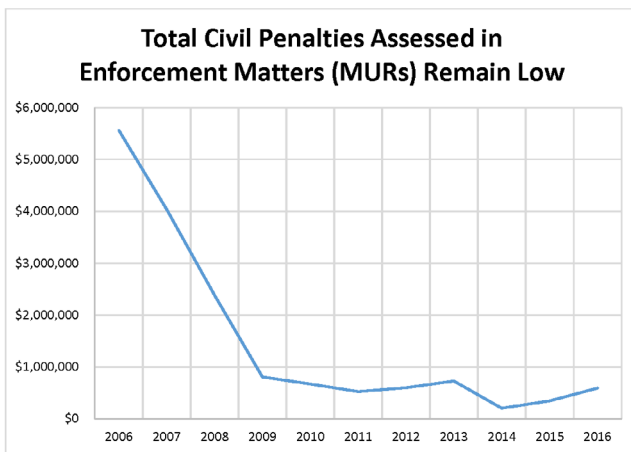
That is no longer the case. While there is still widespread agreement among the public (who generally want stronger campaign finance laws³¹), Beltway insiders are now sharply divided along party lines. Most Democrats support stronger rules, while their Republican counterparts are increasingly opposed.³² The partisan divide over campaign finance is evident even on the Supreme Court; *Citizens United* and other recent deregulatory cases were all decided by majorities composed entirely of Republican appointees, with the Court's Democratic appointees all dissenting.³³ The same disagreement between the two parties on campaign finance regulation that is so evident in other parts of the government has naturally trickled over to the FEC. That has resulted in a sharp rise in party-line deadlocked votes.

ENFORCEMENT

The increasing prevalence of deadlocks is perhaps most evident in the Commission's civil enforcement process. According to data compiled by the office of then commissioner Ann Ravel, the Commission deadlocked on 37.5 percent of regular enforcement cases in 2016, as compared with 4.2 percent in 2006 — a more than seven-fold increase.³⁴ And that statistic significantly understates the problem, since almost all the votes on which commissioners achieved consensus that year involved housekeeping matters, minor violations, or the dismissal of frivolous allegations.³⁵ On most matters of significance, the Commission cannot reach four votes. Penalties have plummeted as a result of these deadlocks. In 2016 the Commission brought in less than \$600,000 in civil penalties in enforcement cases, compared with roughly \$5.5 million a decade earlier.³⁶



Source: Analysis of Vote Certifications in the FEC's Enforcement Query System ("EQS")



Source: Analysis of FEC Enforcement Statistics, Total MUR Civil Penalties, <http://www.fec.gov/press/bkgnd/EnforcementStatistics.shtml>.

Virtually all enforcement deadlocks happen at the so-called “reason to believe” (RTB) stage, which is the preliminary determination commissioners must make that an investigation is warranted.³⁷ RTB is merely the first step toward enforcement.³⁸ But even reaching this point frequently takes more than a year.³⁹ It is not uncommon for an RTB vote to be taken only as the five-year statute of limitations for campaign finance violations approaches. In one notorious case, a donor admitted that he had formed an LLC solely for the purpose of hiding a \$1 million contribution to the super PAC supporting Mitt Romney’s 2012 presidential campaign. The Commission delayed more than four years before deadlocking on whether to proceed, notwithstanding that all six commissioners appear to have agreed that the donor broke the law.⁴⁰ This was but one of a number of high-profile matters from the 2012 election cycle that were not resolved until 2015 or later.⁴¹

Such delays mean that even when the Commission does negotiate a significant penalty, it is likely to have little deterrence value.⁴² Recently, for instance, the FEC fined Jeb Bush’s super PAC almost \$400,000 for accepting an illegal \$1.3 million campaign contribution from a company con-

trolled by a foreign national (the company was fined another \$550,000).⁴³ This was a straightforward violation for which there was direct documentary proof in the form of an email from the candidate’s brother Neil. But it still took the FEC two and a half years to complete its investigation and negotiate a settlement that, while large in absolute terms, was less than a third of the illegal contribution at issue and less than .3 percent of the more than \$120 million the PAC raised for the 2016 election cycle.⁴⁴

Importantly, enforcement delays do not just hurt those who have actually violated the law. Even those wrongfully accused of violations often wait a year or more for their names to be cleared.⁴⁵

The Commission’s enforcement process has never been perfect. As the Commission’s longest-serving member, Ellen Weintraub, acknowledges, “We have always struggled with the reality that enforcement cases take far too long.”⁴⁶ Now, however, most high-profile or novel cases languish at the Commission for years, at which point commissioners usually deadlock.⁴⁷ Federal courts have repeatedly rebuked the Commission for its failure to investigate allegations that, if true, would amount to clear legal violations.⁴⁸ Nevertheless, entire categories of rules, such as those limiting collaboration between candidates and super PACs that can raise unlimited amounts of money, continue to go largely unenforced.⁴⁹ But the same commissioners who vote against enforcement lack the votes actually to change the Commission’s regulations. And so many unenforced rules remain on the books, undermining the rule of law and fostering uncertainty for those trying in good faith to comply.⁵⁰

RULEMAKING AND ADVISORY OPINIONS

Partisan gridlock also impairs the FEC’s ability to provide coherent guidance to political actors on novel legal and policy questions. As noted, its rulemaking process has virtually ground to a halt. Historically, commissioners with different regulatory philosophies were usually able to hammer out compromises on key issues. But now, according to Weintraub, there is “a fear that you will give an inch and the other side will take a mile.”⁵¹ As a result, even as the last decade has seen major changes in the governing law and the emergence of new threats like foreign governments seeking to influence U.S. elections via the internet, the Commission has done hardly anything to update its code of regulations.⁵² More than nine years after *Citizens United*, for instance, the FEC’s regulations still make no mention of super PACs. And its main rules governing transparency for internet ads date back to 2006, when major social media platforms like Facebook and Twitter were in their infancy and nobody would have predicted their use by a major foreign power to meddle in a U.S. presidential election.⁵³

In the absence of a functioning rulemaking process, the main way the FEC provides guidance to candidates, parties,

and other political actors is through the issuance of advisory opinions to individual requesters. Persons planning to engage in political activity can ask for an opinion from the Commission as to the legality of their activity; the Commission is obligated to respond to these requests.⁵⁴ Advisory opinions in theory have limited application beyond the requester but are in practice treated as precedents forming a significant body of law in their own right.⁵⁵

The use of advisory opinions to develop campaign finance law is inherently problematic. As one senior lawyer who headed the Commission’s policy division puts it, advisory opinions are “a very poor substitute for rulemaking.”⁵⁶ Those opinions are issued under a compressed time frame that affords few avenues for fact-finding; there is no opportunity for anyone other than the person who requested the opinion to appear before the Commission to testify; and the entire process tends to be dominated by a small cadre of repeat participants from major Democratic and Republican law firms.⁵⁷

In any event, the advisory opinion process is also increasingly dysfunctional. The Brennan Center reviewed all 1,996 advisory opinion requests that have been submitted to the Commission. Prior to 2008, the Commission deadlocked (i.e., failed to agree on an answer to at least one of the requestor’s questions) on 4.9 percent of requests per year on average; in a number of years there were no deadlocks. Between 2008 and 2017, the deadlock rate jumped to 24.1 percent on average — a more than fivefold increase — almost entirely along party lines. And as the Commission’s reputation for gridlock has spread, the number of advisory opinion requests

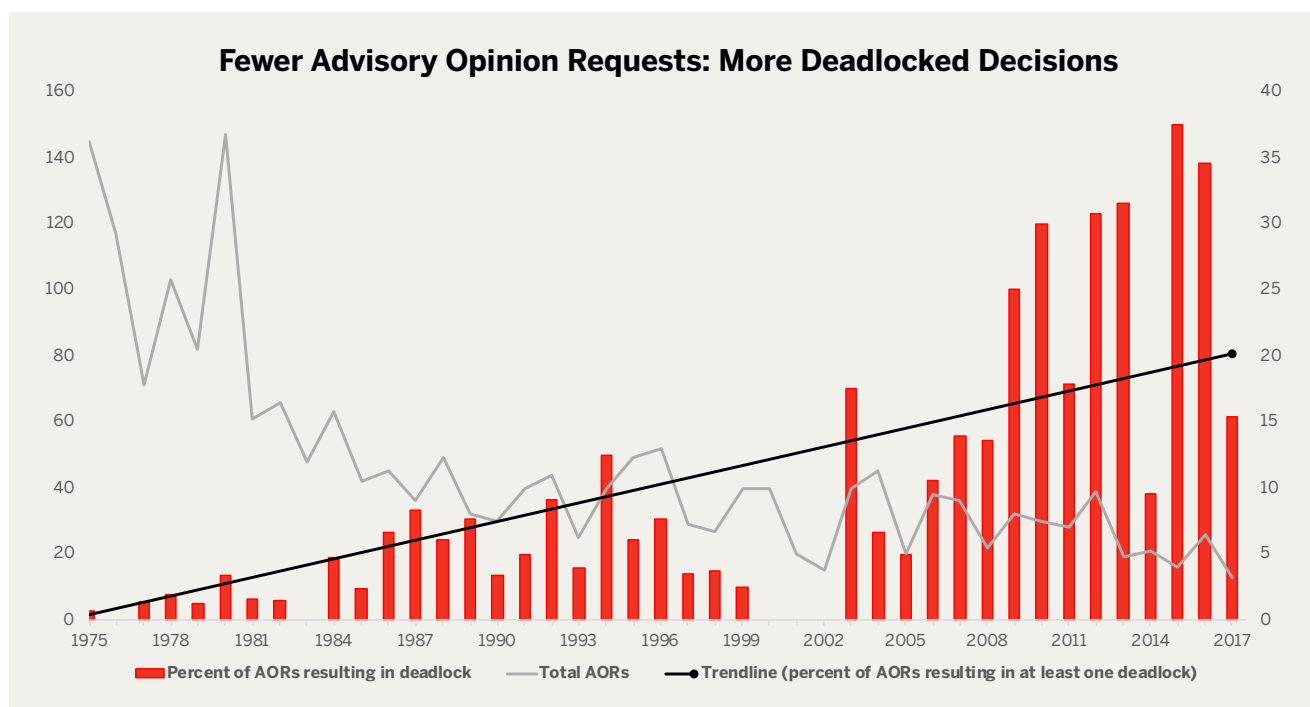
it receives has declined, from a high of 147 in 1980 to a low of 13 in 2017.⁵⁸

Once again, the numbers understate the real problem. Most of the advisory opinions the Commission manages to issue today deal with relatively straightforward matters, like whether candidates can use campaign funds for particular campaign-related purposes⁵⁹ or the circumstances in which a professional association may operate a federal PAC.⁶⁰ On many novel or problematic subjects — everything from candidates appearing in supposedly independent super PAC ads to the rules governing use of Twitter by political committees — commissioners have failed to agree,⁶¹ eliminating a last source of regulatory guidance in hard cases.

MANAGEMENT

The partisan stalemate at the FEC has also taken a toll on the agency as an institution. Senior staff positions routinely go several years without being filled. Most notably, the Commission has not had a permanent general counsel (its chief legal officer, and one of its two top staffers) for more than five years, nor any inspector general (permanent or acting) for more than two years.⁶²

In the meantime, morale among the agency’s rank-and-file staff remains lower than at most other federal agencies of comparable size.⁶³ A scathing inspector general report in 2016 highlighted partisan discord among commissioners as the main cause.⁶⁴ The report also noted the problem of pervasive gridlock. One anonymous survey respondent said they found it “frustrating to see how Commissioners do not act on reports/recommendations for months or years.”⁶⁵ Another



explained that “for me, the biggest cause of low morale is that I spend lots of time working on projects that end up sitting for months or years because the Commission deadlocks or holds over discussion.”⁶⁶ Such complaints inevitably translate into staff attrition and recruitment challenges, making it even harder for the FEC to carry out its mission.

In sum, the FEC, which was always subject to criticism, has in the past decade been overtaken by a polarized political culture to the point that its evenly divided structure simply does not work. Some have called for replacing the current commissioners, all of whom are serving as holdovers.⁶⁷ But FEC dysfunction is ultimately about more than any one group of officials. The best way to restore the agency’s ability to shape coherent regulatory policy and carry out fair and effective civil enforcement is to reform its basic structure.

A Blueprint for Reform

Any plan to fix the FEC must tackle the agency’s problems while preserving meaningful safeguards to protect the political rights of all Americans. The following changes are key:

Reduce the number of commissioners from six to five and reserve one seat for a political independent. To curtail gridlock at the FEC, its structure should be brought more into line with other multimember independent regulators. Most important, that entails giving the agency an odd number of commissioners with the power to approve new rules and advisory opinions by a majority vote.⁶⁸

Currently, the FEC has six commissioners who serve for staggered six-year terms, no more than three of whom can be affiliated with one political party at the time of their appointment.⁶⁹ In theory a president could appoint technocrats or political independents to all or some of the Commission’s seats, but none has ever done so.⁷⁰ Instead, presidents have for the most part continued to nominate party loyalists, which has become the primary driver of gridlock as the parties themselves have become more polarized.

The most sensible fix for this problem is to reduce the number of commissioners from six to five, with three votes required for most major decisions. The major parties should each be limited to two seats on the Commission, with commissioners in those seats continuing to serve for staggered six-year terms.⁷¹ The fifth seat should be reserved for a political independent, which should be defined as someone who has not been affiliated with, donated to, or represented either major party or any of its candidates or officeholders for at least the previous five years.⁷² Ideal candidates would include former judges, law enforcement officials, or even senior members of the Commission’s career staff. Such individuals are less likely to feel beholden to the president or congres-

sional leaders, and more likely to represent the substantial number of Americans who do not affiliate with either of the two major parties.⁷³ The term for this fifth seat should be only four years, to ensure that every new president has the opportunity to nominate a new independent tiebreaker.

Critics of the idea of an odd-numbered commissioner with an independent tiebreaker have charged that the Commission’s independent member would likely be a wolf in sheep’s clothing — I.e., a closet partisan.⁷⁴ But that risk can be mitigated through safeguards like barring nominees who previously worked for one of the major parties and requiring representatives of both major parties to be included in the vetting process, as discussed below. It should be noted, moreover, that partisan overreach is a risk even under the Commission’s current structure. The president already has broad discretion to nominate FEC commissioners, provided no more than three are affiliated with the same party at the time they are nominated.⁷⁵ The tradition of allowing leaders of the opposing party to name half the nominees has no force of law.⁷⁶

Ultimately, no government institution functions independently from background norms that restrain excessive partisanship and other abuses of power. That would be true of a restructured FEC, just as it is true of the current body. But the reforms proposed here would actually increase legal safeguards against partisan overreach relative to the status quo.

To be sure, the presence of an independent commissioner is no guarantee that the Commission’s decisions will never be weighted toward one party’s legal and policy views. It is entirely correct that most presidents are likely to try to appoint independents with whose views they broadly agree. This is not unreasonable. What is not acceptable is for a president to use the Commission as a weapon with which to pursue partisan opponents. Having at least one truly independent commissioner provides an important safeguard against that risk, especially when combined with other checks and balances in the enforcement process.

Establish an inclusive, bipartisan vetting process for potential nominees. To provide an additional safeguard, Congress should establish a blue-ribbon advisory panel composed of election law experts, retired law enforcement, and others with relevant background to recommend potential nominees to the president, as has previously been proposed.⁷⁷ The panel’s recommendations would be published at the time a nomination was transmitted to the Senate, so that the Senate and the public could consider them in evaluating the president’s nominee.⁷⁸

The panel should be required to include representatives of both major parties, ideally to be designated by party leaders in Congress. But it should be diverse in more than just a partisan sense. It is unacceptable that in the more than 40

years it has existed, the Commission has never included a person of color.⁷⁹ Other groups have also been underrepresented.⁸⁰ To begin to address this problem, Congress should direct that the president take reasonable steps consistent with constitutional antidiscrimination protections to ensure the panel includes members of both genders and diverse racial, ethnic, and professional backgrounds.

Give the Commission a real leader. To ensure greater accountability for how the Commission runs, the agency should also have a single, clear leader in the person of a chair designated by the president from among the sitting commissioners (again following the model of other independent agencies).⁸¹

Currently, the office of chair rotates yearly among commissioners and carries little real power.⁸² Appointments of senior staff, budgeting, and even many routine management decisions require four affirmative votes.⁸³ Under this structure, it has long been hard for even experienced observers to understand who is making critical operational decisions at the agency.⁸⁴

Giving the FEC a clear leader would provide the president, Congress, and the public with a single figure to hold accountable for how well the Commission runs. The chair would oversee the Commission's day-to-day management, appoint its senior staff (except the newly created director of enforcement, as discussed below), submit a budget to Congress, and otherwise act as the agency's chief administrative officer. However, the chair would still have only one vote on substantive policy and enforcement matters.⁸⁵ A chair whose party lost the White House would generally be expected to vacate the role, although he or she could continue to serve as a commissioner.

It makes sense for the chair to be named by the president. The president is elected to, among other things, run the executive branch — and ideally is judged by the electorate for how well this task is carried out. A chair affiliated with the president would create a more direct connection between the Commission's management and an elected officeholder whom the voters can hold accountable, even as the other checks and balances set forth in these recommendations would ensure that the president's power to designate the chair would not unduly compromise the Commission's independence from the White House.

Eliminate indefinite holdovers. To ensure periodic infusions of fresh leadership and bolster the Commission's independence from the elected officials it ostensibly regulates, Congress should also eliminate the ability of commissioners to stay in office indefinitely past the expiration of their terms.

During their statutory six-year terms, FEC commissioners can be removed only for cause.⁸⁶ Before 1997, commissioners

could be reappointed to new terms an unlimited number of times. Congress eliminated reappointment with two goals: ensuring that the agency would periodically have fresh leadership, and reinforcing commissioners' independence in the face of congressional attempts to use the reappointment process as leverage to deter enforcement.⁸⁷ But commissioners still had the ability to stay in office indefinitely as holdovers past the expiration of their terms until the arrival of a successor.⁸⁸ Lengthily holdover periods are now the norm; all four current commissioners are holdovers who have served for more than a decade, having first been named during the George W. Bush administration (two seats are vacant).⁸⁹

As former commissioner Toner puts it, this situation represents “the worst of both worlds.”⁹⁰ Letting commissioners stay indefinitely as holdovers means that there is still very little turnover in the Commission's leadership. And commissioners whose terms have expired are even more dependent on the president and Congress, who can replace them at any time. In today's polarized climate, that makes bipartisan compromise even harder and creates a very real risk of commissioners suffering retribution for specific policy decisions.

To be sure, frequent turnover among commissioners also is not ideal, especially if it leads to constant vacancies while Congress and the president wrangle over nominees. The balance drawn at most other multimember agencies is to allow commissioners or board members who serve for a fixed statutory term to be reappointed once, with any holdover after the expiration of a term limited to a period of one to two years.⁹¹ The FEC should follow a similar approach.

Overhaul the Commission's enforcement process. Finally, the Commission's civil enforcement process needs fundamental change. Two hallmarks of effective enforcement are the robust, timely pursuit of credible allegations of misconduct and the expeditious resolution of non-meritorious or otherwise trifling allegations.⁹² As discussed above, the FEC's current process largely fails on both counts. The following changes would help address this problem.

> Create an independent enforcement bureau with investigative power:

The most important change Congress can make is to create an independent enforcement bureau within the Commission that has some measure of autonomy from commissioners. The bureau should be led by an enforcement director appointed by a bipartisan majority of the full Commission (i.e., with at least one vote from both a Republican and a Democratic commissioner) in a public vote on the motion of the Commission's chair. The director's appointment should be subject to renewal every four years.⁹³

The director should have the authority to make initial determinations of whether to investigate or dismiss alleged violations that the Commission learns about from adminis-

trative complaints. Commissioners would retain the power to overrule the director by a majority vote. Under this process, incoming administrative complaints would be routed to the enforcement bureau, which would prepare an analysis for the director, who would then make a preliminary determination on whether to investigate the allegations in the complaint or take no action and close the file. Then both the director's decision and the underlying file would be forwarded to the Commission, which would have two weeks to overrule the director. In such cases, commissioners would be required to state publicly their reasons for doing so within 30 days of the vote.

After commencing an investigation, the director would also have the power to authorize subpoenas to compel production of documents or testimony, with a one-week waiting period during which time the Commission could vote to overrule him or her.

Ultimate authority over whether to bring an enforcement action or pursue settlement should still rest with commissioners. At the conclusion of every investigation, the enforcement director should be required to submit a written recommendation to the Commission. Congress should require the Commission to vote on recommendations within 45 days of their submission.

Where an enforcement action is authorized, the case should return to the enforcement bureau to be litigated.⁹⁴ The law should specify that investigations must remain strictly confidential unless and until the Commission authorizes an enforcement action or the matter is closed.⁹⁵

These changes would bring the Commission's enforcement process more into line with that of other independent watchdog agencies, where agency heads typically do not make initial investigative determinations.⁹⁶ They would not only help ensure pursuit of credible violations but also make it easier to timely dispose of non-meritorious allegations.

> Provide a legal remedy when the Commission fails to act on a complaint:

As an additional safeguard against enforcement delays, Congress should require that the Commission act on administrative complaints (by bringing an enforcement action, opening settlement negotiations, or dismissing) within one year of a complaint's submission, and should provide both complainants and alleged violators with a legal remedy when the Commission fails to do so.

Current law gives complainants, but not alleged violators, the right to sue the Commission if it takes no action within 120 days of receiving a complaint.⁹⁷ But courts typically treat such cases as disputes over the allocation of resources, with respect to which agencies are entitled to heightened deference.⁹⁸ This makes it possible for the Commission to sit on both meritorious and frivolous complaints for years, as discussed above.⁹⁹

The best solution is to extend the 120-day deadline to one year but empower courts to review cases that come before them on the merits and order the agency to take action or dismiss. The law should provide that in the rare case where an ongoing investigation is unusually complex or being held in abeyance for a legitimate reason (like an overlapping criminal prosecution), the Commission should be able to confidentially seek a stay of proceedings.

> Limit the Commission's prosecutorial discretion:

Congress should also limit the Commission's use of prosecutorial discretion as a reason not to pursue serious violations. Unlike a substantive legal interpretation, an agency's exercise of prosecutorial discretion is also entitled to significant deference from courts.¹⁰⁰ Commissioners often cite prosecutorial discretion as an alternative ground for not pursuing enforcement, and the agency's lawyers have argued that this reliance on prosecutorial discretion can shield even legally erroneous determinations from judicial review.¹⁰¹ Congress should specify that any dismissal of an enforcement matter in which the amount in violation exceeds \$50,000 (indexed to inflation) should be treated as a dismissal on the merits subject to full judicial review.

> Restore the Commission's random audit authority:

Congress should also restore the Commission's ability to conduct random financial audits of campaigns, party committees, and other political committees (including super PACs). Random audits are a key means to ensure compliance with the law.¹⁰² But the FEC is currently allowed to conduct audits only for cause, based on errors that are evident on the face of a committee's campaign finance reports.¹⁰³ Instead of major violators, this approach tends to ensnare less sophisticated players who file sloppy reports, often because they have fewer resources to hire expensive compliance consultants. Cash-strapped state and local party committees in particular are frequently audited, while super PACs that can raise unlimited funds are rarely audited.¹⁰⁴

A better approach would be for the Commission to randomly audit a set percentage of committees, making sure to include a proportionate number of campaign and party committees, traditional PACs (which give directly to candidates), and super PACs. This was the Commission's approach when it was first created, before Congress removed its random audit authority in 1979 in reaction to what it perceived as the Commission's overzealous approach in nitpicking small reporting errors.¹⁰⁵

To head off such renewed concerns, the Commission should be required to establish clear materiality thresholds for audits to ensure that they focus on uncovering significant violations.¹⁰⁶ For instance, the Commission could establish that disclosure violations will be deemed immaterial for audit purposes unless the amount in violation exceeds \$10,000. Lower thresholds could be used for more serious offenses,

like the receipt of prohibited contributions from a government contractor or foreign national.

> Permanently reauthorize and expand the Commission's administration fines program:

Congress should also expand and make permanent the Commission's power to assess "traffic ticket" penalties for routine reporting violations like failing to file a report on time, which it does as part of its administrative fines program.¹⁰⁷ The program, first authorized in 2000, establishes an expedited process and set schedule of penalties for routine reporting violations.¹⁰⁸ It helps to ensure that these violations carry predictable and relatively swift consequences without consuming a disproportionate amount of the Commission's time and resources.¹⁰⁹ But the program has never been made permanent. The latest reauthorization of the program, passed in December 2018, provides that it will sunset on December 31, 2023.¹¹⁰ It is time to make the program permanent.

In addition, the program does not currently extend to all types of reports. For instance, although Congress in 2013 authorized the FEC to develop a schedule of penalties for reporting errors by super PACs and others who run independent campaign ads,¹¹¹ the Commission failed to do so.¹¹² Congress should mandate that the program be expanded to cover all such reporting violations.

> Provide more resources:

Finally, the changes discussed above, especially creation of an independent enforcement bureau, are likely to necessitate increasing the FEC's roughly \$71 million annual budget.¹¹³ The best way to ensure that the agency's politically sensitive responsibilities are carried out with professionalism and due regard for both the public's interests and those of elected officials, candidates, and other political actors is to give the agency the resources necessary to bring on high-quality staff in sufficient numbers to carry out prompt enforcement. Even a 50 percent increase in the Commission's budget, which would allow it to significantly expand its enforcement capabilities, would amount to less than a rounding error in the overall federal budget of \$4 trillion.¹¹⁴

Because of the FEC's unique role in regulating incumbent officeholders, Congress should also consider funding the agency through automatic or multiyear appropriations to keep the budget process from being used as leverage over the agency to deter enforcement, as has happened in the past.¹¹⁵

Conclusion

For all the divisions among the political elite, an overwhelming majority of Americans across the partisan spectrum consistently say they want strong campaign finance rules to deter corruption and amplify the voices of ordinary citi-

zens.¹¹⁶ Moreover, while the Supreme Court has taken some measures off the table, many others remain constitutionally viable.¹¹⁷ Skeptics of the entire project of campaign finance reform would do well to recognize this reality. In one form or another, campaign finance laws are here to stay. A dysfunctional FEC that fails to consistently administer and enforce them creates the worst of both worlds, disadvantaging the most conscientious (or least sophisticated) actors and weakening the public's faith in the rule of law.¹¹⁸

But both sides of this debate could benefit from a reality check. Those who favor strict limits and rigorous disclosure must recognize that a functional regulator does not equate to one that will always share their priorities. Campaign finance regulation implicates difficult trade-offs between the need for effective safeguards and the imperative to respect freedom of expression and association.¹¹⁹ These trade-offs are at the heart of philosophical debates over what sort of democracy we want to have.¹²⁰ Democratically accountable leaders in the White House and Congress tend to have strong views on these subjects. The courts too are virtually certain to continue playing an active role in policing the boundaries of acceptable regulation. The FEC will always need to be responsive to these constituencies, as well as to the public, resulting in looser rules than some advocates want.

Ultimately, what we should hope for from a functional FEC is not an agency that always opts for or against strong regulation, but one that enforces duly enacted laws in a timely manner with the utmost fairness and is capable of making hard regulatory choices pursuant to its delegated authority. Creating such a body will not solve all the problems with our campaign finance system, but there is no better place to start.

Endnotes

- 1 H.R. 1, 116th Congress, §§ 6001, et seq. (2019).
- 2 52 U.S.C. § 30106(b)(1). The FEC also administers certain relevant provisions of the Internal Revenue code. *Id.* Although the Commission does not enforce the Federal Election Campaign Act's criminal provisions, Commissioners can vote to report suspected criminal violations to law enforcement authorities. *Id.* § 30107(a) (9). Moreover, the Commission's interpretations of the FECA in regulations and advisory opinions often influence whether violations can be considered "knowing and willful," which is a predicate for criminal liability under the Act. As the acting assistant attorney general for the Criminal Division noted at a 2013 hearing before the Senate Judiciary Committee's Subcommittee on Crime and Terrorism, if the FEC affirmatively declines to act or fails to reach agreement in particular circumstances, it is highly unlikely that evidence of similar circumstances could give rise to proof beyond a reasonable doubt of criminal intent. See statement of Mythili Raman, April 9, 2013, at 3. Available at <http://www.justice.gov/iso/opa/ola/witness/04-09-13-crm-raman-testimony-re-current-issues-in-campaign-finance-law-enforceme.201361129.pdf>.
- 3 See 52 U.S.C. §§ 30106(c), 30106(f), 30107. Staff recommendations in enforcement cases are eventually made public, which does provide staff with an independent voice. A controlling bloc of commissioners who depart from the staff recommendation must state in writing their reasons for doing so. See *DCCC v. FEC*, 831 F.2d 1131, 1135 (D.C. Cir. 1987). The Commission's frequent deadlocks have also forced its staff to act independently in some other contexts, but there are no clear rules governing such circumstances. See, e.g., Matea Gold, "FEC Engulfed in Power Struggle Over Staff Independence," *Washington Post*, July 13, 2013, <http://wapo.st/18gywx3>.
- 4 52 U.S.C. § 30106(a)(5).
- 5 See Julian Salisbury, *U.S. Campaign Finance Regulation: An Examination of the Federal Election Commission Enforcement Process* (2002) 177-186; Thomas E. Mann, "The FEC: Administering and Enforcing Campaign Finance Law," in Anthony Corrado, et al., eds., *The New Campaign Finance Sourcebook* (Washington, DC: Brookings Institution Press, 2005), 233.
- 6 Compare, e.g., statement of Chair Bauerly and Commissioner Weintraub, Notice of Proposed *Citizens United* Rulemaking (January 20, 2011). Available at <https://www.fec.gov/resources/about-fec/commissioners/statements/DEMCommissionersCNPRMStatement1-20-11.pdf> (arguing that existing federal law gives FEC authority to impose stronger disclosure rules); and Statement of Vice Chair Caroline Hunter, Comm'r McGahn and Petersen, Notice of Proposed *Citizens United* Rulemaking (January 20, 2011). Available at <https://www.fec.gov/resources/about-fec/commissioners/statements/GOPCommissionersCNPRMStatement1-20-11.pdf> (arguing FEC lacks authority to require additional disclosure). See also Ann M. Ravel, "How Not to Enforce Campaign Finance Laws," *New York Times*, April 2, 2014, <https://www.nytimes.com/2014/04/03/opinion/how-not-to-enforce-campaign-laws.html>; Caroline Hunter, "FEC Enforces the Law as It Is, Not as Some Wish It to Be," *Roll Call*, July 13, 2009, <https://www.rollcall.com/news/-36730-1.html>.
- 7 See Part I.
- 8 "Dark Money Basics," OpenSecrets, accessed Oct. 11, 2018, <https://www.opensecrets.org/dark-money/basics?range=tot#outside-spending>.
- 9 See Brent Ferguson, *Candidates & Super PACs: The New Model in 2016*, Brennan Center for Justice, 2015. Available at http://www.brennancenter.org/sites/default/files/publications/Super_PACs_2016.pdf.
- 10 Jordan Muller, "FEC Rejects Proposal to Consider New Rules on Foreign Spending in U.S. Elections," OpenSecrets.org, May 25, 2018, <https://www.opensecrets.org/news/2018/05/fec-rejects-proposal-to-consider-new-rules-on-foreign-spending-in-us-elections/>.
- 11 The Commission released a final notice of proposed rulemaking in March 2018. See Federal Election Commission, Notice of Proposed Rulemaking: Internet Communications Disclaimers and the Definition of "Public Communication," 83 Fed. Reg. 12864 (March 26, 2018). Available at <https://www.fec.gov/updates/nprm-internet-communication-disclaimers-definition-public-communication-2018/>. It has taken no further action to date. Recently, two dozen senators signed a letter to FEC Chair Ellen Weintraub to express "concern regarding the Commission's delay in issuing a final rule." See "Lawmakers Want to Tighten Ad Spending Disclosures," *NJ Today*, March 6, 2019, <http://njtoday.net/2019/03/07/lawmakers-want-to-tighten-ad-spending-disclosures/>.
- 12 Former Republican Commissioner Lee Goodman proposed loosening rules on political party fundraising, but the Commission took no action on his suggestions. See Lee Goodman, "A Time to Revive the Party," *The Exam-*

- iner, Nov. 16, 2015, <https://www.washingtonexaminer.com/a-time-to-revive-the-party>.
- 13 Telephone interview with Michael Toner, former FEC commissioner and partner, Wiley Rein LLP (April 6, 2018) [hereinafter “Toner Interview”]. This is a source of bipartisan frustration. See Dave Levinthal, “Politics Souring on FEC Advice?” The Center for Public Integrity, July 22, 2014, <https://www.publicintegrity.org/2014/07/22/15030/politicos-souring-fec-advice> (quoting longtime Democratic attorney Joe Sandler lamenting FEC dysfunction).
 - 14 See, e.g., FEC Advisory Opinion Request No. 2018-08 (Darrell Issa), <https://www.fec.gov/data/legal/advisory-opinions/2018-08/> (request from retiring congressman on use of campaign funds to repay debt to candidate); FEC Advisory Opinion Request No. 2018-04 (Conservative Primary, LLC), <https://www.fec.gov/data/legal/advisory-opinions/2018-04/> (request for legal guidance on various issues from political startup); FEC Advisory Opinion Request No. 2016-20 (Mlinarchik), <https://www.fec.gov/data/legal/advisory-opinions/2016-20/> (request for guidance on application of ban on contributions from government contractors).
 - 15 See, e.g., Bob Bauer, “Trump Exposes the Holes in Campaign-Finance Laws,” *The Atlantic*, July 26, 2018, <https://www.theatlantic.com/ideas/archive/2018/07/did-trump-break-campaign-finance-laws/566180/>; Megan R. Wilson, “Schock Wants Campaign Finance Charges Dropped,” *The Hill*, April 25, 2017, <https://thehill.com/homenews/house/330395-schock-wants-campaign-finance-charges-dropped>; Matea Gold, “Menendez Indictment Marks First Big Corruption Case Involving a Super PAC,” *Washington Post*, April 2, 2015, https://www.washingtonpost.com/politics/menendez-indictment-marks-first-big-corruption-case-involving-a-super-pac/2015/04/01/f42f4aee-d8d9-11e4-8103-fa84725dbf9d_story.html; Jerry Markon, “John Edwards Indicted on Campaign Finance Charges,” *Washington Post*, June 3, 2011, https://www.washingtonpost.com/politics/john-edwards-indictment-expected-today/2011/06/03/AGQwEuHH_story.html. Of course, to be convicted of a criminal campaign finance violation one must have, at a minimum, actual knowledge that one’s conduct was illegal, which is ultimately a question of fact. See, e.g., *United States v. Danielczyk*, 788 F. Supp. 2d 472, 490 (E.D. Va. 2011). But to even be accused of a criminal violation (and potentially indicted) can impose huge financial and reputational costs on candidates and others, costs that might be avoided if the FEC issued clearer guidance as to what the law requires.
 - 16 This is a point of agreement between both Republican and Democratic practitioners. See Toner Interview; telephone interview with Neil Reiff, founding member, Sandler Reiff Lamb Rosenstein & Birkenstock (April 2, 2018).
 - 17 Telephone interview with Wes Bizzell, senior assistant general counsel and managing director of political law programs, Altria Group (Sept. 26, 2018).
 - 18 See *FEC Statement on Carey v. FEC Reporting Guidance for Political Committees That Maintain a Non-Contribution Account*, 2011, <https://www.fec.gov/updates/fec-statement-on-carey-fec/>.
 - 19 See *Nonconnected Committees* (Washington, D.C.: Federal Election Commission, 2008). Available at <https://www.fec.gov/resources/cms-content/documents/nongui.pdf>.
 - 20 “Kilmer, Buck Lead Bipartisan Call to President Trump: Fill Vacant Seats on Federal Election Commission Immediately,” 2018, <https://kilmer.house.gov/news/press-releases/kilmer-buck-lead-bipartisan-call-to-president-trump-fill-vacant-seats-on-federal-election-commission-immediately>.
 - 21 See, e.g., Charlie Savage and Kenneth P. Vogel, “The Legal Issues Raised by the Stormy Daniels Payment, Explained,” *New York Times*, May 3, 2018, <https://www.nytimes.com/2018/05/03/us/politics/trump-cohen-payment-legal-issues.html>.
 - 22 Scott E. Thomas and Jeffrey H. Bowman, “Obstacles to Effective Enforcement of the Federal Election Campaign Act,” *Administrative Law Review* 52 (2000): 590.
 - 23 *Id.* at 576-77 (“Representative Dawson Mathis warned: ‘We are going to set up a bunch of headhunters down here who are going to spend their full time trying to make a name for themselves persecuting and prosecuting Members of Congress. . . . Members had better watch their heads once the Commission is established.’”)
 - 24 52 U.S.C. § 30107(a).
 - 25 52 U.S.C. § 30106(c).
 - 26 52 U.S.C. § 30106(a). The FEC’s original structure provided for both the president and congressional leaders to name FEC commissioners, but the Supreme Court held that as “principal officers” of the executive branch, commissioners had not been nominated by the president and confirmed by the Senate. *Buckley v. Valeo*, 424 U.S. 1, 142 (1976).
 - 27 See note 5. A recent profile of the powerful Senate

- Majority Leader Mitch McConnell noted that Republican FEC commissioners are the only nominees that he makes a point of personally interviewing. See Charles Homans, “Mitch McConnell Got Everything He Wanted, but at What Cost?,” *New York Times Magazine*, Jan. 22, 2019, <https://www.nytimes.com/2019/01/22/magazine/mcconnell-senate-trump.html>.
- 28 Republican presidents signed both the original Federal Election Campaign Act and its 2003 expansion in the McCain-Feingold law (which was pushed by a bipartisan group of sponsors). Seth Gitell, “Making Sense of McCain-Feingold and Campaign-Finance Reform,” *The Atlantic*, July 2003, <https://www.theatlantic.com/magazine/archive/2003/07/making-sense-of-mccain-feingold-and-campaign-finance-reform/302758/>. Reform-minded Republicans like Missouri Representative Thomas Curtis were some of the staunchest early advocates for a strong FEC. Brooks Jackson, *Broken Promises: Why the Federal Election Commission Failed* (Indianapolis: Priority Press Publications, 1990), 27. Meanwhile, leading Democrats in Congress like the powerful Ways and Means Chairman, Ohio Congressman Wayne Hays, were decisive in limiting the FEC’s independence. See “Eliminating the FEC: The Best Hope for Campaign Finance Regulation?” *Harvard Law Review* 131 (2018): 1424-1425.
 - 29 See generally Project FEC, *No Bark, No Bite, No Point: The Case for Closing the Federal Election Commission and Establishing a New System for Enforcing the Nation’s Campaign Finance Laws*, Democracy21, 2002, 59-71. Available at <http://www.democracy21.org/uploads/%7BB4BE5C24-65EA-4910-974C-759644EC0901%7D.pdf>.
 - 30 In 2002, for example, the agency crafted an entire body of new regulations to implement McCain-Feingold in the months following the law’s passage. See, e.g., Explanation and Justification of Regulations on Contribution Limitations and Prohibitions, 67 Fed. Reg. 69928 (Nov. 19, 2002); Explanation and Justification of Regulations on Electioneering Communications, 67 Fed. Reg. 65190 (Oct. 23, 2002); Explanation and Justification of Reorganization of Regulations on Contributions and Expenditures, 67 Fed. Reg. 50582 (Aug. 5, 2002); Explanation and Justification of Regulations on Prohibited and Excessive Contributions; Non-federal Funds or Soft Money, 67 Fed. Reg. 49064 (July 29, 2002). It then moved fairly quickly to amend many of these same regulations in 2007 following the Supreme Court’s decision in *FEC v. Wisconsin Right to Life*. See Explanation and Justification of Rules on Electioneering Communications, 72 Fed. Reg. 72899 (Dec. 26, 2007). Even with respect to enforcement, the Commission was capable of decisive actions — particularly with respect to corporations and powerful independent interest groups. See, e.g., “Federal Home Mortgage Corporation (‘Freddie Mac’) Pays Largest Fine in FEC History,” April 18, 2006, <https://www.fec.gov/updates/federal-home-loan-mortgage-corporation-freddie-mac-pays-largest-fine-in-fec-history/>; “FEC Collects \$630,000 in Civil Penalties From Three 527 Organizations,” Dec. 13, 2006, <https://www.fec.gov/updates/fec-collects-630000-in-civil-penalties-from-three-527-organizations/>.
 - 31 Daniel Hensel, “New Polls Agree: Americans are Over Money in Politics,” *Issue One*, July 22, 2016, <https://www.issueone.org/new-polls-agree-americans-money-politics/>.
 - 32 This is evident in Congress, where Democrats have made campaign finance reform a centerpiece of their agenda. H.R. 1 passed the Democratic-controlled House without a single Republican vote, and Senate Republican leader Mitch McConnell has said he will not even allow a Senate vote. Kate Ackley, “House Passes H.R. 1 Government Overhaul, Sending It Back to Campaign Trail,” *Roll Call*, March 8, 2019, <https://www.rollcall.com/news/congress/house-passes-hr-1-government-overhaul-sending-it-back-to-campaign-trail>. The last time the Democrats controlled the House, a proposal to overhaul disclosure rules, which used to be an area of bipartisan agreement, died when it failed to garner a single Republican vote to overcome a Senate filibuster. Michael Beckel, “Senate Republicans Again Block DISCLOSE Act, Designed to Reveal Special Interest Spending,” OpenSecrets, Sept. 23, 2010, <https://www.opensecrets.org/news/2010/09/senate-republicans-again-block/>; Meredith Shiner, “GOP Ranks Hold Against Campaign Bill,” *Politico*, July 27, 2010, <https://www.politico.com/story/2010/07/gop-ranks-hold-against-campaign-bill-040289>.
 - 33 Lawrence Norden, Brent Ferguson, and Douglas Keith, *Five to Four*, Brennan Center for Justice, 2016, 3. Available at https://www.brennancenter.org/sites/default/files/publications/Five_to_Four_Final.pdf. It is true that President Trump, unlike many other Republicans, was critical of *Citizens United* early in the 2016 campaign. Marge Baker, “Trump is Wrong About Basically Everything — Except This,” MSNBC, Aug. 16, 2015, <http://www.msnbc.com/msnbc/trump-wrong-about-basically-everything-except>. But his administration has not acted on these criticisms, which do not appear to be shared by other Republican leaders.
 - 34 *Dysfunction and Deadlock: The Enforcement Crisis at the Federal Election Commission Reveals the Unlikelihood of Draining the Swamp*, Office of FEC Commissioner Ann M. Ravel, February 2017, 2, 4. Available at https://classic.fec.gov/members/ravel/ravelreport_feb2017.

- pdf (hereinafter “Ravel Report”). The data compiled by Commissioner Ravel’s office are consistent with earlier studies. See, e.g., *Roiled in Partisan Deadlock, Federal Election Commission Is Failing*, Public Citizen, Jan. 2013. Available at <https://www.citizen.org/sites/default/files/fec-deadlock-statement-and-chart-january-2013.pdf>.
- 35 Ravel Report at 10 (“[statistics] do not fully account for cases where the Commission takes very limited action because Commissioners who may favor holding a violator fully accountable will have no choice but to agree to finding RTB for a minor infraction, or significantly reduced penalties”).
- 36 *Id.* at 2, 4. These figures exclude routine administrative fines and alternative dispute resolution, with respect to which commissioners’ discretion is limited. The Commission’s penalties ticked up somewhat in 2017, thanks in part to a single large penalty negotiated with the American Conservative Union, but then fell again. See Bob Lenhard and Perrin Cook, *Enforcement Down at the Four-Member FEC, but Risks Remain for the Unwary*, Covington and Burling, July 11, 2018. Available at https://www.cov.com/-/media/files/corporate/publications/2018/07/enforcement_down_at_the_four_member_fec_but_risks_remain_for_the_unwary.pdf?_ga=2.226998685.145627635.1542752907-1037010459.1542752907. Penalties for 2019 are likely to be higher, thanks to \$1 million in penalties negotiated in connection with an illegal foreign contribution to the super PAC that supported Jeb Bush’s presidential campaign in 2016, see note 43, but still well below 2006 levels.
- 37 See 52 U.S.C. § 30109(a)(2).
- 38 See FEC Agency Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process, 72 Fed. Reg. 12545 (Mar. 16, 2007) (correcting the misconception that RTB findings amount to “definitive determinations that a respondent violated the Act,” as they actually indicate only that “the Commission found sufficient legal justification to open an investigation to determine whether a violation of the Act has occurred”). See also Statement of Reasons of Commissioner Steven T. Walther in Matter under Review (“MUR”) 6396 at 8-9 (Dec. 30, 2014) (describing the RTB standard as “very low,” lower than the “preponderance of the evidence” standard in civil matters and “far lower” than the “probable cause” and “beyond a reasonable doubt” standards in criminal matters).
- 39 As of September 30, 2017 (the last date for which such information has been made publicly available), more than three dozen matters had been sitting on the Commission’s docket awaiting an RTB determination for at least one year. See Memorandum from Steven T. Walther, Federal Election Commission chairman, to the Commission (Nov. 15, 2017), attachment 1. Available at https://www.fec.gov/resources/cms-content/documents/mtgdoc_17-53-a.pdf.
- 40 See Certification (Feb. 23, 2016), MUR 6485 (W Spann LLC *et al.*). Available at <https://www.fec.gov/files/legal/murs/6485/16044390516.pdf>; Statement of Reasons, Commissioners Walther, Ravel, and Weintraub, MUR 6485 (W Spann LLC, *et al.*). Available at <https://www.fec.gov/files/legal/murs/6485/16044391123.pdf>; Statement of Reasons, Commissioners Petersen, Hunter, and Lee, MUR 6485 (W Spann LLC, *et al.*). Available at <https://www.fec.gov/files/legal/murs/6485/16044391107.pdf>; see also Kenneth P. Doyle, “Delayed FEC Cases Match Romney Super PAC Complaints,” *Bloomberg*, July 20, 2015, <https://www.bna.com/delayed-fec-cases-n17179933660/>.
- 41 Ravel Report at 2.
- 42 Kenneth A. Gross, “The Enforcement of Campaign Finance Rules: A System in Search of Reform,” *Yale Law and Policy Review* 9 (1991): 286-287.
- 43 Nihal Krishan, “Election Watchdog Hits Jeb Bush’s Super PAC with Massive Fine for Taking Money from Foreign Nationals,” *Mother Jones*, March 11, 2019, <https://www.motherjones.com/politics/2019/03/jeb-bush-super-pac-fec-fine-neil-right-to-rise-apic-gordon-tang/>.
- 44 *Id.*; see also “Right to Rise USA: Outside Spending Summary 2016,” OpenSecrets, last accessed March 12, 2019, <https://www.opensecrets.org/outsidespending/detail.php?cmte=C00571372&cycle=2016>. Another large penalty the FEC negotiated recently, a \$350,000 fine against a political nonprofit for contributing in the name of another, was announced more than five years after the alleged violation occurred. See Lydia Wheeler, “American Conservative Union Agrees to Pay Fine for Passing Donation to Super PAC,” *The Hill*, Nov. 20, 2017, <https://thehill.com/regulation/361206-american-conservative-union-agrees-to-pay-fine-for-illegally-passing-donation-to>.
- 45 See, e.g., Notification with Factual and Legal Analysis, MUR 6896 (Margie Wakefield for Kansas). Available at <https://www.fec.gov/files/legal/murs/6896/15044385209.pdf>; Notification with General Counsel’s Report, MUR 6904 (Cat Ping for Congress). Available at <https://www.fec.gov/files/legal/murs/6904/16044396706.pdf>.

- 46 Telephone interview with Ellen Weintraub, vice chair, Federal Election Commission (Sept. 20, 2018). Weintraub began a one-year term as chair of the Commission on January 1, 2019 (her third stint in this role).
- 47 Ravel Report at 1.
- 48 See, e.g., *Citizens for Responsibility & Ethics in Washington v. FEC*, 316 F. Supp. 3d 349 (D.D.C. 2018) (holding that FEC’s failure to pursue complaints at RTB stage was contrary to the FECA and BRCA); *Citizens for Responsibility & Ethics in Washington v. FEC*, 299 F. Supp. 3d 83, 93 (D.D.C. 2018) (same); *Citizens for Responsibility & Ethics in Washington v. FEC*, 209 F. Supp. 3d 77 (D.D.C. 2016) (same).
- 49 See, e.g., Soo Rin Kim, “FEC Challenged Again to Find Coordination in Current Campaigns,” *Huffington Post*, Oct. 7, 2016, https://www.huffingtonpost.com/open-secrets-blog/fec-challenged-again-to-f_b_12386356.html (describing FEC’s failure to enforce rules limiting coordination between candidates and super PACs and other outside groups).
- 50 See Karl-Heinz Nassmacher, “Monitoring, Control, and Enforcement of Political Finance Regulation,” in *IDEA Handbook: Funding of Political Parties and Election Campaigns*, eds. Reginald Austin & Maja Tjernstrom (Stockholm: International Institute for Democracy and Electoral Assistance, 2003), 140. Available at <http://unpan1.un.org/intradoc/groups/public/documents/un/pan014975.pdf> (discussing danger of unenforced rules).
- 51 Weintraub Interview.
- 52 It took the Commission almost five years just to delete the two regulations invalidated by *Citizens United*. See 79 Fed. Reg. 62797 (Oct. 21, 2014) (revising 11 C.F.R. §§ 104, 114). Available at <http://sers.fec.gov/fosers/showpdf.htm?docid=305685>. During that time, the Commission repeatedly deadlocked on proposals for a more comprehensive rulemaking to address the effects of *Citizens United*. Minutes of FEC Jun. 15, 2011 Open Meeting. Available at https://www.fec.gov/resources/updates/agendas/2011/approved2011_39.pdf; Minutes of FEC Dec. 15, 2011 Open Meeting. Available at https://www.fec.gov/resources/updates/agendas/2012/approved2012_02.pdf; Minutes of FEC Mar. 7, 2013 Open Meeting. Available at https://www.fec.gov/resources/updates/agendas/2013/approved_1311.pdf. See also Statement of Commissioner Ellen L. Weintraub on the 2014 *Citizens United* Rulemaking, Oct. 9, 2014. Available at http://www.fec.gov/members/weintraub/statements/2014-10-09_Statement_of_Commissioner_Weintraub_on_2014_CU_Rulemaking.pdf.
- 53 See Federal Election Commission, Internet Communications, 71 Fed. Reg. 18,589 (April 12, 2006). Available at https://transition.fec.gov/law/cfr/ej_compilation/2006/notice_2006-8.pdf.
- 54 52 U.S.C. §§ 30107(a)(7), 30108.
- 55 See 52 U.S.C. § 30108(c).
- 56 Telephone interview with Adav Noti, formerly associate general counsel for policy at the FEC and now senior director, trial litigation and chief of staff at the Campaign Legal Center (October 29, 2018).
- 57 *Id.*
- 58 These numbers are derived from the database of advisory opinions available on the Commission’s website. See Federal Election Commission, Advisory Opinions, <https://www.fec.gov/data/legal/advisory-opinions/>.
- 59 FEC Advisory Opinion No. 2018-15 (Wyden). Available at <https://www.fec.gov/files/legal/aos/2018-15/2018-15.pdf>; FEC Advisory Opinion No. 2018-06 (Liuba for Congress). Available at <https://www.fec.gov/files/legal/aos/2018-06/2018-06.pdf>.
- 60 FEC Advisory Opinion No. 2018-02 (Alabama Academy of Radiology and ALRAD PAC). Available at <https://www.fec.gov/files/legal/aos/2018-02/2018-02.pdf>.
- 61 See FEC Advisory Opinion Request No. 2017-05 (Great America PAC and Committee to Defend the President), <https://www.fec.gov/data/legal/advisory-opinions/2017-05/>; FEC Advisory Opinion Request No. 2011-23 (American Crossroads), <https://www.fec.gov/data/legal/advisory-opinions/2011-23/>.
- 62 See Dave Levinthal and Suhauna Hussain, “Five Years Ago, the Federal Election Commission’s Top Lawyer Resigned. No Permanent Replacement Has Yet Been Named,” *Public Radio International*, July 4, 2018, <https://www.pri.org/stories/2018-07-04/five-years-ago-federal-election-commission-s-top-lawyer-resigned-no-permanent>; Dave Levinthal, “At the Federal Election Commission, No Watchdog for the Watchdogs,” *Center for Public Integrity*, April 3, 2019, <https://publicintegrity.org/federal-politics/fec-elections-watchdog/>. Recent reporting on the IG vacancy has revealed an extreme level of dysfunction in the hiring process, which at one point devolved into open conflict between two agency divisions that commissioners were powerless to resolve. *Id.*
- 63 Dave Levinthal and Ashley Balcerak, “Democrats Plan ‘Aggressive’ Oversight of Federal Election Commission,”

- Center for Public Integrity, Nov. 20, 2018, <https://www.publicintegrity.org/2018/11/20/22499/democrats-plan-aggressive-oversight-federal-election-commission> (noting FEC morale ranked 24th out of 28 comparable agencies for 2017).
- 64 Federal Election Commission Office of Inspector General, *Root Causes of Low Employee Morale Study* (Washington, DC: Federal Election Commission, July 2016), 1, <https://transition.fec.gov/fecig/documents/RootCause-sofLowEmployeeMoraleStudy-FinalReport-OIG-15-06.pdf>.
- 65 *Id.* at 3.
- 66 *Id.* at 4.
- 67 *Appoint FEC Commissioners Committed to Transparency*, Sunlight Foundation, 2013. Available at <http://assets.sunlightfoundation.com.s3.amazonaws.com/policy/papers/One%20Pagers/Money%20in%20Politics/7%20FEC%20commissioners%20.pdf>.
- 68 See, e.g., 15 U.S.C. § 41 (the FTC shall be composed of five commissioners); 15 U.S.C. § 78d(a) (the SEC shall be composed of five commissioners); 47 U.S.C. § 154 (the FCC shall be composed of five commissioners).
- 69 52 U.S.C. §§ 30106(a)(1), 30106(c). When the number of sitting commissioners drops below four the Commission loses its quorum and the ability to perform most of its core responsibilities. See Matthew Mosk, “As Primaries Begin, the FEC Will Shut Down,” *Washington Post*, Dec. 22, 2007, <http://www.washingtonpost.com/wp-dyn/content/article/2007/12/21/AR2007122102299.html>.
- 70 *Buckley*, 424 U.S. at 142.
- 71 For the foreseeable future that is likely to be the Democrats and Republicans, but the requirement could be framed in terms of the largest and second-largest parties in Congress. Under a new five-member Commission the quorum number should drop to three, but only where no party occupies more than one seat on the Commission (such that both major parties would be represented).
- 72 These restrictions are analogous to those imposed on the nonpartisan members of the United Kingdom Electoral Commission, which also administers campaign finance requirements. See Political Parties, Elections and Referendums Act, 2000, c. 41, §§ 3A, 4, 4A (Eng.).
- 73 See “Party Identification Trends, 1992-2017,” Pew Research Center, last modified March 20, 2018, accessed Oct. 12, 2018, <http://www.people-press.org/2018/03/20/party-identification-trends-1992-2017/>. Representation for political independents was actually proposed when the FEC was first restructured following *Buckley*. An amendment that would have added two seats on the Commission for political independents passed the Senate but was not included in the final legislation. See “Court Decision Forces New Campaign Law,” in *CQ Almanac 1976* (1977). Available at <https://library.cqpress.com/cqalmanac/document.php?id=cqal76-1186827>.
- 74 Bradley A. Smith, *Testimony of Bradley A. Smith Before the U.S. House Oversight and Reform Committee: H.R. 1: Strengthening Ethics Rules of the Executive Branch*, Institute for Free Speech, Feb. 6, 2019, 11. Available at <https://www.ifs.org/expert-analysis/testimony-of-bradley-a-smith-before-the-u-s-house-oversight-and-reform-committee/>
- 75 *Buckley*, 424 U.S. at 140.
- 76 Daniel I. Weiner, “FEC’s Status Quo Is Hazardous—Proposed Legislation Would Help Fix It,” *The Hill*, Feb. 10, 2019, <https://thehill.com/opinion/campaign/429294-fecs-status-quo-is-hazardous-proposed-legislature-would-help-fix-it>.
- 77 See Restoring Integrity to America’s Elections Act, H.R. 2034, 115th Cong., § 2(c) (2017); Federal Election Administration Act of 2017 (FEAA), H.R. 3953, 115th Cong., § 352(b)(3)(B) (2017).
- 78 H.R. 2034, 115th Cong. § 2(c)(3)(B)(iii) (2017); H.R. 3953, 115th Cong. § 352(b)(3)(B)(iii) (2017).
- 79 This is especially unfortunate given the disproportionate impact money in politics so often has on communities of color. See Adam Lioz, “Stacked Deck: How the Racial Bias in Our Big Money Political System Undermines Our Democracy and Our Economy,” Demos, 2013, 43, 51. Available at https://www.demos.org/sites/default/files/publications/StackedDeck2_1.pdf.
- 80 Since 2008 women have occupied half the Commission’s seats, but that is a relatively recent development. Only one openly LGBTQ person has ever served on the Commission. Non-lawyers have also made up only a tiny fraction of commissioners. See Federal Election Commission, All Commissioners, <https://www.fec.gov/about/leadership-and-structure/commissioners/>.
- 81 See, e.g., Kirti Datla, “Deconstructing Independent Agencies (and Executive Agencies),” *Cornell Law Review* 98 (2013): 796 (“Chairs... usually hold their position as chair (but not as members of the agency)

- at the will of the President.”). *See, e.g.*, 15 U.S.C. § 41 (2012) (giving the president the power to designate one member of the FTC to serve as chairman); 29 U.S.C. § 153(a)(1) (2006) (same provision for the NLRB). The FEC chair should receive the same salary (Level III on the executive schedule) as the leaders of other independent watchdog agencies like the FCC and FTC chairs. *See* 47 U.S.C. § 154(d) (FCC); 15 U.S.C. § 42 (FTC).
- 82 52 U.S.C. § 30106(a)(5).
- 83 *See* Will Tucker, “No Issue Too Small to Create a Standoff at the FEC,” OpenSecrets, Apr. 8, 2016, <https://www.opensecrets.org/news/2016/04/no-issue-too-small-to-create-a-standoff-at-the-fec/>.
- 84 Amanda LaForge, “The Toothless Tiger: Structural, Political and Legal Barriers to Effective FEC Enforcement,” *Administrative Law Journal of the American University* 10 (Spring 1996): 362 (“The lack of a strong chairperson creates an ambivalent atmosphere at the FEC in which participants in the administrative process never actually know who is in control of the agency’s operations.”).
- 85 As a practical matter, most FEC chairs likely would have some heightened influence relative to other commissioners, especially by virtue of appointing key personnel like the staff director and general counsel (though not the new director of enforcement, as discussed below). But again, it is not unreasonable for the president to have some influence over the FEC, just as she or he has influence over other independent regulators, provided the power to name the chair does not translate into an ability to weaponize the Commission against the president’s political opponents.
- 86 *See* *NRA Political Victory Fund v. FEC*, 6 F.3d 821, 826 (D.C. Cir. 1993), *cert. dismissed*, 513 U.S. 88 (1994) (recognizing limits on the president’s right to remove FEC commissioners during their terms).
- 87 Exec. Office Appropriations Act of 1998, 105 Pub. L. No. 61, 111 Stat. 1272 (Oct. 10, 1997).
- 88 *See* 52 U.S.C. § 30106(a)(2)(B).
- 89 “All Commissioners,” Federal Election Commission, accessed Oct. 18, 2018, <https://www.fec.gov/about/leadership-and-structure/commissioners/>.
- 90 Telephone interview with Michael Toner, former FEC commissioner and partner, Wiley Rein LLP (Apr. 6, 2018).
- 91 15 U.S.C. § 41 (limiting FTC commissioner appointments to seven-year terms, with the potential to be held over until a replacement is appointed); 15 U.S.C. § 78d(a) (limiting SEC commissioner appointments to five-year terms, with the potential to be held over until their replacement is appointed, but no longer than the end of the next session of Congress following term expiration); 47 U.S.C. § 154 (limiting FCC commissioner appointments to five-year terms, with the potential to be held over for up to until their replacement is appointed, but no longer than the end of the next session of Congress following term expiration).
- 92 *See* Todd Lochner and Bruce E. Cain, “Equity and Efficacy in the Enforcement of Campaign Finance Laws,” *Texas Law Review* 77 (1998): 1902-1904 (referencing Eugene Bardach and Robert A. Kagan, *Going by the Book: The Problem of Regulatory Unreasonableness* (Philadelphia: Temple University Press, 1982)).
- 93 In the event that commissioners cannot agree on an enforcement director, another staffer from the enforcement bureau should be able to fill the role in an acting capacity.
- 94 Some have urged Congress to authorize the FEC or a successor agency to itself adjudicate enforcement cases using administrative law judges (ALJs). *See* Project FEC, *No Bark, No Bite, No Point: The Case for Closing the Federal Election Commission and Establishing a New System for Enforcing the Nation’s Campaign Finance Laws*, Democracy21, 2002, 36. Available at <http://www.democracy21.org/uploads/%7BB4BE5C24-65EA-4910-974C-759644EC0901%7D.pdf>. ALJs are used throughout the federal government, and certainly could be successful at the FEC. *See* Kenneth A. Gross, “The Enforcement of Campaign Finance Rules: A System in Search of Reform,” *Yale Law and Policy Review* 9 (1991): 286-287. On the other hand, there is some evidence that ALJs tend to be “house players” who are disproportionately inclined to rule in the government’s favor. *See* Lucille Gauthier, “Insider Trading: The Problem with the SEC’s In-House ALJs,” *Emory Law Journal* 67 (2017): 134–140. They are also not immune from political interference and lack the life tenure afforded to Article III judges. *See* Eric Yoder, “Trump Moves to Shield Administrative Law Judge Decisions in the Wake of High Court Ruling,” *Washington Post*, July 10, 2018, <https://www.washingtonpost.com/news/powerpost/wp/2018/07/10/trump-moves-to-shield-administrative-law-judge-decisions-in-wake-of-high-court-ruling/>. For all these reasons, it may make more sense for Congress to leave ultimate adjudication of campaign finance enforcement cases in the hands of the judiciary, and focus instead on making the FEC’s process for investigating alleged violations and deciding whether to pursue them more efficient.

- 95 At the conclusion of a matter, commissioners who disagree with the outcome should still be able to issue a statement, as is the current practice.
- 96 See, e.g., Office of Chief Counsel, *Enforcement Manual* (Washington, D.C.: U.S. Securities and Exchange Commission, 2017), §2, <https://www.sec.gov/divisions/enforce/enforcementmanual.pdf>; Federal Trade Commission, *Operating Manual* (Washington, DC: U.S. Federal Trade Commission), ch. 3, https://www.ftc.gov/sites/default/files/attachments/ftc-administrative-staff-manuals/ch03investigations_0.pdf; Office of the General Counsel, *Regional Attorneys' Manual* (Washington, D.C.: U.S. Equal Employment Opportunity Commission, 2005), pt. 2 §§ 2, 3, <https://www.eeoc.gov/eeoc/litigation/manual/index.cfm>.
- 97 52 U.S.C. § 30109(a)(8). Complainants aggrieved by the Commission's decision not to pursue allegations in a complaint also have a statutory right to sue, provided they have standing. See 52 U.S.C. § 30109 (a)(8)(C).
- 98 See, e.g., *Democratic Senatorial Campaign Comm. v. FEC*, 1996 U.S. Dist. LEXIS 22849, *14, 1996 WL 34301203 (“In making decisions regarding whether it will accept administrative complaints for investigation, there is little doubt that the FEC is entitled to considerable judicial deference. Resource allocation in general and prosecutorial decisions in particular are areas in which courts are reluctant to intervene in agency operations without substantial justification.”).
- 99 Where the Commission votes affirmatively not to pursue a matter, complainants should continue to have the right to challenge that decision in court. See 52 U.S.C. § 30109(a)(8).
- 100 See *Citizens for Responsibility & Ethics in Washington v. FEC*, 892 F.3d 434, 439 (DC Cir. 2018).
- 101 See, e.g., *Citizens for Responsibility & Ethics in Washington v. FEC*, 316 F. Supp.3d 349, 420 (D.D.C. 2018).
- 102 Research shows that audits have a positive impact on compliance. Mihriye Mete, “Bureaucratic Behavior in Strategic Environments: Politicians, Taxpayers, and the IRA,” *The Journal of Politics* 64 (May 2002): 398.
- 103 52 U.S.C. § 30111(b); see FEC Audit Division, *The FEC Audit Process: What to Expect* (Washington, DC: Federal Election Commission, 2012), https://transition.fec.gov/pages/brochures/audit_process.pdf.
- 104 See “Audit Reports,” Federal Election Commission, accessed Oct. 19, 2018, <https://www.fec.gov/legal-resources/enforcement/audit-search/>.
- 105 Lauren Eber, “Waiting for Watergate: The Long Road to FEC Reform,” *Southern California Law Review* 79 (2006): 1168. Available at https://southern.californialawreview.com/wp-content/uploads/2018/01/79_1155.pdf.
- 106 See generally International Accounting, Auditing and Ethics Audit and Assurance Faculty, *Materiality in the Audit of Financial Statements*, Institute of Chartered Accountants in England and Wales, 2017, 5.
- 107 52 U.S.C. § 30109(a)(4)(C)(iv). See also 65 Cong. Rec. H5622 (daily ed. July 15, 1999) (statement of Rep. Maloney) (referring to the administrative fines bill as a “traffic ticket” system).
- 108 Administrative Fines, 65 Fed. Reg. 31,787 (May 19, 2000) (codified as amended at 11 C.F.R. §§ 111.30-111.46); Federal Election Commission, Administrative Fine Program, <http://www.fec.gov/af/af.shtml>.
- 109 Steven T. Walther, Caroline C. Hunter, Lee E. Goodman, Matthew S. Petersen, and Ellen L. Weintraub, *Legislative Recommendations of the Federal Election Commission 2017* (Washington, DC: Federal Election Commission, 2017), 11, <https://www.fec.gov/resources/cms-content/documents/legrec2017.pdf>
- 110 Amendment – Federal Election Campaign Act of 1971, Pub. L. No. 115-386, 132 Stat. 5161 (2018).
- 111 52 U.S.C. § 30109(a)(4)(C)(iv); Public Law No. 113-72 (December 26, 2013) (expanding the Administrative Fine Program to include violations for certain independent expenditure reports and other contribution reports).
- 112 A rulemaking that would take up this issue has been pending on the Commission's docket since 2015. See Rulemaking Petition: Administrative Fines Program and Commission Forms, 80 Fed. Reg. 16594 (March 30, 2015) (to be codified at 11 C.F.R. pt. 111). Available at <https://www.gpo.gov/fdsys/pkg/FR-2015-03-30/pdf/2015-07176.pdf>.
- 113 *Fiscal Year 2018 Congressional Budget Justification* (Washington, DC: Federal Election Commission, 2017), https://www.fec.gov/resources/cms-content/documents/FEC_FY_2018_Congressional_Budget_Justification.pdf.
- 114 Leigh Angres and Jorge Salazar, “The Federal Budget in 2017,” Congressional Budget Office, March 2018, <https://www.cbo.gov/system/files?file=115th-congress-2017-2018/graphic/53624-fy17federalbudget.pdf>.

- 115 See Project FEC, *No Bark, No Bite, No Point: The Case for Closing the Federal Election Commission and Establishing a New System for Enforcing the Nation's Campaign Finance Laws*, Democracy21, 2002, 22. Available at <http://www.democracy21.org/uploads/%7BBB-4BE5C24-65EA-4910-974C-759644EC0901%7D.pdf>. There are also a variety of other minor budgeting changes that should be made, such as permitting the FEC to pay its senior staff more, as the Commission itself has requested of Congress. See Steven T. Walther, Caroline C. Hunter, Lee E. Goodman, Matthew S. Petersen, and Ellen L. Weintraub, *Legislative Recommendations of the Federal Election Commission 2017* (Washington, DC: Federal Election Commission, 2017), 4, <https://www.fec.gov/resources/cms-content/documents/legrec2017.pdf>.
- 116 One recent survey found almost 80 percent support for reasonable limits on campaign spending. See Bradley Jones, “Most Americans Want to Limit Campaign Spending, Say Big Donors Have Greater Political Influence,” Pew Fact Tank, May 8, 2018, <http://www.pewresearch.org/fact-tank/2018/05/08/most-americans-want-to-limit-campaign-spending-say-big-donors-have-greater-political-influence/>.
- 117 See Wendy R. Weiser and Alicia Bannon, *Democracy: An Election Agenda for Candidates, Activists, and Legislators*, Brennan Center for Justice, 2018. Available at <http://www.brennancenter.org/publication/democracy-election-agenda-2018>.
- 118 Karl-Heinz Nassmacher, “Monitoring, Control, and Enforcement of Political Finance Regulation,” in *IDEA Handbook: Funding of Political Parties and Election Campaigns*, eds. Reginald Austin and Maja Tjernstrom (Stockholm: International Institute for Democracy and Electoral Assistance, 2003), 140. Available at <http://unpan1.un.org/intradoc/groups/public/documents/unct/unpan014975.pdf> (unenforced campaign rules inevitably “produce a scandal which will damage people’s trust in democracy ... and in democratically elected leaders who do not live up to their own laws.”); Todd Lochner, “Surveying the Landscape of State Campaign Finance Enforcement: A Preliminary Analysis,” *Election Law Journal* 4 (2005): 329, 331, 339 (“One cannot discount the possibility that candidates or groups who are navigating the waters of campaign finance law for the first time may be sufficiently afraid due to their perception of the consequences of ‘breaking the law’ that they forgo otherwise legitimate campaign strategies.”)
- 119 Even skeptics of the Supreme Court’s equation between spending money in the political arena and literal political speech concede that campaign spending is a form of expressive or associational conduct entitled to heightened First Amendment protection. See Burt Neuborne, *Madison’s Music: On Reading the First Amendment* (New York: The New Press, 2015), 80. Daniel I. Weiner and Benjamin Brickner, “Electoral Integrity in Campaign Finance Law,” *NYU Journal of Legislation and Public Policy* 20 (2017): 101, 133 (noting that constitutional distinction between “pure” speech and other First Amendment-protected conduct is not as clear as many assume).
- 120 Deborah Hellman, “Defining Corruption and Constitutionalizing Democracy,” *Michigan Law Review* 111 (June 2013): 1422.

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