

February 23, 2021

The Honorable Nancy Pelosi
Speaker of the House of
Representatives
U.S. House of Representatives
Washington, DC 20510

The Honorable Kevin McCarthy
Republican Leader
U.S. House of Representatives
Washington, DC 20510

The Honorable Chuck Schumer
Majority Leader
U.S. Senate
Washington, DC 20510

The Honorable Mitch McConnell
Republican Leader
U.S. Senate
Washington, DC 20510

Dear Speaker Pelosi, Republican Leader McCarthy, Majority Leader
Schumer, and Republican Leader McConnell:

We are former Commissioners and Chairs of the Federal Election Commission (“FEC”)—one appointed as a Republican and one as a Democrat—and write in support of the FEC reform provisions of the “For the People Act,” H.R. 1 and S. 1 in the current Congress. Our comments are limited to the bill’s FEC reform provisions (Title VI, Subtitle A of H.R. 1).

The FEC is “*the* independent regulatory agency charged with administering and enforcing . . . federal campaign finance law.”¹ For the first three decades of its existence, the Commission performed its functions at least reasonably well. But since then, the FEC has grown deeply dysfunctional, and our democracy has suffered as a result.

Over roughly the past decade, the FEC has routinely failed to enforce the law, even when presented with overwhelming evidence of likely legal violations.² For example, every election cycle reveals new instances of super PACs and candidates working hand-in-glove, and yet the FEC has *never* fined a super PAC for coordinating with a campaign.³ Dark money grows

¹ Mission and History, FEC, <https://www.fec.gov/about/mission-and-history/> (emphasis added).

² See, e.g., Karl Evers-Hillstrom, *Republican FEC Commissioners Let the Clinton Campaign Off the Hook for Super PAC Coordination*, CENTER FOR RESPONSIVE POLITICS (Jul. 22, 2019), <https://www.opensecrets.org/news/2019/07/republican-fec-commissioners-let-clinton-campaign-off/>.

drastically each election cycle—reaching \$750 million in 2020⁴—yet the FEC refuses to enforce the disclosure laws on the books. This inaction has resulted in an explosion in secret spending and our politics increasingly rigged in favor of wealthy special interests.

Moreover, even as Supreme Court decisions and rapidly evolving technological practices have transformed the electoral landscape, the FEC has failed to meaningfully update its regulations.⁵ For example, more than \$2 billion was spent on digital political ads in the 2020 cycle,⁶ but the FEC has not updated its digital ad regulations since 2006;⁷ indeed, for the past eight years, the FEC has been unable to agree on how to update regulations that refer to technologies such as “telegrams,” typewriters,” and “magnetic diskettes.”⁸ Since 2012, the FEC has issued just one substantive regulation, regarding the technical question of how to report multistate independent expenditures and electioneering communications.

To fix the FEC, H.R. 1 / S. 1 draws from the bipartisan “Restoring Integrity to America's Elections Act,” which was introduced with Republican and Democratic co-sponsors in the 114th,⁹ 115th,¹⁰ and 116th Congresses.¹¹

³ Ellen L. Weintraub, Chair Ellen L. Weintraub’s Supplementary Responses to Questions from the Committee on House Administration at 4, 5 (May 1, 2019), https://www.fec.gov/resources/cms-content/documents/FEC_Response_to_House_Admin_Attachment_A_Weintraub.pdf.

⁴ Anna Massoglia, ‘Dark Money’ Groups Find New Ways to Hide Donors in 2020 Election, CTR. FOR RESPONSIVE POLITICS (Oct. 30, 2020), <https://www.opensecrets.org/news/2020/10/dark-money-2020-new-ways-to-hide-donors/>.

⁵ See REG 2014-02 (Independent Expenditures by Authorized Committees; Reporting Multistate Independent Expenditures and Electioneering Communications); see also FEC, *Responses to Questions from the Committee on House Administration*, at 26-28, 30-37 (May 1, 2019), https://www.fec.gov/resources/cms-content/documents/FEC_Response_to_House_Admin.pdf (FEC identifying just one substantive rule in response to a question about rulemakings completed since January 1, 2012).

⁶ CTR. FOR RESPONSIVE POLITICS, Online Political Ad Spending, <https://www.opensecrets.org/online-ads> (accessed Feb. 10, 2021).

⁷ See FEC Record: Outreach, *Internet Communications and Activity*, FEC (May 1, 2006), <https://www.fec.gov/updates/internet-communications-and-activity/> (describing internet regulations adopted 2006); see also REG 2011-02 (Internet Communication Disclaimers) (digital disclaimer rulemaking that has remained pending since 2011).

⁸ See REG 2013-01 (Technological Modernization) (rulemaking to acknowledge modern technology and practices that has remained pending since 2013).

⁹ H.R. 2931, 114th Congress (2015).

¹⁰ H.R. 2034, 115th Congress (2017).

¹¹ H.R. 1272, 116th Congress (2019).

H.R. 1 / S. 1 changes the number of FEC Commissioners from six to five to avoid deadlocks—one of whom will be a chair with broad authority to manage the agency—and requires that no more than two Commissioners can be members of the same political party. This means agency actions will require at least one vote from either an independent or a member of a different party.

As described in more detail below, H.R. 1 / S. 1’s bipartisan FEC reforms will help ensure that the campaign finance laws that protect the voices of everyday Americans will be enforced, regardless of whether the lawbreaker is a Democrat or a Republican.

The FEC Is Broken

Under current law, the FEC is led by six Commissioners nominated by the President, no more than three of whom can be from the same political party.¹² The political custom is that nominees are recommended by party leaders in Congress. To pursue investigations or take other substantive actions, at least four Commissioners need to agree.¹³

This structure allows just three Commissioners to paralyze the agency by withholding affirmative votes. When that occurs, the Commission “deadlocks,” meaning it fails to achieve the four votes required to proceed and cannot act.

For the first thirty years of its existence, the Commission deadlocked relatively infrequently. One of us was on the FEC between 1991 and 1995, and can recall only *once* during those four years that the agency deadlocked on an enforcement matter. That was because Commissioners seemed to view their job as ensuring that the law was applied, and applied even-handedly, to both parties.

That changed in the mid-2000s. Around that time, Congressional opponents of campaign finance regulation began to prioritize the recommendation and confirmation of FEC Commissioners who are ideologically opposed to campaign finance laws and their enforcement.¹⁴ Ever since, three

¹² 52 U.S.C. § 30106(a)(1).

¹³ *See id.* § 30106(c).

¹⁴ *See, e.g.,* Charles Homans, *Mitch McConnell Got Everything He Wanted. But at What Cost?*, N.Y. Times (Jan. 22, 2019), <https://www.nytimes.com/2019/01/22/magazine/mcconnell-senate-trump.html> (noting that, following McConnell’s failed legal challenge to the Bipartisan Campaign Reform Act in 2002, “his attention shifted to the Federal Election Commission,” and with his former chief of staff stating that, of all the government agencies

Commissioners have routinely voted as a bloc to prevent the FEC from taking action on important issues like disclosure of secret money, super PAC coordination, transparency for digital political advertising, and more. As a result, deadlocks have become the norm.

To be clear, the problem is not that the Republican Commissioners only vote to enforce the law against Democrats, and vice-versa; it is that the Republican Commissioners largely refuse to enforce the law against *anybody*, Democrat or Republican.¹⁵ The agency’s refusal to enforce the law against a “bipartisan” set of wealthy special interests is an argument for reforming the FEC, not preserving it as-is.

Those seeking to defend a broken status quo have attempted to downplay the severity of the FEC’s dysfunction. But the numbers don’t lie: “the FEC does not deadlock occasionally or sporadically—it deadlocks *most of the time*.”¹⁶

As the FEC itself admitted to the Committee on House Administration in 2019, the FEC has had at least one deadlocked vote in the majority (50.6%) of the enforcement matters it has considered since 2012.¹⁷ Other recent analyses of deadlock rates have reached similar conclusions.¹⁸

for which McConnell, as the Senate Republican leader, selected and vetted potential appointees, “the one that I know of where McConnell himself interviewed every single person was the F.E.C.”); *see also* Nancy Cook, *He’s Going to Be an Enabler*, Politico (Feb. 21, 2017), <https://www.politico.com/magazine/story/2017/02/trump-mcgahn-white-house-lawyer-214801/> (describing how former FEC Commissioner Don McGahn’s “tenure seemed like part of a broader Republican-sanctioned strategy to defang the agency. That could be why Senate Majority Leader Mitch McConnell handpicked him for the job.”)

¹⁵ *See, e.g.*, MUR 6940 (Correct the Record PAC) (FEC deadlocked and dismissed complaint alleging coordination between 2016 Democratic presidential candidate Hillary Clinton’s campaign and a supportive super PAC, with the Democratic Commissioners voting to pursue the matter and Republican Commissioners voting to dismiss it); MUR 7183 (Thornton Law Firm) (FEC deadlocked and dismissed complaint involving alleged straw donations to Democratic candidates and committees, with Democratic Commissioners voting to pursue the matter and Republican Commissioners voting to dismiss); MUR 6932 (Hillary Rodham Clinton) (FEC deadlocked and dismissed complaint alleging that the 2016 Clinton campaign accepted in-kind contributions from a supportive super PAC, with the Democratic Commissioners voting to pursue the matter and Republican Commissioners voting to dismiss).

¹⁶ Before the H. Comm. on H. Admin., 116th Cong. 3 (2019) (written testimony of Adav Noti, Senior Dir., Trial Litig. & Chief of Staff, Campaign Legal Ctr.), <https://docs.house.gov/meetings/HA/HA00/20190925/109983/HHRG-116-HA00-Wstate-NotiA-20190925-U1.pdf>

¹⁷ FEC, *Responses*, *supra* note 5 at 20; *see also* Weintraub, *supra* note 3, at 4 (noting that “a slim majority of 51% have at least one split vote along the way”).

¹⁸ A Congressional Research Service (“CRS”) report found that the Commission deadlocked in 24.4% of enforcement matters closed in 2014, compared to 13% in 2008 and 2009. R. Sam

A recent letter submitted by nine former FEC Commissioners sought to downplay these numbers, but they are arguing what the data simply does not show.¹⁹ The letter claims that deadlocks are rare, but it relies on sources that include figures from the Commission’s entire existence (thereby obscuring the stark differences between the FEC’s relatively successful first thirty years, and its largely dysfunctional last ten), or that includes vote results on noncontroversial, non-substantive matters (such as routine votes to approve meeting minutes, to sign-off on essentially automatic administrative fines, or to close a file after the Commission deadlocks). Such efforts are misleading, disingenuous, and easily countered.²⁰

Strained attempts to portray the FEC as a functional agency belie the widespread understanding in the campaign finance field that the FEC simply does not do its job. As one leading Republican campaign finance lawyer told the *Washington Post* in 2016, “we are in an environment in which there has been virtually no enforcement of the campaign finance laws.”²¹

Garrett, Cong. Research Serv, R44319, *The Federal Election Commission: Enforcement Process and Selected Issues for Congress*, at 9–10 (Dec. 22, 2015), <https://crsreports.congress.gov/product/pdf/R/R44319/3>. Garrett’s “analysis defined a deadlock as any matter including a vote without a majority of at least four members.” *Id.* at 10 n.44.

An analysis conducted by one of our offices in 2017, following the same methodology as the CRS report, found that in 2006, only 2.9% of all substantive votes in closed enforcement matters were deadlocked votes. 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*, at 1, 9 (Feb. 2017), <https://shpr.legislature.ca.gov/sites/shpr.legislature.ca.gov/files/Ravel%20-%20FEC%20Dysfunction.pdf>. In 2013, it was 26.2%, and by 2016, the rate had exceeded 30%. *Id.* Other findings included that, in 2016, 12.5% of enforcement matters closed because of a deadlock, while none had ten years previously, and 37.5% of enforcement matters closed with at least one deadlocked vote on a substantive matter in 2016, up from 4.2% in 2006. *Id.* at 10.

¹⁹ Letter from Nine Former FEC Commissioners to Congressional leadership, (Feb. 9, 2021), https://www.ifs.org/wp-content/uploads/2021/02/2021-02-09_Former-FEC-Commissioners-Letter_Concerns-With-HR-1-And-S-1.pdf (citing Bradley A. Smith, *Feckless: A Critique of Critiques of the Federal Election Commission*, 27 GEO. MASON L. REV. 503, 528-530 (2020), http://georgemasonlawreview.org/wp-content/uploads/2020/07/Smith_Final_Web.pdf.)

²⁰ For a fuller response to the misleading deadlock calculations cited by the letter from 9 former Commissioners, see Trevor Potter, *A Dereliction of Duty: How the FEC Commissioners’ Deadlocks Result in a Failed Agency and What Can Be Done*, 27 GEO. MASON L. REV. 483, 487-89 (2020), http://georgemasonlawreview.org/wp-content/uploads/2020/07/Potter_Final_Web.pdf.

²¹ Matea Gold, *Trump’s Deal With the RNC Shows How the Money Is Flowing Back to the Parties*, WASH. POST (May 18, 2016), <https://www.washingtonpost.com/politics/trumps->

Indeed, the FEC’s routine deadlocks send a clear signal that wealthy special interests can violate the law and expect to get away with it. This is illustrated particularly clearly with regard to the FEC’s refusal to enforce disclosure laws. Despite Congress explicitly mandating disclosure of large donors to groups that spend money influencing elections, and despite the Supreme Court in decisions like *Citizens United* endorsing “effective disclosure” as a constitutional means of “insur[ing] that the voters are fully informed,”²² so-called dark money groups spent over \$750 million on the 2020 election cycle alone.²³

FEC Commissioners have deadlocked on enforcing transparency laws in even the most egregious cases. For example, in one case, FEC lawyers calculated that more than 68% of a dark money group’s \$4.5 million in spending went towards influencing elections, and the group therefore should have registered a political committee and disclosed its donors.²⁴ Contrary to law and Supreme Court precedent, the Commissioners deadlocked, and the dark money group kept its donors secret.²⁵ In another set of cases, arising out of the 2012 and 2016 election cycles, several Democratic and Republican donors masked their contributions to super PACs—in amounts ranging from \$857,000 to over \$12 million—by laundering the money through LLCs. Some donors even admitted to the media that they gave through shell corporate entities to hide their identities from the public. The FEC sat on the matters until 2016, then deadlocked; three Commissioners acknowledged that the contributions violated the law but voted against enforcement anyway.²⁶

The H.R. 1 / S. 1 Fix

First, H.R. 1 / S. 1 changes the number of FEC Commissioners from six to five to avoid deadlocks, and requires that no more than two Commissioners

[deal-with-the-rnc-shows-how-big-money-is-flowing-back-to-the-parties/2016/05/18/4d84e14a-1d11-11e6-b6e0-c53b7ef63b45_story.html](https://www.fec.gov/disclosure/deal-with-the-rnc-shows-how-big-money-is-flowing-back-to-the-parties/2016/05/18/4d84e14a-1d11-11e6-b6e0-c53b7ef63b45_story.html).

²² *Citizens United v. FEC*, 558 U.S. 310, 368-70 (2010) (quoting *Buckley v. Valeo*, 424 U.S. 1, 76 (1976)).

²³ Massoglia, *supra* note 4.

²⁴ First General Counsel’s Report, at 3, 5, MUR 6872 (New Models) (May 21, 2015), <https://www.fec.gov/files/legal/murs/6872/17044432599.pdf>.

²⁵ Certification, at 1, MUR 6872 (New Models) (Nov. 15, 2017), <https://www.fec.gov/files/legal/murs/6872/17044432619.pdf>.

²⁶ Statement of Reasons of Commissioners Petersen, Goodman, and Hunter, at 1-2, 8, MURs 6485, 6487 & 6488, 6711, 6930 (W. Spann LLC, et al.) (Apr. 1, 2016), <https://www.fec.gov/files/legal/murs/6485/16044391107.pdf>.

be members of the same political party. This means that agency actions will require at least one vote from either an independent or a member of a different party. Changing the number of FEC Commissioners to an odd number, and allowing the President to nominate one of those Commissioners as a chair with broad powers to manage the agency, would bring the FEC's structure more closely in line with other independent regulatory agencies, like the Federal Communications Commission.

Second, H.R. 1 / S. 1 reforms the Commissioner selection process to increase the likelihood that FEC Commissioners will be committed to the mission of the agency. While Commissioner nominations are ultimately up to the President, H.R. 1 creates a diverse nonpartisan “blue-ribbon” advisory panel to identify and recommend qualified nominees. This would limit the ability of political insiders to stack the FEC with ideologues. The panel's recommendations would be made public when the President submits his or her nominee to the Senate, placing pressure on the President to explain deviations from those recommendations.

Third, H.R. 1 / S. 1 strengthens the enforcement process to prevent Commissioners from shutting down investigations at an early stage. When the FEC receives a complaint or other evidence suggesting violations of campaign finance law, the FEC's nonpartisan attorneys first review the evidence and recommend whether there is “reason to believe” a violation has occurred, which is the threshold to open a formal investigation. Currently, just three out of six Commissioners can—and often do—override that recommendation and thwart any inquiry into an alleged violation. H.R. 1 / S. 1 would change the process to instead require a *majority vote* to overrule the FEC attorneys' recommendation. So if FEC attorneys recommend “reason to believe” a violation has occurred, and the recommendation is not overruled, an investigation will take place. Similarly, after an investigation, FEC attorneys make a recommendation as to whether to find “probable cause” that a violation occurred; the Commissioners have 30 days to approve or disapprove the recommendation by majority vote.

H.R. 1 / S. 1 would retain the procedural protections currently in place for enforcement matters. For example, accused parties would have opportunities to respond to the allegations and present evidence. Moreover, the FEC cannot penalize anyone without their consent. If the accused party admits the violation and agrees to a negotiated penalty, the FEC will issue fines; otherwise, the FEC must file suit in federal court, where the accused would

enjoy the judicial system’s due process protections, and convince a judge of the violation.

Those seeking to defend the FEC’s broken status quo have made a number of disingenuous arguments about these reforms. For example, the letter from nine former Commissioners emphasizes that under H.R. 1 / S. 1, the Chair “is appointed on a partisan basis by the President.”²⁷ But that is no different from the process used for other regulatory agencies, such as the Federal Communications Commission, where the president selects a Senate-confirmed Chair, nor is it meaningfully different from the FEC’s current nomination process, where Commissioners are similarly nominated “on a partisan basis.”

The letter also relies on a skewed interpretation of “bipartisan.”²⁸ Under H.R. 1 / S. 1, major agency actions—such as adopting regulations or hiring the General Counsel—require three votes, meaning at least one vote from either an independent or a member of a different party. In other words, Commissioners must cross party lines to reach the requisite number of votes. Substantive FEC decisions cannot be made purely along party lines.

Ultimately, those misleading claims boil down to an assertion that the FEC will become a “partisan” agency under H.R. 1 / S. 1. These claims are false—in reality, H.R. 1 / S. 1’s FEC reforms *limit* the ability of one political party to control the agency, and *reduce* the opportunities for partisan gamesmanship that exist under the FEC’s *current* structure.

For example, under current law, no more than three Commissioners can be from the same political party, but the law does not define what it means to be affiliated with a political party; this means that current law would allow a president to nominate three Democrats and an “independent socialist,” or three Republicans and an “independent libertarian,” creating four votes to enforce or not enforce the law. H.R. 1 / S. 1 protects against such gamesmanship by creating a nonpartisan commission to recommend nominees and strictly defining what it means to be affiliated with a political party to prevent the nomination of a closet partisan. Moreover, all commissioners—including the chair—are recommended by the nonpartisan commission, nominated by the President, and confirmed by the Senate.

²⁷ Letter from Nine Former Commissioners, *supra* note 19, at 3.

²⁸ *Id.*

Defenders of the FEC’s broken status quo also raise concerns about the H.R. 1 / S. 1 judicial review provisions. The reality is that current law already allows for judicial review when the FEC dismisses or delays action on an administrative complaint, yet a series of court decisions have established barriers to meaningful judicial oversight in practice.²⁹ For example, when reviewing deadlocked decisions, courts have tended to grant deference to the three Commissioners who *declined* to enforce the law, rather than the three Commissioners who *supported* enforcing it. This deference to the anti-enforcement bloc has insulated the FEC from accountability for making decisions contrary to law. H.R. 1 / S. 1 includes provisions to make meaningful judicial oversight a reality, while continuing to protect due process rights.

Ultimately, opponents of campaign finance regulation—not to mention wealthy special interests seeking to buy influence, and politicians who thrive in a money-drenched political system—have come to prefer a dysfunctional FEC that routinely fails to carry out its mission.

To reduce political corruption and protect the voices of voters in our democracy, we need a stronger FEC that will enforce campaign finance laws. H.R. 1 / S. 1 would fix the FEC.



Trevor Potter
(1991-1995)



Ann Ravel
(2013-2017)

²⁹ See, e.g., Potter, *supra* note 20, at 496-98.