

Money, Politics, and the Crippling of the FEC: A symposium on the Federal Election Commission's arguable inability to effectively regulate money in American elections.

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Thank you, Professor Popper, for that kind introduction. And thank you Michael Cabrera, Ross Handler, and your colleagues at the Washington College of Law at American University and the Administrative Law Review for organizing this timely and important symposium.

I say *timely* because we currently have a malfunctioning FEC, with one vacant commissionership and five commissioners whose terms have expired, all at the start of a new presidency, so this is an ideal time to step back and look at the FEC and talk about how to enable it to function again.

I say *important* because the FEC was perhaps the keystone of the Watergate reforms, and it retains a central place in our federal campaign finance system. It has the potential to faithfully and fairly enforce the campaign finance laws, bringing certainty to the field. So long as the FEC exists, but fails in these roles, it leaves a vacuum or a black hole (in the physics use of that phrase) at the heart of our system. It “preempts” and “occupies” enough of the field in a legal sense that others—the courts, the Department of Justice, other agencies—cannot step in and do the job the FEC is not doing. So its ability to function successfully is important to our campaign finance system—we effectively have no laws if the FEC is not enforcing them.

As an FEC Commissioner between 1991 and 1995, I speak from personal experience in saying that it is not true that the FEC is “*unable*” to regulate money in elections.

During my time on the Commission, my colleagues and I sometimes disagreed about *how* to enforce the law, but we *did* agree that the FEC’s job was to enforce the campaign finance laws passed by Congress, and to faithfully implement those laws in its regulations.

My understanding when I came to the agency was that my job as a Commissioner was to enforce the law fairly and even-handedly, regardless of party. I would have considered myself a failure if I had worked hard to get my party off the hook in cases, but voted to throw the book at the other side. One of my Democratic colleagues said to me before a vote on a complaint against a Democratic member of Congress that, “I am going to vote

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with you on this because I agree he crossed the line. But you better vote with me next time, when it's one of yours who has done this.”

And I did, because my view was that our job as Commissioners was not to write or rewrite the laws, but to enforce what Congress had written, to the best of our ability. I worked with my colleagues in those years to faithfully implement the statute, and to improve the performance of the agency. And I saw the Commission's 3-3 structure as the Congressional framers did—a mechanism to ensure that the Commission enforced the law fairly towards all candidates and committees, NOT as a way to ensure deadlock and failure.

In recent years, however, the FEC has changed to the point where I believe it can fairly be said that it has ceased to function as intended: all too often it no longer can issue advisory opinions on what the law is, investigate complaints that the law has been broken, agree that violations have occurred, negotiate penalties that deter, and vigorously pursue violators in court when necessary.

Yes, the agency still exists; yes, Commissioners are still there; and yes, the staff machinery still produces successful conclusions to non-controversial matters and routine “traffic ticket” violations. But none of the hard issues in campaign finance law today are being successfully addressed by the Commission: for example, when is a group spending millions on elections a “federal political committee” required to report its spending and the sources of most of its money? How to implement the Supreme Court's mandates in *Citizens United* that the new corporate spending it allowed in elections be fully disclosed and “completely” independent of candidates and parties?

This change at the FEC has mirrored the change in Congress on federal campaign finance law. McCain-Feingold was a law that reinforced and refreshed the 1974 and 1976 post-Watergate reform laws, but it was designed to make existing laws work, not reinvent the system. It was opposed by the Republican Congressional leadership and passed despite their strenuous efforts to defeat it—but it not only had bipartisan sponsorship but only passed because of bipartisan support in both the House and the Senate—20 percent of the Republican Senate Caucus disagreed with their leadership and supported the bill. And it was signed into law by a Republican president, and successfully defended in the Supreme Court by a Republican Solicitor General.

Since then, the Republican leadership's opposition to the central features of that law—limits on corporate and labor spending in elections, limits on soft money to party committees, no secret funding for campaign advertising—has hardened and become more official. Some Republican Commissioners at the time actively lobbied Congress to defeat McCain-Feingold, and then attempted to limit its reach through drafting half-hearted implementing regulations—regulations that were promptly thrown out by the Courts, which declared them “contrary to law.” But Republican commissioners in that period also supported important enforcement actions against 527s on a bipartisan basis.

But then a new set of commissioners arrived in 2008, and since then the partisan gridlock in Congress was imported into the FEC, and the Commission has deadlocked time and again, on virtually every important issue. I say this is a “partisan” gridlock because it is along party lines—but the split between Republican and Democratic Commissioners is not over whether to penalize one party’s candidates or the other, but over whether to penalize anyone.

Before 2008, both Republican and Democratic Commissioners had generally sought to avoid or minimize deadlocks, on the theory that 3-3 splits made the Commission appear dysfunctional and ineffective, and that this appearance would carry forward into how people perceived the Commissioners themselves.

But the Republican Commissioners who joined after 2008 apparently had a different audience in mind. The deadlocks came to be viewed as effective ways of controlling the FEC and accomplishing Republican policy goals: less disclosure of the sources of campaign spending, an expanded role for super PACs and other outside money (which has been dominated by Republican-aligned groups) and undermining the remaining provisions of McCain-Feingold. Instead of looking bad, deadlocks made the GOP commissioners look good—at least to Republican leadership in Congress.

Three Republican Commissioners can prevent the agency from acting, and (as I will explain) the courts grant their position *Chevron* deference as the “controlling” commissioners. So long as this political dynamic remains, and the agency’s structure does not change, the FEC will be able to do no more than the Republican leadership in Congress—who oppose limits on money in politics—wants it to do. This is potentially fatal to the agency’s mission.

First, though, let me acknowledge what some may call the elephant in the room—that the McCain-Feingold statute, the law passed by Congress, was significantly changed when the Supreme Court held in 2010 in *Citizens United* that the government cannot limit independent political speech by corporations.² In one 5-4 decision, the Court undid a significant part of McCain-Feingold, of the 1974 and 1976 Federal Election Campaign Acts, and of the 1947 Congressional ban on union and corporate political spending. But, as the Court made clear in *Citizens United*, the law still has very important requirements of full disclosure of the sources of campaign funding, and of the independence from campaigns and parties of the new unlimited spending.³ And it is these requirements—transparency and non-coordination—that the gridlocked FEC has been unable to enforce.

The deadlock in recent years not only means that those who have already violated the law are not penalized, but sends a signal that others can push the legal envelope with little fear of recourse. As one attorney who routinely advises campaigns and political parties

² *Citizens United v. FEC*, 558 U.S. 310, 365 (2010).

³ *Id.* at 357, 360, 367.

on federal election laws told the *Washington Post* last year: “We are in an environment in which there has been virtually no enforcement of the campaign finance laws.”⁴

This is particularly concerning, because history instructs that without effective administration and enforcement, campaign finance laws mean very little—and create the conditions for corruption and scandal. And scandal is what led to the creation of the FEC in the first place.

During the first Gilded Age of the late 19th and early 20th Century, Congress enacted a series of campaign finance reforms in response to the growing influence of wealthy and powerful trusts and corporations. In 1907, Congress passed the Tillman Act, banning corporate contributions to federal candidates and parties.⁵ This was followed by the Publicity Act, enacted in 1910 and strengthened over the following years, requiring the reporting of sources of campaign funds.⁶ And as political influence shifted to labor unions under the Democrats and Franklin Roosevelt and Harry Truman, a Republican Congress in 1947 passed the Taft-Hartley Act which, among other things, banned unions as well as corporations from making contributions to federal candidates and parties, and banned unions and corporations from making independent expenditures in federal elections.⁷

Yet, by the early 1970’s, the campaign finance system established by Congress earlier in the century was in disrepair. An overarching problem was that there was effectively no enforcement of the laws on the books, either in terms of disclosure or limits.

Campaign finance disclosure reports were kept in closets locked up in Congress, and no one got into trouble for failing to file them. So it became the norm to ignore the law because there was no agency charged with enforcing it. The only sanction for such violations was criminal prosecution by the Department of Justice, but the Department took the view that it should not criminally prosecute violations which were so universal.

Enter Richard Nixon. The lack of enforcement of the campaign finance laws that existed at the time created a climate of secrecy that was the perfect Petri dish for the virus that became “Watergate.”

Watergate often brings to mind enemies lists, IRS audits, and late-night break-ins. But it was fundamentally a scandal about money and politics — lots of money, with no working system of disclosure or enforcement. Nixon’s Attorney General dropped anti-trust actions

⁴ Matea Gold, *Trump’s deal with the RNC shows how big money is flowing back to the parties*, WASH. POST (May 18, 2016), https://www.washingtonpost.com/politics/trumps-deal-with-the-rnc-shows-how-big-money-is-flowing-back-to-the-parties/2016/05/18/4d84e14a-1d11-11e6-b6e0-c53b7ef63b45_story.html?utm_term=.8a480f0f79bc.

⁵ Pub. L. 59-36, 34 Stat. 864 (1907).

⁶ Pub. L. No. , 43 Stat. 1070 (1925) (repealed 1972).

⁷ Pub. L. No. 80-101, § 304, 61 Stat. 136, 159-60 (1947) (repealed 1972).

in return for contributions to the Republican National Committee (RNC),⁸ the White House sold milk price supports in return for contributions to the RNC,⁹ and corporations in general were hit up for corporate contributions to the RNC and the famous committee to re-elect the president, or “CREEP,” as its acronym was known.¹⁰ Some contributions arrived in envelopes of cash, which were harder to trace—and, it turned out, easy to spend on ill-advised and illegal activities.

Ultimately, after very public Congressional investigations, the President resigned, corporate executives were convicted of illegal corporate contributions, and Congress set out to reform our campaign finance system.

One of the key elements of the 1974 amendments to the Federal Election Campaign Act, or “FECA,” was the creation of the FEC as an independent regulatory agency. Such an independent agency was supported by members of both parties: Democrats saw an advantage to enforcement being removed from a Department of Justice under the control of a Republican President, and Republicans liked removing administration of campaign finance laws from the Secretary of the Senate and the Clerk of the House, who at the time were both Democratic Party functionaries who reported to the Democratic leadership of the two houses.¹¹

The FEC created in the wake of Watergate was charged with administering and enforcing the new law, including receiving and publishing campaign finance reports, enforcing limitations and restrictions on the sources of funding, and administering the presidential public financing system (remember that?).¹²

The initial proposal for the FEC had been made prior to Watergate, by Senate Minority Leader Hugh Scott, a Republican, who proposed a five-member Commission in 1971. This proposal was opposed by Democratic leadership in the House.¹³ Watergate created new momentum for the FEC proposal, particularly after the Senate Watergate Committee said that establishment of “an independent, nonpartisan Federal Elections Commission” would be “the most significant reform that could emerge from the Watergate scandal.”¹⁴

Originally, the new law provided that two commissioners be appointed by the President, two by the Speaker of the House of Representatives, and two by the President pro

⁸ Jack Anderson with Daryl Gibson, *Peace War and Politics: An Eyewitness Account*, 194-97 (Forge Publishing 1999); see also Jack Anderson, *Secret Memo Bares Mitchell-ITT Move*, WASH. POST, February 29, 1972.

⁹ George Lardner Jr. and Walter Pincus, Dairy Farmers Got Nixon Support in Exchange for Campaign Cash, Wash. Post (Oct. 30, 1997), <http://www.washingtonpost.com/wp-srv/national/longterm/nixon/103097milk.htm>.

¹⁰ See, e.g., *Buckley v. Valeo*, 519 F.2d 821, 838–40 (D.C. Cir. 1975), *aff'd in part, rev'd in part*, 424 U.S. 1, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976), and *modified*, 532 F.2d 187 (D.C. Cir. 1976)

¹¹ Robert E. Mutch, *CAMPAIGNS, CONGRESS AND COURTS* 87-88 (Praeger Publishing 1988).

¹² 52 U.S.C. § 30106(b)(1).

¹³ See Lauren Eber, *Waiting for Watergate: The Long Road to FEC Reform*, 79 SO. CAL. L. REV. 1155, 1163-64 (2006).

¹⁴ S. Rep. No. 93-981, at 564 (1973) (quoted in Eber at 1164).

tempore of the Senate.¹⁵ This was the product of a compromise between the Senate, which favored a traditional method of presidential appointees confirmed by the senate, and the House, where Democratic officials sought to preserve Congressional control.¹⁶

However, in the 1976 *Buckley v. Valeo* decision, the Supreme Court held that the Congressional appointments plan violated the separation of powers principles in Article II of the Constitution.¹⁷ The FEC was then revised by Congress to consist of six voting members nominated by the president and confirmed by the senate, and two non-voting members -- the Clerk of the House and the Secretary of the Senate.¹⁸ In 1994, however, the D.C. Court of Appeals ruled that the two ex officio Commission members still representing Congress in a non-voting capacity also violated separation of powers.¹⁹

So today, the FEC consists of six commissioners, “[n]o more than 3 . . . affiliated with the same political party”²⁰—which has effectively meant the Commission is split evenly between Republicans and Democrats (although sometimes with an Independent approved by the party leadership of one side or the other).

By statute, the FEC requires four votes to take *any* action—to open an investigation, issue subpoenas, make findings of fact, sue in court to enforce its judgements, or issue advisory opinions and regulations.²¹ This four-vote requirement reflected Congress’s concern that no one party be able to seize control of the FEC and use it as a partisan political tool: the FEC may only take action if it does so on a bipartisan basis, with at least one commissioner voting with the members of the other party.

Today, Commissioners are officially nominated by the president, and confirmed by the Senate. However, the *practice* has been that the president, regardless of party, defers to the recommendations of the respective House and Senate party leaders as to who is nominated for the Commission.

As a result of this structure, the FEC has long struggled with a form of “agency capture,” since the Commissioners owe their positions to the very people they regulate: the two major political parties, members of Congress, and the President.

For example, in 1976, the FEC investigated (and ultimately dismissed) alleged campaign finance violations by Rep. Charles Rose, a Democrat from North Carolina who sat on the House Administration Committee—which authorized the FEC's yearly budget. The chair of the Committee. Rep. Wayne Hays, was a Democratic party leader who had fought against the creation of the FEC in the first place. Rep. Hays responded to the FEC’s

¹⁵ Some have posited that this unique structure was the product of a compromise between the Senate, which wanted the FEC to be an independent agency, and the House, which sought to retain Congressional control. Mutch, *Campaigns, Congress and Courts* (1988) at 87-88.

¹⁶ Mutch at 87-88.

¹⁷ 424 U.S. 1, 135-37 (1976) (per curiam).

¹⁸ Federal Elections Campaign Act Amendments of 1976, Pub. L. No. 94-283, tit. I, § 101.

¹⁹ *FEC v. NRA Political Victory Fund*, 6 F.3d 821 (D.C. Cir. 1993).

²⁰ 52 U.S.C. § 30106(a)(1).

²¹ *Id.* § 30106(c).

investigation by threatening: “If you don’t fire the employees involved, I’ll cut the guts out of your budget If you can’t control this staff you’ve got, we’ll do it for you.”²²

Shortly thereafter, the agency created another firestorm with its plans to conduct random audits of Congressional campaign finance reports. Representative Hays used the occasion of the FEC’s first budget authorization in 1975 to declare that the FEC would conduct audits “over my dead body,” and threatened to cut the agency’s funding.²³ Two years later, in 1977, Democratic Congressman Theodore Risenhoover was facing one of those random audits, and told Commissioner Thomas Harris that the agency had become a “monster” and warned that Congress would “gut” the FEC.²⁴ The FEC nonetheless went forward with random audits, and uncovered many reporting errors that were ultimately resolved without becoming serious enforcement cases.²⁵ Congress responded by defunding the agency’s audit budget in 1978, and banning random audits altogether the following year, preventing the agency from applying a traditional tool to ensure compliance with the law.²⁶

To this day the ban on random audits remains in the statute. A message was clearly being sent. I can recall being at the Commission and suggesting that we should do something, and having a commissioner or staffer say to me, “remember random audits!”

A reticence towards taking on powerful political players may have been part of the reason that the FEC throughout the 1980s and 1990s, for example, allowed the growth of “soft money:” the agency had a difficult time saying “no,” especially in situations where the two major parties’ interests aligned with regard to the creation or expansion of loopholes.

I clearly recall a Commission meeting early in my time there when we had before us an Advisory Opinion requesting Commission approval, and it came from both the Republican and Democratic National Committees. We started a discussion, and I had a number of questions about this Advisory Opinion request, and one of the *ex officio* members (i.e. the non-voting members of Congress), interrupted and said: “Excuse me, Mr. Chairman, but I don’t understand why we are having this conversation. Both parties have requested the Advisory Opinion—why do we need to even talk about it? Can’t we just approve it?”

And that was very much the mindset, I think, of some members of the Commission. It was a mindset I strove to change as a Commission, because my view was not that we were not responsible just to the two major parties, but to other parties, to people outside the system, to the general public, and to members of congress who created this statute.

²² David J. Weidman, *The Real Truth About Federal Campaign Finance: Rejecting the Hysterical Call for Publicly Financed Congressional Campaigns*, 63 TENN. L. REV. 775, 779 (1996).

²³ Mutch at 96.

²⁴ *Id.* at 97.

²⁵ *Id.* at 97-98..

²⁶ *Id.* at 98-99.

Nonetheless, from the FEC's creation until quite recently, the FEC was seen as a fair and reasonably effective enforcement agency, and commissioners worked hard behind the scenes to reach compromises and avoid 3-3 deadlocks. I only recall one 3-3 deadlock on an Advisory Opinion during my time there.

For example, following a nationwide investigation that took several years, in 1979 the FEC obtained settlement agreements from the American Medical Association PAC and state medical PACs after the FEC found the PACs had been exceeding contribution limits.

Then, during the first President Bush's term, the Commission found bipartisan support to initiate an investigation against the incumbent President's 1988 campaign over allegations of coordinating with the makers of the infamous Willie Horton advertisement.²⁷

In 1991, the Commission followed a court order and adopted regulations requiring party committees to disclose soft money contributions which, for the first time, exposed corporation and union contributions to the political parties.²⁸

In 1996, the Commission voted to investigate and file a lawsuit against the Christian Coalition of America for violating FECA's ban on corporate express advocacy.²⁹

And in 2004 and 2005, the Commission voted to open investigations into both Democratic and Republican 527 groups that had sought to evade contribution limits during the 2004 elections, eventually collecting over \$1 million in fines.³⁰

Throughout these years, the Commission agreed—on a bipartisan basis, of course—that numerous members of Congress of both parties (or their campaigns) had violated the campaign finance laws, and entered into conciliation agreements with them. This rigorous enforcement of the law, regardless of office, served as a public warning to other candidates, political parties, and the army of campaign consultants, that they had better follow the law, rather than ignore it.

When I was on the Commission, there were Commissioners who may have disagreed with aspects of certain laws, but they recognized that they were neither a Member of Congress nor a judge. They left the decision on whether to amend or invalidate laws to Congress and the courts. I recall a fellow Republican Commissioner once saying about a vote to take an enforcement action that "I'll vote for this, but I hope we lose in court, because I think the law is wrong, and probably unconstitutional."

²⁷ MUR 3069 (1990), http://www.fec.gov/disclosure_data/mur/3069.pdf

²⁸ See 55 Fed. Reg. 26058 (June 26, 1990).

²⁹ *FEC v. The Christian Coalition*, FED. ELECTION COMM'N RECORD, Sept. 1996, at 1-2, <http://www.fec.gov/pdf/record/1996/index96.htm>.

³⁰ See Press Release, *FEC Collects \$630,000 in Civil Penalties*, Fed. Election Comm'n (Dec. 13, 2006), <http://www.fec.gov/press/press2006/20061213murs.html>; Kate Phillips, *Another 527 Group Settles With the FEC*, N.Y. TIMES (Aug. 29, 2007), https://thecaucus.blogs.nytimes.com/2007/08/29/another-527-group-settles-with-fec/comment-page-1/?_r=0.

In recent years, however, the agency has been crippled by regular 3-3 splits. Although some of the current Republican commissioners have asserted that 86 percent of all votes are bipartisan,³¹ this is a spectacularly misleading number: this conclusion is reached by including Commission votes on routine administrative matters like approval of meeting minutes, and uncontroversial personnel matters like votes on staff salaries. On the contentious issues of enforcement and policy, deadlock is a substantial factor.

According to an analysis from former Commissioner Ann Ravel, 3-3 splits on serious enforcement cases occurred about 2.9 percent of the time in 2006, but it has jumped in the years since, with commissioners deadlocking on 30 percent of all substantive votes on enforcement matters in 2016.³² Again, this includes all enforcement matters—the deadlocks are in the controversial cases.

This increase has particularly increased in just the last five years. Prior to 2013, the commissioners had never deadlocked on more than 15 percent of its substantive enforcement votes; but in 2013, that number spiked to 25 percent, and has gone up since.³³

In 2006, only 4.2 percent of votes on enforcement cases—known as “Matters Under Review”—closed with one deadlocked vote, but that number was a shocking 37.5 percent in 2016.³⁴ This means that the Commission gives up the investigation with no result, and sends a letter that it is “unable to resolve the matter.”

Worse, these numbers appear to understate the problem, because they include only the results of cases when the commissioners take a vote at all. A study from last year found that the FEC held an average of 727 votes per year on enforcement actions between 2003 and 2007.³⁵ But since 2008, that number suddenly and precipitously dropped, to an average of only 183 votes per year.³⁶

So the Commission is holding fewer and fewer votes on whether to even consider enforcing our campaign finance laws, and it’s deadlocking more and more often on those votes that it *does* hold.

Another indicator of how the FEC’s law enforcement function is working is the fines it imposes. The FEC imposed almost \$5.6 million in civil penalties for serious violations in

³¹ Lee Goodman, *The FEC’s Problems Aren’t with the GOP*, POLITICO (May 10, 2015), <http://www.politico.com/magazine/story/2015/05/the-fecs-problems-arent-with-the-gop-117798>.

³² Office of Commissioner Ann Ravel, Federal Election Commission, *Deadlock and Dysfunction: the Enforcement Crisis at the Federal Election Commission Reveals the Unlikelihood of Draining the Swamp*, at 1 (February 2017) http://www.fec.gov/members/ravel/ravelreport_feb2017.pdf. See also Public Citizen, *Roiled in Partisan Deadlock, Federal Election Commission Is Failing*, at 1 (July 19, 2016), <http://www.citizen.org/documents/FEC%20deadlock%20updated%20July%202016.pdf>.

³³ Ravel, *supra* note 32, at 9.

³⁴ *Id.* at 1.

³⁵ Public Citizen, *supra* note 32, at 1.

³⁶ *Id.*

2006; it imposed only \$595,424 in 2016.³⁷ In 2006, the average FEC civil fine for the most serious enforcement cases was about \$179,500; in 2016, it was about \$19,850.³⁸

So even though the amount of money spent in federal elections has almost doubled between 2006 and 2016,³⁹ the total and average amounts of fines dropped by about 90 percent.

Lest anyone suggest I am selectively picking years, let's look at the broader trends. In the eight years between 2001 and 2008, the FEC assessed \$21,310,172 in civil fines for serious violations, or \$2.66 million per year; over the next eight years, 2009 to 2016, the FEC issued a total of \$4,488,244 million in fines—an average of \$561,030 per year.⁴⁰ This is despite the rise of big-spending super PACs and dark money groups pushing the legal envelope over that same 2009 to 2016 period, following Supreme Court decisions in *Wisconsin Right to Life*⁴¹ and *Citizens United*.⁴²

In fact, total fines over the last eight years (2009 to 2016) were about the same as the total fines over just the five years I was on the Commission, from 1991 to 1995.⁴³ And that is without accounting for the impact of inflation since the 1990s.

Although fines may ebb and flow, a review of FEC enforcement statistics show a steady increase in fines for serious violation from the late 1970s through the mid-2000s, and then a decline over the past decade—even as the total amount of money spent in federal elections continued to increase.

As I have noted, today's split is not “partisan” in a traditional sense, with the Republican Commissioners only voting to enforce the law against Democrats, and Democratic Commissioners only supporting enforcement against Republicans; instead, the divide is generally ideological, with Republicans consistently blocking enforcement of the law regardless of party.

It might be tempting to conclude that the current divide on the FEC reflects the partisan divide among the country as a whole. But such a conclusion would be wrong.

Republican voters, like most Americans, overwhelmingly support reasonable limits on money in elections. For example, a 2015 New York Times-CBS poll found that three-quarters of self-identified Republicans support more disclosure by outside spending organizations, and about the same percentage support limits on allegedly independent

³⁷ Federal Election Commission, FEC Enforcement Statistics 1977-2017, <http://www.fec.gov/press/bknd/EnforcementStatistics.shtml?>

³⁸ *Id.*

³⁹ See Center for Responsive Politics, *Cost of Election*, <https://www.opensecrets.org/overview/cost.php>.

⁴⁰ *Id.*

⁴¹ *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007).

⁴² *Citizens United v. FEC*, 558 U.S. 310 (2010).

⁴³ Federal Election Commission, *supra* note 394. The FEC assessed \$4,488,244 in fines between 2008 and 2016, and \$4,378,018 in fines between 1991 and 1995. *Id.*

groups like super PACs. ⁴⁴ Eighty percent of Republican voters believe money has “too much influence in American politics.” ⁴⁵

In other words, the anti-regulatory stance of the Republican FEC Commissioners does not reflect the perspective of Republican voters, but instead track the deregulatory views of the party leaders who have played a key role in their selection.

Dysfunction on the FEC has rendered it unable, or perhaps unwilling, to respond to the changing legal landscape wrought by Supreme Court decisions like *Citizens United* and *McCutcheon*. In a now-infamous example, it took nearly five years after *Citizens United* for the FEC to muster the four votes necessary to even issue a basic notice of proposed rulemaking to rewrite the FEC’s regulations to comply with the Court’s opinion. This was because of the 3-3 chasm on the Commission about how to regulate money in politics in the post-*Citizens United* world—and specifically, whether to incorporate in the notice of proposed rulemaking the issue of whether the FEC should change its regulations to implement the Supreme Court’s support for full disclosure of the sources of funding for the new independent spending created by the decision.

I have given entire speeches about *Citizens United* and the flaws in the procedural consideration and holdings of that decision. I will spare you that today because my focus is not *Citizens United* per se, but instead the failure of the FEC to respond to it.

There are several issues important raised by *Citizens United* to which the Commission has been unable to respond:

First, “independence.” The *Citizens United* opinion rested on the premise that expenditures that are wholly and completely independent of candidates and parties cannot corrupt those candidates or parties. ⁴⁶

Justice Kennedy wrote: “By definition, an independent expenditure is political speech presented to the electorate that is not coordinated with a candidate.” ⁴⁷ Therefore, the Court held, corporations cannot be prohibited from making independent expenditures, since the *independence* means that the expenditures pose little risk of corruption. In other campaign finance cases, the Court has defined independent expenditures as “totally,” “truly,” and “wholly” independent of candidates. ⁴⁸

It falls to the FEC to guarantee that independence—but it has failed to do so. Instead, in the years since *Citizens United*, the FEC has allowed supposedly “independent” super PACs to grow increasingly intertwined with the candidates they support. Super PACs are now established by candidates before they announce their candidacy, staffed by

⁴⁴ *Americans’ Views on Money in Politics*, N.Y. TIMES (June 2, 2015),

<https://www.nytimes.com/interactive/2015/06/02/us/politics/money-in-politics-poll.html>

⁴⁵ *Id.*

⁴⁶ *Citizens United*, 558 U.S. at 357.

⁴⁷ *Id.* at 360.

⁴⁸ *FEC v. Colorado Republican Fed. Campaign Comm.*, 533 U.S. 431, 465 (2001); *Buckley v. Valeo*, 424 U.S. 1, 47 (1976) (per curiam).

supporters selected by the candidate and campaign—often former senior aides or close friends of the candidate—and broadcast ads are filmed in coordination with the candidate but run by the Super PACs. The FEC has allowed candidates to solicit contributions to these super PACs, arrange fundraising events with them, and thank donors for contributing to them, which is completely at odds with the *Citizens United* constitutional standard that these unlimited groups are not corrupting and do not present the “appearance of corruption” because they are wholly independent of candidates⁴⁹—a standard Judge Gorsuch noted in his confirmation hearings this week.⁵⁰

Because it is now broadly understood that the FEC will likely split 3-3 on any enforcement action, we’ve increasingly seen super PACs bend the few rules that do exist with little fear of recourse.

- For example, in the 2016 election cycle, a Hilary Clinton super PAC called “Correct the Record” declared that it could legally coordinate with the Clinton campaign, as long as it didn’t run paid television or online advertising.⁵¹ Clinton’s attorneys cited a narrow 2006 FEC regulation that declared that content posted online for free, such as blogs written by unpaid volunteers, is off limits from regulation.⁵² But Correct the Record was not a volunteer blogging operation. It was a \$9.7 million professional opposition research, surrogate training and messaging operation staffed with paid professional employees.⁵³
- On the Trump side, the super PAC “Rebuilding America Now” was formed by two former Trump staffers almost immediately after they left the campaign.⁵⁴ FEC rules require a 120-day “cooling off” period before former staffers can use their knowledge of a campaign’s strategy and needs to develop communications for an “independent” group. Yet these staffers claimed they could ignore this 120-day rule because they weren’t actually paid by the campaign.⁵⁵ If that were the rule, a political operative could “volunteer” for a campaign, structure its plans and learn about its strategy and needs, then jump to a super PAC, start collecting huge checks, and use the information gained during their time on the campaign to guide the super PAC, thereby entirely undermining the rule’s anti-coordination purpose.

But presumably these operatives understood that the likelihood of a deadlocked FEC challenging them was somewhere between slim and none.

⁴⁹ *Citizens United*, 558 U.S. at 357.

⁵⁰ See Rick Hasen, *Judge Gorsuch Gives Dissatisfying Written Answer About Citizens United and Expenditures*, Election Law Blog (Mar. 30, 2017, 1:04 PM), <http://electionlawblog.org/?p=91870>.

⁵¹ Complaint at 5-6, *Campaign Legal Center v. Correct the Record*, FED. ELEC. COMM’N (filed Oct. 6, 2016), <http://www.campaignlegalcenter.org/sites/default/files/10-06-16%20Correct%20the%20Record%2BClinton%20final.pdf>.

⁵² *Id.* at 5.

⁵³ *Id.* at 5-6; *Correct the Record*, CTR. FOR RESPONSIVE POL. (Mar. 30, 2017), <https://www.opensecrets.org/pacs/lookup2.php?strID=C00578997>.

⁵⁴ Complaint at 6, *Campaign Legal Center v. Rebuilding America Now*, Fed. Elec. Comm’n (filed Oct. 6, 2016), <http://www.campaignlegalcenter.org/sites/default/files/10-06-16%20RBA%2BMAN1%2BTrump%20final.pdf>.

⁵⁵ *Id.* at 10-11, 27.

If the FEC were a functioning agency, these likely legal violations would have quickly been investigated, and those investigations and findings would deter others. Or more likely, these actions based on the urgency of the moment and far-fetched legal theories would never would have been tried in the first place.

The second issue raised by *Citizens United* and its aftermath is “disclosure.” The Court in *Citizens United* specifically upheld disclosure as a less-restrictive means of preventing corruption. Justice Kennedy wrote that, “With the advent of the Internet, prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters,” and that such disclosure means that “citizens can see whether elected officials are ‘in the pocket’ of so-called moneyed interests.”⁵⁶ Eight of the nine justices joined this part of the decision.⁵⁷ A few years later, in the *McCutcheon* decision, Chief Justice Roberts wrote, “With modern technology, disclosure now offers a particularly effective means of arming the voting public with information.”⁵⁸ And, the Court again showed its broad support for disclosure last month when it summarily affirmed the three-judge district court decision in the *Independence Institute* case, which sought to relitigate the pro-disclosure holding of *Citizens United*.⁵⁹

And yet, despite the Supreme Court’s overwhelming support for donor disclosure, the FEC has allowed “dark money” to flourish: in the years since *Citizens United*, at least \$800 million has been spent on federal elections by entities that keep the sources of their funding a secret.⁶⁰ Dark money is most pronounced in targeted down-ballot races—for example, in the five most expensive (and most hotly-contested) U.S. Senate races in 2016, between ten and twenty percent of outside spending came from entities that keep their donors secret.⁶¹

⁵⁶ *Citizens United v. FEC*, 558 U.S. 310, 370 (2010) (citation omitted).

⁵⁷ *Id.* at 316.

⁵⁸ *McCutcheon v. FEC*, 134 S. Ct. 1434, 1460 (2014) (plurality opinion).

⁵⁹ *Independence Institute v. FEC*, 2017 WL 737809 (2017) (mem.) (summary affirmance).

⁶⁰ See calculation by Center for Responsive Politics at

https://www.opensecrets.org/outsidespending/nonprof_summ.php. This estimate is only a slice of overall dark money, as it is calculated based only on spending reported to the FEC. Ads that name candidates but don’t expressly advocate for their election or defeat (“issue ads”) are not reported to the FEC unless aired within 30 days of a primary election or 60 days of a general election. Most dark money “issue ad” spending outside of the reporting windows are not included in this estimate. For example, the dark money group One Nation spent \$40 million between mid-2015 and 2016 supporting vulnerable Republican Senators, yet reported only \$3.4 million in spending to the FEC. Robert Maguire, *One Nation rising: Rove-linked group goes from no revenue to more than \$10 million in 2015*, Center for Responsive Politics/Open Secrets (Nov. 17, 2016) <https://www.opensecrets.org/news/2016/11/one-nation-rising-rove-linked-group-goes-from-no-revenue-to-more-than-10-million-in-2015/>.

⁶¹ Compare https://www.opensecrets.org/outsidespending/nonprof_races.php with <https://www.opensecrets.org/outsidespending/summ.php?cycle=2016&disp=R&pty=A&type=S>

The public doesn't know the sources of dark money, but in many cases, the candidates who benefit from it do.⁶² And, repeated studies have shown that secretly-funded ads are more effective. A 2015 study by the Wesleyan Media Project found “ads sponsored by unknown groups are more effective than candidate-sponsored ads.”⁶³ This echoes the findings of a 2013 study by two political science professors, Conor Dowling of the University of Mississippi and Amber Wichowsky of Marquette University, which found that “voters may discount a group-sponsored ad when they have more information about the financial interests behind the message.”⁶⁴

The FEC *could* write new rules requiring that donors to dark money groups are publicly disclosed, but the FEC has repeatedly split 3-3 on whether to open a rulemaking to do so.

The FEC's current rules only require disclosure of contributions made for the *purpose* of funding electioneering communications, even though there is no “purpose” requirement in the disclosure provisions enacted by Congress.⁶⁵ In 2010, three of the Commissioners further narrowed the regulation by voting not to enforce even these weak disclosure rules unless a donation was made for the *specific purpose* of funding a *particular* ad.⁶⁶

As a result, the FEC's rules have allowed the wholesale evasion of the disclosure laws the agency is charged with administering. As long as there is no proof that a person “earmarked” a donation or gave it specifically for the purpose of funding a *particular* ad, there is no donor disclosure—even though most ads aren't created until *after* the money is raised for them.

The Campaign Legal Center represented Congressman Chris Van Hollen in a lawsuit filed against the FEC in 2011 challenging its non-disclosure rule as contrary to the law it was supposed to implement. The D.C. District Court twice sided with these objections, but in the end the D.C. Circuit deferred to the agency's deadlock on the issue last year.⁶⁷

⁶² See, e.g., Matea Gold, *An Inside Look at How Politicians Beg for Big Checks*, Wash. Post (Sept. 20, 2016), https://www.washingtonpost.com/politics/an-inside-look-at-how-politicians-beg-for-big-checks/2016/09/19/c0308e24-7c1b-11e6-bd86-b7bbd53d2b5d_story.html?utm_term=.e77dfcf790c3

⁶³ Travis N. Ridout, Michael M. Franz & Erika Franklin Fowler, *Sponsorship, Disclosure, and Donors: Limiting the Impact of Outside Group Ads*, 68 POL. RESEARCH Q. 154, 154 (2014).

⁶⁴ Connor M. Dowling & Amber Wichowsky, *Does It Matter Who's Behind the Curtain? Anonymity in Political Advertising and the Effects of Campaign Finance Disclosure*, 41 AM. POL. RESEARCH 965, 965 (2013).

⁶⁵ Compare 11 C.F.R. § 104.20(c)(9) (“Statements of electioneering communications filed under paragraph (b) of this section shall disclose . . . the name and address of each person who made a donation aggregating \$1,000 or more . . . which was made for the purpose of furthering electioneering communications.”), with 52 U.S.C. § 30104(f)(2)(F) (“Each statement required to be filed under this subsection shall be made under penalty of perjury and shall contain . . . the names and addresses of all contributors who contributed an aggregate amount of \$1,000 or more to the person making the disbursement during the period beginning on the first day of the preceding calendar year and ending on the disclosure date.”).

⁶⁶ T.W. Farnam, *Disclosure of 'issue ad' funding is on the wane*, WASH. POST (Sept. 16, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/09/15/AR2010091507172.html>.

⁶⁷ *Van Hollen, Jr. v. FEC*, 811 F.3d 486, 488-89, 491 (D.C. Cir. 2016).

Even without promulgating a broader disclosure rule, the FEC *could* find that tax-exempt dark money groups that do little else besides engage in campaign activity are “political committees” that must register with the FEC and disclose their donors. For example, a majority of Crossroads GPS’ expenditures in the 2010 cycle went towards electing federal candidates, according to the FEC General Counsel’s office—but the Commission nonetheless split 3-3 on whether to open an investigation into whether Crossroads GPS should have registered as a political committee.⁶⁸

So to recap, Justice Kennedy in *Citizens United* assured us that “A campaign finance system that pairs corporate independent expenditures with effective disclosure has not existed before today.”⁶⁹ This was true, but the reality is that—contrary to Justice Kennedy’s reading of the statutes—such a system did not exist *after* that day either. In fact, the system which is now in place post-*Citizens United*, in terms of “independence” and disclosure, looks nothing like what Justice Kennedy described. And that is due in no small part to the deadlocks at the FEC.

So what can be done?

By statute, aggrieved parties can bring lawsuits to hold the FEC accountable in the courts. The law that created the FEC expressly allows a party that files a complaint with the agency to sue in federal court if the FEC takes longer than 120 days to take action, or when it dismisses the complaint.⁷⁰ But as you all know, courts have held, as a general proposition, that the Constitution limits standing to sue to only those who can show that they have suffered a direct injury due to the agency’s action or failure to act.⁷¹ What this means is that public interest organizations which file FEC complaints often have a difficult time establishing standing to challenge the Commission’s dismissal of their complaint. Depending on the facts, certain organizations and voters may be able to establish standing to sue over the FEC’s failure to enforce disclosure laws on grounds they’ve suffered an informational injury relevant to their ability to cast an informed vote, but it is more difficult to challenge the FEC’s refusal to enforce laws that don’t have a disclosure or informational component.

If a plaintiff can get past the standing hurdle, there is another problem: in the case of an increasingly common 3-3 split, courts have interpreted the “no” votes as the “controlling bloc” for the purposes of determining who represents the agency’s reasoning.⁷² Courts rarely take into account the views of the commissioners who supported an enforcement action, instead affording *Chevron* deference to the views of the three Commissioners who obstruct.

⁶⁸ *Statement of Vice Chair Ann M. Ravel and Commissioner Ellen L. Weintraub on Judicial Review of Deadlocked Commission Votes 1*, Fed. Elec. Comm’n (June 17, 2014), <http://eqs.fec.gov/eqsdocsMUR/14044354045.pdf>.

⁶⁹ *Citizens United v. FEC*, 558 U.S. 310, 370 (2010).

⁷⁰ 52 U.S.C. § 30109(a)(8)(A).

⁷¹ *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 563 (1992).

⁷² *FEC v. Nat’l Republican Senatorial Comm.*, 966 F.2d 1471, 1476 (D.C. Cir. 1992).

What would an Administrative Law Review symposium be without some discussion of *Chevron*? Of course, affording *Chevron* deference to the three “no” votes is contrary to the provision of the statute that requires four votes for the FEC to take a position, and hands controlling power over court review to three of the six commissioners—thereby removing an important incentive for Commissioners to compromise.

As a side note, some opponents of the “administrative state” have sought for quite some time to abolish *Chevron* deference, but be careful what you wish for: without *Chevron* deference, courts would be reviewing FEC decisions and dismissal of enforcement cases *de novo*. This presents the likelihood that courts, following the statute as their guide and without deference to the three deadlocking commissioners, would end up finding violations and ordering the FEC to pursue them.

But currently, even if a party can overcome *Chevron* deference and show that the FEC’s dismissal of a complaint was arbitrary, capricious, and contrary to law, a court can’t review the dismissal until the case is closed—and the dysfunction on the Commission has resulted in the slow-walking of many pending enforcement actions. A 2015 analysis by Commissioner Walther found years-long delays in resolving dozens of enforcement cases.⁷³ And by allowing such delays, the FEC can effectively run the five-year statute of limitations. Last month, for example, a D.C. District Court found that the FEC had “strong grounds to prosecute” a dark money group called Committee on Hope, Growth, and Opportunity, yet deferred to the three Republican commissioners who voted to drop the matter because the case had dragged on for so long that a statute of limitations had lapsed.⁷⁴

So, what can be done?

First, let’s not forget that President Trump was elected on a pledge to “drain the swamp.” He called super PACs a “scam” and the political system “broken.”⁷⁵ One way to follow through on that pledge is to nominate FEC Commissioners who actually believe in the mission of the agency and will enforce the law. Ann Ravel’s recent departure means there is an open seat on the Commission, and the five remaining Commissioners are serving on expired terms. A new Commission, working together, could address the “broken system” candidate Trump once critiqued.⁷⁶

⁷³ Memorandum from Stephen Walther to Federal Election Commission re: Motion to Set Priorities and Scheduling on Pending Enforcement Matters Awaiting Reason-to-Believe Consideration 2-3 (July 14, 2015), http://www.fec.gov/agenda/2015/documents/mtgdoc_15-41-a.pdf.

⁷⁴ *Citizens for Responsibility & Ethics in Wash. v. Fed. Election Comm’n*, No. CV 15-2038 (RC), 2017 WL 706155, at *1, *13 (D.D.C. Feb. 22, 2017).

⁷⁵ Fred Imbert, *Donald Trump latest: ‘Super PACs are a scam,’* CNBC (Oct. 26, 2015), <http://www.cnn.com/2015/10/26/donald-trump-latest-super-pacs-are-a-scam.html>.

⁷⁶ Jill Ornitz and Ryan Struyk, *Donald Trump’s Surprisingly Honest Lessons About Big Money in Politics*, ABC News (Aug. 11, 2015), <http://abcnews.go.com/Politics/donald-trumps-surprisingly-honest-lessons-big-money-politics/story?id=32993736> (“‘I will tell you that our system is broken,’ Trump said on stage in Thursday’s GOP candidates’ debate. ‘I gave to many people before this -- before two months ago I was a businessman. I give to everybody. When they call, I give. And you know what, when I need something from them two years later, three years later, I call them. They are there for me. That’s a broken system.’”)

Second, bipartisan legislation has been introduced in Congress by Rep. Derek Kilmer (D-WA) and Rep. Jim Renacci (R-OH) to overhaul the FEC and break the gridlock.⁷⁷ The Kilmer-Renacci bill would, among other things, reduce the number of Commissioners from six to five to eliminate deadlocks, and encourage the president to draw nominees not from party leaders in Congress, but from a nonpartisan blue ribbon advisory panel.

So where does that leave us? There are serious problems with the current FEC, but these problems are not insurmountable.

Solving these problems will, however, require a clear-eyed recognition of the agency's current gridlocked situation. I hope this forum will be helpful in establishing a record in that regard.

Addressing these problems will require political will on part of the President and Congress. The FEC needs, at a minimum, six commissioners who believe in its existence and mission and can work together to enforce the existing laws. In my view, it would be improved by a statutory overhaul to the Commission's structure, like Congressmen Kilmer's and Renacci's proposal, to prevent the type of gridlock that has characterized the Commission in recent years.

We need these changes to occur because our legal system needs a functioning FEC to provide disclosure as to who is trying to influence our elections, to ensure the independence of unlimited outside spending, and to hold those who violate the law accountable. The FEC, which Congress hoped would be "the most important reform to emerge from the Watergate scandal,"⁷⁸ is too important to our democracy to let wither away.

⁷⁷ Restoring Integrity to America's Elections Act, H.R. 2931, 114th Cong. (2015).

⁷⁸ S. Rep. No. 93-981 at 564 (1973).