



**INSTITUTE FOR
FREE SPEECH**

**BEFORE THE
HOUSE COMMITTEE ON HOUSE ADMINISTRATION
UNITED STATES HOUSE OF REPRESENTATIVES**

*Oversight of the Federal Election
Commission*

TESTIMONY OF

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SEPTEMBER 25, 2019

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Introduction

Thank you Chair Lofgren, Ranking Member Davis, and Members of the Committee on House Administration for inviting me to testify today on FEC oversight.

At the time that the FEC was created, Senator Alan Cranston (D-Calif.) warned his colleagues and the public:

We must not allow the FEC to become a tool for harassment by future imperial presidents who may seek to repeat the abuses of Watergate. I understand and share the great concern expressed by some of our colleagues that the FEC has such a potential for abuse in our democratic society that the president should not be given power over the Commission.¹

In order to assure that the FEC would not become a weapon of partisan politics, the FEC was created with a number of unusual, though not, for the most part, unique features. But from its inception, advocates of “robust” campaign finance regulation, and an aggressive approach to enforcement, argued that structural features of the Agency left it insufficiently powerful. Over time, this has hardened into a claim that the Agency was “structured to be ineffective.” The FEC has been derided for literally decades with such terms as, “the Failure to Enforce Commission,” “the little agency that can’t,” “a lapdog,” a toothless watchdog,” and a “watchdog without a bite,” “FEC-less,” “pathetic,” and “nuts,”² among others.

These criticisms of the FEC are based on the belief that the self-evident shortcomings of the Federal Election Campaign Act amendments of 1974 and the Bipartisan Campaign Reform Act of 2002 are a problem of administrative law. In fact, the underlying problem is in the substance of the law and the intractable First Amendment problems raised by what is, in the end, the regulation of political speech. There is little reason to believe that campaign finance regulation would have been, or will be, more successful if a different or restructured agency were placed in charge of enforcement. Indeed, to the extent most proposals for FEC reform would ameliorate some sore point of regulatory enforcement, they would create even worse problems of their own. Many of the supposed design defects of the FEC are not bugs, but features, and features of progressive ideology at that. The proposed reforms would, in fact, cost the regulatory enterprise the popular support and legitimacy that would be needed for the “rigorous” and “robust” enforcement that the FEC’s critics hope to see.

Today in these prepared remarks I want to focus on two issues, one structural, and one substantive but shedding light on the weakness of the structural criticism. The first is the claim that the FEC’s bipartisan structure leads to “deadlocked” votes that make it ineffective, and the second is concern that the FEC has failed to take aggressive action against so called “dark money.”

¹ Federal Election Commission, *Legislative History of Federal Election Campaign Act Amendments of 1976*, at 89.

² See Lauren Eber, *Waiting for Watergate: The Long Road to FEC Reform*, 79 S. CAL. L. REV. 1155, 1155-56 (2006); Scott E. Thomas and Jeffrey H. Bowman, *Obstacles to Effective Enforcement of the Federal Election Campaign Act*, 52 Admin. L. Rev. 575, 577, and citations at footnotes 14-24 (2000)

I then quickly address the failure of Congress to act on the FEC's own recommendations for reform, and of the Senate minority party to put forth names to fill Commission vacancies.

The FEC's Bipartisan, Six-Member Structure

Perhaps no criticism of the FEC is more predominant than that its structure, in particular the 3-3 split of commissioners between the two major parties, assures an ineffective agency.³

The FEC's 3-3, bipartisan makeup is at the core of almost all structural criticism of the FEC. The structure is not unique, but it is unusual.⁴ Critics of this structure argue that it effectively incorporates gridlock into the enforcement process. They therefore seek to shrink the Commission to three or five members, or expand it to seven, to avoid these "deadlocks." There is a certain facial appeal to this criticism. Given that four votes are necessary for the FEC to take action,⁵ a cynical view of the process suggests a situation in which Republicans block any enforcement against their members, and Democrats do the same when complaints are filed against their side.

At the outset, the accusation proves too much. If we cannot count on commissioners to vote except along party lines, we have to doubt whether a Commission with an odd number of members could ever function as anything other than a tool of partisan politics. The argument that a 3-3 bipartisan commission is doomed to "gridlock" undermines the entire project of campaign finance regulation, for if there is no expertise, only politics, regulation is less about good government than kneecapping one's political opponents.

But let us take the claim on its own terms. Is it even true? In fact, the record clearly shows that "deadlocks" are the exception, rather than the rule, at the FEC, that their importance, when they occur, has been vastly overstated, and that their existence is, in fact, an intentional and beneficial part of the FEC design, as Senator Cranston noted all those years ago.

³ 52 U.S.C. § 30106(a)(1). Although in theory a Libertarian or other third party member could be appointed, none has ever seriously been contemplated. At least one declared independent has served, but his alignment with one of the major parties is not questioned. Commissioner Stephen Walther is an independent, but previously served as counsel to Democratic Senate Leader Harry Reid in Reid's 1999 election recount. Ed Vogel, *Recount Not Expected to Unseat Reid*, LAS VEGAS REV.-J., p. 1A, Nov. 10, 1998. Walther was appointed on Reid's recommendation to Republican President George W. Bush, as a "Democratic commissioner." *Senate Confirms New FEC Commissioners, Ending Long Partisan Standoff*, THE POLITICO (June 24, 2008), <https://www.cbsnews.com/news/senate-confirms-new-fec-commissioners-ending-long-partisan-standoff/>. Reid had previously sought a judgeship for Walther, a "longtime Reid friend and political ally." *Reid Taps Attorney for Judgeship*, LAS VEGAS REV.-J., p. 11B, Oct. 8, 1999, 1999 WLNR 525480.

⁴ Other federal agencies with an even number of commissioners are the Election Assistance Commission, 52 U.S.C.A. § 20923(a)(1); and the United States International Trade Commission, 19 U.S.C. § 1330(a).

⁵ 52 U.S.C. § 30106. For this reason, though I use the designation "3-3," in the discussion that follows, any time less than a full complement of commissioners voted, due to vacancies or recusals, I include 3-2, and 3-1 votes among the designation "deadlocked."

According to a report by the office of former Commissioner Ann Ravel, in 2016 the FEC “deadlocked” on 30 percent of enforcement matters.⁶ The Ravel report came on the heels of two reports, one by the advocacy organization Public Citizen (which seeks greater regulation in the field), and the other by the more respected Congressional Research Service, finding “deadlocks” in over twenty percent of Commission votes on enforcement matters in 2013 and 2014, respectively.⁷ Another major study of advisory opinions found “deadlocks on just 3.7 percent of requests from 1977 through 2012, but over six percent every year but one between 2006 and 2012, rising to 20 percent in the last year of the study.⁸ Of course, ending up in tie votes on one-fifth to one-third of all matters is hardly perpetual gridlock. But these are not insubstantial numbers either, suggesting some credence to the “deadlock” theory.

At the outset, there is considerable controversy over the accuracy of these numbers. An analysis released by three FEC Commissioners in September of 2016 found that the FEC had “deadlocked” on just 14 percent of votes in the first 9 months of the year,⁹ not the 30 percent claimed by Commissioner Ravel. Commissioner Ravel argued that this tally included non-substantive votes such as approval of meeting minutes and internal staff issues. Commissioner Lee Goodman, however, argued that in 2014 the Commission deadlocked just seven percent on all

⁶ Office of Commissioner Ann M. Ravel, *Dysfunction and Deadlock: The Enforcement Crisis at the Federal Election Commission Reveals the Unlikelihood of Draining the Swamp* 9 (2017), https://www.fec.gov/resources/about-fec/commissioners/ravel/statements/ravelreport_feb2017.pdf.

⁷ Public Citizen, *Roiled in Partisan Deadlock, Federal Election Commission Is Failing* 1 (2015), <https://www.citizen.org/wp-content/uploads/fec-deadlock-update-april-2015.pdf> (finding that the rate of “deadlocked” votes on proposed enforcement actions topped ten percent each year from 2009 through 2014, the last year covered in the report, reaching a high of 22.5% in 2013); R. Sam Garrett, *The Federal Election Commission: Enforcement Process and Selected Issues for Congress* 9-10 (2015), <https://fas.org/sgp/crs/misc/R44319.pdf> (finding a 24.4 percent “deadlock” rate on enforcement matters in 2014).

⁸ Michael M. Franz, *The Federal Election Commission as Regulator: The Changing Evaluations of Advisory Opinions*, 3 U.C. IRVINE L. REV. 735, 750 (2013).

⁹ Chairman Matthew S. Petersen and Commissioners Caroline Hunter and Lee E. Goodman, *Press Statement* (Sept. 7, 2016) (found online at [https://media.nbcwashington.com/documents/NBC4+Press+Statement+Sept+2016+\[Sept+7+2016\].pdf](https://media.nbcwashington.com/documents/NBC4+Press+Statement+Sept+2016+[Sept+7+2016].pdf)).

“Results from ... analyses vary based on methodology, time period, and the types of votes studied.” Garrett, *supra*, at 10. For example, in Garrett’s 2009 study, he placed the “deadlock” rate in enforcement matters at 13 percent for the 12 months from July 2008 through June 2009, but noted that it would drop to six percent if all enforcement matters, including Administrative Fines and cases sent to the Commission’s Office of Dispute Resolution, were included in the total. R. Sam Garrett, *DEADLOCKED VOTES AMONG MEMBERS OF THE FEC: OVERVIEW AND POTENTIAL CONSIDERATIONS FOR CONGRESS* 6 (Oct. 2009), <https://crsreports.congress.gov/product/pdf/R/R40779>.

matters and 14 percent on all substantive matters (i.e. votes cast on enforcement matters, audits, advisory opinions and the like”), to Ravel’s figure of 20 percent.¹⁰

This Committee asked the FEC for data on all Matters Under Review (MURs) on which there was even one 3-3, 3-2, or 3-1 vote at any point in the enforcement process. The FEC’s response shows that each year since 2012 some 40 to 60 percent of Matters Under Review include at least one vote without a four-vote majority. These numbers, however, are misleading for several reasons. First, having at least one “deadlocked” vote occurring anywhere in the process hardly means the matter was not efficiently or effectively resolved. Such a vote may come on a preliminary matter, a discovery request, the appropriate level for a fine, or the legal theories involved. If more controversial approaches are defeated on a 3-3 vote, leading to a clear majority vote to resolve the matter on firmer grounds, that is a good thing—that is what the Commission’s bipartisan structure is intended to do.

Further, the 40 to 60 percent number is misleading on its own, because it does not include votes decided on tally,¹¹ matters handled through the Commission’s Administrative Fines Program, and matters handled through the Commission’s innovative Alternative Dispute Resolution (ADR) program. For example, responding to this Committee’s specific question, the Commission’s 2018 numbers show a high percentage of MURs (59%) considered in Executive Session with at least one “split vote.” However, when MURs closed on tally votes are included, the percentage drops to 26%. Add in adjudications through Administrative Fines and ADR, and the percentage drops to 15%. Can we live with 15 percent? I think the answer is yes.

First, note that these percentages are not exceptionally high when compared to other administrative agencies. For example, in recent years the Federal Communications Commission has had a similar level of straight party-line commission votes. Under Chairman Thomas Wheeler, the FCC split 3-2, on a straight party-line basis in 26% of major orders, as defined by the Chairman himself.¹² It is safe to assume that if the FCC had the same bipartisan structure as the FEC, most of those votes would have been 3-3. Of course it is true that those 3-2 votes allowed one party to get its way. But that again ignores the very reason why the FEC is structured differently. FCC matters are important, but unlike FEC MURs they do not directly involve the government in campaign disputes that may handicap one party or the other. It is fair to say that if in 26 percent of MURs the FEC found liability on the basis of straight party-line votes in favor of the majority party, we would have a true crisis of democratic legitimacy in campaign finance regulation.

¹⁰ Compare Lee Goodman, *The FEC's Problems Aren't with the GOP*, Politico (May 10, 2015), <https://www.politico.com/magazine/story/2015/05/the-fecs-problems-arent-with-the-gop-117798>) with Ravel, *supra*. Since neither Commissioner released the basis for their dueling statistics, it is difficult to referee.

¹¹ Before a MUR is placed on the Commission’s agenda, the General Counsel’s recommendation is circulated. Commissioners then approve or object to the Counsel’s recommendation. If all commissioners agree and none demands the matter be placed on the agenda, it is approved “on tally.”

¹² Scott Wallsten, *The Partisan FCC*, Technology Policy Institute, Feb. 16, 2016.

In any case, it is not clear that these relatively high recent percentages are anything more than a brief aberration. Critics have propounded the “deadlock” theory for literally decades. Yet during most of that time, the “deadlock” rate was, by any calculation, extremely low—far lower than that claimed by Commissioner Ravel or Public Citizen for recent years. Between 1996 and 2006 the FEC “deadlocked” on just 2.8% of votes on enforcement matters.¹³ Similar low numbers have been the norm throughout the Agency’s history, even as complaints about “deadlock” and “stalemate” emanated from critics. A review of Agency votes from 1993 through 1999 found just 2.6% resulted in 3-3 or 3-2 votes.¹⁴ Through the first six months of 2004 the Commission “deadlocked” on just 3.1 percent of substantive votes, and in 2003 on just one percent.¹⁵ This low rate of “deadlocked” votes throughout the Commission’s history, during which criticism of the bipartisan, six-member structure was all but identical to today’s criticism,¹⁶ suggests that the relatively high rate of “deadlocked” votes in some years is merely coincidental to the critics’ claims—much like the proverbial “stopped clock” which gets the time right twice a day. Certainly it belies the notion that the Agency’s bipartisan structure makes “deadlock” inevitable or even likely. Looking at the history of criticism over the FEC for “deadlock” even when such “deadlocks,” by any definition, were uncommon, leads to the conclusion that the criticism is merely an effort to divert attention from the inherent difficulties in regulating campaign finance.

Faced with actual data the blows up the “perpetual deadlock” argument, the traditional response has been to argue that the Commission may not actually be generally prone to perpetual “deadlock” after all, but that it tends towards tie votes on “critical questions” or “key questions.”¹⁷ In fact, the evidence is not convincing. For example, Project FEC listed as examples of such “key” and “important” matters just eight decisions over the decade preceding issuance of its 2002 report. These included, among others, a decision by the FEC not to file an amicus brief in a state law case in Missouri, and a 2001 decision not to appeal a Fourth Circuit Court of Appeals decision striking down an FEC regulation previously held unconstitutional—after appeal by the agency—in the U.S. Courts of Appeal for the First, Second, and D.C. Circuits. One might dispute if these were really

¹³ See Franz, *supra* note 22, at 176, Table 5.

¹⁴ See Thomas & Bowman, *supra* at 591, n. 88 (citing an internal review by the Commission in response to Congressional inquiry). See also *FEC Panel Discussion: Problems and Possibilities*, 8 Admin. L. J. Am. U. 223, 252 (1994) (Comments of Lawrence Noble, then FEC General Counsel, speaking in 1994: “I do not have the figures, but three-three splits occur in a very, very small number of cases.”).

¹⁵ Bradley A. Smith, *Opening Statement Before the Senate Committee on Rules and Administration* 2 (July 14, 2004), <https://www.fec.gov/resources/about-fec/commissioners/smith/smithstatement05.pdf> (based on internal FEC statistics).

¹⁶ See e.g. BROOKS JACKSON, *BROKEN PROMISE: WHY THE FEDERAL ELECTION COMMISSION FAILED* 63 (1990) (“drift and deadlock are built in”); Amanda S. La Forge, *The Toothless Tiger—Structural, Political and Legal Barriers to Effective FEC Enforcement: An Overview and Recommendations*, 10 Admin. L. J. Am. Univ. 351, 359 (1996) (the structure “effectively incorporates gridlock into the enforcement process”); 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* 9 (2002) (“a recipe for stalemate”).

¹⁷ *FEC Panel Discussion, supra*, 252-53 (1994) (comments of Elizabeth Hedlund) (“When they do deadlock, it is always on critical questions of law”); Project FEC, *supra* at 9.

particularly “important” matters leaving the regulated community without clear guidance. If they were among the eight most important “deadlocked” cases over a decade, it suggests that “deadlock” is a very minor problem. At times, however, the argument seems to border on tautology: Proponents of the “key vote” theory define a “key” matter as any on which the Commission “deadlocks.”

Yet there may be a kernel of truth to the “key questions” claim. The Commission probably is more likely to split down the middle where the substantive issue is highly contested, and important enough that commissioners are less willing to compromise, i.e. where the matter is “controversial.” But is this a bug or a feature?

If we are concerned about avoiding appearances of partisanship or the weaponization of campaign finance law for political purposes, it is precisely on the most difficult facts or most highly contested propositions of law that the danger of abuse is greatest. Having an odd number of commissioners to put an end to tie votes would raise serious questions about the legitimacy of the agency “in the most politically volatile cases.”¹⁸ If commissioners are experts, and the experts are evenly divided, it is hard to argue that failure to adopt the policy of “robust enforcement” is a failure of the Agency. If, on the other hand, commissioners are mere politicians sent to represent their party’s electoral interests, the 3-3 vote is, in fact, an important safeguard against partisan abuse—as Congress intended. Indeed, the critics of the FEC who argue most vociferously for a “tiebreaking” commissioner when they don’t like Commission decisions regularly retreat behind the FEC’s bipartisan requirement to defend decisions they do like. For example, the 2002 Project FEC report by the pro-“robust enforcement” outfit Democracy 21, scathing in its criticism of the Commission and its 3-3 structure, fended off Republican criticism that the Agency had been too partisan in certain enforcement matters by immediately noting, “none of these investigations could have gone forward without the vote of at least one Republican commissioner.”¹⁹ Exactly. It is hard to imagine a better endorsement for how the FEC’s bipartisan structure gives it legitimacy.

In fact, 3-3 votes are rarely problematic from a standpoint of agency efficiency or effectiveness. As a practical matter, 3-3 or 3-2 votes on enforcement matters are decisive²⁰ and readily understood by the parties—the matter does not go forward. And while a 3-3 vote failed to garner a majority, thus possibly giving it less precedential weight, to the extent agencies are expected to be consistent, such a vote still serves as a precedent. Critics of the Commission’s enforcement record tend to complain when the Agency doesn’t vote to pursue actions they believe

¹⁸ Todd Lochner and Bruce E. Cain, *Equity and Efficacy in the Enforcement of Campaign Finance Laws*, 77 TEX. L. REV. 1891, 1895, 1929 (1999). See also Goodman, *supra* (“That a percentage of votes break 3-3 is not a flaw of the agency but rather one of its most prudential features,” and reviewing several high profile cases resulting in 3-3 votes).

¹⁹ See Project FEC, *supra* at 78.

²⁰ See, e.g., *Federal Election Commission v. National Republican Senatorial Committee*, 966 F.2d 1471, 1476 (D.C. Cir. 1992) (upholding FEC’s dismissal of an enforcement matter based on a 3-3 deadlock and noting that “when the Commission deadlocks 3–3 and so dismisses a complaint . . . the three Commissioners who voted to dismiss . . . constitute a controlling group for purposes of the decision”) (citing *Democratic Congressional Campaign Committee v. Federal Election Commission*, 831 F.2d 1131 (D.C. Cir. 1987)).

should be pursued. But it has never been explained why a 3-3 vote terminating proceedings is worse than a hypothetical commission with an odd number of members voting 3-2 or 4-3 to terminate proceedings. In fact, those complaining about “deadlocks” appear to care less about the fact that the vote was tied than that they lost. What they really want is for the FEC to agree with their preferred ideological and legal conclusions when writing regulations or adjudicating complaints. They want to win. They would hardly be happier on the losing end of a 2-1, 3-2 or 4-3 vote than they are when on the losing end of a 3-3 vote.

The possibility of a tie vote is, admittedly, more troublesome on the regulatory side of the ledger. A tie vote on an Advisory Opinion request, for example, may leave regulated parties uncertain about their obligations under the law, yet still potentially subject to prosecution for violations. Yet again, the impact can be overstated. A “deadlocked” vote on a decision not to amend or repeal a regulation means the prior regulation remains in effect; a “deadlocked” vote on a proposed new regulation means it does not take effect. Problems arise, then, when a statutory change by Congress or a court decision upsetting the regulatory regime makes an existing regulation unenforceable or demands the issuance of new guidance. It does not minimize the importance of these situations to note that they are relatively rare. This could, of course, be resolved by having an odd number of commissioners. But that requires us to forget why the FEC requires a bipartisan vote.

The trade-off is between relatively rare “deadlock,” and hence lack of guidance, and the potential weaponization of the Commission’s rules on contentious points of law. Moreover, once again the agency’s critics are left with the fact that they, too, agree that tie votes—thus taking no action—may be preferable to losing a vote. For example, it took nearly five years from the federal court decisions in *Citizens United v. Federal Election Commission* and *SpeechNow.org v. Federal Election Commission*-- revolutionizing corporate ability to engage in campaigning and leading to the creation of “Super PACs,”--for the FEC merely to repeal regulations made obsolete by those decisions, and it still has not passed regulations fully accounting for those decisions. The primary reason for that has been the insistence of pro-regulation commissioners, most notably the current Chairman, that, as part of any regulatory update, the Commission adopt far-reaching and contentious new disclosure regulations not required by those court decisions, and possibly barred by law. In other words, she prefers “deadlock” to outright defeat. And thus the 3-3 system has worked in favor of “robust” enforcement as well as bipartisanship.

In summary, even with the recent, and likely temporary, increase in deadlocked votes, the substantial majority of cases are decided by majority votes. When they are not, however, a 3-3 vote is still conclusive in the vast majority of cases, particularly on the enforcement side. To a substantial degree, the complaint of the Agency’s interlocutors is merely that they are not winning votes at the Commission—something that would surely be a common complaint for many organizations and persons at any regulatory agency, and hardly a sign of an ineffective structure. To the extent that the Commission’s regulatory function periodically stalls on the inability to reach a majority agreement, that, too, is often clear and decisive. When it is not, it must be weighed against the trade-off in legitimacy gained by the Commission’s structure.

If this Congress wishes to ignore the warnings of Senator Cranston and others that led to the original creation of a bipartisan FEC, it is free to do that. Certainly you are better positioned

than I to know if you and your constituents would be comfortable having an FEC with a partisan majority appointed by President Trump, and whether that would fit your definition of “good government.”

With that in mind, I note that earlier this year this House passed HR 1, which included provisions altering the FEC’s structure, but only after the next presidential election. Those who are cynical about Congress might be forgiven for thinking—wrongly of course, but appearances sometimes lead people to err on their understanding of the facts—that the current majority is less interested in good government than in gaining partisan control over the Commission as the next escalation in our nation’s current political warfare.

The “Dark Money” Issue

I next want to address the question of “dark money,” because it illustrates how substantive legal problems are often blamed, incorrectly, on the Commission.

“Dark money” is a term with no legal meaning, and little fixed meaning in ordinary discourse. However, to the extent it has meaning, it has historically been defined as independent expenditures made by organizations that do not, in turn, disclose the identities of all of their donors.²¹ Although it is sometimes claimed that we don’t know how much “dark money” is spent, in fact we do, because the spending must be reported even when the identities of donors to organizations doing the spending is not.

In fact, “dark money” is not “swamping” the system. Since the Supreme Court decision in *Citizens United v. Federal Election Commission* set off the current alarm about “dark money” in 2010, such spending has never reached even six percent of total political spending in an election cycle. In 2018, according to the numbers at the pro-regulation Center for Responsive Politics (CRP), it was between 2.2 percent and 5.2 percent, depending on how calculated.²² Moreover, many of those “dark money” spenders are hardly unknown to voters. For example, according to CRP, the largest “dark money” groups in 2018 included the U.S. Chamber of Commerce, the Environmental Defense Action Fund, Everytown for Gun Safety Action Fund, the National Association of Realtors, Planned Parenthood Action Fund, the Republican Jewish Coalition, the ACLU, and NARAL Pro-Choice America. It’s highly doubtful that voters don’t know what these organizations stand for without knowing the names of all their individual members.

²¹ Occasionally efforts are made to sweep up as “dark money” funds spent by non-profit organizations and others to promote discussion of public affairs separate from candidate elections. It should be understood that such spending has long existed and never been regulated by campaign finance laws. Efforts to regulate based on any such definition would be a dramatic expansion of federal regulatory authority, and would likely be unconstitutional under Supreme Court precedent. See *Buckley v. Valeo*, 424 U.S. 1 (1976); *Federal Election Commission v. Wisconsin Right to Life*, 551 U.S. 449 (2007).

²² Approximately \$5.7 billion was spent on the 2018 midterms. The Center for Responsive Politics estimates that \$126 million was spent by “dark money” groups directly, and another \$176 million given to Super PACs, which disclose their donors, and may or may not have spent all of their funds.

There are, of course, costs to attempting to expose the members and donors to these organizations. The Supreme Court has long recognized that.²³ And there is the added problem of “junk disclosure.” For example, a person may give to the ACLU because he supports its general principles and mission, but not be in favor of a particular ACLU ad opposing a particular candidate. Yet the individual would be disclosed as having helped to fund that ad. This would be at best misleading to voters, not informative, and unfair to the donor. Still, some argue that the effort is worthwhile on balance.

But any effort to dictate disclosure of these donors runs into direct constitutional problems. In *Buckley v. Valeo*, the Supreme Court held that disclosure of donors to such organizations was constitutionally limited to situations where the organizations either “make contributions earmarked for political purposes or authorized or requested by a candidate or his agent, to some person other than a candidate or political committee,” or “when they make expenditures for communications that expressly advocate the election or defeat of a clearly identified candidate.”²⁴ The question is whether that allows for publication of all donors to such organizations, or only to those who contributed specifically for such expenditures. Concerned about the First Amendment and policy impacts of overly-broad disclosure, the FEC has, literally for decades, subscribed to the latter approach. Nevertheless, in 2018, for the first time, a federal district court ruled that the FEC should take the former, broader approach, requiring the junk disclosure of general donors to and members of the organization who may not have intended to or known about such expenditures. That case is still be litigated.²⁵ No federal appellate court has made such a ruling.

In short, “dark money” is not a crisis swamping the system, but a small percentage of total political spending, primarily by well-known public interest organizations and associations. It has always existed in the system, and is not growing as a percentage of total spending. The FEC has not changed its rules in any way to allow more “dark money,” and the FEC’s interpretations have been based on legitimate statutory and constitutional concerns. The Commission is not wrong to consider these constitutional concerns. As one federal court of appeals has noted, “[u]nique among federal administrative agencies, the Federal Election Commission has as its sole purpose the regulation of core constitutionally protected activity.”²⁶ Even if one ultimately disagrees with the Commission’s interpretations, the Commission should be praised, not excoriated, for sensitivity to that responsibility.

The point here is to illustrate that even if one believes that the FEC’s policy of four decades has been wrong, it is not due to any structural defect, but due to a determination by numerous combinations of commissioners over many years that that policy is correct. Hence we see that the

²³ *NAACP v. Alabama*, 357 U.S. 449 (1958) (“It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute [an] effective [] restraint on freedom of association... This Court has recognized the vital relationship between freedom to associate and privacy in one’s associations.”)

²⁴ 424 U.S. at 80.

²⁵ *Citizens for Responsibility and Ethics in Washington v. Federal Election Commission*, 316 F. Supp. 3d 349 (D.D.C. 2018).

²⁶ *AFL-CIO v. Federal Election Commission*, 333 F.3d 168, 170 (D.C. Cir. 2003)

agency's critics are again mistaking a substantive disagreement over the law for a structural defect in the Commission.²⁷

Congress's Failure to Act on the FEC's Own Recommendations

While I have addressed two areas of criticism of the FEC, it is worthwhile to quickly note the obvious: many of the complaints now aimed at the FEC can be laid directly at the feet of our elected politicians.

In particular, for many years, Congress has ignored the FEC's own recommendations for statutory changes that would help it improve its performance. In particular, it has refused to adopt the Commission's recommendation to increase the threshold for compulsory disclosure of donors. That threshold is currently just \$200, and has not been adjusted, even for inflation, in over 40 years. Raising it substantially, say to \$2000, would reduce the Commission's workload, protect the privacy of small donors, who have suffered documented incidents of harassment and retribution for contributions, and make the names of large donors easier for the general public to find.

Additionally, Congress has failed to change the statutory classification of the Commission's two key staff positions, General Counsel and Staff Director. While adequate when enacted over 40 years ago, changing government personnel and pay practices leaves those positions grossly underpaid, and hence almost impossible for the Commission to fill. It was a source of tremendous difficulty when we selected a new General Counsel 18 years ago, and I'm sure has grown much worse since then.

Six New Commissioners are Needed

The FEC currently has just three commissioners due to various resignations. The remaining three have long since overstayed the single term to which they were appointed. This hampers the Commission's ability to act. At least one Commissioner has been on the Commission more than twice as long as an acting Commissioner than she was in filling her original term, despite the fact that the law is supposed to limit commissioners to a single term. While this House has no formal role in either the nomination or appointments process, members may wish to use their influence to promote the nomination and confirmation of a full complement of six new commissioners.

Conclusion

As one who has devoted my academic life to questions of campaign finance, has represented clients before the FEC, and has served as Chairman and Commissioner on the FEC, I am happy to answer any questions you may have about these remarks or other elements of the Commission's work.

Thank you.

²⁷ As my colleague on this panel, Professor Torres-Spelliscy, notes, it is incumbent on Congress, if it desires and can do so in accordance with the Constitution, to "give clear statutory guidance to the FEC that disallows dark money... ."