
A Dereliction of Duty: How the FEC Commissioners' Deadlocks Result in a Failed Agency and What Can Be Done

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Introduction

Enacted in 1974 as a cornerstone of the post-Watergate reforms, the Federal Election Commission (“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 each of those functions with at least a passing grade: it wrote and implemented new rules and regulations, it responded to changes in the law and in campaign practices, and it regularly enforced the law against violators across the political spectrum.²

Over the past decade, however, congressional leaders and political ideologues who are opposed to the campaign finance laws that the FEC is charged with enforcing have ensured that there is a controlling bloc of Commissioners who share this ideological opposition.³ Now, even when presented with overwhelming evidence of likely violations of law, the routine result is that the Democratic Commissioners will vote to proceed with an investigation into whether a legal violation did occur, and the Republican Commissioners will stop the process in its tracks (no matter which political party is implicated in the alleged violation). The result has been an administrative agency that does not administer the law, and an

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¹ *Mission and History*, FEC, <https://perma.cc/J2RZ-MHTZ> (emphasis added).

² See 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 6 (2017) [hereinafter DYSFUNCTION AND DEADLOCK], <https://perma.cc/D95J-L7T9>; DANIEL I. WEINER, FIXING THE FEC: AN AGENDA FOR REFORM 3, 12 n.30 (2019), <https://perma.cc/4DUJ-LDEY>.

³ See DYSFUNCTION AND DEADLOCK, *supra* note 2, at 7–8; Richard Skinner, *The Agency That Enforces Our Campaign Finance Laws Doesn’t Do Its Job. And Many People Like It That Way*, VOX (Jan. 26, 2016), <https://perma.cc/HZ5Z-WXTY>.

enforcement agency that does not enforce it. This result occurs because the statute effectively requires a bipartisan vote for any Commission action.⁴

Campaign finance regulation opponents, who prefer that result to a functional agency that carries out the tasks with which it was entrusted, have attempted to argue that Congress *designed* the FEC to fail at that task, that the perceived problems of the agency are “not bugs, but features,” that the agency’s deadlock rate is overstated, and that deadlocks, when they do occur, are often the preferable outcome.⁵ But each of these propositions is highly misleading. Congress did *not* design the FEC to fail, the agency’s recent deadlock rate is stunning and unprecedented, and regular deadlocks cause the FEC to fail to fulfill its core functions, to devastating effect.

First, I will describe the ways in which the FEC’s era of dysfunction has caused it to fail spectacularly to fulfill the promises upon which the Supreme Court has based its recent campaign finance jurisprudence, especially in the areas of independent, “non-coordinated” spending and disclosure. Those failures have reaped serious consequences for our elections and our democracy as a whole. Next, I will explain the ways in which Congress structured independent judicial review in those instances where the Commission does deadlock, and the challenges that Congress’s design for judicial review has encountered, particularly in recent years. Finally, I will consider the legislative reforms that could, and should, be enacted to remedy this situation.

I. Deadlocks

By law, the FEC comprises “6 members appointed by the President, by and with the advice and consent of the Senate,” and “[n]o more than 3 members of the Commission . . . may be affiliated with the same political party.”⁶ Taking any substantive action, such as finding “reason to believe” a legal violation has occurred, authorizing an investigation, or issuing new rules, requires “the affirmative vote of 4 members of the Commission.”⁷ In practice, that requirement means that three Commissioners refusing to offer their affirmative votes can block any given substantive action, if they

⁴ This effective result stems from the statute’s requirements that no more than three Commissioners belong to any single party and that most decisions require a majority of—i.e., at least four—Commissioners to agree. See 52 U.S.C. § 30106(a)(1), (c) (2018).

⁵ See, e.g., Bradley A. Smith, *Feckless: A Critique of Critiques of the Federal Election Commission Structure*, 27 GEO. MASON L. REV. 501, 504–05, 524–31 (2020).

⁶ 52 U.S.C. § 30106(a)(1).

⁷ See *id.* § 30106(c).

so choose. When that occurs, the Commission “deadlocks,” meaning it fails to achieve the four votes required to proceed and cannot act.

After a complaint is filed, the respondents named in the complaint have an opportunity to provide written responses to the FEC concerning the complaint’s allegations, and the FEC’s Office of the General Counsel proceeds to compile a preliminary factual and legal analysis that outlines the evidence, the arguments presented on both sides, and the relevant law.⁸ All of this occurs outside of any public view. Then, the Commissioners vote on whether to find “reason to believe” that a violation of the law has occurred.⁹ If four Commissioners believe this standard is met, then the FEC proceeds with an investigation. But it is at that stage that three Commissioners’ “no” votes can, and frequently do, effect a deadlock, which prevents any further action on the matter.¹⁰ While campaign finance regulation opponents will attempt to claim otherwise, a “reason to believe” finding by itself does not establish that the law has been violated,” explained the FEC itself in 2007.¹¹ It “instead simply means that the Commission believes a violation may have occurred” and that there is enough evidence to investigate the facts, as the FEC explains again in the guide for complainants and respondents currently posted on its website:

A reason to believe finding is generally followed by either an investigation or pre-probable cause conciliation. For example, a reason to believe finding followed by an investigation would be appropriate when there is reason to believe a violation may have occurred, but an investigation is required to determine whether a violation in fact occurred and, if so, the exact scope of the violation.¹²

For the first thirty years of its existence, the Commission deadlocked relatively infrequently, at the “reason to believe” stage or otherwise. During my four years on the Commission (1991–1995), I can recall only a single instance of *any* deadlock in an enforcement matter. I believe that was because Commissioners viewed their job as ensuring that the law was applied, and applied even handedly, to both parties. In other words, they understood Congress’s mandate to mean that the FEC should be fair—not that it do nothing. When I served on the Commission, my colleagues and I would have been embarrassed by a run of deadlocks and a resulting

⁸ See FEC, GUIDEBOOK FOR COMPLAINANTS AND RESPONDENTS ON THE FEC ENFORCEMENT PROCESS 9–11 (2012), <https://perma.cc/GCH7-YEPE>.

⁹ *Id.* at 12.

¹⁰ See DYSFUNCTION AND DEADLOCK, *supra* note 2, at 6–7, 9–10.

¹¹ See Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process, 72 Fed. Reg. 12, 545 (Mar. 16, 2007) (to be codified 11 C.F.R. pt. 111); see also 52 U.S.C. § 30109(a)(2) (2018).

¹² FEC, *supra* note 8, at 12.

failure to open investigations, resolve violations, write regulations, and give guidance.

Unfortunately, over the last ten years, deadlocks have become the increasingly likely outcome at the Commission, particularly in its core functions of enforcement matters and rulemakings. 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 2012.¹³ “In other words, the FEC does not deadlock occasionally or sporadically—it deadlocks *most of the time*.”¹⁴

Other recent analyses that have examined deadlock rates have reached similar conclusions. 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 2009.¹⁵ An analysis conducted by the office of former Commissioner Ann Ravel 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.¹⁶ In 2013, it was 26.2%, and by 2016, the rate had exceeded 30%.¹⁷ 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 2006.¹⁸ The Commission is also *holding* fewer votes in the first place, which means that its enforcement activity is lower overall than it used to be.¹⁹

This plummet in enforcement has coincided with—and helped drive—a surge in campaign finance activity that toes or crosses the legal

¹³ FEC, RESPONSES TO QUESTIONS FROM THE COMMITTEE ON HOUSE ADMINISTRATION 20 (2019), <https://perma.cc/W2JS-B6NQ>; see also CHAIR ELLEN L. WEINTRAUB, FEC, CHAIR ELLEN L. WEINTRAUB’S SUPPLEMENTARY RESPONSES TO QUESTIONS FROM THE COMMITTEE ON HOUSE ADMINISTRATION 4 (2019), <https://perma.cc/YZJ4-AXHP> (noting that “a slim majority of 51% have at least one split vote along the way”).

¹⁴ *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.) [hereinafter Noti], <https://perma.cc/ZL5Y-Y2JU>.

¹⁵ R. SAM GARRETT, CONG. RESEARCH SERV., R44319, THE FEDERAL ELECTION COMMISSION: ENFORCEMENT PROCESS AND SELECTED ISSUES FOR CONGRESS 9–10 (2015), <https://perma.cc/JPD2-YWYN>. 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.

¹⁶ DYSFUNCTION AND DEADLOCK, *supra* note 2, at 9.

¹⁷ *Id.*

¹⁸ *Id.* at 10.

¹⁹ See Press Release, Pub. Citizen, Roiled in Partisan Deadlock, Federal Election Commission Is Failing 1 (Apr. 11, 2017), <https://perma.cc/CY58-8XWK>.

line.²⁰ Frequently, that activity occurs in full view of the public, but, increasingly, thanks to the FEC, it escapes penalty. In some cases, subsequent revelations illuminate what the FEC failed even to investigate. In 2016, for example, the FEC deadlocked on whether to investigate Campaign Legal Center's ("CLC") complaint alleging that a shell corporation had illegally given nearly \$1 million to a super PAC supporting President Obama's reelection.²¹ Later, the Department of Justice conducted its own investigation, and that probe ultimately revealed not only that the super PAC contribution had been laundered through the shell corporation, but also that the money had originated from a foreign fugitive's funds.²² However, because the bar for criminal campaign finance violations is relatively high—the violations must be "knowing and willful" before they fall under the Department of Justice's criminal enforcement authority²³—and because the FEC is the sole agency with civil enforcement authority of campaign finance activity,²⁴ in a case where the FEC deadlocks and the Department of Justice does not pursue its own criminal investigation, the FEC's deadlock halts any chance of enforcement in its tracks. The FEC's desertion of its duty means that many violators may go completely un-penalized, and others can take the lesson that they can do the same or go even further.

A. "*Lies, Damned Lies, and Statistics*"

Campaign finance regulation opponents, determined to argue what the data simply do not show, have resorted to concocting calculations padded with data that have little to no relevance to any accurate assessment of the Commission's fulfillment of its core substantive functions. Unlike analyses by the Congressional Research Service, Ravel, and others, which limited their datasets to enforcement matters, and separated out substantive votes from non-substantive votes, apologists' approaches serve little more than to dilute and disguise the significant

²⁰ See discussion *infra* Part I.C.2.

²¹ Prakazrel "Pras" Michel, MUR 6930, at 1, (FEC Feb. 23, 2016) (Certification), <https://perma.cc/6GQ2-QYCY>.

²² See Megan McAllen, *Delay, Deadlock, Dismiss: Pras Michel Indictment Exposes How FEC Dysfunction Opens Our Elections to Foreign Meddling*, CAMPAIGN LEGAL CTR. (May 15, 2019), <https://perma.cc/3NFM-REKJ>.

²³ See 52 U.S.C. § 30109(a)(11) (2018); see also Brendan Fischer, *What Special Counsel Mueller's Report Tells Us About Campaign Finance Law and Foreign Interference*, CAMPAIGN LEGAL CTR. 4–5 (May 8, 2019), <https://perma.cc/JKS6-UR9Y> (demonstrating how the high bar for criminal campaign finance violations affected Special Counsel Robert Mueller's investigation).

²⁴ See FEC, *supra* note 8, at 4.

recent indicators of dysfunction in a sea of irrelevant data.²⁵ They do so by including 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 vote results on noncontroversial, non-substantive matters. Such efforts are misleading and disingenuous.

First, apologists usually include votes on a host of noncontroversial matters, such as approvals of staff salaries and promotions. Then, they count sign-offs on administrative fines, which are determined by preset formulas for late-filed reports, and other "traffic ticket" violations, as enforcement votes, even though they are essentially automatic. But "counting every kind of issue that has been put before the Commission"²⁶ is hardly a measure of how the Commission is fulfilling its self-described mission of "administering and enforcing the federal campaign finance law."²⁷

Second, even within the context of enforcement matters, apologists will attempt to artificially inflate their denominators by including votes not only on the substantive legal questions, but also on the perfunctory, noncontroversial ones.²⁸ For example, in a recent matter on which the Commission deadlocked at the reason to believe stage, the Commission recorded two votes: one deadlocked vote on whether to find reason to believe any of the respondents had violated the law, and a second vote, unanimous, to "[c]lose the file" and "[s]end the appropriate letters."²⁹ That second vote was routine, and was required to administratively dispose of the matter after the Commission deadlocked on the entirety of the substantive considerations. But those wishing to downplay the Commission's dysfunction include such votes in their calculations to deflate the deadlock rate. Such a difference can be significant. Most reasonable observers, for example, would conclude that ten enforcement matters with vote patterns identical to the one described above meant that the Commission deadlocked in ten out of ten, or 100%, of that set of enforcement matters—not that the Commission deadlocked only 50% of

²⁵ See *DYSFUNCTION AND DEADLOCK*, *supra* note 2, at 8–10.

²⁶ Press Statement, Matthew S. Petersen, Chairman, Caroline Hunter & Lee E. Goodman, Comm'rs, FEC, to NBC-4 (2016) [hereinafter Petersen, Hunter & Goodman], <https://perma.cc/4XC2-TQ77>.

²⁷ See *Mission and History*, *supra* note 1.

²⁸ See, e.g., Petersen, Hunter & Goodman, *supra* note 26; see also *Before the H. Comm. on H. Admin.* 116th Cong. 3–4 (2019) (written testimony of Bradley A. Smith, Chairman, Inst. for Free Speech, Josiah H. Blackmore II/Shirley M. Nault Professor of Law, Capital Univ.) [hereinafter Smith Written Testimony], <https://perma.cc/WT7R-S5JJ>.

²⁹ Thornton Law Firm LLP, MUR 7183, at 1–2 (FEC Apr. 9, 2019) (Certification), <https://perma.cc/84H3-CLPC>.

the time because it also took ten nominal, non-substantive votes to close the files after deadlocking on the ten matters' substantive questions. It takes little imagination to see how including those routine votes misleadingly portrays a much more functional Commission than is the reality.

Third, to further dilute and obscure the current problem, apologists include figures from time periods when the FEC *did* function reasonably effectively and that thus have little bearing on an assessment of the present state of the Commission.³⁰ Claiming that “it is not clear that these relatively high recent percentages are anything more than a brief aberration,” Professor Bradley Smith and others insist that in the 1990s, or in the early 2000s, or across the entire history of the Commission, it deadlocked in low percentages of matters before it.³¹ “[L]ow numbers” of deadlocks on enforcement matters, says Professor Smith, “have been the norm throughout the Agency’s history.”³² While this is true, it is the significant rise in deadlocks and other forms of substantive inaction in *recent* years that should be cause for concern for anyone who believes in the mission of the Commission, and in the importance of a well-functioning, well-administered campaign finance system. Deadlocks in a majority of current cases cannot be hidden behind averaging forty-five years of history.

Nor do opponents provide evidence for the claim that high proportions of recent matters that result in deadlocks “are anything more than a brief aberration,” and, in fact, proceed to make an alternative argument that deadlocks are “rarely problematic from a standpoint of agency efficiency or effectiveness.”³³ Campaign finance regulation opponents apparently acknowledge the problem that the recent data on Commission activity presents to their argument, which is evident in their attempts to dilute and minimize the numbers, but they proceed to expose their true aims when they begin arguing that those deadlocks are not only unproblematic, but are in fact the outcomes they prefer.

B. *Advisory Opinions*

As the FEC has increasingly become an enforcement agency that does not enforce the law, and a rulemaking agency that does not issue rules interpreting the law, one of the few remaining means for political actors to obtain guidance from the Commission has been the advisory opinion

³⁰ See Smith, *supra* note 5, at 525–28; Smith Written Testimony, *supra* note 28, at 5.

³¹ Smith Written Testimony, *supra* note 28, at 5.

³² *Id.*

³³ *Id.* at 5–6.

process. Through this process, candidates, political committees, and others may request guidance from the Commission about the permissibility of a certain “transaction or activity” under current law and regulation.³⁴ By statute, the FEC is required to issue an advisory opinion within sixty days of the request, or within twenty days if the advisory opinion request is made by a federal candidate within sixty days of an election.³⁵ But advisory opinions are not the way that Congress intended the FEC to make policy. While Congress specified that “[t]he Commission *shall* . . . prescribe rules, regulations, and forms to carry out the provisions of this Act,” issuing advisory opinions does not appear on that statutorily required list of “duties” that “[t]he Commission *shall*” perform.³⁶ Instead, rendering advisory opinions is one of the “authorities” that the Commission “has the power” to perform.³⁷

Advisory opinions are a “very poor substitute for rulemaking” because

[t]hose opinions are issued under a compressed time frame that affords few avenues for fact-finding; there is no opportunity for anyone other than the person who requested the opinion to appear before the Commission to testify; and the entire process tends to be dominated by a small cadre of repeat participants from major Democratic and Republican law firms.³⁸

Furthermore, the advisory opinion process has become captured by the deadlock and the dysfunction that have gripped the rulemaking and enforcement functions of the agency. According to an analysis by the Brennan Center for Justice, the average annual rate of deadlocks on advisory opinions has increased more than fivefold in recent years: before 2008, on average, the Commission deadlocked in under 5% of advisory opinions, but between 2008 and 2017, that average annual rate of deadlocks was 24.1%.³⁹

When the FEC is unable to agree on one or more of the requester’s questions, it informs the requester that it will not issue an advisory opinion,⁴⁰ stating that it is “unable to render an opinion in this matter,”⁴¹

³⁴ 52 U.S.C. § 30108(a)(1) (2018).

³⁵ *Id.* § 30108(a)(1)–(2).

³⁶ *Id.* § 30111(a)(8) (emphasis added).

³⁷ *Id.* § 30107(a)(7).

³⁸ WEINER, *supra* note 2, at 5 (quoting Telephone Interview by Daniel I. Weiner with Adav Noti, Former Assoc. Gen. Counsel, FEC, Current Senior Dir., Trial Litig. & Chief of Staff, Campaign Legal Ctr. (Oct. 29, 2018)).

³⁹ *Id.* (categorizing an advisory opinion as “deadlocked” if the Commission “failed to agree on an answer to at least one of the requestor’s questions”).

⁴⁰ See, e.g., FEC, Advisory Opinion Request 2019-10 (Aug. 22, 2019), <https://perma.cc/67RA-UFFZ>.

⁴¹ E.g., FEC, Advisory Opinion Request 2018-08 (Aug. 2, 2018), <https://perma.cc/DD6G-3DYG>; FEC, Advisory Opinion Request 2018-04 (May 21, 2018), <https://perma.cc/9LG9-5XNG>.

or that it “could not approve a response by the required four affirmative votes.”⁴² One of the many areas in which such nondecisions have perpetuated and exacerbated ambiguity on what the law requires has been on the issue of digital political ad disclosure. In 2011, Facebook asked the Commission whether certain political ads run on its platform could be exempt from the disclaimer requirements that the law requires for political ads run on other mediums.⁴³ The Commission could not agree on the answers to any of Facebook’s questions. Instead, the Commission informed Facebook that it had “considered but did not approve any draft . . . by the affirmative vote of at least four Commissioners,” and, therefore, the Commission “was unable to render an opinion in this matter.”⁴⁴

Deadlocks have also plagued the FEC’s rulemaking process. By the FEC’s own admission, it has promulgated only *one* substantive rule since 2012.⁴⁵ Instead, it has repeatedly failed even to initiate rulemakings and to seek public comment. Sometimes, rulemakings perish in committee before they make it back to the full Commission. For example, in December 2015, the full Commission referred a potential rulemaking matter to its Regulations Committee, which includes one Commissioner of each party; the Regulations Committee proceeded not even to hold a single formal meeting during either of the next two calendar years.⁴⁶ This is important because if the FEC does not implement regulations explaining the laws that Congress has passed, significant ambiguities are left in the law—and sophisticated political actors can exploit those ambiguities.

C. *Impacts of the FEC’s Dysfunction on Citizens United’s Promises of Disclosure and Independence*

According to the Supreme Court in *Citizens United v. FEC*,⁴⁷ which for the first time allowed corporations to spend unlimited amounts in US elections, the post-*Citizens United* campaign finance world would be one of robust disclosure and independent spending that would be truly independent of the candidates and political parties that spending

⁴² *E.g.*, FEC, Advisory Opinion 2017-05, at 1 (Sept. 20, 2017), <https://perma.cc/5R43-47VM>.

⁴³ See Letter from Marc E. Elias, et. al, Counsel, Facebook, on Advisory Opinion Request 2011-09 to Christopher Hughey, Acting Gen. Counsel, FEC (Apr. 26, 2011), <https://perma.cc/Q8SZ-8CW7>.

⁴⁴ FEC, Advisory Opinion Request 2011-09 (June 15, 2011), <https://perma.cc/6CUT-GUH>.

⁴⁵ See FEC, *supra* note 13, at 26–28. The single substantive rule that the FEC promulgated pertained to the reporting of multistate independent expenditures and electioneering communications. See *id.* at 27.

⁴⁶ See *id.* at 6, 36; see also Noti, *supra* note 14, at 14 n.35.

⁴⁷ 558 U.S. 310 (2010).

supports. Thanks to the FEC's routine deadlocks on enforcement and rulemaking matters, neither promise has been realized.

1. Disclosure

In a section of the *Citizens United* opinion that seven other Justices joined, Justice Kennedy emphasized that disclosure was both required by law and essential to the functioning of our democracy: "citizens," wrote Justice Kennedy, "can see whether elected officials are 'in the pocket' of so-called moneyed interests," and disclosure will "enable[] the electorate to make informed decisions and give proper weight to different speakers and messages."⁴⁸ Despite *Citizens United's* promise, the FEC has failed to write new disclosure rules implementing this decision, has repeatedly deadlocked on every proposed disclosure rulemaking, and has further failed to reach agreement to enforce the laws that are in effect.⁴⁹ Meanwhile, spending from secret, undisclosed sources continues flooding our elections, and recently crossed the \$1 billion mark.⁵⁰

After *Citizens United*, the FEC took more than four years to take any regulatory action, because the Democratic Commissioners wanted to implement the disclosure part of the *Citizens United* opinion, and the Republican Commissioners refused.⁵¹ They would agree only to remove the ban on corporate expenditures from the regulations.⁵² While Professor Smith justifies this deadlock as being due to "the insistence of the most 'pro-reform' commissioners that, as part of any regulatory update, the Commission adopt far-reaching and contentious new disclosure regulations not required by those court decisions,"⁵³ his complaint really lies with Justice Kennedy's vision of a post-*Citizens United* campaign finance system of "effective disclosure" with "transparency [that] enables the electorate to make informed decisions and give proper weight to different speakers and messages."⁵⁴

⁴⁸ *Id.* at 370–71 (quoting *McConnell v. FEC*, 540 U.S. 93, 259 (2003) (Scalia, J., concurring in part and dissenting in part)).

⁴⁹ See generally WEINER, *supra* note 2, at 1–6 (describing the effects of *Citizens United*, partisan gridlock, and FEC deadlocks on FEC enforcement and rulemaking).

⁵⁰ See Anna Massoglia, *State of Money in Politics: Billion-Dollar 'Dark Money' Spending Is Just the Tip of the Iceberg*, OPENSECRETS.ORG (Feb. 21, 2019), <https://perma.cc/TLG5-36GJ>.

⁵¹ See R. SAM GARRETT, CONG. RESEARCH SERV., R41542, THE STATE OF CAMPAIGN FINANCE POLICY: RECENT DEVELOPMENTS AND ISSUES FOR CONGRESS 7 (2018), <https://perma.cc/B6HV-XKHN>.

⁵² *Id.*

⁵³ Smith, *supra* note 5, at 532.

⁵⁴ See *Citizens United v. FEC*, 558 U.S. 310, 370–71 (2010).

Members of the public continued urging the FEC to take further action in light of the Court's decision in *Citizens United*, but to little avail.⁵⁵ In 2015, the FEC deadlocked again on whether even to *open* a rulemaking to discuss updating its regulations on disclosure and independence.⁵⁶

The FEC has similarly failed to uphold *Citizens United's* promise of disclosure in the enforcement context. In 2017, Commissioners deadlocked and blocked an investigation to determine whether a nonprofit organization should disclose its donors, even after the FEC's nonpartisan attorneys had reviewed the group's spending and calculated that the group had devoted more than 68% of its total spending to influencing elections, well over the "major purpose" threshold for political committee status.⁵⁷

In another example, in 2010, political operatives formed a 501(c)(4) organization after its founders fell short of fundraising targets for its sister super PAC.⁵⁸ In response to an administrative complaint, the 501(c)(4) group claimed that its "major purpose" was not federal campaign activity, and therefore that it was not required to register as a political committee with the FEC and disclose its donors.⁵⁹ The FEC's attorneys in the Office of the General Counsel disagreed. The Office of the General Counsel concluded that the group had in fact devoted the majority (53%) of its spending to express advocacy communications and other communications "that criticize or oppose a clearly identified federal candidate," and thus that the group's "spending by itself shows that the group's major purpose during 2010 was federal campaign activity."⁶⁰ In light of that evidence, the Office of the General Counsel recommended that the Commission find reason to believe that the group failed to register and report as a political committee and proceed with an

⁵⁵ For example, on its 2015 Notice of Availability about whether to open a rulemaking to implement the disclosure and other provisions of the *Citizens United* decision, the FEC received more than 11,000 public comments. See Motion to Open a Rulemaking in REG 2015-04 in Response to Public Comment, Agenda Document No. 15-65-A, at 1 (FEC Dec. 17, 2015) (Certification), <https://perma.cc/E2ML-JWG8>. Ninety-seven percent of those comments supported the opening of a rulemaking. *Id.*

⁵⁶ See *id.*

⁵⁷ See New Models, MUR 6872, at 3 (FEC May 21, 2015) (First Gen. Counsel's Rep.), <https://perma.cc/B38W-KNXD>; see also New Models, MUR 6872, at 1 (FEC Nov. 14, 2017) (Certification), <https://perma.cc/PTE4-D6TS>.

⁵⁸ See, e.g., Kenneth P. Vogel, *Secrecy Flip-Flop Fueled Crossroads*, POLITICO (Oct. 25, 2010), <https://perma.cc/RC43-58W8>.

⁵⁹ See Crossroads Grassroots Policy Strategies, MUR 6396, at 1 (Dec. 22, 2010) (Response), <https://perma.cc/49B6-F4JX>.

⁶⁰ See Crossroads Grassroots Policy Strategies, MUR 6396, at 26–27 (FEC Nov. 21, 2012) (First Gen. Counsel's Rep.), <https://perma.cc/5LKD-5P43>.

investigation.⁶¹ Despite this recommendation from its Office of the General Counsel, the Commission deadlocked, thus blocking an investigation and forcing the closure of the matter.⁶²

As a result, the FEC is a significant source of the blame for what even Justice Kennedy acknowledged five years after *Citizens United*: that the disclosure he had envisioned was “not working the way it should.”⁶³

2. Independence vs. “Coordination”

Since *Buckley v. Valeo*,⁶⁴ the Supreme Court has allowed independent spending in elections under the theory that such spending could not be corrupting if independent of the candidates it supports.⁶⁵ In *Citizens United*, the Court extended this reasoning to corporations under the theory that, “[b]y definition, an independent expenditure is political speech presented to the electorate that is not coordinated with a candidate.”⁶⁶ Soon after *Citizens United*, the D.C. Circuit reasoned that the rational corollary was that contributions to committees that only make independent expenditures cannot be limited because they *also* cannot corrupt.⁶⁷ This decision led to the creation of “super PACs”—political committees that can raise and spend unlimited amounts from individuals, corporations, and unions, as long as they only use those funds to make independent expenditures.⁶⁸ As in the realm of disclosure, the FEC has failed to carry out the jurisprudential promises of this decision.

Super PACs have spent more than \$3 billion in federal elections since 2010, according to the Center for Responsive Politics.⁶⁹ Yet nearly a decade after *Citizens United* and *SpeechNow.org v. FEC*,⁷⁰ the term “super PAC”

⁶¹ See *id.* at 3.

⁶² See Crossroads Grassroots Policy Strategies, MUR 6396 (FEC Dec. 3, 2013) (Certification), <https://perma.cc/W284-LAQJ>.

⁶³ See Paul Blumenthal, *Anthony Kennedy’s Citizens United Disclosure Salve ‘Not Working,’* HUFFPOST (Nov. 2, 2015, 5:04 PM), <https://perma.cc/X47N-V7Q2>.

⁶⁴ 424 U.S. 1 (1976) (per curiam).

⁶⁵ See *id.* at 46–47.

⁶⁶ See *Citizens United v. FEC*, 558 U.S. 310, 360 (2010) (citing *Buckley*, 424 U.S. at 46).

⁶⁷ See *SpeechNow.org v. FEC*, 599 F.3d 686, 694–96 (D.C. Cir. 2010).

⁶⁸ See FEC, Advisory Opinion 2010-11, at 2–3 (July 22, 2010), <https://perma.cc/M3XA-T8UV>; *How to Report: Registering as a Super PAC*, FEC, <https://perma.cc/H5FC-S5XV>.

⁶⁹ See *2010 Outside Spending, by Super PAC*, OPENSECRETS.ORG, <https://www.opensecrets.org/outsidespending/summ.php?cycle=2010&chrt=V&disp=O&type=S> (for the spending total from 2010 to 2020, click on the “select CYCLE” drop down menu and select each cycle from 2010 to 2020, then add all the spending cycles together).

⁷⁰ 599 F.3d 686 (D.C. Cir. 2010).

does not appear anywhere in the FEC's regulations, nor does the FEC even have a dedicated form for super PACs to register with the FEC.⁷¹

But the FEC's failures to uphold *Citizens United's* promise of independence are far more serious than mere forms. By the FEC's own admission in its responses to the Committee on House Administration in 2019, the Commission has not found a single violation of its rules on coordination since *Citizens United*.⁷² That is not because there has been any dearth of clear, public evidence of coordination presented to the FEC. Many complaints have contained such evidence. Instead, the FEC has repeatedly deadlocked on whether to even permit an investigation, or has failed to vote at all in a number of pending cases.⁷³

For example, in one case, a presidential candidate and his advisers set up a super PAC, directed by one of the candidate's top advisers, before he formally declared his candidacy.⁷⁴ The candidate directly fundraised for the group for months, and by the time he officially entered the race, his super PAC had stockpiled millions to support his presidential bid.⁷⁵ CLC filed a complaint in 2015,⁷⁶ but four years later—and with the next presidential election in full swing—the FEC still hasn't resolved the matter.

In another recent case, the FEC deadlocked and declined to even investigate a super PAC that had publicly acknowledged that it coordinated with a Democratic presidential candidate's campaign.⁷⁷ The group's founder even admitted that it had worked “under the thumb” of the campaign.⁷⁸ Despite a recommendation from the FEC's career attorneys that the campaign and super PAC had violated the law by coordinating up to \$9 million in unreported spending, the FEC

⁷¹ WEINER, *supra* note 2, at 2, 4.

⁷² See FEC, *supra* note 13, at 24–25.

⁷³ See, e.g., Kan. Republican Party, MUR 7503, at 1 (FEC July 23, 2019) (Certification), <https://perma.cc/89V3-T6QS>; Nat'l Republican Cong. Comm., MUR 6908, at 1, 6 (FEC May 6, 2019) (Statement of Reasons of Chair Ellen L. Weintraub), <https://perma.cc/5ERM-MKA5>.

⁷⁴ See Ashley Parker & Maggie Haberman, *As Jeb Bush Struggles, Some Allies Blame His 'Super PAC,'* N.Y. TIMES (Jan. 21, 2016), <https://perma.cc/35GJ-33QR>.

⁷⁵ See Paul S. Ryan, “Testing the Waters” or Diving Right In?: *How Candidates Bend and Break Campaign Finance Laws in Presidential Campaigns*, COMMON CAUSE 4–5 (Jan. 2019), <https://perma.cc/8WSM-XPRT>.

⁷⁶ Campaign Legal Ctr. v. Bush (FEC Mar. 31, 2015) (Complaint), <https://perma.cc/R3PN-AZ2E>.

⁷⁷ See Correct the Record, et al., MURs 6940, et al., at 1 (FEC Sept. 20, 2019) (Statement of Reasons of Chair Ellen L. Weintraub), <https://perma.cc/XD5K-FD48>.

⁷⁸ See *id.* at 2 & n.9.

deadlocked and dismissed the matter at the reason to believe stage.⁷⁹ Notably, it was the Republican Commissioners who blocked the investigation into Democrats, rather than the Democratic Commissioners.⁸⁰

Open coordination between candidates and super PACs has continued into the 2020 cycle and is likely to only get worse—and more flagrant. In May 2019, the Trump campaign sent out an email to its list telling supporters that “there is one approved outside non-campaign group, America First Action, which is run by allies of the President and is a trusted supporter of President Trump’s policies and agendas.”⁸¹ It is difficult to imagine how such a communication could be consistent with *Citizen United*’s promise of independent activity that is “not coordinated with a candidate.”⁸² But since the Court’s decision, the FEC has never found a coordination violation, nor has it opened a rulemaking to consider stronger coordination rules.

II. Congressional Intent & Judicial Review

Importantly, as Judge Cooper of the US District Court for the District of Columbia recently put it, Congress “legislated a fix” to the possibility that the FEC would deadlock along party lines.⁸³ That fix was a statutory provision allowing judicial review in cases where the FEC dismissed an administrative complaint, or delayed in reaching a decision:

Any party aggrieved by an order of the Commission dismissing a complaint . . . or by a failure of the Commission to act on such complaint during the 120-day period beginning on the date the complaint is filed, may file a petition with the United States District Court for the District of Columbia.⁸⁴

As the plain language of the statute indicates, Congress did not intend for campaign finance enforcement to be a failed venture. Rather, it anticipated that the *FEC* might fail, and therefore legislated a recourse for deadlocked or unaddressed administrative complaints. The challenge, particularly in the decade of the *FEC*’s unprecedented dysfunction, has been in the realization of that recourse. That challenge has arisen from

⁷⁹ See *Correct the Record, et al., MURs 6940, et al.*, at 1, 4 (FEC June 4, 2019) (Am. Certification), <https://perma.cc/A9LT-GLRH>; Brendan Fischer, *CLC Sues After FEC Allows Clinton Campaign to Create New Campaign Finance Loophole*, CAMPAIGN LEGAL CTR. (Aug. 5, 2019), <https://perma.cc/6CL8-K777>.

⁸⁰ See *Correct the Record, et al.*, *supra* note 79, at 3; Fischer, *supra* note 79.

⁸¹ See Campaign Legal Ctr., at 3 (FEC May 9, 2019) (Complaint), <https://perma.cc/N38N-34KS>.

⁸² See *Citizens United v. FEC*, 558 U.S. 310, 360 (2010).

⁸³ *Citizens for Responsibility & Ethics in Wash. v. Am. Action Network*, 410 F.Supp. 3d 1, 6 (D.D.C. 2019).

⁸⁴ 52 U.S.C. § 30109(a)(8)(A) (2018).

factors such as recent court decisions that have presented barriers for complainants in establishing standing, the issue of which agency rationales courts defer to and review, and other inherent difficulties in challenging agency actions. They do not arise from the statute as Congress wrote it.

First, as a matter of general federal court practice, a plaintiff must demonstrate that it has standing to challenge a particular FEC dismissal or delay. According to the Supreme Court, in order for an organization to demonstrate Article III standing, it must show that it has “(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision.”⁸⁵ In the campaign finance realm, courts have further specified that to satisfy the first prong, public interest organizations like CLC typically must demonstrate a particular *informational* injury⁸⁶—and courts have set particular constraints on what qualifies as an informational injury. Plaintiffs often have to show the court that the FEC’s failure to act has deprived them of particular, undisclosed information that is not “duplicative reporting of information that under existing rules is already required to be disclosed.”⁸⁷ For example, it is typically not sufficient for plaintiffs simply to want the courts to force the FEC to “get the bad guys,” or solely to force a determination that a legal violation has occurred.⁸⁸ Nor is it sufficient for plaintiffs to seek a legal reclassification of already disclosed activity, such as a reclassification of certain previously disclosed expenditures to the category of “coordinated expenditures.”⁸⁹ Standing difficulties are not unique to challenges under the Federal Election Campaign Act (“FECA”), but this set of circumstances do create particular barriers to—and have impeded—plaintiffs seeking court actions to compel the FEC to enforce the law.

A second challenge is *what* the courts can review, and the resulting inclination to treat the deadlocking, or controlling, Commissioners’ statement of reasons for their refusal to enforce the law as the agency “decision” when, in many ways, no decision has actually taken place. The Supreme Court’s *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*⁹⁰ opinion requires deference to an administrative agency’s expertise when agency decisions are not clearly contrary to law.⁹¹ In the view of

⁸⁵ *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016).

⁸⁶ *See FEC v. Akins*, 524 U.S. 11, 24–25 (1998).

⁸⁷ *See, e.g., Wertheimer v. FEC*, 268 F.3d 1070, 1075 (D.C. Cir. 2001).

⁸⁸ *See Common Cause v. FEC*, 108 F.3d 413, 418 (D.C. Cir. 1997).

⁸⁹ *See Wertheimer*, 268 F.3d at 1075.

⁹⁰ 467 U.S. 837 (1984).

⁹¹ *See id.* at 843–44, 866.

campaign finance regulation opponents, a Commission deadlock *is* a definitive decision,⁹² and it therefore follows that those who vote to take no Commission action are the agency “decision makers,” with their reasoning entitled *Chevron* deference. This leaves little recourse for the equal number of Commissioners who believe a violation occurred and further action is warranted. As the Commission’s longest-serving Commissioner has put it, “The ratchet only goes one way. There is no leverage – ever – for anyone who wants to vigorously enforce the law. The advantage always falls to those who want to do less.”⁹³

Third and finally, the Commissioners blocking matters from proceeding beyond the reason to believe stage have created another challenge that has capitalized on the inherent difficulties in challenging agency actions in court: the citation of “prosecutorial discretion” as one reason for dismissing administrative complaints at the reason to believe stage.⁹⁴ In an apparent effort to render a 3-3 “decision” not to proceed unreviewable, these Commissioners, who have not effected a *majority* decision, have nevertheless begun sprinkling “passing invocation[s] of prosecutorial discretion” into their statements of reasons justifying their votes blocking enforcement, as a recent federal district court opinion noted.⁹⁵ The problem is that a mere “talismanic recitation of the phrase ‘prosecutorial discretion’”⁹⁶ should not on its own render the result unreviewable, but some courts have suggested that it does.⁹⁷

These challenges to the statutory right to judicial review of FEC dismissals and delays, combined with the regulatory dysfunction described, have created a two-prong problem for those seeking enforcement of campaign finance law: first, the FEC is increasingly likely to deadlock at the reason to believe stage, and, second, complainants who file suit against the FEC for that inaction then face at least three different obstacles in the courts in their attempts to obtain the judicial review the statute grants them.

⁹² See, e.g., Smith, *supra* note 5, at 532.

⁹³ WEINTRAUB, *supra* note 13, at 4.

⁹⁴ See Plaintiffs-Appellants’ Response in Opposition to Appellee’s Motion for Summary Affirmance at 22, Campaign Legal Ctr. v. FEC, No. 18-5239 (D.C. Cir. Oct. 11, 2018), <https://perma.cc/49XQ-FFST>.

⁹⁵ See, e.g., Citizens for Responsibility & Ethics in Wash. v. Am. Action Network, 410 F.Supp.3d 1, 19 (D.D.C. 2019).

⁹⁶ *Id.* at 16.

⁹⁷ See, e.g., Heckler v. Chaney, 470 U.S. 821, 827, 837–38 (1985); Citizens for Responsibility & Ethics in Wash. v. FEC, 892 F.3d 434, 438 (D.C. Cir. 2018).

III. Reform Possibilities

In light of these challenges, what can be done? The first step is to recognize that fixing the FEC means halting the ability of an ideological bloc of Commissioners to frustrate the agency's functions. Despite opponents' claims of current levels of dysfunction being an "aberration,"⁹⁸ there are few signs that the FEC will become functional again on its own. Instead, campaign finance reform opponents would prefer the status quo to remain the perpetual state.

Although the most direct route to reform is the President prioritizing the nomination of, and the Senate confirming, strong Commissioners who believe in the mission of the agency, and who exhibit an ability to work together toward that goal, a number of legislative remedies exist as well. Legislative proposals to fix the FEC would (1) end the ability of less than a majority of Commissioners to block the FEC's professional lawyers and investigators from doing their jobs; (2) change the number of Commissioners from six to five to avoid deadlocks; or (3) depoliticize the nomination process by creating a nonpartisan panel that recommends Commissioner nominees to the President.

First, under the current structure, merely three of six Commissioners possess the ability to make substantive decisions on behalf of the agency—including, importantly, the decision to ignore the recommendations of staff attorneys and terminate an enforcement matter before it is even investigated. Congress could amend the statute such that it would require four votes to *reject* the recommendation of the FEC's General Counsel regarding an investigation into allegations of wrongdoing, rather than requiring four votes to *approve* the professional staff's recommendation.⁹⁹ Under such a system, the FEC's General Counsel and other nonpartisan, nonpolitical enforcement staff would still follow the enforcement procedures already established by law. These existing procedures protect the First Amendment and Due Process rights of all parties by, for example, allowing the parties accused of violating the law opportunities to respond to the charges and present evidence. Nor would such a change amount to the agency seeking penalties or issuing fines without a majority vote. The authority over whether to bring an enforcement action or pursue a settlement would still rest with the Commissioners, and the decision to act would still require a majority vote. Most importantly, the FEC does not have—and this proposal does not create—the ability of the FEC to penalize anyone without their consent. If the FEC seeks a fine for what it believes to be illegal actions, the respondent must admit the violation and

⁹⁸ Smith Written Testimony, *supra* note 28, at 5.

⁹⁹ See H.R. 1, 116th Cong. § 6004(a)(1) (2019).

agree to a negotiated penalty, or the FEC process ends without any penalty, and the FEC must file suit in federal court and convince a judge of the violation.

Second, Congress could change the number of FEC Commissioners from six to five (or another odd number), and allow the President to nominate a chair, bringing its structure more closely in line with other independent regulatory agencies.¹⁰⁰ Such proposals often would also provide that no more than two Commissioners can be affiliated with the same party, thereby ensuring that at least one Commissioner—the potential tiebreaker—will be a political independent.¹⁰¹ Under such a structure, every vote would have a demonstrable majority, and the Commissioners voting in that majority could more readily be held to account for their decisions. If three out of five Commissioners vote to block a particular enforcement matter, there would be no confusion about responsibility for that obstruction, as there is under the current six-Commissioner structure. Similarly, if three Commissioners appeared to be pursuing enforcement on inappropriately political grounds, this would be clear from the voting record and more readily subject to public exposure and Congressional oversight. Alternatively, a *seventh* Commissioner could be added as a chair, but only entitled to vote in the event of a tie.

Critics have claimed that such an odd-numbered FEC would make the agency “subject to partisan domination,”¹⁰² even though under the most common proposal the FEC would consist of two Republicans, two Democrats, and an independent. This argument rests on the premise that the President would abuse his or her nomination authority and guarantee that the fifth “independent” Commissioner would be a closet partisan, and a compliant Senate would go along.¹⁰³ Such a risk can be mitigated by

¹⁰⁰ For example, both the Federal Communications Commission and the Securities and Exchange Commission comprise five Commissioners who serve five-year terms; no more than three Commissioners may belong to the same party. *What We Do*, FCC, <https://perma.cc/4ZVR-AFNK>; *What We Do*, SEC, <https://perma.cc/D5XL-3HWK>.

¹⁰¹ See H.R. 1, 116th Cong. § 6002(a)(1) (2019); see also WEINER, *supra* note 2, at 6.

¹⁰² Smith, *supra* note 5, at 540; see also *H. Comm. on H. Admin.* 116th Cong. 2 (2019) (written testimony of Bradley A. Smith, Chairman, Inst. for Free Speech), <https://perma.cc/PB88-H9MA>; Bradley A. Smith, *Analysis of H.R. 1 (Part Two): Establishing a Campaign Speech Czar and Enabling Partisan Enforcement; An Altered FEC Structure Poses Risks to First Amendment Speech Rights*, INST. FOR FREE SPEECH 3–4 (Jan. 31, 2019) [hereinafter Smith, *Analysis*], <https://perma.cc/4UPC-68WE>.

¹⁰³ Criticizing H.R. 1 as it was introduced on January 3, 2019, Smith argued that it would allow Senators Bernie Sanders and Angus King, both independents who caucus with Democrats, to be nominated as “independent” Commissioners. See Smith, *Analysis*, *supra* note 102, at 4. This concern has been addressed; after receiving amendments from various committees, H.R. 1 now states that a person is affiliated with a political party if they were a “registered voter, employee, consultant, donor, officer, or attorney” of a party within the five years prior to their nomination. H.R. 1, 116th Cong.

clearly defining what it means to be affiliated with a political party. H.R. 1, for example, states broadly that a person is affiliated with a political party if they were a “registered voter, employee, consultant, donor, officer, or attorney” of a party within the five years prior to their nomination.¹⁰⁴ In any case, the current statute already provides for such partisan gamesmanship: FECA only provides that no more than three Commissioners can be from the same party,¹⁰⁵ which means that a Democratic president could try stacking the FEC with three Democrats and three members of the Green Party, or a Republican President could nominate three Republicans and three members of the Libertarian Party. But none have done so.

Third, Congress or the President could create a nonpartisan vetting process for FEC Commissioners. While current law gives the President the constitutional authority to nominate Commissioners as he or she sees fit, political customs currently provide that the President nominates commissioners recommended by party leaders in Congress. As described, over the past decade, Republican political elites who are opposed to campaign finance laws—even as majorities of Republican voters support such measures—have made a point of recommending nominees who are ideologically opposed to the mission of the agency. Rather than deferring to those ideological pressures, the President could instead choose FEC nominees from a list created by a bipartisan advisory panel who could recommend highly qualified, nonideological nominees. The panel could consist of election law experts, retired judges, law enforcement professionals, and others with relevant background, and it could make its recommendations public at the time of the nomination.

Congress could codify the requirements for membership in such an advisory panel, but the President could also convene such a panel on his or her own. The Senate could make known to the President that it would be disinclined to confirm nominees other than those recommended by the nominating panel. Raising the standards for Commissioner nominees—and creating political consequences for the nomination of inappropriately partisan or ideological candidates—would substantially elevate the functioning of the Commission.

§ 6002(a)(1) (as received by Senate, Mar. 12, 2019). Both Sanders and King have donated to Democrats and would not be considered independents.

¹⁰⁴ H.R. 1, 116th Cong. § 6002(a)(1) (as received by Senate, Mar. 12, 2019).

¹⁰⁵ 52 U.S.C. § 30106(a)(1) (2018).

Conclusion

In poll after poll, American voters across the political spectrum overwhelmingly say that they are unhappy with the campaign finance system and believe that significant reform is needed. Only 20% say they are satisfied with our current campaign finance system;¹⁰⁶ 82% believe that the government is “run by a few big interests looking out for themselves”;¹⁰⁷ and 64% think that their “vote does not matter because of the influence that wealthy individuals and big corporations have on the electoral process.”¹⁰⁸ The FEC’s recent history of deadlocked votes and resulting inaction bears much of the blame for those results. Over the past decade, the only government agency tasked with administering and enforcing campaign finance laws has systematically failed at both of those tasks, and, in doing so, has ushered in an era of secret, unaccountable political spending on an unprecedented scale, and a political system that voters increasingly perceive to be tilted in favor of wealthy special interests. Such a system was never an inevitable outcome, nor does it need to be the inevitability of our future.

¹⁰⁶ Grace Sparks, *Very Few Americans Are Satisfied with Campaign Finance Laws, but Most Don’t Know a Lot About Them*, CNN (Apr. 4, 2019), <https://perma.cc/Q6WY-44K9>.

¹⁰⁷ *The ANES Guide to Public Opinion and Electoral Behavior: Is the Government Run for the Benefit of All 1964-2016*, AM. NAT’L ELECTION STUDIES (2016), <https://perma.cc/4FKT-2N8M> (select the “Notes” tab to view the poll question, and select the “Data” tab to view the percentage results). In 1964, when this question was first asked, only 29% felt this way. *Id.*

¹⁰⁸ ROBERT P. JONES ET AL., PUB. RELIGION RESEARCH INST., ANXIETY, NOSTALGIA, AND MISTRUST: FINDINGS FROM THE 2015 AMERICAN VALUES SURVEY 30 (2015), <https://perma.cc/2KW2-9HFL>.