The Federal Election Commission
Toothless Tiger or Sabotaged Slug?

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INTRODUCTION

The Federal Election Commission (FEC or Commission) is an independent agency in the Executive branch that is the sole government body that can enforce and interpret our campaign finance laws under the Federal Election Campaign Act (FECA). The goal of the FEC is to reduce actual, but also perceived, corruption.[1] The FEC, although created with the best intentions, has become ineffective and has failed in achieving its goal. Partisan divides and control that the crafters of FECA once feared have transitioned to one party calling for action, and the other

[1] What is and is not corruption will not be discussed in this article. For more on the Court's interpretation of what is corruption *see McCutcheon v. FEC*, 572 U.S. 185, 192-195 (2014).

deregulation.[2] To attain the statutory goal of FECA and the FEC, Congress could simply increase judicial oversight of the Commission to assure the purpose of the statute is met. Or, in the alternative, Congress could relocate the FEC's enforcement body, separating the two functions of the commission and in doing so making the goal of the legislation more attainable.

In Part I, this report will briefly describe the legal and political history of the creation of the FEC and subsequent amendments to FECA. Part II will discuss the FEC's duties and authority. These powers range from the traditional powers of enforcement and interpretation of statutes to administering the public campaign finance program for Presidential elections. Part III analyzes *CREW v. FEC*. This case exemplifies the inability of the FEC to exercise its duties, both due to partisan bickering and structural inadequacies. Lastly, in Part IV, this report will suggest two potential reforms to address the identified inadequacies: (1) simply amend FECA to allow for heightened judicial review of FEC action and/or (2) dissolve the FEC's enforcement power and create a new enforcement body that is housed in the Department of Justice (DOJ) and the judicial branch.

I. ORIGIN

Congress passed FECA in 1971 but did not provide for the creation of the FEC until the 1974 amendments.[3] At first, Congress thought self-regulation would work best;[4] having the Clerk of the House, Secretary of the Senate, and the Comptroller General monitor for compliance, and the Justice Department play the enforcement role.[5] Although over 7,000 cases were referred to the Justice Department during the first election under this scheme, only 5 were litigated.[6] This

[2] *Infra* discussion at Note 66.

[3] FEC Complete Timeline (2015), https://transition.fec.gov/pages/40th_anniversary/40th_anniversary.shtml (last visited May 20, 2020).

[4] Trevor Potter, *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*, 69 Admin. L. Rev. 447, 452-53 (2017)

[5] *Id.*

failure of implementation coupled with the building controversies associated with Watergate, made it apparent that an independent agency was necessary for meaningful enforcement.

The 1974 amendments granted the FEC: (1) sole jurisdiction on all civil enforcement of FECA; (2) authority to interpret FECA and create regulations; (3) responsibility to monitor compliance with FECA; and (4) the role of national source for information regarding the administration of elections.[7] Under these amendments, the President, Speaker of the House, and the President pro tempore of the Senate each appointed two of the six voting Commissioners, and the Secretary of the Senate and Clerk of the House served as nonvoting Commissioners.[8]

The Supreme Court, in *Buckley v. Valeo*, struck down this appointment structure, among other provisions within these amendments.[9] The Court found that this appointment structure violated the separation of powers.[10] The Court reasoned that the FEC was primarily adjudicatory and executive in nature.[11] Congress, the legislative branch, appointed four of the six members; effectively allowing the legislative branch to both make the rules and enforce them.[12]

The 1976 amendments created the FEC as we know it today, with the President appointing all six members with advice and consent of the Senate.[13] The nomination process has been "captured," though.[14] It is now a process seemingly controlled by party leadership in the

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[6] Appendix 4: Brief History, https://transition.fec.gov/info/appfour.htm (last visited Apr. 25, 2019).

[7] *Id.*

[8] 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. U. 351, 355 (1996).

[9] *Buckley v. Valeo*, 424 U.S. 1, 143-44 (1976) (also striking down expenditure limits for campaigns, independent groups/individuals, and candidates personal funds on freedom of speech grounds).

[10] *Id.*

[11] *Id*. at 1-3

[12] *Id.* at 120-21.

[13] La Forge, *supra* note 8, at 363.

[14] *Id.*

Senate. They submit a list of acceptable individuals the President may choose from, and the President has historically not wavered from this list.[15]

II. CURRENT DUTIES AND FUNCTIONS

The FEC's powers are mainly concerned with information gathering and enforcement, including the powers to subpoena; order testimony; initiate, defend, and appeal civil enforcement proceedings; and to publish advisory opinions.[16] The FEC's powers are not limited to enforcement, though, as they are directed "to develop such prescribed forms and to make, amend, and repeal such rules" that are necessary to implement and execute FECA.[17] Alongside these general functions, the FEC also tracks and discloses campaign funds and administers the Presidential Public Finance Program.[18] A crucial piece in understanding the function of the FEC is that it takes an affirmative vote from a majority of the commission to use any power.[19] In other words, at least four members of the commission must vote in favor of anything from opening an investigation, initiating the rulemaking process, to even if they serve bagels or donuts.[20]

A. Enforcement

Enforcement of FECA is the primary purpose of the Commission, as it is the only government body given authority to pursue violations of FECA.[21] There are three enforcement procedures at the disposal of the FEC: (1) traditional enforcement, called Matters Under Review

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[15] *Id*. at 363-64.

[16] 52 U.S.C. § 30107(a).

[17] *Id.*

[18] Sam Garrett, Cong. Research Serv. R44318, The Federal Election Commission: Overview and Selected Issues for Congress 3 (2015).

[19] Trevor Potter, *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*, 69 Admin. L. Rev. 447, 449-450 (2017). This has developed to the point where all "deadlock" votes have been considered affirmative no's in the eyes of the court.

[20] 52 U.S.C. § 30106 (c); https://www.nytimes.com/2015/05/03/us/politics/fec-cant-curb-2016-election-abuse-commission-chief-says.html.

[21] 52 U.S.C. § 30107(e) (also allows for citizen suits, as discussed below).

(MURs); (2) Alternative Dispute Resolution (ADR); and (3) the Administrative Fine Program (AFP).[22]

One unique feature of FEC enforcement is that all enforcement measures are kept confidential until the MUR file and the proceeding comes to a conclusion.[23] This is because of the sensitive nature of these violations.[24] Just an allegation of breaking campaign finance laws can have a severe negative effect on a campaign.[25] The enforcement process begins with a third party filing an administrative complaint, a referral from another agency, or the commission on its own determines that there is "reason to believe" a violation has been, or will be, committed.[26] The Commission will then decide which enforcement procedure to pursue, if any.[27] If the Commission decides to pursue traditional enforcement or ADR, then it is statutorily mandated to seek a Conciliation Agreement (CA) before imposing any fine or penalty.[28]

The Commission must vote at specific milestones of an enforcement process, requiring at least four votes in support of continuing the investigation.[29] The first of these votes takes place after a respondent's ability to reply has run, and they must find a "reason to believe" a violation has or will take place.[30] A "reason to believe" finding does not mean the commission has found a violation and does not create any liability for the defendant. This finding merely allows the FEC's Office of General Counsel (OGC) to begin to investigate or enter initial conciliation

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[22] Fed. Election Comm'n, Guidebook for Complainants and Respondents on the FEC Enforcement Process, 4 (2012).

[23] *Id.* at 7.

[24] (probably cite to the below footnote)

[25] Kenneth A. Gross, *The Enforcement of Campaign Finance Rules: A System in Search of Reform*, 9 YALE L. & POL'Y REV. 279, 289 (1991).

[26] 52 U.S.C. § 30107(a)(1)-(2).

[27] Federal Election Commission, supra note 14, at 5.

[28] 52 U.S.C. § 30109(a)(4)(i). A CA is simply a "payment of civil penalties through voluntary settlements." FEC, *Guidebook for Complainants and Respondents on the FEC Enforcement Process*, 5, May 2012.

[29] Garrett, *supra* note 18, 9-10.

[30] 52 U.S.C. § 30109(a)(2).

negotiations.[31] After the Commission affirmatively votes on a complaint or referral, the OGC must notify the respondent identified in the complaint or referral.[32] The respondent may respond to the complaint within 15 days, but does not need to for the process to continue.[33]

After this initial investigation, the OGC files a brief with the Commission and the respondent discussing the presence of probable cause of a violation taking place.[34] The Commission then must vote on whether or not to find a "probable cause to believe that any person has committed, or is about to commit, a [campaign finance] violation."[35] If the Commission makes a finding of probable cause, the OGC must negotiate for at least 30 and no more than 90 days with the respondent discussing the terms of a CA.[36] If the OGC and the respondent successfully negotiate a CA, the Commission must vote on whether or not to enter into it.[37] If the Commission votes to not enter into a CA, then the Commission must vote on whether or not to authorize the OGC to file suit against the respondent.[38] If the Commission does not have a majority to make a decision, and instead are "deadlocked," then a letter is sent informing the respondent of the inability of the Commission to reach a decision.[39]

Once the MUR is resolved, either by CA, filing a suit, or a deadlock vote concluding in no action, the Commission has 30 days to publicly disclose the file.[40] Deadlock votes, in the eyes

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[31] Garrett, *supra* note 18, at 12.

[32] *Id.* § 30109(a)(3). This notice must be within five days of the vote by the Commission. *Id.*

[33] *Id.* The respondent can do so by filing a brief with the Secretary of the Commission. *Id.*

[34] Garrett, *supra* note 18, at 5.

[35] 52 U.S.C. § 30109(4)(A)(i).

[36] Garret, *supra* note 18, at 12.

[37] *Id*.

[38] 52 U.S.C. § 30109(6)(A).

[39] Trevor Potter, *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*, 69 ADMIN. L. REV. 447, 457 (2017) ("This means that the Commission gives up the investigation with no result and sends a letter that it is 'unable to resolve the matter.'").

[40] *Id*.

of reviewing courts, count as a "no" and have been granted the same amount of deference as an affirmative 4-vote majority no-vote.[41] This raises questions on how the Commission operates, giving inaction the same amount of deference as action, arguably hindering the goals Congress outlined in FECA.

The ADR process was created to settle more cases outside of general enforcement MURs, usually taking place before the Commission votes on a "reason to believe" finding.[42] But, this is not an option for every violation; ADR is only available if the alleged violation falls within previously approved criteria sanctioned by the Commission through rulemaking.[43] If ADR is used, the OGC sends a letter to the alleged violator informing them that the ADR process has been initiated and the Statute of Limitations is put on hold during this process.[44] The alleged violator has 15 days to respond.[45] If no response is given, then the matter transitions back to the traditional enforcement program.[46] The ADR program focuses more on remedial solutions like expanding a compliance office or requiring compliance officers to attend training seminars instead of solely fining the violator.[47] Once an ADR negotiation has finished, the Commission must approve of the agreement, and it goes on the public record; but these agreements are given no precedential value.[48]

The AFP is an expedited program for three specific violation types: failure to file reports on time; failure to file any reports; and failure to file 48-hour notices of contributions.[49] This

[41] *Id*. at 465; *Common Cause v. FEC*, 842 F.2d 436, 449 (D.C. Cir. 1988).
[42] Federal Election Commission, *supra* note 14, at 23.
[43] *Id.*
[44] *Id.*
[45] *Id.*
[46] *Id.*
[47] *Id.*
[48] *Id.* at 24.
[49] *Id*.

process requires the Commission to issue a "reason to believe" a violation has occurred.[50] But instead of the OGC sending a letter to the alleged violator, the Commission itself does.[51] This letter contains the factual and legal circumstances surrounding the violation, as well as the fine to be assessed.[52]

In AFP, there is no settlement process—the alleged violator may accept the fine or challenge the "reason to believe" finding or fine amount through the Office of Administrative Review (OAR).[53] Challenges may only be made if there is a factual or legal error in the Commission's "reason to believe" finding; a miscalculation of the fine; or a good faith effort to comply, but is prevented by unforeseen circumstances outside of their control.[54] After the OAR review of a challenge, a letter is sent to the alleged violator with the findings of the review; they then have 10 days to respond to these findings.[55] The Commission then can uphold the "reason to believe" finding; declare the "reason to believe" finding was based on an error and cancel the fine; stop the proceeding; or modify the fine.[56] OAR will notify the alleged violator of the Commission's decision, and then the alleged violator must respond within 30 days with either a payment of the fine or filing of a suit.[57]

In sum, the FEC's primary role is to enforce the federal campaign finance laws, either through traditional enforcement, ADR, or AFP. These processes are cumbersome, complicated, and ripe for inaction. In the 2017-18 election cycle, there were 608 total enforcement actions,

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[50] *Id.*
[51] *Id.*
[52] *Id.*
[53] *Id.*
[54] *Id.* at 25.
[55] *Id.*
[56] *Id.*
[57] *Id.*

with total fines reaching $2,792,580, or an average fine of $4,593.[58] In 2018 there were 12,310 Political Action Committees (PACs) registered with the FEC,[59] and over $5,000,000,000 spent by PACs in the 2017-2018 election cycle.[60] This trend continues in the 2020 election, with over 7,000 PACs alone spending nearly $2.4 billion in 2019.[61] Either the campaign finance industry is incredibly good at following the rules, or the FEC does not have the capacity to fulfill its mission of reducing actual or perceived corruption. This issue is not going away, but growing worse due to judicial decisions, and requires meaningful action by the only government body sanctioned to do so.

B. Rulemaking

As is the case for many federal agencies, Congress has delegated FECA rulemaking authority to the FEC.[62] Similar to the FEC's enforcement procedures, there must be a four-vote majority to begin the process and adopt any regulations.[63] Again, this was prescribed with the best intentions of avoiding partisan enforcement and rules but has recently devolved into complete inaction because of the changing partisan nature.[64] Initially, the mischief being fought was Democrats enforcing on Republicans and vice versa, now it is Democrats wanting to enforce and Republicans not wanting to enforce at all.[65]

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[58] Fed Election Comm'n, Enforcement Statistics for Fiscal Years 1977-2018 (2018).

[59] Fed Election Comm'n, Committee Summary 2018 (2019), https://www.fec.gov/files/bulk-downloads/2018/committee_summary_2018.csv.

[60] Press Release, Fed Election Comm'n, Number of Federal PACs Increases (August 12, 2008) (on file with author); Cost of 2018 election to surpass $5 Billion, CRP projects, https://www.opensecrets.org/news/2018/10/cost-of-2018-election/ (last visited April 25, 2019).

[61] This is only PAC money, and does not consider the amount spend by parties or candidate campaigns. PAC Table 1, https://transition.fec.gov/press/summaries/2020/tables/pac/PAC1_2019_12m.pdf (last visited Mar 12, 2020).

[62] 52 U.S.C. § 30111(a)(8).

[63] Garrett, *supra* note 11, at 9.

[64] *Id.* at 11-14.

[65] *Id.*

A prime example are the actions, or lack thereof, taken by the FEC after the landmark decision of *Citizens United*. It took the FEC nearly five years to adopt rules bringing their regulations into compliance with the decision, and the final rules were to simply remove spending prohibitions.[66] These rules did not require additional disclosure requirements, calling into question the very reasoning of the *Citizens United* decision and its related cases.[67] Frustrated with the lack of progress, in 2015 two Commissioners filed petitions for rulemaking to "respond to and comply with the Supreme Court's decision in *Citizens United,*" but ultimately the Commission never began rulemaking.[68] Due to the Commission's inaction regarding their duty to promulgate regulations, the Advisory Opinion process has been increasingly relied on to assure compliance and attempt to ascertain an interpretation of the law.[69]

C. Advisory Opinions

A crucial function of the FEC outside of, but relating to, enforcement and rulemaking is their ability to administer Advisory Opinions (AOs).[70] AOs are answers to questions submitted by regulated entities on the applicability of the law to their specific situation.[71] These AOs only have precedential value for individuals involved in the AO, as well as any person involved in a situation that is "indistinguishable in all its material aspects" from the specific issues and activities being discussed in a given AO.[72] AOs will not be completed for general interpretation

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[66] Sam Garrett, Cong. Research Serv. R41542, The State of Campaign Finance Policy: Recent Developments and Issues for Congress 7 (2018).

[67] Note, *Eliminating the FEC: The Best Hope for Campaign Finance Regulation?*, 131 HARV. L. REV. 1421, 1434 (2018).

[68] Ann M. Ravel and Ellen L. Weintraub, rulemaking petition, FEC meeting-agenda document no. 15-31-B, June 8, 2015, http://fec.gov/agenda/2015/documents/mtgdoc_15-31-b.pdf.

[69] *See,* Sam Garrett, Cong. Research Serv. R41542, The State of Campaign Finance Policy: Recent Developments and Issues for Congress (2018).

[70] Sam Garrett, Cong. Research Serv. R44318, The Federal Election Commission: Overview and Selected Issues for Congress 11 (2015).

[71] *Id.*

[72] 52 U.S.C. § 30108(c)(1).

questions, hypothetical situations, activities the requestor is not involved in, or past activities that will not continue.[73] But, because AOs have been one of the few non-controversial actions the FEC has the ability to take, they have been increasingly relied upon due to the failure of the Commission to interpret and enforce FECA through the traditional channels.[74]

This results in a patch-work of haphazard regulation of the campaign finance industry, which has seen an explosion in growth in the past decade in both scale and complexity.[75] Importantly, as long as there is a good faith effort to comply with these limitations, using an AO as guidance will act as a liability shield for any violation that may result from following the AO's guidance.[76] There are some procedural requirements set forth for an AO, including a 4-vote requirement[77], public availability,[78] and a limited amount of time to submit comments.[79]

D. Other Functions

The FEC has some other functions outside of the general areas of rulemaking and enforcement: the tracking and disclosure of campaign finances and administering the Presidential Public Finance Program (PPFP). The Commission, through its regulations, mandates some reporting by political committees, including their total contributions, amount of cash on hand, and transfers of funds between committees.[80] The FEC is mandated to make this information

[73] Fed. Election Comm'n, Advisory Opinion Process, https://www.fec.gov/legal-resources/advisory-opinions-process/ (Last Visited April 25, 2019).

[74] Sam Garrett, Cong. Research Serv. R44318, The Federal Election Commission: Overview and Selected Issues for Congress 11 (2015).

[75] Press Release, Federal Election Comm'n, Number of Federal PACs Increases (August 12, 2008) (on file with author); Cost of 2018 election to surpass $5 Billion, CRP projects, https://www.opensecrets.org/news/2018/10/cost-of-2018-election/ (last visited April 25, 2019).

[76] 52 U.S.C. § 30108(c)(2).

[77] Sam Garrett, Cong. Research Serv. R44318, The Federal Election Commission: Overview and Selected Issues for Congress 9 (2015).

[78] 11 C.F.R. § 112.2(a).

[79] *See id.* § 112.3.

[80] *See id.* §§ 102, 104.

available to the public.[81] There have been increasing calls to reform reporting requirements to reflect the Court's recent decisions in the realm of campaign finance, as discussed above, but this is not likely without structural reforms.[82]

The PPFP is a program in which a presidential candidate may gain access to public funds for their primary and general campaigns, so long as they meet specific requirements.[83] The funding for this program comes from an optional federal income tax.[84] If a taxpayer so chooses, they can check off the "Presidential Election Campaign Fund" box on their tax form, designating $3 for the fund.[85] This does not increase an individual's tax liability, it merely takes $3 from the general coffers and puts it into the fund to finance this program.[86]

To be eligible for public financing during the primary election, a candidate must raise over $5,000 in at least 20 states, and only the first $250 of a donation counts towards this goal.[87] This is to say, that a candidate looking to receive public financing of their presidential campaign must have at least 20 donors of at least $250 in 20 individual states. Along with these requirements, there are restrictions on the amount of funds you can spend, both overall and in each individual state.[88] This range in states is due to a population-contingent factor, allowing a specific amount of spending per eligible voter.[89] Some expenses are exempt from these spending

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[81] 52 USC § 30112.

[82] *See* Potter, supra note 35, at.

[83] Sam Garrett, Cong. Research Serv. R44318, The Federal Election Commission: Overview and Selected Issues for Congress 1 (2015).

[84] *The Public Funding of presidential* elections, Fed. Election Comm'n, https://www.fec.gov/introduction-campaign-finance/understanding-ways-support-federal-candidates/presidential-elections/public-funding-presidential-elections/ (Last visited April 30, 2019).

[85] *Id.*

[86] *Id.*

[87] *Id.*

[88] *Id.* In 2016 the overall limit was just over $48 million, and ranged from just under $1 million for Wyoming and just over $23 million for California.

[89] *Id.*

caps, including legal and accounting expenses that are made ensuring compliance with the public financing requirements.[90] Lastly, the candidate must limit their personal spending on their campaign to less than $50,000.[91] Once these requirements are met, the federal government will match fundraising dollars up to the overall limit of campaign funds, translating to a maximum of $24 million for primary public funds available to presidential primary candidates, for a total of $48 million available for a presidential primary campaign.[92]

For the general election, the requirements and limits are much simpler. The candidate's campaign must agree to limit spending to the public funds given and to not accept private contributions.[93] They can spend another $50,000 of their own personal funds, and this does not count against their spending limit.[94] The general election funds are in the form of a grant, rather than matching donations.[95] No campaign has used the grant since McCain's campaign in 2008, who received just over $84 million, which was prior to the *Citizen's United* decision.[96] The loosening of campaign finance requirements may make it less likely for candidates to be attracted to public financing in the future, as evidenced by 2018. In the 2018 presidential cycle, Hillary Clinton and Donald Trump both raised $1.19 billion and $646 million respectively. In the alternative, the public funds available to mount a campaign totaled just under $100 million.[97]

III. CREW v. FEC

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[90] *Id.*

[91] *Id.*

[92] *Id.*

[93] *Id.*

[94] *Id.*

[95] *Id.*

[96] *Id.*

[97] Bill Allison et al., Tracking the 2016 Presidential Money Race: Clinton v. Trump (2016), https://www.bloomberg.com/politics/graphics/2016-presidential-campaign-fundraising/ (Dec. 9, 2016) *The Public Funding of presidential* elections, Fed. Election Comm'n, https://www.fec.gov/introduction-campaign-finance/understanding-ways-support-federal-candidates/presidential-elections/public-funding-presidential-elections/ (Last visited April 30, 2019).

A recently challenged CA is a prime example of the lack of meaningful enforcement by the Commission, while also reflecting the judicial system's lack of meaningful oversight. The root of this case was a CA approved by the FEC with the American Conservative Union, Now or Never PAC, Now or Never PAC's Treasurer, and Government Integrity, LLC.[98] The complainant, Citizens for Responsibility and Ethics in Washington (CREW), argues that the FEC acted contrary to law by not pursuing the ultimate source of the donation at issue, which they brought to the FEC's attention in an administrative complaint.[99] The Commission moved to dismiss the case for lack of jurisdiction, failure to state a claim where relief can be granted, and a judgment on the pleadings.[100] The Court agreed with the FEC and dismissed the action for lack of subject matter jurisdiction without reaching the merits due to FECA precluding judicial review of the FEC's actions.[101]

A. Agency Action and Factual Background

The agency action at issue in the case was the Commission entering into a CA with the four parties identified in CREW's administrative complaint.[102] CREW filed this complaint on February 27, 2015, and after the OGC initiated an investigation they found that an unknown "trust that had a relationship with Government Integrity transmitted funds to Government Integrity; that Government Integrity wired $1.8 million to ACU; and that on the day it received the wire, ACU sent the $1.7 million contribution at issue in the investigation to the Now or Never PAC."[103] Then, on July 12, 2017, the FEC declined, by a vote of 2-2 on partisan lines, to find a

[98] *Citizens for Responsibility and Ethics in Washington v. FEC*, No. 17-2770, 2018 WL 6807167, at *1 (D. D.C. Dec. 27, 2018).
[99] *Id*.
[100] *Id.*
[101] *Id.* at *9.
[102] *Id*. at *1.
[103] *Id.* at *2.

knowing violation, but did unanimously find a "reason to believe" a violation did occur.[104] On August 10, 2017, the OGC served subpoenas on the unknown trust that had a relationship with Government Integrity and two unknown individuals, John Does 1 and 2 associated with the trust.[105] Just over a month later, the OGC recommended the Commission enter a "reason to believe" finding that the John Does violated FECA, and to authorize a civil action to enforce the subpoena.[106] The Commission rejected the OGC's recommendation along partisan lines, and then unanimously authorized a conciliation process for the four named parties.[107] The Commission then approved this CA on October 24, 2017.[108]

Then, Commissioner Weintraub released a Statement of Reasons to explain her vote to follow OGC's recommendations, and stated that, in her view, the FEC failed to adhere to its mission and find the "ultimate source" of the contribution.[109] Two commissioners responded to this with their own Statement of Reasons, concluding that "the unclear state of the law, imminent expiration of the statute of limitations, and other legal difficulties" reflected the need to enter into a CA rather than continue enforcement.[110] In other words, because the FEC has not interpreted the law, the law has not been made clear, so the FEC cannot enforce the law.[111] CREW filed this action three days after Commissioner Weintraub's Statement of Reasons.[112]

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[104] *Id*.

[105] *Id.*

[106] *Id.*

[107] *Id*.

[108] *Id.*

[109] *Id.*

[110] Statement of Reasons of Vice Chair Caroline C. Hunter and Commissioner Lee E. Goodman, Ex. 5 to Compl. [Dkt. # 1-5].

[111] This is not the only case that the courts have accepted this reasoning. *See Campaign Legal Ctr. & Democracy 21 v. FEC*, 952 F.3d 352, 354-55 (D.C. Cir 2020) ("They expressed concern that Commission precedent and regulations provided inadequate guidance regarding how § 30122 would be applied to closely held corporations and corporate LLCs.").

[112] Statement of Reasons of Commissioner Ellen L. Weintraub, Ex. 1 to Compl. [Dkt. # 1-1].

CREW claims the FEC acted contrary to law regarding the enforcement process when: (1) the Commission did not find a "reason to believe" John Doe 1 and 2 violated the act; (2) the Commission did not enforce subpoenas against John Doe 1 and 2; and (3) the Commission failing to pursue the true source of the donation, be it John Doe 1 and 2 or some other unknown third party.[113] CREW claimed that the defendants in this case were not the ultimate sources of the funds at issue, and the CA, in closing the MUR, resulted in the FEC not fulfilling their statutory duty outlined in 52 U.S.C. §30122.[114] This section of FECA prohibits anyone from making a donation in the name of another, otherwise known as a straw-man donation, and has been expanded in the FEC's regulations.[115] If the court reached the merits of the case, then they would have utilized the contrary to law standard of review provided in FECA.[116] But, because the court concluded that a dismissed claim that is an outgrowth and not part of the original complaint is not reviewable, they prevented themselves and future courts from reaching this analysis. In the alternative, CREW challenged the action under APA's § 706, specifically using the arbitrary and capricious, abuse of discretion, and contrary to law standards.[117]

B. Motions by FEC

The FEC made three separate motions for dismissal: a 12(b)(1), a 12(b)(6), and a motion for a judgment on the pleadings.[118] Because this is a decision based on the above motions, the Court did not use the FECA or APA standards of review. Instead, the court utilized the standards for motions to dismiss. The court explains that they must take all factual allegations as true, and

[113] *CREW,* 2018 WL 6807167, at *4.

[114] *Id.*

[115] 11 C.F.R. § 110.4.

[116] 52 U.S.C. § 30109(a)(8)(C).

[117] Brief for Petitioner at 15, Citizens for Responsibility and Ethics in Washington v. FEC, No. 17-2770, 2018 WL 6807167, (D. D.C. Dec. 27, 2018).

[118] *CREW*, 2018 WL 6807167, at *4.

grant the non-moving party "the benefit of all inferences from the alleged facts," but they do not need to accept any inferences not supported by facts or accept legal conclusions made in the complaint.[119] Along with this general standard of review, the Court also outlined that for a 12(b)(1) motion, a motion claiming lack of jurisdiction, the plaintiff must establish jurisdiction by a preponderance of the evidence.[120] But, unlike other motions to dismiss, the Court may "consider such materials outside the pleadings as it deems appropriate" to conclude if it has jurisdiction or not.[121] At first glance, this seems like a massive amount of power for a court to wield, but under closer inspection it is necessary due to the need to look at legislative history, uncited court decisions, and other materials that would be useful for making a decision on the existence of jurisdiction for judicial review.

C. Court's Dismissal due to Preclusion from Review

The Court concluded that FEC's enacting statute, FECA, precludes judicial review of FEC actions except for two specific circumstances: (1) dismissal of an administrative complaint and (2) lack of action regarding an administrative complaint for 120 days.[122] To reach this conclusion, the Court used the *Block* factors and *expression unius*.[123] In *Block*, the Court provided a list of factors for a reviewing court to consider when determining judicial

[119] *CREW*, 2018 WL 6807167, at *5.
[120] *Id*.
[121] *Id.*
[122] *Id.* at *6.
[123] *Id.*

reviewability: express statutory language, structure of the statutory scheme, statutory objectives, the associated legislative history, and the agency action that is involved.[124]

The express language and structure of FECA provides only the two opportunities for judicial review of an enforcement action—only the dismissal provision is relevant for this case.[125] CREW claims that the "Commission's decision to take no action on the OGC's recommendation to find reason to believe the [John] Does violated the law and to close the file was tantamount to a dismissal of their complaint."[126] The Court did not buy this reasoning. Due to both the factual background of the case but more significantly, the statutory language.[127] The Court could have found on the factual matter of the case, but instead dives into the world of statutory interpretation to preclude all judicial review save for the two specific instances described above.

The FEC went through the procedural hurdles of settling the case through a CA, and never affirmatively voted to include the John Does into the enforcement action and simply dismissed the tangential claim against the John Does and not CREW's complaint.[128] Since the Court found that the claim against the John Does was not within the "four corners of the administrative complaint," FEC's dismissal of tangential claims was not a dismissal of the complaint.[129] The Court reasons that because CREW's complaint contained the terms "unknown

[124] *Block v. Community Nutrition Institute*, 467 U.S. 340, 345 (1984).
[125] *CREW,* 2018 WL 6807167, at *6, n.3.
[126] *Id.* (interior quotations omitted).
[127] *Id.*
[128] *CREW*, 2018 WL 6807167, at *7.
[129] *Id.* at *6.

source" and "unknown respondent" and did not have "source or sources," or "unknown respondent(s)," CREW was asking the Court to look beyond their administrative complaint.[130]

In sum, the court found that CREW's administrative complaint was too specific to encompass John Does 1 and 2.[131] The court ultimately concludes that because FECA only allows for the review of dismissed complaints, the court is precluded from reviewing the dismissal of claims.[132] This reading of intent to limit judicial review by the Court seems to directly contradict the intent of the overall statute imputed by Congress, which is to root out any corruption or appearance of it. The court also finds that the present action is precluded from judicial review under the APA due to §701.[133] This reasoning does seemingly overlook 52 U.S.C. § 30110, which provides for judicial review as it pertains to constitutionality.[134]

IV. FEC Needs Reform

The FEC is in need of serious, structural reform. This reform can come in two ways, either: (1) maintaining the overall structure of the Commission and granting more extensive judicial review of FEC action and inaction or (2) eliminating the Commission's enforcement role and creating a new judicial body that will work alongside the Justice Department to pursue corruption in our political system. These reforms would likely survive constitutional challenge.

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[130] *Id.* at *7-8. This seems to contradict the standard of review for this motion, allowing the court to look at items outside of complaints to seek guidance on jurisdiction.

[131] Seemingly going against the march towards requirement of more and more specific pleadings. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

[132] *CREW*, 2018 WL 6807167, at *7-9. *See also Citizens for Responsibility & Ethics in Washington v. Fed. Election Comm'n*, 923 F.3d 1141, 1142-43 (D.C. Cir. 2019).

[133] *Id.* ("Thus, for the same reasons that judicial review of the challenged enforcement actions is precluded by FECA, it is precluded under APA: because the statute expressly limits review to the two circumstances identified in 52 U.S.C. § 30109(a)(8)(A).")

[134] *See* 52 U.S.C. § 30110. This could represent an avenue for advocacy groups to challenge FEC's enforcement as unconstitutional, if it is available.

The first is well within Congress' power and would involve a simple amendment of FECA, as discussed below. The second will involve the creation of a new Article III court, and the creation and appointment of a permanent independent counsel.

A. Expanding Judicial Review of Agency Action

A simple, but potentially effective, reform to FECA would be to simply expand the actions that are reviewable under the contrary to law standard. As discussed above, FECA only allows two agency citizen enforcement related actions to be challenged under this standard: dismissal of a complaint or failure to act on a complaint within 120 days.[135] Instead, FECA should allow judicial review of any citizen enforcement related action that is contrary to law, or at the very least a dismissal of claims rather than complaints. This would directly pursue FECA's purpose, to decrease actual and perceived corruption.[136] Allowing judicial review of citizen enforcement related agency action would likely incentivize more action by the Commissioners; due to actual avenues to address the inadequacies of some agency action that is founded on a deadlock vote that is treated as an affirmative no.[137]

B. Structural Reform of the FEC

Rather than simply kicking the can down the road, Congress should pursue a set of reforms that would address the root of the problem with the FEC, rather than the symptoms. These reforms would: (1) establish a new specialized Article III court that only hears matters including campaign finance violations and (2) eliminate the FEC enforcement role, instead relocating it to an independent counsel appointed by the newly created court and the DOJ. These

[135] 52 U.S.C. § 30109(a)(8)

[136] *Infra* discussion at Part II.

[137] *Infra* discussion at Part II.

reforms, when viewed in conjunction, may also incentivize the Commission to actually use its rulemaking authority. The Commission would both no longer be burdened from the duty of reviewing all enforcement decisions multiple times and also need to give courts clear guidance when it comes to the meaning of FECA.

Congress, to truly march towards its goal of eliminating corruption in campaign finance should create the Court of Campaign Finance (CCF). There should be 15 judges in this court that are divided into three five-judge panels. Each panel of judges will have a Chief Judge, and the three Chief Judges comprise the Chief Judge Board. The Chief Judges should be the only positions with lifetime appointment, and be selected by the President with advice and consent of the Senate. The other associate judges should sit for 9 years, and be chosen by a Chief Judge with advice and consent of the Chief Justice of the Supreme Court to sit on the preceding Chief Judge's panel. In other words, each Chief Judge chooses another's panel, rather than them choosing their own. This deters the ability of partisanship to enter the CCF, and will ensure the independence of the CCF from the legislative branch, but still only choose candidates from a pool of individuals already confirmed by Congress.

Alongside the establishment of a specialized Article III court, Congress should eliminate the FEC's role in enforcement of the statutes they interpret and regulations they promulgate. Instead, a new permanent independent counsel position should be created within the Justice Department, with their jurisdiction limited only to the violation of FECA and its regulations. If any other illegal misconduct is discovered during these investigations, the information should be sent to the DOJ to allow them to pursue that potentially criminal conduct. The appointment of this independent counsel position should be similar to the process in which independent counsel

were appointed in the Ethics in Government Act.[138] One significant difference would be the fact that this independent counsel would be a permanent position, not one created for a specific controversy. So, rather than having the DOJ investigate a claim and then have the judicial branch appoint an independent counsel, the DOJ should nominate an individual to serve in the role, and the CCF in its entirety must confirm the counsel unanimously.

Ending the Commission's role in the enforcement process, and instead allowing an independent counsel to work with and before a specialized court on the matter, would allow for the actual purpose of FECA to be pursued.

V. Conclusion

In sum, as is clear in *CREW*, the FEC is not fulfilling its statutory mandate to: (1) promulgate rules interpreting FECA and then (2) enforce those rules against both corruption and the appearance of corruption. This is due to structural deficiencies of an agency designed by those that will be regulated by it. Even Exxon-Mobil cannot *explicitly design* the regulatory bodies that oversee them, why should politicians that are dependent on maintaining the political status-quo be able to? To increase faith in the democratic process, the FEC should either have heightened judicial oversight, or have their enforcement authority transitioned to an independent counsel and a new, specialized, court. In the end, the FEC as we know it is closer to a sabotaged slug than a toothless tiger, even a toothless tiger should still be feared because of its claws.

[138] Cynthia Brown, Jared Cole, Cong. Research Serv. R44857, Special Counsel Investigations: History, Authority, Appointment and Removal 4-6 (2019).