

FEDERAL ELECTION COMMISSION

Hans A. von Spakovsky

MISSION/OVERVIEW

The Federal Election Commission (FEC) is an independent federal agency that began operations in 1975 to enforce the Federal Election Campaign Act (FECA) passed by Congress in 1971 and amended in 1974.¹ FECA governs the raising and spending of funds in all federal campaigns for Congress and the presidency. The FEC has no authority over the administration of federal elections, which is performed by state governments.

While the FEC has exclusive civil enforcement authority over FECA,² the U.S. Justice Department has criminal enforcement authority, which is defined as a knowing and willful violation of the law.³ Because the FEC is an independent agency and not a division or office directly within the executive branch, the authority of the President over the actions of the FEC is extremely limited.

As former FEC Commissioner Bradley Smith has said, the FEC's "[r]egulation of campaign finance deeply implicates First Amendment principles of free speech and association."⁴ The FEC regulates in one of the most sensitive areas of the Bill of Rights: political speech and political activity by citizens, candidates, political parties, and the voluntary membership organizations that represent Americans who share common views on a huge range of important and vital public policy issues.

NEEDED REFORMS

Nomination Authority. The President's most significant power is the appointment of the six commissioners who govern the FEC, subject to confirmation by the U.S. Senate. Commissioners may only serve a single term of six years but

Mandate for Leadership: The Conservative Promise

because they stay in office until a new commissioner has been confirmed, many commissioners continue to serve past their terms.⁵ Currently, the longest serving commissioner still at the FEC is Ellen Weintraub (D), whose regular term expired in 2007.

Under FECA, no more than three commissioners may be from the same party.⁶ While that means that a commissioner could be an independent or a member of the Libertarian or Green Parties, in practice, this has meant that the FEC has always had three Democrat and three Republican commissioners.⁷

There is a long-held political tradition since the FEC's founding that when a commission slot held by a member of the opposition political party opens up, the President consults with, and nominates, the chosen nominee of the opposition party's leader in the Senate. In exchange, the Senate party leader and his caucus agree to approve the President's nominee to fill an empty position for the President's political party. It has also been customary to advance the two nominees of the differing political parties at the same time; this bipartisan pairing has historically permitted easy confirmation of both parties' selectees.

Thus, by convention, a Republican President will nominate a Republican and a Democrat for two open commission slots, including the choice of the Democrat Senate leader for his party's seat. In turn, the senator will direct his party to vote to confirm both nominees. In the almost 50-year history of the FEC, this tradition has only been broken once—when Senate Majority Leader Harry Reid refused to approve one of George W. Bush's nominees (Hans von Spakovsky) for a Republican commission slot.⁸

In 2025, when a new President assumes office, the term of five of the current FEC commissioners will have either expired or be about to expire:⁹

- Shana M. Broussard (D)—April 30, 2023
- Sean J. Cooksey (R)—April 30, 2021
- Allen Dickerson (R)—April 30, 2025
- James Trainor, III (R)—April 30, 2023
- Ellen L. Weintraub (D)—April 30, 2007

During their terms, the three Republican commissioners have demonstrated with their votes and their public statements that they believe the FEC should not overregulate political activity and act beyond its statutory authority, construe ambiguous and confusing provisions against candidates and the public instead of the government, and infringe on protected First Amendment activity.

Federal Election Commission

- **The President assuming office in 2025 must ensure, if the three Republican commissioners do not wish to remain on the FEC past their terms, that nominees for these positions share the views of those commissioners.**
- **Also, to the extent that the President has the ability to negotiate with the Democratic Party leader in the Senate, he should try to temper any choice of the opposition party to ensure that this individual does not have extreme views on aggressive overenforcement that would severely restrict political speech and protected party, campaign, and associational activities.**

U.S. Department of Justice/FEC-Related Activities. The President does have control of the Department of Justice (DOJ). Thus, he has authority as President, primarily through his choice of attorney general and other political appointees, to direct the prosecutorial functions of the DOJ regarding criminal enforcement of FECA. Such investigations and prosecutions are carried out by the Public Integrity Section of the Criminal Division, with the assistance, coordination, and help of the Offices of U.S. Attorneys in whatever state an alleged violation occurs.

- **The President must ensure that the DOJ, just like the FEC, is directed to only prosecute clear violations of FECA.** The department must not construe ambiguous provisions against the public instead of the government or apply FECA in a way that infringes on protected First Amendment activity.

It should be but is not always obvious to overzealous government prosecutors that if a federal law is confusing, it would be unjust to prosecute individuals who are unable to determine if they are violating the law.

- **The President should direct the DOJ and the attorney general not to prosecute individuals under an interpretation of the law with which the FEC—the expert agency designated by Congress to enforce the law civilly and issue regulations establishing the standards under which the law is applied—does not agree.**
- **In making prosecution decisions, DOJ should be instructed to consult and consider all official actions by the FEC that interpret the law including prior enforcement actions, regulatory pronouncements, and advisory opinions, just as private practitioners, the public, and political actors must do.**

Mandate for Leadership: The Conservative Promise

It is fundamentally unfair for the DOJ to prosecute an individual for supposedly violating the law when the FEC has previously determined that a similarly situated individual has not violated the law. Furthermore, this rule should apply even when there is a tied or three-to-three vote by the FEC commissioners whether in an enforcement action or an advisory opinion since under the statute, the FEC cannot take any action unless there are four affirmative votes.

Again, it seems obvious that if the commissioners designated by Congress to interpret the law are unable to determine what the law requires, then it is unfair to prosecute a citizen for violating that law. The DOJ should not engage in criminal prosecutions that stretch legal theories and defy FEC interpretations and regulations.

Another issue directly related to what has often been a contentious relationship between the FEC and the DOJ is the conduct of litigation. The vast majority of federal agencies are defended by the DOJ, which also represents them when the agency is pursuing litigation as a plaintiff.

The FEC, however, is one of the few federal agencies with independent litigating authority.¹⁰ The FEC's lawyers represent the agency in federal court up through the federal courts of appeal. If a case reaches the U.S. Supreme Court, then the Office of the Solicitor General of the Justice Department represents the FEC.

In recent years, the FEC has failed to defend itself against litigation filed by political allies of certain Democrat commissioners. It takes four votes to authorize the general counsel of the FEC to defend a lawsuit filed against the agency, and those commissioners have refused to provide that fourth vote, so “the public was treated to the scandalous spectacle of the Commission—an independent agency of the United States government—defaulting in litigation before federal courts.”¹¹

These cases involved enforcement matters in which the commissioners disagreed on whether a violation of the law had occurred. Accordingly, the final votes of the commissioners did not approve moving forward with enforcement because there were not four affirmative votes that a violation of the law occurred. When private plaintiffs then sued the FEC for failing to take action, Democrat commissioners refused to authorize the defense of the FEC in litigation as a way of circumventing the prior final action of the FEC and the FECA four-vote requirement to authorize an enforcement action. Such defaults in litigation are unacceptable.

- **The President should direct the attorney general to defend the FEC in all litigation when there is a failure of the commissioners to authorize the general counsel of the agency to defend it.** No legislation would be needed to accomplish this; the DOJ has the general authority to defend the government and its agencies in all litigation.

- **As a legislative matter and given this abuse, the President should seriously consider recommending that Congress amend FECA to remove the agency’s independent litigating authority and rely on the Department of Justice to handle all litigation involving the FEC.**

There are also multiple instances of existing statutory provisions of FECA and the accompanying FEC regulations having been found unlawful or unconstitutional by federal court decisions, yet those statutory provisions remain in the U.S. Code and the implementing regulations remain in the Code of Federal Regulations.¹² In such instances, those regulated by the law, from candidates to the public, have no way of knowing (without engaging in extensive legal research) whether particular statutory provisions and regulations are still applicable to their actions in the political arena.

- **The President should request that the commissioners on the FEC prepare such guidance.**
- **In the event that the FEC fails to act, the President should direct the attorney general to prepare a guidance document from the Department of Justice for the public that outlines all of the FECA statutory provisions and FEC regulations that have been changed, amended, or voided by specific court decisions.**

Legislative Changes. While a President’s ability to make any changes at an independent agency like the FEC is limited,¹³ the President has the ability to make legislative recommendations to Congress. One of the most obvious changes that is needed is to end the current practice of allowing commissioners to remain as serving commissioners long after their term has expired, defying the clear intent of Congress in specifying that a commissioner can only serve a single term of six years.

- **The President should prioritize nominations to the FEC once commissioners reach the end of their terms and should be assisted by legislative language either eliminating or limiting overstays to a reasonable period of time to permit the vetting, nomination, and confirmation of successors.**
- **The President should vigorously oppose all efforts, as proposed, for example, in Section 6002 of the “For the People Act of 2021,”¹⁴ to change the structure of the FEC to reduce the number of commissioners from six to five or another odd number.** The current requirement of four votes to authorize an enforcement action, provide

Mandate for Leadership: The Conservative Promise

an advisory opinion, or issue regulations, ensures that there is bipartisan agreement before any action is taken and protects against the FEC being used as a political weapon.

With only five commissioners, three members of the same political party could control the enforcement process of the agency, raising the potential of a powerful federal agency enforcing the law on a partisan basis against the members of the opposition political party. Efforts to impose a “nonpartisan” or so-called “independent” chair are impractical; the chair will inevitably be aligned with his or her appointing party, at least as a matter of perception.

There are numerous other changes that should be considered in FECA and the FEC’s regulations. The overly restrictive limits on the ability of party committees to coordinate with their candidates, for example, violates associational rights and unjustifiably interferes with the very purpose of political parties: to elect their candidates.

- **Raise contribution limits and index reporting requirements to inflation.** Contribution limits should generally be much higher, as they hamstring candidates and parties while serving no practical anticorruption purpose. And a wide range of reporting requirements have not been indexed to inflation, clogging the public record and the FEC’s internal processes with small-dollar information of little use to the public.

CONCLUSION

When taking any action related to the FEC, the President should keep in mind that, as former FEC Chairman Bradley Smith says, the “greater problem at the FEC has been overenforcement,” not underenforcement as some critics falsely allege.¹⁵ As he correctly concludes, the FEC’s enforcement efforts “place a substantial burden on small committees and campaigns, and are having a chilling effect on some political speech...squeezing the life out of low level, volunteer political activity.”¹⁶

Commissioners have a duty to enforce FECA in a fair, nonpartisan, objective manner. But they must do so in a way that protects the First Amendment rights of the public, political parties, and candidates to fully participate in the political process. The President has the same duty to ensure that the Department of Justice enforces the law in a similar manner.

Federal Election Commission

ENDNOTES

1. 52 U.S.C. § 30101 *et seq.*
2. 52 U.S.C. § 30106(b)(1).
3. 52 U.S.C. § 30109(c) and (d).
4. Bradley A. Smith and Stephen M. Hoersting, “A Toothless Anaconda: Innovation, Impotence and Overenforcement at the Federal Election Commission,” 1 *Election Law Journal* 2 (2002), p. 162.
5. 52 U.S.C. § 30106(a)(2).
6. 52 U.S.C. § 30106(a)(1).
7. Former Commissioner Steven Walther (2006–2022) was listed nominally as an independent but he was recommended to President George W. Bush for nomination by former Nevada Sen. Harry Reid (D) and almost always voted in line with the Democrat commissioners on the FEC.
8. Hans von Spakovsky served as a commissioner from 2006 to 2007 in a recess appointment. While no other nominee has been rejected by the Senate, the tradition of bipartisan voice vote confirmation has largely ended. Two Republican nominees—Allen Dickerson and Sean Cooksey—were confirmed on party-line votes in 2020. And one Democrat—Dara Lindenbaum—was confirmed with the support of only six Republican senators in 2022.
9. The term of the 6th Commissioner, Dara Lindenbaum (D), will expire on April 30, 2027.
10. 52 U.S.C. § 30107(a)(6).
11. “Statement of Chairman Allen J. Dickerson and Commissioners Sean J. Cooksey and James E. ‘Trey’ Trainor, III Regarding Concluded Enforcement Matters,” Federal Election Commission (May 13, 2022), https://www.fec.gov/resources/cms-content/documents/Redacted_Statement_Regarding_Concluded_Matters_13_May_2022_Redacted.pdf.
12. See, e.g., *McCutcheon v. Federal Election Commission*, 572 U.S. 185 (2014).
13. It should be noted, however, that the constitutional authority of a President to, among other things, remove appointees and direct the actions of independent agencies is a hotly contested and increasingly litigated issue. See *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477 (2010); *Seila Law LLC v. Consumer Financial Protection Bureau*, 140 S. Ct. 2183 (2020); and *Collins v. Yellen*, 141 S. Ct. 1761 (2021).
14. H.R. 1, 117th Cong. (2021–2022).
15. Bradley A. Smith and Stephen M. Hoersting, “A Toothless Anaconda: Innovation, Impotence and Overenforcement at the Federal Election Commission,” 1 *Election Law Journal* 2 (2002), p. 171.
16. *Id.*

