

February 9, 2021

The Honorable Nancy Pelosi  
Speaker of the House of Representatives  
U.S. House of Representatives  
Washington, DC 20510

The Honorable Chuck Schumer  
Majority Leader  
U.S. Senate  
Washington, DC 20510

The Honorable Kevin McCarthy  
Republican Leader  
U.S. House of Representatives  
Washington, DC 20510

The Honorable Mitch McConnell  
Republican Leader  
U.S. Senate  
Washington, DC 20510

Dear Speaker Pelosi, Republican Leader McCarthy, Majority Leader Schumer, and Republican Leader McConnell:

We write out of deep concern for the threat that the self-styled “For the People Act” (H.R. 1 and S. 1 in the current Congress, hereinafter the “FPA”) poses to the long-standing bipartisan structure of the Federal Election Commission (“FEC”—a concern based on our many years of experience as commissioners of the FEC. The FEC is the federal agency entrusted with primary interpretation, civil enforcement, and administration of federal campaign finance laws.

The threat to bipartisanship in this federal agency should be a concern for the public, but also for members of Congress, who are among the most visible subjects of FEC scrutiny. Candidates for federal office know that the FEC is an intrusive presence in virtually every aspect of their campaigns, requiring disclosure of detailed aspects of their contributions and expenditures, initiating investigations, subpoenaing witnesses and records, imposing civil penalties for violations of its hundreds of pages of regulations, and conducting audits of campaign committees selected by the Commission to monitor compliance, among other actions.

We are all former members of the FEC. Collectively, we have over six decades of service on the Commission. Most of us served as Chair of the FEC, and at least one of us was serving on the Commission at all times between 1998 and 2020.<sup>1</sup>

The FPA, as introduced in the House, is 791 pages and addresses virtually every aspect of election rules and administration. Our comments here are limited to Titles IV and VI in Division B of the Act. We address those provisions because they concern the jurisdiction of the FEC, and our comments specifically represent our combined expertise and experience over decades of service on the Commission. Our decision not to address provisions of the FPA changing election administration outside of FEC jurisdiction, however, should not be viewed as support for or acquiescence in those proposals.

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<sup>1</sup> This letter is signed in our individual capacities and does not necessarily reflect the views of our current employers or any particular client.

Title VI would transform the FEC from a bipartisan, six-member body to a five-member body subject to, and indeed designed for, partisan control. Proponents claim this radical change is necessary to prevent “deadlock” on the Commission and assure efficient operations. This perception of perpetual deadlock is incorrect. Empirically, even the most extreme study of FEC votes—that is, a vigorously contested, non-peer reviewed study, conducted during a short period of relatively high disagreement within the Commission, and not transparent about its methodology or selection of votes—found a maximum of 30 percent of enforcement matters ending in 3-3 votes. But other studies, including peer-reviewed studies, have consistently found much lower rates of “deadlock,” typically in the one to six percent range.<sup>2</sup>

Moreover, the argument that the bipartisan makeup of the Commission hinders its effectiveness is based on a misunderstanding of the FEC’s work and why deadlocks occasionally occur. By definition, campaign finance law inserts the government into partisan electoral disputes. In our experience, the agency’s bipartisan structure both assures that the laws are enforced with bipartisan support and equally important, that they are not perceived as a partisan tool of the majority party—an electoral weapon, if you will. “The indispensable ingredient in the FEC’s creation was its bipartisan makeup,” with an equal number of members from each major party and a voting structure requiring some minimal measure of bipartisan agreement before an enforcement action went forward or a rule was adopted.<sup>3</sup> As Senator Alan Cranston (D-Calif.) explained during post-Watergate Congressional debates about the agency’s creation: “We must not allow the FEC to become a tool for harassment.”<sup>4</sup> Political actors who violate campaign finance laws, and their partisans, are often quick to denounce enforcement as a “partisan witch hunt.” The FEC’s bipartisan makeup is a direct response to this claim and is fundamental to public confidence in the system.

Further, a neutral examination of the relatively few “deadlocks” that do occur reveals that a substantial portion of them concern differences of opinion over the reach of the statutes the FEC enforces. One bloc of three commissioners has often reflected the views of activist organizations that advocate for even more extensive regulation, supporting an expansive view of the statutes that goes beyond what Congress has enacted. In short, the complaints about “deadlocks” come from the regulatory activists who haven’t gotten their way. They now seek to change the bipartisan nature of the Commission, to smooth the path for agency adoption of the more expansive regulations they have unsuccessfully sought for years. Congress has consistently declined to adopt those expansive objectives.

Similarly, in rule-making, the FEC’s bipartisan structure is a beneficial feature, not a defect. It demands that commissioners work to reach consensus and compromise on measures to achieve bipartisan support. If Congress wanted to destroy confidence in the fairness of American elections, it is hard to imagine a better first step than to eviscerate the FEC’s bipartisan structure.

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<sup>2</sup> These studies are cited and summarized in Bradley A. Smith, *Feeble: A Critique of Critiques of the Federal Election Commission*, 27 Geo. Mason L. Rev. 503, 528-530 (2020), available at [http://georgemasonlawreview.org/wp-content/uploads/2020/07/Smith\\_Final\\_Web.pdf](http://georgemasonlawreview.org/wp-content/uploads/2020/07/Smith_Final_Web.pdf).

<sup>3</sup> *Id.* at 513.

<sup>4</sup> Legislative History of Federal Election Campaign Act Amendments of 1976, p. 89 (1977), available at [https://transition.fec.gov/pdf/legislative\\_hist/legislative\\_history\\_1976.pdf](https://transition.fec.gov/pdf/legislative_hist/legislative_history_1976.pdf).

But Title VI goes further. First, it allows the Chair, who is appointed on a partisan basis by the President, to hire and fire the FEC’s General Counsel, a statutory position, with the support of just two commissioners. Thus, this crucial enforcement position can be filled with no bipartisan agreement, as the Chair, the other commissioner from that party, and an “independent” member appointed by a President of the Chair’s party, could make the decision. Further, it places sole authority to hire or fire the Commission’s Staff Director, also a statutory position, in the hands of the FEC Chair, not even requiring the support of an independent commissioner. The Staff Director oversees the Commission’s Auditing, Reports Analysis, Administrative Fines, and Alternative Dispute Resolution processes, which combined handle far more enforcement matters than the Office of General Counsel. Both the appearance and reality of bipartisanship in enforcement is fundamental to the FEC’s success, and Title VI destroys both.

The FPA also makes startling changes in the FEC’s enforcement processes, perhaps no more so than in § 6004 of Title VI. That section provides that, in the event the Commission, after reviewing or investigating a complaint, finds the respondent candidate, campaign, or other entity did not violate the law, the complainant may sue in federal court. There, the matter will be reviewed *de novo*, with no deference to the Commission’s findings of law or fact. If, however, the Commission finds that the respondent did violate the law, and the respondent seeks to contest those findings in court, the Commission’s rulings will be afforded the traditional deference given to administrative agencies by courts of law. In short, while the American justice system has traditionally erred in favor of the accused, so as to protect the innocent and unjustly convicted, the FPA turns the formula on its head, explicitly biasing the judicial review process in favor of findings of guilt against candidates, campaigns, and other defendants.

Furthermore, Section 6004 allows for the appointed General Counsel to launch investigations and even determine matters of guilt or innocence without any majority vote of the Commission. It does this by sharply limiting the time the commissioners have to consider a matter, and then substituting the General Counsel’s verdict for a vote of the Commission.

Other changes in Title VI to the Commission’s structure, enforcement, and regulatory processes are similarly ill-conceived.

In addition to our concerns about Title VI, the FPA also includes a number of troubling, substantive changes to campaign finance law. Most notably, we reiterate the concerns previously expressed in 2010 by many of the signatories below regarding the “DISCLOSE Act,” included in Title IV, Subtitle B.<sup>5</sup> The DISCLOSE Act is unnecessary, burdensome, and would stifle constitutionally protected political speech.

Similarly, the “Stand by Every Ad Act” included in Title IV, Subtitle D would make disclaimer regulation more complex, have a chilling effect on speech, and provide little or no information that is not already available to the public under the Federal Election Campaign Act (“FECA”) and existing Commission regulations. Indeed, in many cases, it would mislead the public as to the sources of an ad’s funding.

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<sup>5</sup> See Letter of Former FEC Commissioners to Robert Brady and Dan Lungren, May 19, 2010, available at <https://www.ifs.org/wp-content/uploads/2010/05/05-19-10-DISCLOSE-Commissioners-Letter.pdf>.

Subtitles F and G of Title IV aim to affirmatively clear the way for the Internal Revenue Service (“IRS”) and the Securities and Exchange Commission to become involved in campaign finance regulation. This is contrary to the design of the FECA, which gives the FEC primary civil enforcement responsibilities and exclusive authority for administering and interpreting the Act.<sup>6</sup> These other agencies do not have expertise in campaign finance law. Attempting to use the IRS for campaign enforcement led to the scandal of 2013, which tarnished that agency’s reputation and public confidence in its operations. Inviting other non-expert agencies into campaign finance enforcement would create a likelihood of inconsistent interpretations and applications of the laws and increase the complexity of a regulatory system already famous for its intricacy.

Based on our collective decades of experience at the FEC, we believe that these, and several other provisions of Titles IV and VI not specifically addressed here, would complicate the law and hinder grassroots political speech and activism, with little or no benefit to public accountability, transparency, understanding of public policy, or reduction in corruption.<sup>7</sup>

Given these concerns, we are disturbed by recent news reports that House Leadership plans to bring H.R. 1 directly to the floor, bypassing committee consideration. We urge members of Congress in both chambers to deliberately and carefully consider this complex, nearly 800-page legislation, with special attention paid to the bill’s harmful impact on First Amendment speech and association rights.

Most importantly, we believe that Title VI, by shifting the Commission from a bipartisan, six-member body to a five-member body subject to partisan control, would be highly detrimental to the agency’s credibility. It would lead to more partisanship in enforcement and in regulatory matters, shattering public confidence in the decisions of the FEC. The Commission depends on bipartisan support and universal regard for the fairness of its actions. The FPA frustrates these goals with likely ruinous effect on our political system.

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Lee E. Goodman  
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<sup>6</sup> See 52 U.S.C. §§ 30106(b)(1) and 30107.

<sup>7</sup> Many of the problematic campaign finance aspects of the bill were discussed in greater detail in testimony presented to the 116<sup>th</sup> Congress. See Testimony before the House Committee on Oversight and Reform, February 6, 2019, available at [https://www.ifs.org/wp-content/uploads/2019/02/2019-02-06\\_Smith-Written-Testimony\\_US\\_HR-1\\_House-Oversight-Committee.pdf](https://www.ifs.org/wp-content/uploads/2019/02/2019-02-06_Smith-Written-Testimony_US_HR-1_House-Oversight-Committee.pdf).