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Original Article

The Devil We Know? Evaluating the Federal Election Commission as Enforcer

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The Federal Election Commission is an agency that was designed to fail, and at that task, at least, it has succeeded brilliantly.

Editorial, The Washington Post, 7/11/2003

The Federal Election Commission (FEC) (formally created in 1974 when Congress amended the Federal Election Campaign Act) is charged with the burdensome role of administering and enforcing federal election laws. Comprised of six voting commissioners, the FEC by law can have no more than three members of the same political party and in practice is balanced between three voting Democrats and three voting Republicans. Its performance has been much maligned, however, and is often targeted for complete overhaul or total elimination. Beyond the *Washington Post* editorial, consider some recent attacks on the FEC:

- "A close look . . . at the FEC's 27-year history reveals an agency that puts protecting the interests of the Democratic and Republican parties ahead of policing election laws or guarding public confidence in the integrity of campaigns and elections" (Columnist Jim Drinkard, 2002).
- "The FEC is an ineffectual agency, structured by Congress to be slow and ineffective, composed of commissioners whose appointments are tightly controlled by members of Congress and the political parties they regulate, and hobbled by a lack of real enforcement powers and a chronic lack of funds" (Walsh and Eilperin, 2002: citing Fred Wertheimer of Democracy 21).
- "The Federal Election Commission has done exactly what Congress intended it to do—nothing much to curb widespread campaign finance abuses. In fact, the feckless six-member panel created the 'soft-money' monster of unregulated campaign contributions. This glaring loophole has essentially negated the reform's goal of sanitizing a corrupt system whereby big contributors gain ready access to lawmakers" (Editorial, *San-Diego Union Tribune*, 7/21/2003).
- "It is clear that the FEC is a failed agency with overtly partisan commissioners who oppose both new and longstanding campaign finance statutes. The FEC has proved its ineffectiveness and its willingness to run roughshod over the will of the Congress, the Supreme Court, the American people and the Constitution" (Senator John McCain, 2004).

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The FEC has also inspired fascinating analogies. Todd Lochner (2003) writes: "the Federal Election Commission has been characterized as a toothless tiger institutionally incapable and wholly unwilling to enforce the Federal Election Campaign Act, but others claim it is toothless like an anaconda whose overzealous prosecution of innocent third parties strangles the life from First Amendment freedoms." Scott Thomas and Jeffrey Bowman (2000) note also that the FEC has been called "a lapdog," "a self-licking ice cream cone," and "nuts."[1]

Amanda La Forge (1996) additionally opines, "The structure of the FEC may make it the weakest of all federal agencies; certainly it is the weakest of the so called 'independent agencies'. . . . An even number of Commissioners generates vote-splitting and effectively incorporates gridlock into the enforcement process. The even number of representatives from each political party also may indicate that Congress expected the Commissioners to behave in a partisan, rather than an impartial manner" (p. 4).

From these assessments, then, one might be greatly worried about the functioning of the American campaign finance system. Indeed, a recent controversy in 2007 and 2008 over the appointment of four new commissioners to the FEC (a controversy that left the Commission inoperable for over six months) raised serious questions about the importance of maintaining the current FEC structure.[2] In response to all of the above assessments, however, there is little empirical work examining systematically the enforcement behavior of the Federal Election Commission. We know very little about the scope of penalties levied by the FEC, its ability to overcome a 3–3 partisan Commissioner balance, or its approach to regulating the same campaigns and candidates that fund the Commission and determine its make-up.

Fortunately, however, the FEC has begun posting detailed information about its enforcement matters. On its web site, for example, the FEC now lists all completed Matters Under Review (MUR), which are enforcement cases investigated by the Commission. The data contain all of the relevant documents and votes for each case, going back over 10 years to about 1996. This article exploits these data and evaluates the enforcement actions of the Commission in these MUR. I code these complaints on a variety of dimensions, including the issue focus, the characteristics of the complainant and respondent, and the final penalty levied by the Commission. I use the data to test a series of hypotheses about predicted FEC behavior.

All told, the evidence points to an FEC that is more severe in recent years, but with some bias towards incumbents and national parties. The evidence is far from a damning indictment of the FEC's enforcement pattern, however. Indeed, I conclude that the Commission deserves increased enforcement powers (in contrast to many who call for its elimination or reconstitution), including the ability to conduct random audits of regulated political committees.

The analysis in this article is the most comprehensive and up-to-date account of FEC enforcement cases in the current literature. Lochner and Cain (1999) rely on a sample of MUR between 1991 and 1993, and more recently Lochner et al. (2008) examine FEC enforcement between 1999 and 2004. The analysis offered here goes farther than either previous investigation. For example, I include a more detailed review of those initiating and those implicated in enforcement cases, and I spend considerable time discussing Commission voting patterns.[3]

The focus on the last 10 years also allows us a number of important advantages. First, we can evaluate the FEC enforcement action during one

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[1] In his dissertation on the FEC, Julian Salisbury (2002) also lists the tendency of FEC observers to describe the Commission with amusing metaphors.

[2] For more information on the FEC appointment controversy in 2008, I recommend Bob Bauer's blog on campaign finance issues (<http://www.moresoftmoneyhardlaw.com>). Click on "Enforcement" for a list of his postings on the matter.

[3] To be more specific, the analysis offered by Lochner and colleagues (2008) is invaluable, but there are important differences between that article and my analysis. They drop certain MUR in 2000 and 2001, which I include. On the other hand, they consider alternative enforcement mechanisms at the Commission (beyond MUR), which I do not. I also include measures for case subject in modeling the outcome of MUR, and I predict the impact of a range of variables on the size of the assessed fine, not simply the presence of a fine (as they do). All told, Lochner et al. are concerned mostly with the impact of structural changes on FEC enforcement, whereas I am concerned also with whether the FEC treats certain respondents with particular deference.

of the most controversial campaign finance periods in a generation (that is, during the use of soft money, issue advocacy, and 527s). Second, we are afforded a number of unique natural experimental conditions—namely a period when the FEC is initiating structural reforms and two brief periods when the FEC operated with a partisan imbalance (because there were, five commissioners instead of six).

THE FEC AS ENFORCER

What pattern of enforcement should we expect from the FEC? This question suggests another: what might *Congress* want in the FEC? From first principles, we might expect Congress to create an agency that monitors diligently for election law violations, whenever and wherever they occur. On the other hand, members of Congress—as once and future candidates—might wish the agency to tread very lightly, at least with respect to incumbents and their major party committees. After all, an aggressive agency with a strong enforcement mandate might quickly become an election law Frankenstein. In the design of the FEC, then, we witness a classic problem in all bureaucratic delegation: how do principals (Congress) delegate authority to an agent (the FEC) that monitors an important problem in democratic politics but does little harm to the principals?

Congress has granted the Commission considerable discretion to define the landscape of campaign finance laws. For example, the FEC can alter and clarify the regulatory context in two principal ways—regulation changes and advisory opinions. Regulations are changed both when Congress alters the law (and tasks the Commission with clarifying and fleshing out the new rules) *and* when the Commission independently perceives current regulations to be unclear or inadequate (for example, how existing election law restrictions conform to new technologies, such as the Internet). The FEC may issue advisory opinions when candidates, parties, or interest groups are uncertain as to the scope of the law and ask the FEC for formal guidance on a specific question. The issued opinion establishes a precedent for similar questions asked by different political actors. With both advisory opinions and regulations, Congress has almost no say in the Commission's interpretation of existing election law. If dissatisfied, Congress can sue the Commission in federal court or pass new legislation.[4]

The FEC also must respond to complaints from individuals, candidates, parties, interest groups, and other governmental agencies about the alleged abuse of federal campaign finance laws. Once a person asserts a potential violation, the FEC opens an enforcement proceeding, called a "Matter Under Review" (MUR). The FEC's Office of General Counsel (OGC) oversees the initial investigation and makes a report to the six commissioners about the viability of the case. If four commissioners vote to find reason to believe that a violation has occurred, the MUR is pursued further. The Commission might investigate and find a violation, but choose not to pursue a penalty, but if commissioners wish to fine those implicated, they can do so only if respondents willingly enter a conciliation agreement with the FEC.[5] Such enforcement power represents a risk for political actors—an investigation is sure to cause even the longest serving incumbent some headache.

How might Congress control the outcome of such FEC power? We know from the bureaucracy delegation literature that Congress can impose both *ex ante* and *ex post* oversight of a bureaucratic agency (McCubbins 1999). Control *ex ante* occurs in the agency structure, which is designed (or constrained) to perform with certain powers and in certain ways in line with the wishes of Congress or the president.[6] By contrast, *ex post* oversight happens when Congress monitors and evaluates agency performance.[7] There is a trade-off, however, be-

[4] Visit <http://www.fec.gov> and click on "Laws & Regulations" for more information.
[5] If the FEC is unable to obtain a conciliation agreement, it still has the option of pursuing the case in federal civil court.
[6] See also McCubbins, Noll, and Weingast (1987, 1989).
[7] There are a number of *ex post* strategies. McCubbins and Schwartz (1984) distinguish, for example, between "fire alarm" and "police patrol" oversight—the former occurring when Congress reacts to an overt crisis; the latter when Congress constantly monitors for wrong-doing in the bureaucracy.

tween the forms of enforcement. A predominantly *ex ante* approach creates the potential for regulators to "drift" from the wishes of Congress, but an *ex post* approach requires a significant investment of time and resources by the principals.

With respect to the FEC, Congress employs a mix of both oversight strategies. Consider its *ex ante* oversight first. As Oldaker (1986) notes, during the initial phase of FEC design, Congress worked to maintain significant controls over agency performance. He writes, "If the foxes in Congress were giving up their self-supervisory role, they were not going to turn the keys over to just anyone" (p. 134). Congress designed the agency to be bipartisan, for instance, and mandated that decision-making be based on a majority of four Commissioners.[8] The FEC additionally does not have a powerful chairperson, but rotates the position annually among the six commissioners. Julian Salisbury (2002, p. 176) writes: "The Commission has been poorly led. Yet this enduring characteristic was more the product of Congressional self-interest and less the product of individual failure at the FEC" (p. 179). In 1979, Congress worked to further weaken the Commission's influence by stripping its ability to conduct random audits of registered political committees.

In many ways, then, the extent of the FEC's legislative and enforcement discretion is limited by the *ex ante* constraints on its power. With no random audit authority, the Commission is forced to rely on third party complaints or inadvertent discovery by agency staff to initiate an investigation. (Furthermore, conciliation agreements must be accepted by accused respondents; this precondition provides some opportunity to force the Commission's hand into either dropping the investigation or pushing the matter into federal court.) Its bipartisan structure with rotating leadership hampers the Commission's ability to form a clear and consistent perspective on enforcing campaign finance laws. And with its modest budget, the extent to which the general counsel's office can swiftly investigate multiple violations is weakened. On this latter point, Salisbury notes that FEC staff increased from 223 to 302 between 1978 and 1998, but the amount of spending in campaigns (and by proxy, the potential for increased campaign finance law violations) increased by nearly 500 percent in the same timeframe (2002, p. 122). These figures notably exclude the explosion of issue advocacy and 527s in late 1990s, both being controversial forms of electioneering which put further pressure on FEC enforcement (Franz 2008).

As a consequence, the MUR process has been the focus of considerable criticism. For example, Ken Gross (1991, p. 283)—former associate general counsel at the FEC—notes: "Many participants in the political process believe that the election laws need not be heeded. The chance is slim that violations will be detected; party-line deadlocks reduce the chance that the Commission will investigate violations of the law, and any resulting penalty will probably come long after the election."[9]

In addition to these structural (*ex ante*) constraints, though, Congress also relies on significant *ex post* controls. These include, perhaps most significantly, yearly budgeting authority. Congress also holds significant sway in commissioner appointment powers. Although Congress formally approves commissioners nominated by the president, an informal norm allows Congress to effectively choose new commissioners. In addition, Salisbury (2002, p. 114) convincingly recounts congressional pressures on the FEC to improve performance, usually measured as case completions and conciliation agreements. He writes, "One might reasonably assert that Congress is attempting to influence the type of violations and cases the FEC ultimately enforces"—namely, smaller violations

[8] Originally, Congress established that two of the six commissioners were to be appointed by the president and the other four by the House and Senate. Following *Buckley v. Valeo,* 424 U.S. 1 (1976), Congress responded by giving the president power to appoint all six commissioners with advice and consent from the Senate. The FEC originally also had two non-voting ex officio members, the Clerk of the House and the Secretary of the Senate. In 1993, however, the D.C. Appeals Court in *FEC v. NRA Political Victory Fund* (6 F.3d 821) ruled that their participation on the Commission was unconstitutional.

[9] Gross also questions whether MUR enforcement violates respondents' due process rights. Since 2003, in response to such criticisms, commissioners have adopted new policies relative to its enforcement process (such as the publication of all MUR materials on the FEC web site). Visit <http://www.fec.gov/law/policy.shtml> for more information and documentation concerning these changes. The FEC conducted a similar review of enforcement in early 2009.

that are easier to investigate.[10] The Democracy 21 Task Force report on the FEC, released in 2002, also tells of considerable (and aggressive) pressures from Congress to improve performance (pp. 71–84).

Under such conditions, then, we can make some reasonable inferences about the Commission's enforcement of election laws. Given the pre-existing *ex ante* limits on enforcement powers, for example, we might have reason to expect its overall performance to be unsatisfactory to many. Nevertheless, Congress should feel relatively unthreatened with its generous grant of power to the FEC in the realm of regulations, advisory opinions, and enforcement—after all, the grant of power comes with few opportunities for the Frankenstein outcome noted earlier.

Given the concomitant threat of *ex post* oversight, though, we might expect to find certain patterns in Commission enforcement behavior. With a watchful Congress often bent on improved enforcement numbers, with the looming threat of budget cuts, and with congressional appointment powers, it is no stretch to predict that the Commission will treat its benefactors with some deference. As William Oldaker (1986, p. 136) notes: "the FEC will be forced to continue to walk a tightrope—vigorously enforcing the laws passed by Congress, while stopping short of incurring congressional wrath to such an extent that Congress decides to put the FEC out of business." Lochner and Cain (1999) add: "The FEC . . . is somewhat unique in that it directly regulates the very people responsible for the agency's budget" (p. 1899). (See also "Symposium on the Federal Election Commission," 1994.)

I term my first set of expectations the "**respondent bias hypothesis**." The hypothesis states that FEC enforcement decisions will favor incumbents and the major DC-based party committees, the latter because of their close ties to incumbents.[11] This outcome allows Congress to grant agency discretion in the enforcement of campaign finance laws, but remain insulated from aggressive intrusion on its members' own behavior. In other words, *ex post* controls (budgetary or otherwise) are always available to Congress should the FEC drift away from the policy preference of Congress (or assert powers inconsistent with the *ex ante* limitations placed on it).

The hypothesis specifically expects the following. First, incumbents and national party committees should be less likely than other respondents to enter conciliation agreements, and pay lower fines when they do. Second, votes on MUR involving incumbent and national party committees should induce consensus among commissioners as they jointly defer to principals.

There is some existing evidence of this phenomenon. Franz (2008) investigated a related regulatory process at the FEC, evaluations of advisory opinions. When looking at all opinions issued between 1977 and 2003, Franz found a significant bias in favor of candidates. More specifically, when controlling for a number of factors predicting FEC approval of proposed campaign behavior, candidates (and incumbents particularly) were far more likely to have their request approved.

There are at least two possible objections to this hypothesis. First, some delegation scholars worry about congressional preferences changing over time, making it harder for bureaucrats to locate Congress's current outcome goals (Epstein and O'Halloran 1994, p. 713). Others note that the initial creation of an agency can be often fraught with conflicts within Congress, weakening the match between bureaucratic outcomes and congressional wishes (Wood and Bohte 2004). These should be less of a concern for campaign fi-

[10] On a larger scale, Congress often considers plans for a complete FEC reorganization, overhaul, or elimination—on its own an *ex post* and overt threat to the FEC. For example, in both 2003 and 2006, Senators John McCain (R-AZ) and Russ Feingold (D-WI), and Representatives Chris Shays (R-CT) and Marty Meehan (D-MA), proposed the Federal Election Administration Act, which would replace the FEC with a new Election Administration composed of an independent three-member commission and administrative law judges.

[11] Commissioners often have close ties to incumbents and party committees. For example, Michael Toner (who served from 2002–2007) was former chief counsel to the Republican National Committee, and Thomas Josefiak (1985–1991) was former legal counsel to the National Republican Congressional Committee. David Mason (1998–2008) was a former staffer to Republicans John Warner and Trent Lott, and current Commissioner Cynthia Bauerly was a former staffer to Democrats Charles Schumer and Amy Klobuchar.

nance law enforcement, as presumably all incumbents (whether Democrats or Republicans) would prefer an incumbent bias.

Second, some might object to an expectation of incumbent bias because parties often have conflicting opinions on campaign finance law enforcement. Republicans, for example, might prefer less enforcement, and a weaker FEC, consistent with its goal of less federal power. In contrast, Democrats might prefer a stronger FEC because of its general faith in government power. Stated simply, the FEC conceivably might be unable to assert an incumbent or party bias because ideological commissioners diverge on these matters.

Beyond the hypothesis of "respondent bias," we might also form expectations about the influence of certain changes in agency design. Since 1996 there have been three key changes in the nature of the Commission. First, Congress enacted term limits for commissioners in the Treasury and General Government Appropriations Act of 1998. Those nominated beginning in 1998 are now eligible for only one term on the Commission. This has produced considerable turnover at the FEC. For example, three new commissioners took office in July 1998, and four took office in July 2008. All together, 13 new commissioners have taken office since 1998. Compare this to 15 different commissioners serving between 1975 and July 1998.

Second, the FEC initiated a pilot program to handle minor reporting violations more swiftly and outside the MUR process. This is called the Administrative Fines Program (AFP), and Congress authorized the change beginning on July 14, 2000. Although the initial authorization ran out at the end of 2001, Congress has regularly extended the program, most recently in December 2008 (until the end of 2013)—an obvious example of *ex post* control. Under the program, if a candidate, party, or PAC committee fails to file its reports on time, the Commission can automatically levy a penalty, although it also allows the respondent a chance to protest the fine.[12] By most impressionistic accounts, the structural change has been a success, moving minor violations outside of the MUR process and allowing more time for more serious and consequential enforcement cases (Smith and Hoersting, 2002).

Finally, the FEC established an additional enforcement tool through the Alternative Dispute Resolution Office, which went into effect (initially as a pilot program) in November 2000. This process (called ADR) allows for a mediated approach to "minor and inadvertent violations" (Smith and Hoersting, 2002, p. 4).[13] According to the FEC's 2005 annual report: "The program's success in reaching its goal of expediting the resolution of enforcement matters is evident in changes that have taken place both at the Commission and within the regulated community. For example, ADR has established a presence among the regulated community, with members of the election bar requesting that matters be considered by the program [as opposed to the traditional MUR process]."[14]

We might expect a number of different empirical patterns in the handling of MUR since these changes went into effect. I refer to these potential changes as the "**structural change hypothesis**." First, because of both the AFP and ADR programs, we should expect to see more conciliation agreements and higher assessed penalties in MUR since 2000. This is because the remaining enforcement cases are more consequential and substantive. Second, both programs should also lead to a decrease in the number of dismissed cases and a reduction in the total time spent on processed MUR. Both trends point to an MUR process that is more efficient. Third, because of increased turnover

[12] The penalty is determined by a number of factors, including the number of previous late filings and the level of activity on the report.

[13] According to Smith and Hoersting (2002): "The program exempts certain cases from consideration under ADR, most notably matters also subject to criminal investigations; allegations or prima facie evidence of knowing and willful violations; violations of the Presidential Fund Acts; matters covered under a concurrent MUR within the General Counsel's Office; repeat offenders; respondents who fail to respond to Commission inquiries, and certain types of complex legal cases" (p. 4).

[14] It should be noted that the changes described above come after another major change prior to the time frame under consideration here. In 1993 the FEC initiated an enforcement prioritization program that allowed its Office of General Counsel to preview all enforcement cases, giving the Commission the ability to weed out more effectively complaints that appeared to have no merit (Mann 2005, pp. 236–237).

in commissioners, and because the AFP and ADR programs weed out minor enforcement matters, we should see more contentious votes over time. (This is because the remaining, more substantial, cases might induce principled conflict over whether a violation was actually committed.)

Finally, with any agency-induced shift in procedure comes the possibility of "bureaucratic drift," in which agency behavior diverges from the wishes of Congress (Epstein and O'Halloran 1994). With the discretion granted to the FEC in implementing the ADR and AFP, it is conceivable that an incumbent or party advantage has declined in recent years. Because of FEC term limits, however, any noted drift is likely to be minor; Congress would put much effort into appointing commissioners who follow Congressional wishes. This is in contrast to long-serving commissioners who might more gradually "drift" from their original mandate. As such, the final expectation of the structural change hypothesis is that altered behavior has not adversely affected any respondent bias.[15]

DATA

The data for this article come from the FEC's online Enforcement Query System.[16] The data were coded between June and July of 2006, and they include all Matters Under Review (MUR) listed on the web page at the time. This represents 747 completed enforcement cases. The vast majority of enforcement cases involved alleged infractions in the elections of 1996–2004, but a few cases involved lingering issues from older elections.[17]

The data were coded on a number of important variables—including the names and identities of the MUR complainants and respondents, the subject of the complaint, final penalties and dispositions on all respondents, and all of the Commission votes relative to the case. The data allow for a number of different structures. For example, in one structure I disaggregated the MUR to the level of individual respondents. Some enforcement cases involve only one respondent, while a handful involves over 100. The median number of respondents per MUR is four.

Table 1 shows the distribution of the data disaggregated to the level of the respondent; there are over 5,500 implicated in the 747 MUR. As we can see, over 55 percent of these respondents were non-candidate individuals (i.e., treasurers of campaigns and parties, CEOs, union leaders, and regular citizens). 18 percent of the respondents were campaigns, while just under 6 percent were Democratic or Republican Party committees (local, state, or national). 9.5 percent were corporations.

The pattern demonstrates that the FEC is aggressive at holding responsible the *individual* who committed the violation. For example, in MUR 5044, the FEC inadvertently discovered a reporting violation by The Loose Group, a PAC registered with the Commission. The FEC pursued a conciliation agreement with the group and its treasurer, Frank Stevenson, who was considered responsible for physically making the report to the Commission. Both Stevenson and the group agreed to pay a $2,100 fine. In MUR 5647, the 2004 congressional campaign committee of Virginia Foxx (at the time a candidate for an open seat in North Carolina, one she would win that year) agreed to pay a fine of $17,000 for reporting violations concerning media expenditures. Notably, her campaign treasurer (Carolyn Aldridge) also was assessed the fine.

The distributions in Table 1 are important. The FEC does not neglect individuals in enforcement proceedings while pursuing organizations. This is at least modest evidence for the claims of some that one weakness in the FEC enforcement process is its "overdeterrence," or its tendency to aggressively enforce the law against "small fish" or for minor violations.

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[15] There is one alternative to this characterization of term limit effects. In the pre-term limit phase, commissioners may have attended to an incumbent and party bias to guarantee re-appointment. Once this incentive is no longer present, term limited commissioners might conceivably be free to go after any and all election law violators. If this alternative is true, we should expect some evidence of bureaucratic drift away from any respondent bias.

[16] The System can be accessed at <http://www.fec.gov/em/mur.shtml>.

[17] The FEC is in the process of posting information on all completed MUR, but the data here consist of all uploaded cases as of summer 2006.

Table 1. Profile of Respondents

Respondent	*Frequency*	*Percent*
Individuals (non-candidates)	3,063	55.62
Campaigns or Candidates	1,005	18.24
Incumbents	312	5.66
Challengers	645	11.71
Democratic or Republican party committees	321	5.83
National committees	115	2.10
State committees	115	2.10
Local committees	91	1.65
All other groups (i.e., advocacy groups, third parties)	594	10.7
Corporations	524	9.5
Total	5,507	100

Table 2 shows the distribution of complainants. I split these numbers in two ways—complainants as a percentage of the over 700 MUR, and as a percentage of the over 5,500 respondents. Individuals who file a complaint account for 32 percent of all MUR and 25 percent of all respondents.[18] The discrepancy in these numbers demonstrates that "lone wolf" complainants tend to initiate enforcement matters in cases involving a disproportionately lower number of respondents than other complainants.

Campaigns account for only 10 percent of all MUR (and 11.5 percent of all respondents) while Democratic or Republican committees account for nearly 20 percent (and 28 percent

[18] I define individuals here as those without any overt connection to an organization, campaign, or party. For example, in MUR 4895, George Anderson of Rome, Georgia filed a complaint against Congressman Bob Barr, alleging expenditure and reporting violations. Mr. Anderson had no evident affiliation with a candidate or campaign.

Table 2. Profile of Complainants

	With MUR as the unit of analysis		*With respondent as the unit of analysis*	
Complainant	*Frequency*	*Percent*	*Frequency*	*Percent*
Individuals (non-candidates)*	229	32.11	1,393	25.27
Campaigns or Candidates	70	9.82	635	11.52
Incumbents	15	2.10	154	2.79
Challengers	55	7.71	481	8.73
Democratic or Republican party committees	136	19.07	1,560	28.30
National committees	61	8.56	880	15.97
State committees	67	9.40	629	11.41
Local committees	9	1.26	51	0.93
Corporations	10	1.40	178	3.23
Interest/advocacy groups	61	8.56	610	11.07
Third parties/other	22	3.01	97	1.76
FEC	171	23.98	958	17.38
Department of Justice	14	1.96	81	1.46
Total	713		5,512	

*Refers to individuals acting without any other complainant.

of all respondents—making them disproportionately more likely to initiate complaints in cases involving larger numbers of respondents). The FEC initiated in nearly 24 percent of all MUR, but the Department of Justice initiated only about 2 percent (most often referring a potential civil violation discovered in a criminal investigation).

Table 3 shows the final judgment for almost 5,300 respondents. Nearly 33 percent of all respondents had the complaint against them dismissed, while 27 percent of the respondent complaints were resolved with "no reason to believe" the law was violated. 23 percent were considered potential violations, but no further action was taken, meaning no fine was levied. Altogether, just over 83 percent of the over 5,000 respondents faced no financial penalty. This might strike many as too large a number, under the assumption that enforcement matters *should* produce fines in a greater number of cases. In contrast, 16 percent of respondents voluntarily entered a conciliation agreement with the FEC and agreed to pay some fine. A very small percentage of cases (less than 1 percent) were pursued further into federal court.

It should be noted that in cases involving many respondents, it is quite common for the FEC to find fault with some respondents and not others. For example in MUR 5305, a case involving 25 respondents, the FEC entered into a conciliation agreement with six of them, levying a combined fine of $159,000. Four other respondents were found not to have committed any violation, while fifteen had potentially violated the law but no conciliation agreement was reached. This diversity of enforcement resolutions points in part to an FEC that astutely investigates all dimensions of a complaint. More respondents mean more investigative work, and there appears to be little evidence that the FEC is inclined to treat complaints with blanket judgments.

As for penalties, Table 4 shows the distribution of final penalties levied against 740 respondents.[19] 28 percent pay less than $5,000, but nearly 30 percent pay over $50,000. These findings stand in contrast to the MUR studied by Lochner and Cain (1999). Their analysis of 196 dispositions from a sample of MUR decided in the early 1990s showed that less than 10 percent of respondents paid a fine of more than $3,000. At the very least, these updated data show that the FEC has been more willing to impose far higher fines in recent years.

In addition, the Enforcement Query System lists the case subject for each MUR. This subject assignment is difficult to interpret, however, as the FEC tends to use fairly broad categories to encompass a large diversity of potential violations. For example, 55 percent of the 747 MUR

[19] The distribution excludes one extremely high penalty—$3.8 million levied against Federal Home Loan Mortgage Corporation in MUR 5390. The fine is so far in the tail of the distribution that I exclude it from the analysis that follows. I also make no adjustments for shared penalties in the table. In other words, if two respondents agree jointly to pay $25,000, the penalty is counted twice. When I alternatively count shared penalties only once, the distributions are affected as follows: penalties of less than $30,000 account for 72 percent of the total (as opposed to 63.5%).

TABLE 3. DISTRIBUTION OF DISPOSITIONS

Disposition	*Frequency*	*Percent*	*Cumulative*
Dismissed	1,736	32.79	32.79
No reason to believe	1,411	26.65	59.44
Reason to believe/No further action	1,253	23.67	83.11
Conciliation	854	16.13	99.24
Court case authorized	35	0.66	99.90
Other	5	0.09	99.99
Total	5,294	100	

*Total does not match Table 1 because some respondents have no listed disposition.

Table 4. Distribution of Penalties

Penalty	*# of Final Dispositions*	*Percent*	*Cumulative*
<$5,000	207	27.9	27.97
$5,000–$9,999	122	16.49	44.46
$10,000–$14,999	53	7.16	51.62
$15,000–$19,999	41	5.54	57.16
$20,000–$24,999	35	4.73	61.89
$25,000–$29,999	12	1.62	63.51
$30,000–$49,999	53	7.16	70.68
$50,000–$99,999	94	12.70	83.38
$100,000+	123	16.62	100
Total	740		

*Total does not match the 854 conciliation agreements in Table 3 because some respondents have no listed penalty.

were coded as contribution violations, in some form or another. Without reading the specifics of each case, we cannot be sure if contribution refers to an excessive in-kind gift, an actual check transfer, or an inappropriate coordination. Therefore, the case subject classifications are not nearly as fine as they could be. To compensate, I rely on three broad categories to classify MUR—contributions, expenditures, and reporting violations. 55 percent involve contributions, 49 percent are about reporting violations, and 17 percent concern expenditures (note that it is possible for a case to involve one or all three of these, which is why the percentages do not add to 100).

The structure of the data also allows for disaggregating to the level of the Commission vote. There were just under 1,500 separate FEC votes on all included MUR. The median number of votes per MUR is one, but the average is just above two. One important structural change in the FEC make-up included two prolonged periods of time with only five commissioners (from October 1995 to August 1998 and August 2005 to January 2006). This was the consequence of a delay between a vacancy and Senate approval of a replacement. Table 5 shows the distribution of vote outcomes under conditions of five and six voting commissioners.

In both cases, a unanimous full member vote is the most common (6–0 votes occur 55 percent of the time with six commissioners, and 5–0 votes happen 54 percent of the time with five commissioners). Of course, with only five voting commissioners, there can be only one dissention, abstention, or absence to avoid stalemate, and this accounts for 41 percent of the five-member votes. With six members, however, a single vote deviation is less common (24 percent), with just over 10 percent of the votes involving only four affirmative votes.

Table 5. Distribution of MUR Votes

Votes	*Five Commissioners*	*Six Commissioners*
0-6	—	1 (~0%)
1-4	0 (0%)	1 (~0%)
1-5	0 (0%)	8 (0.5%)
2-3	0 (0%)	6 (0.4%)
2-4	—	14 (1%)
3-1	5 (3.6%)	0 (0%)
3-2	1 (0.7%)	6 (0.4%)
3-3	—	32 (2.4%)
4-0	32 (23%)	58 (4.3%)
4-1	25 (18%)	36 (2.7%)
4-2	—	44 (3.3%)
5-0	75 (54%)	318 (23.6%)
5-1	—	75 (5.6%)
6-0	—	739 (55%)
Total	138	1,342

Of course, the larger story of Table 5 is the infrequency of 3–3 ties or any stalemate (3–2 or 3–1 votes, for example).

Deadlocked votes are worth some brief discussion, however. One might argue that deadlocked votes, while rare, involve highly controversial and political enforcement cases. To some extent, this is true. Of the 38 enforcement cases involving at least one failed vote, 10 involved a complaint initiated by Democratic or Republican party committees, and 15 involved respondents who were party committees. 32 of the cases implicated a federal candidate in the alleged wrong-doing, and 14 of these were presidential candidates. Respondents in deadlocked cases were also less likely to pay fines. 16 percent of respondents in cases with no deadlocked vote ended up entering a conciliation agreement; only 9 percent of respondents in cases where at least one vote failed ended up paying a fine. Furthermore, of the 32 votes that split 3–3, 19 involved Democratic commissioners opposing Republican commissioners, while 13 included at least one dissent from both parties. It is beyond the scope of this article to draw deep inferences into the causes and consequences of these deadlocked votes, rare as they are, but they very likely signal to political actors the campaign finance behavior that is most susceptible to regulatory and enforcement delay or confusion.

LOCATING RESPONDENT BIAS

In this section I look for evidence of a respondent bias in MUR evaluations. To find such evidence, I ran two multivariate models. The first is a Heckman selection model that predicts simultaneously both the probability that a respondent enters into a conciliation agreement and conditional on such an agreement, the final penalty levied by the FEC. The unit of analysis is the respondent (see Table 1). In the selection equation, then, the dependent variable is coded as 0 for all respondents where the FEC dismissed the charge, investigated but found no reason to believe a violation took place, or found reason but chose not to pursue a penalty. The variable is coded 1 if the FEC pursued a conciliation agreement and succeeded in convincing the respondent to pay a fine. (Respondents whose cases were authorized for a civil suit, or who were handled in some other fashion—see Table 3—are not included in this analysis.)

The second model is a binomial regression in which the unit of analysis is each vote and the dependent variable is the number of yes votes out of six commissioners voting.[20] With this model, the initial challenge is correctly classifying vote outcomes. As Table 5 shows, five affirmative votes might either imply one dissention, one abstention, or one absence. Similarly, four affirmative votes might imply two of those possibilities or some combination of them. Should I treat a 4–2 vote differently from a 4–1 vote with one absence or a 4–1 vote with one abstention? In the end, because there is so little variation within these categories I can effectively treat the number of affirmative votes as the same (regardless of the reasons for two, three, four, or five yes votes). This also makes some sense theoretically. We do not know why a commissioner chooses to abstain from a particular vote, or what the difference in motivation is for a commissioner to dissent or simply not show up. Furthermore, because the final number of yes votes is what determines the outcome (and commissioners know this in advance), the more important question is what drives yes votes up or down.

In both models I control for a number of variables that might predict values on the dependent variables. For example, I specify each model with seven complainant binary variables; specifically, I consider whether the complainant was an incumbent candidate, challenging candidate, national or state party committee, the FEC, an advocacy group, or an individual. This variable is measured at the level of the MUR, so they take on a value of 1 if a respondent was implicated in an MUR initiated by any of the above. Second, I include six respondent binary variables; specifically, I consider whether the respondent was an incumbent or challenger, a national or state party

[20] I drop all votes where there were only five sitting commissioners (as shown in Table 5). I discuss the results of a 5-commission vote model in the text below.

committee, a corporation, or an individual. See again the distributions in Tables 1 and 2; by including these variables, the base category for each is all other respondents and complainants.

If incumbent and party *complainants* are favored, we should expect to see a stronger coefficient in both stages of the Penalty model—as their complaints are taken more seriously. If incumbent and party *respondents* are favored, we should see significant negative coefficients in both stages—as their cases are resolved more leniently.

I also include three variables for the case subject of each MUR. In particular, I specify the models with three binary variables—was the respondent implicated in a case involving a potential contribution violation, a reporting problem, or excessive or potentially illegal campaign expenditures? These variables are not mutually distinct, as some respondents are alleged to have violated two or all of these categories.

Finally, I account for the total number of respondents implicated in each MUR (to account for complaints where a respondent is grouped with others), the year of the initial vote on the MUR (or the year of the vote in the Vote model), the total number of votes taken on the MUR (only in the Penalty model), whether the final penalty was shared across respondents (only the second stage of the Penalty model), and whether the vote outcome was the first or last vote (only the Vote model).

The results of the multivariate models are reported in Tables 6 and 8. Consider first the results in Table 6. Two results in particular point to possible "overdeterrence" issues—an outcome not specifically predicted in my hypotheses, but a common charge leveled at the Commission (Lochner 2003). Salisbury (2002),

Table 6. Predicting Conciliation Agreements and Penalties

	Probability (Conciliation)	*Penalty*
Year of initial vote	0.012 (0.024)	8,630.30 (2,755.94)**
Penalty shared		92,341.98 (19,914.76)**
Total respondents	−0.012 (0.005)*	4,009.72 (772.21)**
Number of votes	0.053 (0.009)**	−3,809.68 (914.56)**
	Complainant type	
Incumbent	0.005 (0.332)	−38,464.59 (33,052.17)
Challenger	−0.746 (0.265)**	−35,119.31 (32,217.97)
National Party	−1.051 (0.272)**	19,057.82 (37,288.41)
State Party	−0.633 (0.216)**	1,351.22 (33,837.41)
FEC/DOJ	0.657 (0.209)**	12,240.22 (28,557.15)
Interest/advocacy group	−0.514 (0.269)+	−143,812.50 (49,430.55)**
Individual	−0.689 (0.237)**	−10,026.73 (31,208.65)
	Respondent type	
Incumbent	0.035 (0.151)	−21,970.85 (14,687.38)
Challenger	0.439 (0.109)**	−31,323.83 (12,825.90)*
National Party	−0.166 (0.237)	96,215.71 (33,225.58)**
State Party	0.778 (0.142)**	−13,149.55 (16,408.94)
Corporation	0.227 (0.202)	56,646.83 (26,467.11)*
Individual	0.136 (0.107)	−14,853.59 (10,561.90)
	Case Subject	
Contribution	−0.224 (0.107)*	4,409.60 (12,906.50)
Expenditure	−0.511 (0.140)**	−11,805.07 (17,136.59)
Reporting	0.001 (0.110)	−23,437.46 (14,172.59)+
Constant	−23.676 (48.146)	−17,300,000 (5,513,210)
N	4958	718

+ p<.10 *p<.05 **p<.01

Entries are coefficients and (standard errors) from both stages of a Heckman selection model. Respondents are only included in the right column estimation if they entered a conciliation agreement.

for example, notes that "the historical reputation of the Commission [is] as a 'nit picker'" (p. 131). The results here show that as the agency expends more time on a case (measured by proxy as the number of votes on the MUR), respondents are more likely to enter a conciliation agreement, but they ultimately pay a lower fine than in cases with fewer Commission votes. Secondly, MUR involving reporting requirements are more likely than cases involving contributions or expenditures to result in a conciliation agreement, but such cases result in lower fines.

Both patterns suggest a skew of FEC resources; penalties are *lower* for the types of cases (reporting requirements) *most* likely to reach conciliation, and for enforcement matters commanding a good deal of Commission effort. Clearly, many in the reform community (as well as inexperienced candidates and PACs who fear making minor mistakes) would wish for an opposite pattern—one in which the Commission spends most of its time on cases that result in higher fines and on pressing matters that most threaten the integrity of the campaign finance system.

How do the results conform to the respondent bias hypothesis? This is seen a bit more clearly in Table 7, in which I show predicted effects from the Penalty model under various complainant-respondent match-ups. In general, the results point to possible respondent bias. First, in terms of entering conciliation agreements, both incumbents and national party committees fare far better as respondents than challengers, state parties, corporations, or individuals. Across any complainant type, incumbent and national party respondents have the lowest probability of entering a conciliation agreement. For example, when advocacy groups file complaints against challengers and corporations, they have a respective 0.26 and 0.20 chance of securing a conciliation agreement. Those probabilities for complaints against incumbents and national parties are 0.15 and 0.11.

Still more, incumbents as complainants have a far higher probability of securing a conciliation agreement. Incumbents tend to go after challengers, corporations, and individuals (and almost never accuse other incumbents or party committees), and they succeed anywhere from 1 in 3 complaints to nearly half the time, depending on the respondent.

TABLE 7. PREDICTED PROBABILITY OF A CONCILIATION AGREEMENT AND PREDICTED PENALTY

	Respondents					
Complainants	*Incumbents*	*Challengers*	*National parties*	*State parties*	*Corporations*	*Individuals*
Incumbents		0.45 $66,951			0.37 $154,922	0.34 $83,421
Challengers	0.10 $79,649	0.19 $70,297	0.07 $197,836		0.14 $158,267	0.12 $86,767
National parties	0.06 $133,827	0.12 $124,474	0.04 $252,013	0.20 $142,648	0.08 $212,444	0.07 $140,944
State parties	0.12 $116,120	0.22 $106,767	0.09 $234,307	0.34 $124,941	0.17 $194,738	0.14 $123,237
FEC/DOJ	0.55 $127,009	0.70 $117,656	0.47 $245,196	0.81 $135,830	0.63 $205,627	0.59 $134,126
Individuals	0.11 $104,742	0.21 $95,389	0.08 $222,929	0.32 $113,563	0.15 $183,360	0.13 $111,859
Advocacy Groups	0.15 −$29,043	0.26 −$38,396	0.11 $89,143		0.20 $49,574	0.17 −$21,925

*Blank entries are for instances where there are less than 10 cases of such pairings in the data

**Penalties are estimated from results in Table 6 for a conciliation agreement where the final fine is shared among respondents.

Compare also the difference between incumbents and challengers. Incumbents have a 0.45 probability of forcing a conciliation agreement against challengers. But challengers have only a 0.10 probability of forcing a conciliation agreement against incumbent respondents. When incumbents accuse corporations of a violation, they have a 0.37 chance of forcing a penalty, but challengers have only a 0.14 chance in the same situation.[21]

Both sets of results do suggest a Commission inclined to favor incumbents and national parties. This is potentially damaging evidence that the Commission is not achieving its mission of non-biased enforcement. Some other patterns, however, belie conclusive evidence of bias. For example, when national parties force an investigation they are significantly less likely to see the complaint reach the penalty phase. Across any respondent type, in fact, the predicted probability of a conciliation agreement is lowest when national party committees are complainants. Additionally, national party committees pay some of the largest fines. (Corporations pay the next largest fines.) As for incumbents who enter conciliation agreements, they pay roughly the same fines as challengers.[22]

All told, the evidence is only moderately suggestive of a respondent bias. In other words, the success of incumbents and national parties at more strongly resisting conciliation agreements (and incumbents' success at forcing penalties when they initiate) could point to an FEC that favors them. It could also indicate, however, that the incumbents and national parties are simply more efficient campaigners and less prone to making glaring mistakes. Consider again the evidence from Tables 1 and 2. Together, incumbents and national party committees represent only about 7.5 percent of all respondents. Challengers and state/local parties account for about 14 percent of all respondents. Perhaps the more experienced campaigners have less to fear from the FEC not because of a regulatory bias, but because of their prior expertise as campaigners.[23]

On the other hand, however, the "overdeterrence" evidence offered above could point to a less overt respondent bias. Because of the *ex post* oversight of Congress, one that pushes the FEC to achieve more conciliation agreements, it's possible that the agency has competently responded by going after weaker crimes more likely committed by more inexperienced candidates and political actors.

We can also assess potential respondent bias by examining how the FEC votes on certain enforcement matters. The hypothesis of respondent bias in this realm expects MUR involving incumbents and national parties to induce consensus, as Commissioners jointly work to help these beneficiaries avoid penalties or conciliation agreements. The results of the binomial regression model are displayed in Table 8. The evidence is completely *unsupportive* of the expectation. In fact, votes involving incumbents and national party committees are more contentious than votes involving challengers, state parties, corporations, or individuals.

Furthermore, we see some evidence of a Commission that operates with a good degree of consensus on other matters. For example, if

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[21] It should be noted that these incumbent/challenger differences contrast with findings presented by Lochner et al. (2008), who find no distinctions among candidates as to the probability of paying a fine. They have only 287 candidates in their model, however, because they exclude MUR between July 2000 and December 2001. My model includes 931 candidates between 1996 and 2006.

[22] These results also help us sort out the ability of the FEC to respond to what Ginsberg and Shefter (1990) call the "RIP" strategy. This is where partisans in contemporary politics tend to pursue a tactic of "revelation," "investigation," and "prosecution" to hurt political opponents. The enforcement procedure at the FEC is ideal for such a tactic. Imagine a candidate launching a complaint against his opponent so as to secure publicity; the slow turnaround time at the Commission insulates the complainant from embarrassment should the matter be dismissed. All else equal, then, with press coverage as the goal, politically-motivated MUR should have the least merit. If the FEC is more independent in its response (meaning it resists being a party to such tactics), these politically-motivated cases should be less likely to reach the conciliation phase. This is true for national parties especially. Furthermore, because national party committees pay such large fines and FEC-initiated MUR are the most successful, we might interpret the evidence as suggestive of a competent FEC, not necessarily one compliant with the RIP tactic.

[23] Some might argue that the bias is located earlier in the process, at the enforcement priority stage (when the OGC weeds out trivial cases). This would put the mechanism of bias, however, at the stage in which the Commission is generally viewed as most aggressive and professional.

Table 8. Predicting Commission Votes

	Number of Yes Votes
Year of vote	−0.056 (0.015)**
Total respondents	−0.002 (0.002)
First vote on MUR	0.058 (0.146)
Last vote	0.810 (0.109)**
Most severe action	
Dismissal	−0.339 (0.156)*
No reason to believe	−0.316 (0.155)*
Reason to believe/no action	−0.660 (0.108)**
Complainant type	
FEC/DOJ	−0.287 (0.186)
Incumbent	−0.426 (0.264)
Challenger	−0.279 (0.221)
National Party	−0.386 (0.200)+
State Party	0.068 (0.213)
Interest/advocacy group	−0.151 (0.205)
Individual	−0.204 (0.188)
Respondent type	
Incumbent	−0.437 (0.126)**
Challenger	−0.248 (0.105)*
National Party	−0.714 (0.103)**
State Party	−0.026 (0.117)
Corporation	0.120 (0.095)
Individual	0.101 (0.086)
Case subject	
Contribution	−0.188 (0.091)*
Expenditure	0.173 (0.110)
Report	0.128 (0.085)
Constant	113.91 (30.77)
N	1297

+$p<.10$ *$p<.05$ **$p<.01$

Entries are coefficients and (standard errors) from a generalized linear model with a binomial link function. Dependent variable is the number of commissioner "yes" votes.

the vote is the final one on the MUR (that is, on the vote to close the case), the number of yes votes goes up. And if the vote is on a case yielding a conciliation agreement (the base category in the "most severe action" subsection of independent variables), the number of yes votes goes up. This indicates that the Commission closes cases and levies fines with little public conflict. (It should be noted that because conflict behind closed doors is unobserved, it is certainly possible that these consensus votes are the consequence of considerable compromise and debate prior to the vote. Even if such situations are common, however, it is notable that the Commission can resolve them with unanimity in so many instances.)

On the other hand, the FEC is most overtly contentious in cases initiated by national parties, in cases involving incumbents and national parties as respondents, and when the final action is to find reason to believe a violation occurred but to take no action. Consider the predicted yes votes in Figure 1. When the FEC initiates a MUR against a corporate respondent and secures a conciliation agreement, the average number of yes votes on the case is over 5.5—near consensus. When an incumbent pushes a case involving a challenger, however, and the case is ultimately dismissed, we can expect about one dissention or abstention. This is similarly true for a challenger complaint filed against an incumbent. In the final case, when a national party files a complaint against the other party, and the FEC chooses not to pursue a conciliation agreement but still recognizes a potential violation, the average vote is only 4.4.[24]

We should derive two important inferences from these results. First, even in the most political of enforcement matters, the FEC is almost never handcuffed by its bipartisan structure. More to the point, in almost no cases is the predicted number of votes below 4 (the necessary majority to take action in any enforcement matter). Second, the evidence is a refutation of the respondent bias expectation. Cases involving incumbents and national parties do not induce consensus, but conflict.

We can assess this from a different perspective by looking for a partisan relationship among commission "no" votes. In other words, in contentious cases involving candidates or national parties, do Democratic and Republican commissioners support respondents and complainants of their own party? Of the 1,342 votes in the data set involving all 6 commissioners (see again Table 5), there are 254 votes with some level of Republican dissent but no Democratic objections; 222 votes where a Democratic

[24] I re-ran the Vote model in Table 7 for the two time periods when the Commission had only five votes. Because this involves only about 140 votes, I do not report the results in a table. All told, the results are only weakly suggestive. All of the effects from Table 8 drop out. It thus appears that Commission votes during an imbalance period are more idiosyncratic.

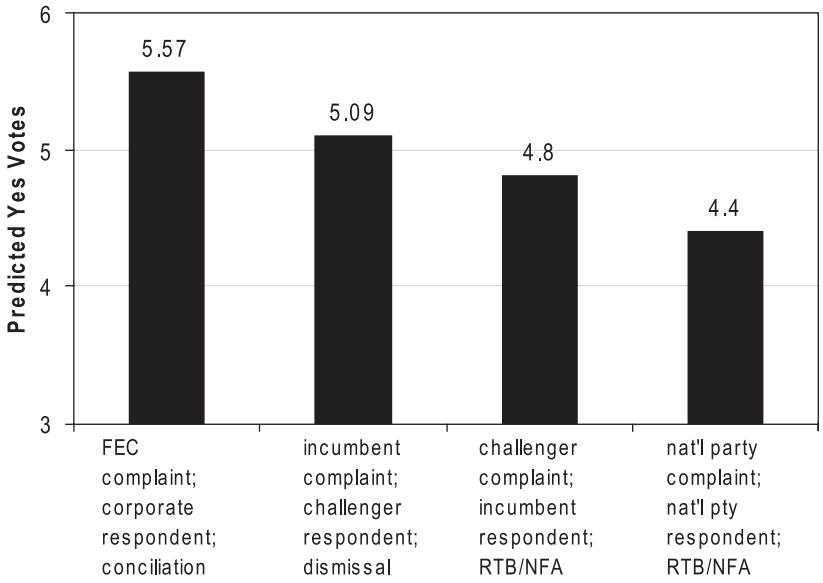

FIG. 1. Predicted commissioner votes. RTB/NFA means the final action on the case was a "reason to believe" a violation occurred, but "no further action" was taken to pursue conciliation agreement. Estimates are from the results in Table 8.

commissioner voted "no" but all GOP commissioners voted affirmatively; and 121 votes where commissioners from both sides registered a dissent. (As with the previous analysis, any means of not voting "yes"—a dissention, recusal, or absence—is treated as a "no.")

I ran two models predicting the presence of a dissenting Republican or Democratic vote. The model specification is identical to the one shown in Table 8, but I also added dummy variables for Democratic and Republican complainants and respondents.[25] Table 9 shows predicted probabilities in four instances, depending on the party of the complainant or respondent and the presence or absence of a conciliation agreement (holding all other control variables constant).

The results demonstrate a clear partisan pattern. For example, regardless of the presence of

[25] I also ran the models as a binomial regression, as in Table 8; the substantive results are the same. For ease of discussion, and because the vast majority of cases involve only one Democratic or Republican dissention, I prefer the dichotomous dependent variable. The partisan independent variables are for respondents or complainants who are either federal candidates or national party committees.

TABLE 9. PREDICTED PARTISAN DISSENT AMONG COMMISSIONERS

	Prob. (Democratic dissention)		*Prob. (Republican dissention)*	
	No fine in MUR	*Fine levied*	*No fine*	*Fine*
Republican complaint/ Democratic respondent	0.38	0.39	0.28	0.22
Democratic complaint/ Republican respondent	0.22	0.18	0.15	0.20

Estimates are from two separate models predicting the probability that a Republican or Democratic commissioner fails to vote "yes." Full model results are not shown, but are available from the author on request. See text for more discussion of the model specification.

a fine, Democratic commissioners are far more likely to object in enforcement cases initiated by a Republican (at about twice the rate of when Democrats file the complaint). More still, the likelihood of a Democratic dissention is greatest when a Republican complaint elicits a fine against a Democratic respondent, and least when a Democratic complaint secures a fine from a Republican respondent. For Republican commissioners, the partisan affiliation of the respondent and complainant matter little when a fine is involved (see the right column of results), but the differences are stark when no fine is levied. On that score, Republican commissioners dissent least often when Democratic complaints against Republicans result in no fine, but at twice the rate in the opposite case.

All told, the evidence in this section is mixed when it comes to the expectations of respondent bias. While incumbents and national parties see some advantage (over other respondents) in terms of their success as respondents, it does not come without some level of conflict in Commission votes. More still, that conflict is at least partly driven by the partisan disposition of the commissioners. The vote patterns specifically suggest that the FEC fails as an agency designed, as critics cynically suggest, to do incumbents and national parties the least harm. I think it safe to conclude as a consequence that experienced political actors benefit in the MUR process not from an explicit Commissioner conspiracy but from the specific advantage of knowing best the rules of the game.

ASSESSING STRUCTURAL REFORM

Is there evidence of the structural reform hypothesis? Recall, this hypothesis expects conciliation agreements and realized penalties to go up in recent years and dismissals to go down. It also expects more contentious votes at the FEC as the agency sees more turnover in commissioners and devotes more attention to consequential enforcement actions.

The strong effect of the "Year" measure in the second phase of the Penalty (Table 6) model is initial persuasive evidence in favor of the structural change hypothesis. The results indicate that the FEC levies significantly higher penalties in conciliation agreements brokered more recently. All else being equal, the predicted fine for a conciliation agreement in 1996 was $40,407 (for a fine shared by at least two respondents); the predicted fine for an identical agreement in 2006 was $118,080.[26] There is also evidence that the FEC in recent years has spent more time on cases with at least some merit. Table 10 shows that the FEC now *dismisses* fewer cases. For example, for all MUR initiated in 1999 or before, the FEC dismissed nearly 50 percent. This number steadily declined to only about 12 percent of all MUR initiated in 2004, though it increased in the following two years.

At the same time, however, the results in the first phase of the Penalty model do *not* show an increased tendency for MUR to result in conciliation. Table 10 shows the by-year breakdown, which also highlights a jump in "no reason to believe" and "reason to believe" evaluations. Lochner et al. (2008) make a similar claim about the steadiness of conciliation agreements (see their Table 5, p.227), and they care very little about judgment distributions among cases with no fines.

How do we interpret this evidence? Indeed, we might establish increased efficiency only when conciliation agreements are more frequent (indications of an FEC focused only on cases that merit a penalty) *and* when outright dismissals are less common. To that effect, the FEC has only accomplished the latter. More optimistically, of course, at least the Commission has winnowed down the number of purely frivolous cases in the MUR process. And perhaps more importantly, penalties are significantly higher—a pattern that alone might signal to political actors a more forceful Commission.

Shifting to the vote analysis, the significance of "Year" in Table 8 indicates a more contentious Commission—another implication of the structural reform hypothesis. All else being equal, the number of "yes" votes on a typical

[26] These predicted dollar figures are in real dollars, but even when adjusting for inflation, the statistical effect is still present and strong.

TABLE 10. DISTRIBUTION OF FINAL DISPOSITION BY YEAR

Year	*Dismissal*	*No reason to believe*	*Reason to believe/ No fine*	*Conciliation*	*Total*
pre-1999/1999	675 48.91%	233 16.88%	230 16.67%	242 17.54%	1380
2000	351 41.94%	164 19.59%	223 26.64%	99 11.83%	837
2001	222 27.96%	277 34.89%	200 25.19%	95 11.96%	794
2002	114 23.60%	98 20.29%	124 25.67%	147 30.43%	483
2003	196 27.34%	298 41.56%	126 17.57%	97 13.53%	717
2004	57 11.70%	136 27.93%	206 42.30%	88 18.07%	487
2005/2006	107 26.55%	202 50.12%	47 11.66%	47 11.66%	403
Total	1,722	1,408	1,156	815	5,101

Percents are row percentages for each year.

MUR vote declined by just over 0.5 votes between 1996 and 2006. This is unlikely to make stalemates more common, but consider this increased conflict in the context of the predicted votes from Figure 1. On FEC enforcement matters involving party complaints and party respondents (the most contentious cases), increased conflict in Commission voting *could* more often result in stalemate (or at least come close). (It should also be noted that there is anecdotal evidence that the FEC has become more partisan since the appointment of new commissioners in 2008. A number of high profile Advisory Opinions and MUR stalemated in late 2008 and early 2009. Rick Hasen has pointed this out on his blog, electionlawblog.org).

Finally, the structural change hypothesis expects little evidence of "bureaucratic drift." More specifically, as the FEC is given more time and energy to investigate higher priority enforcement matters, it is possible that the agency would grow more aggressive in its enforcement (turning more watchful eyes at incumbents and national parties). But as commissioners now are selected for only one term, increased turnover should allow Congress to select commissioners unlikely to be overly aggressive. I looked for any temporal change in the Penalty phase model by splitting the sample into pre and post ADR/AFP time frames. In both the pre and post phases, the effects for incumbents and national parties are unchanged. Even with certain structural changes in the MUR process, then, both are still disproportionately more successful.

It should be noted that we can only make a cautious inference about how structural reforms relate to the total time spent on each MUR. A scatter plot (not shown here) of the total number of days between the first and last votes on an MUR on the date of the initial vote shows a relative decline in the total time devoted.[27] This might imply that the FEC's structural reforms have sped up the enforcement process. However, it is also possible that a significant number of enforcement matters are ongoing, and it is highly likely that these ongo-

[27] A lowess fit of the data shows that earlier cases (initiated before 2000) often took over 500 days on average for completion. In later years that number was essentially cut in half.

ing MUR are disproportionately those initiated in the last few years. Excluding them (which is a necessary function of the MUR process—only concluded cases are made public) limits what we can definitively know about whether the current system is more time efficient.

Unfortunately, though, time efficiency is an important indicator of an enforcement process that works. Lochner (2003) writes, "Theoretically, a large fine might provide a strong measure of deterrence if it were levied shortly before an election in a way that significantly depleted a candidate's war chest or prevented a PAC from making a timely contribution to a favored candidate. In reality, however, the time lag between detection of a possible infraction and the punishment imposed—to say nothing of the time lag between commission of an infraction and its detection—is quite large" (p. 5). Determining the extent to which structural reforms can help with this problem is an important focus of future research.

DISCUSSION

The evidence in this article suggests an FEC more functional than many often claim. It is true that incumbents and national parties often have little to fear with the MUR process. This alone may be enough to justify continued opposition to the FEC. But I contend that the results are by no means an unequivocal affirmation of large-scale bias. Instead, the agency follows through most consistently on its own discoveries of wrong-doing (see the predicted effects in Table 7); it secures large fines from corporations and national parties, and far greater fines in the wake of structural reforms; and it almost never deadlocks. It seems likely that incumbents and national parties are simply better and more efficient campaigners, less prone to making mistakes—and that this is the source of the empirical patterns noted in this article.

A number of proposals have been considered to reform or overhaul the FEC. These include:

- Reducing the FEC from six members to one powerful administrator
- Changing the current structure of a rotating chair to a more permanent, more powerful chair
- Using administrative law judges rather than partisan commissioners

All of these plans are premised on the need for deep change in the way election laws are enforced, and they should all be taken seriously. But with deep changes come also a requirement to handle sticky normative challenges. A stronger FEC, for example, runs the risk of punishing innocent campaigns and candidates (a risk that goes up if the FEC is compelled to resolve election-related matters before elections). A single administrator would also have significant powers in and over American elections. A compelling argument can be made that any regulatory control in the area of elections should be subject to serious *restrictions* of power—lest the regulatory agency overreach with its enforcement. After all, elections are the mechanism through which power is asserted in democracy. If a non-elected bureaucrat wields significant powers in this area (one meant to scare candidates into compliance), it might create more problems than it solves. Of course, a weaker FEC runs the risk of allowing too much behavior that might violate existing election statutes—and this must be guarded against as well.

Not to be forgotten in this debate is the role of sincere political differences over the scope of campaign finance laws. In fact, a significant number of "infractions" are only such in the eyes of some. For example, it is not clear that 527s should register with the Commission as PACs; or that "issue ads" are really election-related. What is an issue ad, after all? Even the Supreme Court has recently recognized the ambiguity in this debate, along with the challenge of establishing regulations that respect First Amendment rights.[28] There are real questions also about appropriate limitations on Internet

[28] In *FEC* v. *Wisconsin Right to Life* 551 U.S. 449 (2007), the Supreme Court ruled that to protect First Amendment rights of free speech and association, some ads aired close to Election Day should not be classified as "electioneering" if a reasonable person can interpret the message as something other than an unambiguous appeal to vote for or against a candidate for office.

campaigning and blogging; and in many other areas.

Some will propose significant reforms, preferring to stem the exploitation of loopholes. That is a legitimate stand to take. Some will see more limited need for such aggressiveness, preferring less bureaucratic oversight in the realm of elections. This is also legitimate. But the fact that those at one end of the spectrum of a principled debate are dissatisfied is hardly indicative of a weak Commission.

The data here do not resolve these questions, but they highlight that some regulatory changes can prove fruitful. In the last 20 years, the FEC has gotten better at levying higher fines and expending fewer resources on frivolous cases. Keep in mind this comment from election lawyer Bob Bauer:

> The first question in judging the effectiveness of enforcement is what we wish to have enforced. On the basics, the law has been plentifully enforced. Contributions limits are enforced; disclosure requirements are enforced; most, for that matter, of the Code of Federal Regulations implementing the federal law is enforced. Not always within the same election cycle as the occurrence of the violation, and not always with the degree of mercilessness in the setting of fines that critics call for: but, still, enforced.[29]

The best possible plan to reform the FEC may not be a complete re-working of the Commission (or its elimination), but a minor re-tooling of it. On that score, the focus should be a continued trend towards efficiency at the Commission. The simplest reform is one that has been proposed for years: return to the FEC its power to conduct random audits. With it, I propose doubling the Commission's budget to hire more staff. This would also help the Commission increase its turn-around time in processing enforcement cases. I agree with many that quickening the enforcement process should be a priority.

Such "tweaking" is of a piece with others' recommendations. For example, Todd Lochner (2003) proposes a "scarlet letter" approach to FEC infractions, which would allow the FEC to use local media to advertise election law violators. He recommends little else by way of drastic restructuring. In fact, in his discussion of "underdeterrence" at the FEC—this being the inability to stem or punish serious election law violations—Lochner argues that any shift toward more aggressive enforcement is likely to compel political actors to "strategically shift" to campaign practices *outside* the scope of election laws, further weakening the very foundation of regulated elections.[30]

The results here are clear. Incumbents are infrequently accused of wrongdoing (see again the distribution of respondents in Table 1), and unlikely to face conciliation agreements (Table 7). But as noted, this likely has more to do with the professionalism of incumbents than it does the bias of commissioners. This should also explain the lack of "bureaucratic drift" in recent years toward more penalties inflicted on incumbents and national party committees.

In short, the random audit power is unlikely to put incumbents and national parties at serious risk, but it should give all political committees some additional pause in seeking to skirt the law. Lochner et al. (2008, p. 231) wonder, though, if random audit power would have any effect on the frequency of outside-initiated complaints, which they see as a significant drag on efficient FEC enforcement. This is a realistic concern. So long as the FEC is forced to expend enforcement resources on frivolous or politically-motivated complaints, efficiency will be reduced. Nonetheless, granting the authority to randomly audit regulated committees seems far more feasible than many large scale plans that would likely be stalled in Congress. Keep in mind: a larger budget would also help the Commission prioritize and process en-

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[29] Accessed at <http://www.moresoftmoneyhardlaw.com/>. August 21, 2008.

[30] There are other small reforms that might bear fruit as well. For example, Congress might mandate that any agency commissioner have a background in enforcement or administrative oversight (see Democracy 21's report on the FEC, p. 61). I am more persuaded by such small reforms than I am by grand projects that seem likely to create a whole host of new problems once implemented.

forcement cases more quickly—and weed out politically motivated ones.

In the end, campaign finance reformers have two tasks when seeking to reformulate regulatory politics. One must balance the political feasibility of any solution with a reform that creates as few new problems as possible. The FEC may indeed be the devil we know, but as it seeks to improve (and shows realized signs of doing so) it may still end up being better than any devil we don't.

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