

## ESSAY

# Supporting the Agency “Designed to Do Nothing”: Creating a Regulatory Safety Net for the FEC

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### ABSTRACT

*To say the Federal Election Commission (“FEC”) is in crisis would be a remarkable understatement. The agency created to limit corruption and enforce campaign finance compliance lacks a quorum and is unable to investigate or prosecute campaign finance violations. Amidst what is likely to be the most expensive election in history, and one subject to foreign interference, the FEC’s challenges represent a near-existential crisis for our democracy.*

*This Essay posits that the FEC is suffering from regulatory failure, evidenced by three things: (1) its inability to protect our elections through enforcement and regulation; (2) its failure to adapt to technology and regulate political advertisements on the internet effectively; and (3) its failure to foresee and prevent Russian interference in the 2016 election. It will assess these challenges in the context of the agency’s design along three dimensions, proposed by Professors Camacho and Glicksman: (1) the centralization dimension, (2) the authority dimension, and (3) the coordination dimension.*

*Following this analysis, the Essay will propose a blueprint for reform that includes shared substantive authority to create a “regulatory safety net” and deeper coordination with other agencies. Though other actions, like simply appointing enough commissioners for a quorum, will have greater short-term impact, addressing the long-term structural deficiencies inherent in the FEC is crucial to protecting the integrity of our elections.*

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\* J.D. 2020, The George Washington University Law School. The author would like to dedicate this article to the memory of his brother-in-law Kheang Ung, who taught him the value of exploration without direction.

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## INTRODUCTION

“The Federal Election Commission is the only government agency that does exactly what Congress designed it to do: nothing.”<sup>1</sup> Though the joke is common in D.C. circles, reading it in an opinion from one of the most important regulatory courts in the land is remarkable, and slightly disturbing. As the decision noted, when establishing the Federal Election Commission (“FEC”), Congress made efforts to prevent partisan enforcement and even created a safety valve to be activated if enforcement was jammed by gridlock.<sup>2</sup> Unfortunately, these safeguards have not protected the agency’s functions from the severe partisanship of our current political climate. Over the

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

<sup>2</sup> *Id.*; see 52 U.S.C. § 30106(a)(1) (2012) (requiring that “[n]o more than 3 members of the Commission appointed under this paragraph may be affiliated with the same political party”). The law also created a citizen suit provision to allow private citizens to sue violating entities in the event the FEC declines enforcement action. *Id.* § 30109(a)(8)(C).

past decade, a partisan bloc has thwarted meaningful regulation and enforcement, and the FEC went nearly nine months without the quorum necessary to undertake enforcement actions and issue regulations, only to lose it again after holding just one meeting.<sup>3</sup>

The FEC’s recent membership challenges underscore just one part of the problem. The 2020 election is expected to hit a record high for campaign spending—more than \$3 billion for the presidential contest alone.<sup>4</sup> Additionally, threats of foreign interference and the inconsistent regulation of political advertising on social media remain complex challenges for the government to address.<sup>5</sup> The COVID-19 crisis has exacerbated these challenges. The stakes for regulating federal elections could not be higher. To ensure effective regulation of our political process, Congress must reform the Commission’s membership and agency’s design by creating overlapping authority over federal election regulation with the Federal Trade Commission (“FTC”) and Securities and Exchange Commission (“SEC”), thereby deepening coordination between these and other agencies.

This Essay considers whether the design of the FEC is equipped to fulfill the important function it is intended to serve. Part I of the essay describes the agency’s history, its structure, and its capabilities. Part II evaluates the FEC’s regulatory failure in both enforcement and rulemaking. Part III describes a framework for assessing the effectiveness of an agency’s design. Lastly, Part IV applies that framework and proposes reforms to strengthen the government’s ability to address the complex challenges facing our elections.

## I. UNDERSTANDING THE FEC

The FEC’s history highlights an intent to create an agency immune from partisanship. This Part describes the history and general

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<sup>3</sup> Daniel Lippman & Zach Montellaro, *FEC Losing Quorum Again After Caroline Hunter Resigns*, POLITICO (June 26, 2020), <https://www.politico.com/news/2020/06/26/fec-caroline-hunter-resigns-341396> [<https://perma.cc/C4E3-AFHV>].

<sup>4</sup> Sara Fischer, *2020 Candidates Are Mostly Focusing Their Advertising Spending Online*, AXIOS (Nov. 5, 2019), <https://www.axios.com/2020-presidential-campaign-advertising-online-tv-8e036c37-68cc-48e4-861e-52ab26b42b6d.html> [<https://perma.cc/DX4X-XEGR>]; *Why 2020 U.S. Presidential Race Will Be Costliest in History*, VOA NEWS (Feb. 14, 2019, 9:16 AM), <https://www.voanews.com/usa/us-politics/why-2020-us-presidential-race-will-be-costliest-history> [<https://perma.cc/MN6X-EZB3>].

<sup>5</sup> *Worldwide Threat Assessment of the U.S. Intelligence Community Before the S. Select Comm. on Intelligence*, 116th Cong. 7 (statement of Daniel R. Coats, Director of National Intelligence) (“Our adversaries and strategic competitors probably already are looking to the 2020 U.S. elections as an opportunity to advance their interests.”).

structure of the FEC, and also provides a brief overview of the matters it regulates.

### A. *The FEC's Inception*

In the wake of the Watergate scandal, Congress established the FEC in 1974 by amending the Federal Election Campaign Act of 1971 (“FECA”).<sup>6</sup> Following an investigation of the 1972 Nixon presidential campaign, the Senate Select Committee known as the Watergate Committee viewed the creation of a federal regulatory authority for campaigns as “[p]robably the most significant reform that could emerge from the Watergate scandal.”<sup>7</sup> The Committee endorsed the idea of an agency with “substantial investigatory and enforcement powers” to “insure that misconduct would be prevented in the future, [and] that investigations . . . would be vigorous and conducted with the confidence of the public.”<sup>8</sup> At inception, Congress made efforts to insulate the agency from the partisanship of the era and to protect against capricious enforcement—for example, by limiting the number of members from the same political party.<sup>9</sup>

### B. *The Structure, Capabilities, and Powers of the FEC*

The FEC is led by six commissioners and has both rulemaking and enforcement capabilities.<sup>10</sup> The Commission requires a quorum of four commissioners to operate, and a four-vote majority to proceed on any rulemaking or enforcement procedure.<sup>11</sup> Congress vested the agency with the power to investigate campaign finance violations, issue advisory opinions, conduct rulemaking in accordance with the Administrative Procedure Act, and shape relevant general policies.<sup>12</sup> Some commentators have posited that the FEC’s structure, capabili-

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6 Pub. L. No. 92-225, 86 Stat. 3 (1972).

7 S. REP. NO. 93-981, at 564 (1974).

8 *Id.* at 564–65. The Committee also proposed limits on expenditures and contributions, *id.* at 567–68, 569–71, among other reforms. *See id.* at 567–77. These recommendations eventually led to the passage of the 1974 amendments to FECA. *See* Pub. L. No. 93-443, 88 Stat. 1263 (1974).

9 R. SAM GARRETT, CONG. RESEARCH SERV., R44318, THE FEDERAL ELECTION COMMISSION: OVERVIEW AND SELECTED ISSUES FOR CONGRESS 1–5 (2015) (“Congress purposely insulated the FEC from excessive partisanship in the wake of Watergate . . .”); *see* Michael J. Malbin, *After Surviving Its First Election Year, FEC Is Wary of the Future*, NAT’L J., Mar. 26, 1977, at 469–73.

10 *Leadership and Structure*, FEC, <https://www.fec.gov/about/leadership-and-structure> [<https://perma.cc/B36S-KWE2>].

11 *Infra* Section II.A.

12 *See* 52 U.S.C. § 30107(a) (2012).

ties, and powers reflect Congress’s intent to create a weak organization—one that is symbolically powerful, but not actually powerful enough to regulate politicians.<sup>13</sup> For one, the FEC’s authority falls short of criminal enforcement, which is under the jurisdiction of the Department of Justice (“DOJ”).<sup>14</sup> Additionally, the stringent vote requirements at each stage of law enforcement create an environment where campaign violations are rarely addressed within the campaign cycle as they take place.<sup>15</sup> Congress has largely kept the FEC underfunded relative to the scope of its mandate.<sup>16</sup> Though these arguments are persuasive, Congress’s stated purpose was to create an agency that would conduct vigorous oversight over elections.

### C. *A Brief Overview of the Activities the FEC Regulates*

The FEC is tasked with regulating federal campaigns and enforcing federal campaign law—primarily FECA, but also more recently enacted campaign finance laws, like the Bipartisan Campaign Reform Act of 2002 (“BCRA”).<sup>17</sup> It ensures that limits on direct contributions—direct donations to campaigns and political committees—are enforced,<sup>18</sup> and also regulates certain independent expenditures—expenditures made by independent actors without any coordination with campaigns.<sup>19</sup> One of its major investigatory tools is its ability to audit mandatory campaign finance disclosures.<sup>20</sup> The FEC also regulates po-

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<sup>13</sup> See Note, *Eliminating the FEC: The Best Hope for Campaign Finance Regulation?*, 131 HARV. L. REV. 1421, 1427 (2018) [hereinafter *Eliminating the FEC*] (“The FEC’s powers and ability to exercise those powers also reflected, from the outset, Congress’s hesitancy to create a powerful regulator.”); see also ROBERT E. MUTCH, CAMPAIGNS, CONGRESS, AND COURTS 87–88 (1988).

<sup>14</sup> See 52 U.S.C. § 30107(a); see also MUTCH, *supra* note 13, at 88.

<sup>15</sup> See Scott E. Thomas & Jeffrey H. Bowman, *Obstacles to Effective Enforcement of the Federal Election Campaign Act*, 52 ADMIN. L. REV. 575, 584–85 (2000).

<sup>16</sup> See Dave Levinthal, *How Washington Starves Its Election Watchdog*, CTR. FOR PUB. INTEGRITY (Dec. 17, 2013), <https://publicintegrity.org/politics/how-washington-starves-its-election-watchdog> [<https://perma.cc/E5RZ-D9GZ>].

<sup>17</sup> Pub. L. No. 107-155, 116 Stat. 81 (2002).

<sup>18</sup> See, e.g., 11 C.F.R. § 110.8 (2020) (outlining “[p]residential candidate expenditure limitations”); *id.* § 110.9(a) (defining violations of limitations). See generally *Contribution Limits*, FEC, <https://www.fec.gov/help-candidates-and-committees/candidate-taking-receipts/contribution-limits> [<https://perma.cc/9XY5-SRMN>] (describing contribution limits and other regulations surrounding contributions).

<sup>19</sup> See, e.g., 11 C.F.R. §§ 109.11, 110.11, 114.10. See generally *Making Independent Expenditures*, FEC, <https://www.fec.gov/help-candidates-and-committees/making-independent-expenditures> [<https://perma.cc/9NWY-WB85>] (describing various laws and regulations regarding independent expenditures). See *infra* Section II.B for a discussion on the FEC’s failure to clearly define what constitutes coordination.

<sup>20</sup> See 11 C.F.R. § 102.9(e) (accounting for contributions and expenditures); *id.* § 104.22

litical advertisements, both as a form of spending and through regulations requiring specific disclosures in the advertisements themselves.<sup>21</sup>

Critics contend that Congress' true intent to hobble the agency is evidenced by its limited funding and complex enforcement structure. Nonetheless, the legislative history and explicit legal authority of the FEC still demonstrate an intent by Congress to create an agency immune from partisanship, and one capable of enforcing the law and regulating elections as necessary to maintain confidence in the integrity of our elections.

## II. THE FEC IS SUFFERING FROM REGULATORY FAILURE

Despite these lofty goals, the FEC is currently suffering from regulatory failure. Regulatory failure, at its simplest, arises when a government agency fails to achieve its enacted mandate.<sup>22</sup> The FEC has two broad functions, enforcement and rulemaking, and it is failing both. The following Sections describe three examples of the FEC's regulatory failure: (1) its failure to protect our elections through enforcement and regulation, (2) its failure to regulate emerging technologies, and (3) its failure to predict and prevent Russian interference in the 2016 presidential election.

### A. *The FEC Has Been Unable to Adequately Protect Our Elections Through Enforcement and Regulation*

*Citizens for Responsibility and Ethics in Washington v. American Action Network* (“CREW”),<sup>23</sup> arose from the FEC's failure to investigate potential campaign finance violations.<sup>24</sup> The plaintiffs, a watchdog group, sued the American Action Network (“AAN”) under FECA's citizen suit provision, which allows citizens to privately file suit for campaign finance violations when the FEC declines to do so.<sup>25</sup> The failure of the FEC to investigate the AAN, in “one of the clearest

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(requiring disclosure); *id.* § 9038.1 (requiring the FEC to conduct audits). *See generally Audits and Repayment*, FEC, <https://www.fec.gov/help-candidates-and-committees/understanding-public-funding-presidential-elections/audits-repayment> [<https://perma.cc/367P-SXKR>] (describing procedures regarding audits of campaigns conducted by the FEC).

<sup>21</sup> *See* 11 C.F.R. § 110.11 (requiring certain disclaimers and specifying the information that must be disclaimed). *See generally Advertising and Disclaimers*, FEC, <https://www.fec.gov/help-candidates-and-committees/making-disbursements/advertising> [<https://perma.cc/MG46-VJ44>].

<sup>22</sup> *See* Zachary J.F. Kolodin, *Standing to Challenge Regulatory Failure in the Age of Preemption*, 22 N.Y.U. ENVTL. L.J. 157, 167 (2015).

<sup>23</sup> 410 F. Supp. 3d 1 (D.D.C. 2019).

<sup>24</sup> *See id.* at 1.

<sup>25</sup> *See* 52 U.S.C. § 30109(a)(8)(C) (2012). CREW marked the first time in history that the provision had been used. Kenneth P. Doyle, *Watchdog Allowed to Sue on Donor Disclosure*

cases in front of them” is just one example of a broader failure of the FEC to enforce or regulate in any meaningful way.<sup>26</sup> It is the result of the agency’s structure as a six-member commission that requires at least four votes for any meaningful action. For the FEC to proceed in an enforcement action, at least four affirmative votes are required at no less than four stages of the action.<sup>27</sup> Accordingly, a commission designed with split partisanship, creating a high potential for deadlock, “make[s] it difficult—if not impossible—for the Commission to resolve a complaint in the same election cycle in which it is brought.”<sup>28</sup> Additionally, FEC rulemaking requires not only compliance with the Administrative Procedure Act, but also meeting the four-vote threshold.<sup>29</sup>

The four-vote threshold was meant to protect against excessive partisanship—and partisan enforcement of the law<sup>30</sup>—but the result is an agency without the ability to engage in meaningful enforcement or rulemaking. A recent report by one former FEC commissioner found that “[a] bloc of three Commissioners routinely thwarts, obstructs, and delays action on the very campaign finance laws its members were appointed to administer.”<sup>31</sup> A 2015 analysis found that this bloc voted together 98% of the time,<sup>32</sup> more than the partisan blocs on the Supreme Court.<sup>33</sup> Former Vice Chair Ravel’s report found that the num-

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*After FEC Won’t Act*, BLOOMBERG GOV’T (Oct. 1, 2019), <https://about.bgov.com/news/watch-dog-allowed-to-sue-on-donor-disclosure-after-fec-wont-act> [<https://perma.cc/FLN6-LRBG>].

26 Press Release, Citizens for the Responsibility & Ethics in Wash., CREW Brings Historic Election Transparency Lawsuit (Apr. 23, 2018), <https://www.citizensforethics.org/press-release/crew-brings-historic-election-transparency-lawsuit/> [<https://perma.cc/H2X7-LS4J>].

27 Four votes are required to proceed to open investigations at the “reason to believe” stage, the “probable cause” stage, to open settlement negotiations, and to file a lawsuit. See FEC, *GUIDEBOOK FOR COMPLAINANTS AND RESPONDENTS ON THE FEC ENFORCEMENT PROCESS* 5 (2012), [https://transition.fec.gov/em/respondent\\_guide.pdf](https://transition.fec.gov/em/respondent_guide.pdf) [<https://perma.cc/M85S-LAB9>]. The AAN complaint was dismissed in a 3–3 vote. MUR 6589R (Am. Action Network), Statement of Reasons of Commissioners Ann M. Ravel & Ellen L. Weintraub, at 2 (Dec. 5, 2016), <https://eqs.fec.gov/eqsdocsMUR/16044403699.pdf> [<https://perma.cc/G3KD-NZWH>].

28 Thomas & Bowman, *supra* note 15, at 584.

29 FEC, *Rules of Procedure of the Federal Election Commission Pursuant to 2 U.S.C. 437(c)(e)* (Dec. 20, 2007), [https://www.fec.gov/resources/cms-content/documents/directive\\_10.pdf](https://www.fec.gov/resources/cms-content/documents/directive_10.pdf) [<https://perma.cc/69C6-KLU6>].

30 See *supra* note 9.

31 OFFICE OF COMM’R ANN M. RAVEL, *FEC, DYSFUNCTION AND DEADLOCK: THE ENFORCEMENT CRISIS AT THE FEDERAL ELECTION COMMISSION REVEALS THE UNLIKELIHOOD OF DRAINING THE SWAMP* 1 (2017), [http://beta.fec.gov/resources/about-fec/commissioners/ravel/statements/ravelreport\\_feb2017.pdf](http://beta.fec.gov/resources/about-fec/commissioners/ravel/statements/ravelreport_feb2017.pdf) [<https://perma.cc/265E-3PMN>] [hereinafter Ravel Report].

32 See *id.*

33 See Ilya Shapiro, *Liberal Supreme Court Justices Vote in Lockstep, Not Just the Conservative Justices*, USA TODAY (Sept. 10, 2019), <https://www.usatoday.com/story/opinion/2019/>

ber of deadlocked votes in closed enforcement cases rose from 2.9% in 2006 to over 30% in 2016.<sup>34</sup> It also noted that while in 2006, only 4.2% of matters under review had at least one deadlocked substantive vote, by 2016 that number had risen to over 37%.<sup>35</sup> In addition to enforcement votes, the number of civil monetary penalties assessed has dramatically decreased, from more than \$5.5 million in 2006, to under \$600,000 in 2016.<sup>36</sup> Other than stymieing enforcement votes, the bloc of commissioners has changed the standard of proof in early stages of enforcement actions, and as a result, “major violators [have been] routinely let off the hook at this early stage.”<sup>37</sup> Perhaps most troubling is the agency’s utter failure to enact rules to address the spread of secret campaign spending, also known as “dark money.”<sup>38</sup> Though one could attribute these changes to genuine policy differences, or see them as evidence of the success of FEC’s compliance and disclosure efforts, the obstructing commissioners themselves have said that they are intentionally choosing not to enforce campaign laws as they were meant to be enforced.<sup>39</sup>

The crisis has affected one of the FEC’s most important—and today, more relevant<sup>40</sup>—functions: preventing the influence of foreign agents in elections through campaign spending. In 2012, the FEC declined to apply the ban on foreign contributions to election spending to a local ballot measure, declaring that local ballot initiatives do not qualify as elections within the meaning of FECA.<sup>41</sup> Following this pro-

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09/10/liberal-supreme-court-justices-vote-in-lockstep-not-the-conservative-justices-column/2028450001 [https://perma.cc/7HW8-AWSN].

<sup>34</sup> Ravel Report, *supra* note 31, at 9.

<sup>35</sup> *Id.* at 10.

<sup>36</sup> *Id.* at 2. “By comparison, this is significantly less than the nearly \$900,000 that California’s Fair Political Practices Commission, an agency for one state, assessed in 2016.” *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *See id.* at 1; *see also* Trevor Potter, *Money, Politics, and the Crippling of the FEC: A Symposium on the Federal Election Commission’s Arguable Inability to Effectively Regulate Money in American Elections*, 69 ADMIN. L. REV. 447, 462 (2017) (“And yet, despite the Supreme Court’s overwhelming support for donor disclosure, the FEC has allowed ‘dark money’ to flourish: in the years since *Citizens United*, at least \$800 million has been spent on federal elections by entities that keep the sources of their funding a secret.”). *See generally* JANE MAYER, DARK MONEY: THE HIDDEN HISTORY OF THE BILLIONAIRES BEHIND THE RISE OF THE RADICAL RIGHT (2016) (describing the history and development of “dark money” organizations).

<sup>39</sup> *See* Ravel Report, *supra* note 31, at 2 (“White House Counsel Don McGahn, a former Commissioner himself, said during his FEC tenure that he would ‘plead guilty as charged’ to ‘not enforcing the law as Congress passed it.’”); *see also id.* at 8 (“Commissioner Goodman told the *New York Times* that ‘Congress set this place up to gridlock. This agency is functioning as Congress intended. The democracy isn’t collapsing around us.’”).

<sup>40</sup> *See infra* Section II.C.

<sup>41</sup> MUR 6678 (Mindgeek USA, Inc.), Statement of Reasons of Commissioner Ellen W.



nouncement, a rule was proposed to clarify the term “election” in the context of the ban on foreign national contributions and expenditures, but the Commission deadlocked at 3–3.<sup>42</sup> This, combined with a 2011 decision of the District Court for the District of Columbia that left the door open for foreign companies and foreign nationals to make independent expenditures on general political advocacy,<sup>43</sup> could dramatically increase the presence of foreign dark money in elections.

While these failures could be attributed to ideological gridlock,<sup>44</sup> the problem is significantly worse now that the FEC lacks a quorum to even begin consideration of new rules or enforcement actions. Even where an ideological consensus may exist, for example on the need to curb foreign influence in the 2020 election, the FEC would be unable to act.

### *B. The FEC Has Failed to Effectively Adapt to Technology and Regulate Political Advertisements on the Internet*

Although the enforcement failures described above in Section II.A are grave, they are just one aspect of the FEC’s regulatory failure. Like many government agencies, the FEC has struggled to adapt to and regulate emerging technologies, particularly with respect to the effects of the internet across spheres.<sup>45</sup>

Weintraub, at 2 (Sept. 15, 2014), <https://eqs.fec.gov/eqsdocsMUR/15044372958.pdf> [<https://perma.cc/V59P-LQK9>].

<sup>42</sup> FEC, Minutes of an Open Meeting (Oct. 1, 2015) (Agenda Doc. No. 15-56-A), <https://www.fec.gov/updates/october-1-2015-open-meeting> [<https://perma.cc/TD2U-Q2SX>].

<sup>43</sup> General political advocacy is not tied to specific election candidates. *See* Bluman v. FEC, 800 F. Supp. 2d 281, 292 (D.D.C. 2011) (“[W]e do not decide whether Congress could prohibit foreign nationals from engaging in speech other than contributions to candidates and parties, express-advocacy expenditures, and donations to outside groups to be used for contributions to candidates and parties and express-advocacy expenditures.”), *aff’d*, 565 U.S. 1104 (2012); Richard L. Hasen, *Bluman v. F.E.C. is a Trojan Horse*, N.Y. TIMES (Nov. 8, 2012), <https://www.nytimes.com/roomfordebate/2012/01/05/should-foreign-money-be-allowed-to-finance-us-elections/bluman-v-fec-is-a-trojan-horse> [<https://perma.cc/Z854-5K4N>].

<sup>44</sup> *See supra* notes 31–32.

<sup>45</sup> For example, consider the regulation of virtual currency. “The current state of financial regulations and policies are aptly referred to as ‘Franken-finance’ because the laws are ‘full of absurd contradictions [and] incongruities.’” Anisha Reddy, *COINSENSUS: The Need for Uniform National Virtual Currency Regulations*, 123 DICK. L. REV. 251, 265 (2018) (quoting DON TAPSCOTT & ALEX TAPSCOTT, *BLOCKCHAIN REVOLUTION: HOW THE TECHNOLOGY BEHIND BITCOIN AND OTHER CRYPTOCURRENCIES IS CHANGING THE WORLD* 56 (2018)). The emergence of the internet created numerous regulatory challenges on issues ranging from privacy in criminal investigation, *see* Andrew W. Yung, *Regulating the Genie: Effective Wiretaps in the Information Age*, 101 DICK. L. REV. 95, 99 (1996), to biotechnology, *see* Victoria Sutton, *Emerging Biotechnologies and the 1972 Biological Weapons Convention: Can It Keep Up with the Biotechnology Revolution?*, 2 TEX. A&M L. REV. 695, 716–18 (2015) (describing possible circumventions to the 1972 Biological Weapons Convention).

For the better part of the 1990s and 2000s, the FEC either declined entirely to apply rules to internet-based political advertisements, or issued ad hoc and conflicting advisory opinions, creating a mostly “regulation-free zone”<sup>46</sup> for political communications on the internet.<sup>47</sup> In 1999, the FEC determined that costs directly tied to communicating over the internet qualified as campaign expenditures,<sup>48</sup> but in 2003, adopted a rule that exempted internet communications from classification as a means of “public communications,” enabling unlawful coordination between campaigns and independent expenditure groups.<sup>49</sup> Though a court challenge ultimately eliminated the full exemption,<sup>50</sup> the final rule regulating internet communications had a narrow scope, stating that the internet is “distinct from other media in a manner that warrants a restrained regulatory approach.”<sup>51</sup> In the past decade, the FEC has issued narrow limitations on digital technology. In 2010, it concluded that character-limited advertisements displayed during routine Google searches do not require disclaimers similar to other political advertisements, provided disclaimers are displayed after clicking the advertisement.<sup>52</sup> Practically, this means that an entire advertisement could be seen without any disclosure requirements, so long as the viewer did not click the advertisement through to the advertiser’s landing page. In 2011, the

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46 Daniel W. Butrymowicz, Note, *Loophole.com: How the FEC’s Failure to Fully Regulate the Internet Undermines Campaign Finance Law*, 109 COLUM. L. REV. 1708, 1724 (2009).

47 See Anthony Corrado et al., *THE NEW CAMPAIGN FINANCE SOURCEBOOK* 71 (2005) (observing that “[t]he FEC has had to consider the applicability of the FECA—written long before the age of cyberspace—to Internet and e-mail communications,” and noting that prior to BCRA, the FEC regulated “in a piecemeal manner in this area”). The FEC attempted to treat the internet as analogous to other regulated entities, like television and radio. See FEC Advisory Op. 1999-37, at 5 (Feb. 11, 2000) (stating any cost directly tied to making internet communication is an expenditure); FEC Advisory Op. 1998-22, at 3 (Nov. 20, 1998) (finding setup and maintenance costs for websites that influence elections to be regulated expenditures). Ultimately, the FEC created limited exemptions for certain internet communications. See FEC Advisory Op. 1999-24, at 3–4, 6 (Nov. 15, 1999) (determining nonpartisan websites with statements and positions of candidates do not constitute expenditures under FECA).

48 See FEC Advisory Op. 1999-37, at 5 (Feb. 11, 2000).

49 The FEC stated that “[a]lthough the term ‘public communication’ covers a broad range of communications, it does not cover some forms of communications, such as those transmitted using the Internet and electronic mail.” Coordinated and Independent Expenditures, 68 Fed. Reg. 421, 430 (Jan. 3, 2003) (to be codified at 11 C.F.R. pts. 100, 102, 109, 110, 114).

50 *Shays v. FEC*, 337 F. Supp. 2d 28, 129–30 (D.D.C. 2004), *aff’d*, 414 F.3d 76 (D.C. Cir. 2005).

51 Internet Communications, 71 Fed. Reg. 18,589, 18,589 (Apr. 12, 2006) (to be codified at 11 C.F.R. pts. 100, 110, 114).

52 FEC Advisory Op. 2010-19, at 2 (Oct. 8, 2010).

FEC declined to issue disclaimer requirements for Facebook advertising following a deadlocked 3-3 vote.<sup>53</sup>

Though the decisions to limit regulation suggest that the FEC considered the impact of the internet on politics and campaigns, they also indicate a failure to appreciate the potential dangers of leaving the space unregulated. In 2014, former Vice-Chair Ravel acknowledged this failure, stating, “[W]hile the world changes, the Commission has not adapted with it and has failed to acknowledge the importance of providing transparency to the public no matter what the medium of political communication. . . . In doing so, the Commission turned a blind eye to the Internet’s growing force in the political arena.”<sup>54</sup> The FEC’s inability to regulate and enforce federal campaign laws, including with respect to foreign actors, and its inability to adapt to the internet came into sharp focus following the recognition of Russian interference in the 2016 presidential election.<sup>55</sup>

### *C. The FEC Failed to Foresee or Protect Against Russian Interference in the 2016 Election*

Although the FEC’s failure to adequately address the challenges the internet era has posed for political communication and advocacy cannot be considered the sole cause of Russian interference, it at least created an environment where digital technology could be weaponized with relatively little oversight.

Volume I of Special Counsel Robert Mueller’s report examined the extent of Russian interference in the 2016 election in painstaking detail, but a few points are especially noteworthy. First, Special Counsel Mueller declined to charge Donald Trump Jr. and other associates involved in the infamous<sup>56</sup> “Trump Tower Meeting” with soliciting an unlawful campaign contribution, partially because the standard for assessing a “thing of value” had not been determined by a court or by

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<sup>53</sup> FEC Advisory Op. Request 2011-09 (July 11, 2011), <https://www.fec.gov/updates/aor-2011-09-facebook> [<https://perma.cc/C3SH-JP2F>].

<sup>54</sup> See, e.g., MUR 6729 (Checks and Balances for Economic Growth), Statement of Reasons of Vice Chair Ann M. Ravel, at 1–2 (Oct. 24, 2014), <http://eqs.fec.gov/eqsdocsMUR/14044363872.pdf> [<https://perma.cc/7NK9-7GUU>].

<sup>55</sup> See 1 DOJ, REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION 9 (2019).

<sup>56</sup> Jo Becker et al., *Trump’s Son Met With Russian Lawyer After Being Promised Damaging Information on Clinton*, N.Y. TIMES (July 9, 2017), <https://www.nytimes.com/2017/07/09/us/politics/trump-russia-kushner-manafort.html?WT.nav=top-news&action=click&auth=login-email&clickSource=story-heading&hp&login=email&module=first-column-region&pgtype=home&region=top-news> [<https://perma.cc/D9FE-TBJQ>].

rulemaking.<sup>57</sup> Prominent campaign finance experts criticized the Special Counsel for this decision, but also placed blame on the FEC for its failure to issue relevant guidance and regulation.<sup>58</sup>

Second, the FEC's failure to regulate political advertising on social media created an environment where online political communications, including those created and targeted for nefarious purposes, could spread to an alarming number of people without oversight. The Mueller Report concluded that a Russian company, the Internet Research Agency ("IRA"), "conducted social media operations targeted at large U.S. audiences with the goal of sowing discord in the U.S. political system."<sup>59</sup> These operations included "buying political advertisements on social media in the names of U.S. persons and entities," which should have triggered FEC oversight.<sup>60</sup> Facebook estimated that roughly 29 million people had seen content directly in their "News Feeds" from the IRA's posts and that as a result, "three times more people may have been exposed to a story that originated from the Russian operation."<sup>61</sup> Accordingly, "approximately 126 million people may have been served content from a Page associated with the IRA . . . ."<sup>62</sup>

To understand the impact of the FEC's failure to issue guidance over the past decade, look to the Russian operation. The failure to regulate in several areas, particularly with respect to the internet, created an environment ripe for abuse by the Russian government, and potentially for other nefarious actors moving forward. Considering the

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<sup>57</sup> See *id.* at 185–87 (noting the Special Counsel's refusal to press charges related to the Trump Tower meeting and discussing a "thing of value" as an element of "prohibited campaign contribution").

<sup>58</sup> See Bob Bauer, *The Trump Campaign-Russia Alliance and Campaign Finance*, JUST SECURITY (Jan. 19, 2018), <https://www.justsecurity.org/51216/trump-campaign-russia-alliance-campaign-finance> [<https://perma.cc/6PZB-DFBF>]; Jed Handelsman Shugerman, *How Mueller Can 'Fix His Mistakes'*, N.Y. TIMES (June 27, 2019), <https://www.nytimes.com/2019/06/27/opinion/mueller-testimony-congress-fec-trump-mess.html> [<https://perma.cc/NR9S-FGPF>]; Ciara Torres-Spelliscy, *Luckily for the Trumps, Some Laws Are Hard to Break*, ATLANTIC (Apr. 21, 2019), <https://www.theatlantic.com/ideas/archive/2019/04/campaign-finance-loopholes-helped-trump-team/587671> [<https://perma.cc/PX8J-8BXZ>]. See generally Zack Beauchamp, *Legal Experts Say Donald Trump Jr. Has Just Confessed to a Federal Crime*, VOX (July 11, 2017), <https://www.vox.com/world/2017/7/10/15950590/donald-trump-jr-new-york-times-illegal> [<https://perma.cc/PU7R-ZLM2>].

<sup>59</sup> See DOJ, *supra* note 55, at 14.

<sup>60</sup> *Id.*

<sup>61</sup> *Open Hearing: Social Media Influence in the 2016 U.S. Election Before the S. Select Comm. on Intelligence*, 115th Cong. 13 (2017) (statement of Colin Stretch, General Counsel, Facebook).

<sup>62</sup> *Id.*

scope of the FEC’s regulatory failure, the next Part will evaluate the design of the agency.

### III. ASSESSING THE DESIGN OF THE FEC

Regulatory failure can be attributed to non-structural factors such as “procedural infirmities, lack of resources, and the use of inadequate tools,”<sup>63</sup> but can also arise from structural factors, including agency design. Professors Camacho and Glicksman provide a useful framework for evaluating agency design, particularly how government authority is allocated. They propose three dimensions: (1) how centralized authority is, (2) how much overlap there is between agencies over a regulatory problem, and (3) the extent to which the authority is exercised independently or with other entities.<sup>64</sup> The choices among these dimensions are not antipodal—rather, each is a point along a spectrum—and the choices regarding one dimension can significantly affect the others.<sup>65</sup> For example, the choice to centralize authority entirely in an agency would limit overlapping authority and affect coordination with other agencies.<sup>66</sup> How agency authority is allocated and executed can greatly affect the functioning and regulatory success rate of the agency, and the considerations for each dimension have important benefits and tradeoffs. The following section will describe each dimension of the framework and apply it to the design of the FEC.

#### A. *Centralization or Decentralization?*

The first dimension to consider is the degree to which authority is centralized, where the power to regulate lies solely with one federal agency, or decentralized, where the power is dispersed among multiple agencies and possibly among different levels of government. Decentralization advocates argue that allocations of regulatory authority should leverage local expertise and knowledge.<sup>67</sup> Accordingly, given geographical, cultural, social, and economic differences, regulation should be responsive primarily to local needs,<sup>68</sup> which can subse-

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<sup>63</sup> ALEJANDRO E. CAMACHO & ROBERT L. GLICKSMAN, REORGANIZING GOVERNMENT: A FUNCTIONAL AND DIMENSIONAL FRAMEWORK 291 n.1 (2019). For specific examples of these factors with respect to the FEC, see *supra* Part II.

<sup>64</sup> CAMACHO & GLICKSMAN, *supra* note 63, at 31.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> See Adrian Vermeule, *Local and Global Knowledge in the Administrative State*, in LAW, LIBERTY AND STATE: OAKESHOTT, HAYEK, AND SCHMITT ON THE RULE OF LAW 295, 296 (David Dyzenhaus & Thomas Poole eds., 2015).

<sup>68</sup> See *id.*

quently encourage regulatory innovation.<sup>69</sup> Similar arguments have been made that “federal decentralization,” with federal authority enabled at offices or branches across the country, is crucial to the constitutional functioning of the federal government.<sup>70</sup>

Nonetheless, where certain problems are of such a “national character,” centralization can be preferable.<sup>71</sup> These include issues that cross jurisdictions and those where states may limit regulation to attract businesses.<sup>72</sup> Centralized authority can avoid a “race-to-the-bottom.”<sup>73</sup> For example, Congress amended the Clean Air Act in 1977, warning that without federal regulation, “States may find themselves forced into a bidding war to attract new industry by reducing pollution standards.”<sup>74</sup> Likewise, some have argued against allowing the purchase of health insurance across state lines.<sup>75</sup> A final argument for centralized regulation is that it encourages fairness, i.e., “uniform treatment of similarly situated entities regardless of location.”<sup>76</sup>

Broadly, election regulation in the United States is decentralized. Though the FEC is the sole, centralized authority over civil campaign law violations and rulemaking pertaining to federal elections,<sup>77</sup> states regulate their own elections, with a few exceptions—i.e., FEC regulation of foreign involvement in state elections.<sup>78</sup> The federal govern-

<sup>69</sup> See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting); David L. Markell, *States as Innovators: It's Time for a New Look to Our "Laboratories of Democracy" in the Effort to Improve Our Approach to Environmental Regulation*, 58 ALB. L. REV. 347, 355 (1994).

<sup>70</sup> See, e.g., David Fontana, *Federal Decentralization*, 104 VA. L. REV. 727, 739 (2018) (“[T]he perpetually geographically distributed nature of political ideologies was seen as a feature of a successful American constitutional experiment to be leveraged, rather than a bug that would doom it. The separation of places was foundational to American constitutional success rather than threatening to its existence.”).

<sup>71</sup> CAMACHO & GLICKSMAN, *supra* note 63, at 36.

<sup>72</sup> *Id.*

<sup>73</sup> See, e.g., Kirsten H. Engel, *State Environmental Standard-Setting: Is There a “Race” and Is It “To the Bottom”?*, 48 HASTINGS L.J. 271, 274 (1997).

<sup>74</sup> H.R. REP. NO. 95-294, at 152 (1977).

<sup>75</sup> See Catherine Rampell, *Opinion, Trump’s Health Insurance Proposal Would Start a Race to the Bottom*, WASH. POST (Mar. 2, 2017), [https://www.washingtonpost.com/opinions/trumps-health-insurance-plan-would-start-a-race-to-the-bottom/2017/03/02/ad6e2466-ff8f-11e6-8f41-ea6ed597e4ca\\_story.html](https://www.washingtonpost.com/opinions/trumps-health-insurance-plan-would-start-a-race-to-the-bottom/2017/03/02/ad6e2466-ff8f-11e6-8f41-ea6ed597e4ca_story.html) [<https://perma.cc/T4GT-QYUZ>] (“[S]truggling insurers left in [ ] high-regulation states would [ ] pressure regulators to loosen coverage requirements to push prices down.”).

<sup>76</sup> CAMACHO & GLICKSMAN, *supra* note 63, at 37.

<sup>77</sup> Although the FEC is the central regulator, other agencies exercise peripheral authority, such as the Office of Foreign Assets Control in the Treasury Department. See *Foreign Interference in a United States. Election Sanctions*, U.S. DEP’T OF TREASURY, [https://www.treasury.gov/resource-center/sanctions/Programs/Pages/election\\_eo.aspx](https://www.treasury.gov/resource-center/sanctions/Programs/Pages/election_eo.aspx) [<https://perma.cc/EZG4-9G48>].

<sup>78</sup> See, e.g., MD. CODE ANN., ELEC. LAW (LexisNexis 2019). Voting is generally regulated

ment provides funds for election security and other ballot issues through the Help America Vote Act of 2002,<sup>79</sup> but the eligibility requirements for these funds are relatively light.<sup>80</sup> This system encourages regulatory innovation, as the states are able to develop innovative practices with their funds.<sup>81</sup> The benefits that arise from decentralization, however, generally do not apply to the scope of issues where the FEC has authority. Campaign finance and legal compliance do not diverge significantly on social, cultural, or geographic differences—particularly given that most FEC regulation only applies to federal elections.<sup>82</sup> Additionally, federal elections could be considered of such a national character as to give rise to a centralized authority, and participants, for fairness reasons, should be treated uniformly across jurisdictions. Practically, it would make little sense for a congressional candidate in California to be subject to different campaign finance limits than a candidate in Wyoming.

Accordingly, along the first dimension, the FEC’s design seems to align well with centralization principles. Decentralization across all elections (federal, state, and local) provides innovation benefits, while maintaining a centralized authority for federal campaign law accords with the national nature of federal election monitoring. Gains from agency design reforms are more likely to come from the second and third dimensions, through overlapping authority and coordination.

### B. *Sharing Substantive Authority*

The second dimension is whether agencies share authority over the same substantive issues. Scholars have advocated for “distinct authority,” where authority over a substantive issue is placed in one agency, rather than concurrently—or “overlapping”—in several. One

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at a local level, *see, e.g., Board of Elections, ANNE ARUNDEL COUNTY*, <https://www.aacounty.org/boards-and-commissions/board-of-elections> [<https://perma.cc/J8JU-JYLT>], though the history of racial discrimination through restrictive voting has resulted in increased federal oversight. *See Voting Rights Act of 1965*, Pub. L. No. 89-110, 79 Stat. 437 (1965). This oversight, however, has diminished significantly following the Supreme Court’s decision to gut the federal regime requiring preclearance of changes in state or local voting law. *See generally Shelby Cty. v. Holder*, 570 U.S. 529 (2013) (invalidating the preclearance formula of the Voting Rights Act).

<sup>79</sup> Pub. L. No. 107-252, 116 Stat. 1666 (2002).

<sup>80</sup> *See* Elizabeth Howard et al., *Defending Elections: Federal Funding Needs for State Election Security*, BRENNAN CTR. FOR JUST. (July 18, 2019), <https://www.brennancenter.org/our-work/research-reports/defending-elections-federal-funding-needs-state-election-security> [<https://perma.cc/UBR9-VAKE>].

<sup>81</sup> *Id.*

<sup>82</sup> *See Mission and History*, FEC, <https://www.fec.gov/about/mission-and-history> [<https://perma.cc/4HBY-LRE5>].

reason for creating distinct authority is that regulation should have an underlying “Matching Principle,” where a regulatory problem is matched to the authority that can best address the problem.<sup>83</sup> Another reason is efficiency—advocates for distinct authority argue that it minimizes “transaction costs” by avoiding duplication of regulatory effort (not to mention the possibility of reducing compliance costs for regulated entities).<sup>84</sup> Additionally, distinct authority can avoid the “regulatory commons” problem, where one agency avoids regulatory choices in the hope that another agency with concurrent authority will address it.<sup>85</sup> Distinct authority can also improve agency accountability, leaving agencies without the option of passing blame to others that share responsibility.<sup>86</sup>

Advocates for overlapping authority argue that it increases the likelihood of regulatory action, by creating a “regulatory safety net” with several benefits. First, a regulatory safety net increases the likelihood of regulatory action if one agency should fail to regulate.<sup>87</sup> This is particularly important in contexts where underregulation has “high-cost or irreversible effects.”<sup>88</sup> Additionally, overlap can allow agencies to bring distinct skills, capabilities, and knowledge to various regulatory challenges.<sup>89</sup> Overlapping authority also has important effects on

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<sup>83</sup> See, e.g., Henry N. Butler & Jonathan R. Macey, *Externalities and the Matching Principle: The Case for Reallocating Environmental Regulatory Authority*, 14 *YALE L. & POL’Y REV.* 23, 25 (1996) (advocating for a matching principle in environmental regulation, where the size of the geographic area to be regulated should determine the appropriate level of government for regulatory authority); JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY* 113–16 (1962) (using public choice analysis to determine the “optimum size of governments”).

<sup>84</sup> Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 *HARV. L. REV.* 1131, 1150 (2012); see Jacob E. Gersen, *Overlapping and Underlapping Jurisdiction in Administrative Law*, 2006 *SUP. CT. REV.* 201, 214.

<sup>85</sup> See William W. Buzbee, *The Regulatory Fragmentation Continuum, Westway and the Challenges of Regional Growth*, 21 *J.L. & POL.* 323, 357 (2005) (arguing such regulatory commons could discourage efforts to “deal . . . with a widely dispersed social harm”).

<sup>86</sup> See Freeman & Rossi, *supra* note 84, at 1187 (“[W]here responsibility is shared, agencies might be more inclined to shirk their duties . . . [or] deviate from congressional preferences . . . because they can blame other agencies for program failures.”).

<sup>87</sup> See *id.* at 1138; Benjamin Ewing & Douglas A. Kysar, *Prods and Pleas: Limited Government in an Era of Unlimited Harm*, 121 *YALE L.J.* 350, 354 (2011).

<sup>88</sup> CAMACHO & GLICKSMAN, *supra* note 63, at 42.

<sup>89</sup> Alejandro E. Camacho, *Adapting Governance to Climate Change: Managing Uncertainty Through a Learning Infrastructure*, 59 *EMORY L.J.* 1, 67 (2009) (“Designed correctly, such a system may allow for a diversity of tailored approaches and help cultivate an array of laboratories of innovation for collective learning about the benefits and detriments of particular management strategies.”); see David E. Adelman & Kirsten H. Engel, *Adaptive Federalism: The Case Against Reallocating Environmental Regulatory Authority*, 92 *MINN. L. REV.* 1796, 1813–31 (2008) (discussing the strengths of adaptive systems as applied to environmental federalism).



agency relationships with regulated interest groups. Interest-group capture is more difficult as “[a]gencies . . . may [ ] be more reluctant to respond favorably to interest-group pressure because other agencies sharing regulatory authority may detect and cast adverse light on that behavior[.]”<sup>90</sup> and because interest groups will necessarily find it more difficult to capture multiple agencies.<sup>91</sup>

Currently, the FEC does not share significant overlapping authority over the substantive issues of federal election regulation and law enforcement. Though both the DOJ and FEC enforce federal campaign laws, the DOJ’s scope is limited to criminal enforcement, and the FEC’s to civil enforcement.<sup>92</sup> The Federal Communications Commission (“FCC”) has sole, narrow authority over some disclosure of political advertisements on television.<sup>93</sup> Accordingly, the FEC’s authority over the substantive issues it regulates can be characterized as distinct, with no safety net should it fail to regulate or enforce laws.

### C. *Interaction Between Agencies*

The third dimension to consider in agency design is the extent to which agencies interact with each other when exercising authority. Agencies are characterized along this dimension as either coordinated or independent—i.e., those that engage in considerable communication and collaboration with other agencies and those that do not engage with other agencies, respectively.<sup>94</sup> Coordination can have several benefits. It promotes the exchange of ideas and knowledge between agencies with subject-matter expertise.<sup>95</sup> Coordination can reduce the transaction costs associated with the duplication problem from overlapping authority.<sup>96</sup> Despite these benefits, there are situa-

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<sup>90</sup> CAMACHO & GLICKSMAN, *supra* note 63, at 42.

<sup>91</sup> See Neal Kumar Katyal, *Internal Separation of Powers: Checking Today’s Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2325 (2006); Todd S. Aagaard, *Regulatory Overlap, Overlapping Legal Fields, and Statutory Discontinuities*, 29 VA. ENVTL. L.J. 237, 294 (2011) (“From the perspective of the interest groups, regulatory authority dispersed across multiple agencies may make it more difficult to influence policy, because they have to target more decisionmakers.”).

<sup>92</sup> See 52 U.S.C. § 30107(a) (2012); see also MUTCH, *supra* note 13, at 88.

<sup>93</sup> 47 U.S.C. §§ 315(e)(1)(B), (e)(2)(E), (e)(2)(G) (2012); Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (2002).

<sup>94</sup> See CAMACHO & GLICKSMAN, *supra* note 63, at 43.

<sup>95</sup> Freeman & Rossi, *supra* note 84, at 1184 (noting that a Government Accountability Office report found that when the Environmental Protection Agency and the National Highway Traffic Safety Administration engaged in “joint rulemaking,” “formed joint technical teams,” and “pooled data and information,” they developed stronger regulatory outcomes and “improved expertise”).

<sup>96</sup> *Id.* at 1183 (“DOJ-FTC merger guidelines illustrate the benefits of early notice regard-

tions where independence is preferable. Coordination can be costly and time-consuming, not only for the agencies (particularly for overstretched agencies with limited budgets), but for regulated entities as well.<sup>97</sup> Moreover, independent authority can encourage regulatory innovation by generating competition among agencies.<sup>98</sup> Perhaps most importantly, independence can promote accountability.<sup>99</sup>

The FEC's coordination with other agencies is limited. The highest level of coordination is with the DOJ. For decades, the FEC has freely shared enforcement records with the DOJ, for the express purposes of reducing administrative burden and increasing efficiency.<sup>100</sup> Nonetheless, given the DOJ's sole authority to prosecute criminal cases, this sharing does not rise to the level of idea generation and exchange envisioned by the framework.<sup>101</sup> The FEC has also engaged in "Audit Peer Reviews" with the FTC,<sup>102</sup> but these audits are more supervisory in nature, rather than collaborative.

Based on this assessment, regulation of federal elections would be classified as highly centralized in the FEC, with minimal overlapping authority and coordination. Reforms along these dimensions offer a blueprint for Congress to improve the regulation and enforcement of federal election campaigns.

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ing enforcement policy, reducing uncertainty and enabling private firms to adjust their practices to avoid legal violations.").

<sup>97</sup> *Id.* at 1182 ("[R]elatively mild procedural consultation requirements . . . require the agency to expend time and staff to process comments—resources that might otherwise be deployed elsewhere. . . . Thus, for example, the joint DOJ-FTC horizontal merger guidelines likely consumed significant staff time and resources.").

<sup>98</sup> See CAMACHO & GLICKSMAN, *supra* note 63, at 47; see also Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the "Race-to-the-Bottom" Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210, 1211–12 (1992) ("[C]ontrary to prevailing assumptions, competition among states for industry should not be expected to lead to a race that decreases social welfare; indeed, as in other areas, such competition can be expected to produce an efficient allocation of industrial activity among the states.").

<sup>99</sup> See CAMACHO & GLICKSMAN, *supra* note 63, at 49.

<sup>100</sup> Memorandum from Anthony Herman, Gen. Counsel, FEC, & Daniel A. Petalas, Assoc. Gen. Counsel for Enft, to FEC (June 17, 2013), [https://www.fec.gov/resources/updates/agendas/2013/mtgdoc\\_13-21-d.pdf](https://www.fec.gov/resources/updates/agendas/2013/mtgdoc_13-21-d.pdf) [<https://perma.cc/97T9-ZQZB>] ("[T]he Commission's legal advice and records help DOJ avoid unnecessary investigations and prosecutions of public officials, candidates, and other political actors.").

<sup>101</sup> See CAMACHO & GLICKSMAN, *supra* note 63, at 43.

<sup>102</sup> OFFICE OF INSPECTOR GEN., FTC, SEMI-ANNUAL REPORT TO CONGRESS, REPORT NO. 49, at 10 (2013), <https://www.ftc.gov/system/files/documents/reports/fiscal-year-2013-first-half/semi1349.pdf> [<https://perma.cc/C9V8-2K9E>].

#### IV. A BLUEPRINT FOR REFORM: MORE OVERLAP, MORE COORDINATION

Right now, nothing would be more impactful to the FEC’s function than the President filling its vacancies. A distant second would be Congress reforming the quorum and four-vote threshold requirements.<sup>103</sup> Elected officials have advocated for changing the Commission size to an odd number to avoid deadlocks.<sup>104</sup> This would have a significant impact on the FEC’s ability to regulate and enforce. Although these changes are necessary, they are not sufficient to fully address the FEC’s long-term regulatory crisis. To survive, the system needs the ability to withstand the ebbs and flows of partisanship. The challenges described in Section II.B illuminate the fact that the FEC is not meeting the requirements of the modern world to regulate and enforce campaign finance law. The framework described in Part III provides a blueprint for reform by creating a regulatory safety net that utilizes deeper coordination with relevant agencies.

The FEC’s authority over federal elections is mostly distinct. Distinct authority is best suited to situations where the “regulatory commons” challenge might lead to lax enforcement or those where a regulatory problem matches the authority best able to address the problem. Given that the FEC is already failing to enforce and regulate, the regulatory commons concern is less profound. Additionally, other agencies have enough substantive expertise on issues related to elections that the matching principle may not be most relevant here. Moreover, the arguments for overlapping authority are strong. A regulatory safety net would enable other agencies to protect the integrity of elections and avoid interest-group capture—i.e., capture by incumbent politicians who underfund the agency. Furthermore, elections are inherently “irreversible,”<sup>105</sup> and the failure to enforce can have high-cost negative effects.<sup>106</sup> In short, the stakes at hand warrant a regulatory safety net created through overlapping authority.

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<sup>103</sup> See *Eliminating the FEC*, *supra* note 13, at 1431 (identifying the four-vote threshold as the reason most cited for the failure of the FEC).

<sup>104</sup> See Restoring Integrity to America’s Elections Act, S. 2639, 116th Cong. (2019).

<sup>105</sup> It is very difficult to reverse election results. The 2000 general presidential election in Florida is a stark example. See Ron Elving, *The Florida Recount of 2000: A Nightmare That Goes on Haunting*, NPR (Nov. 12, 2018, 5:00 AM), <https://www.npr.org/2018/11/12/666812854/the-florida-recount-of-2000-a-nightmare-that-goes-on-haunting> [<https://perma.cc/TER8-7MNS>]. The Supreme Court held that it would not be possible to remedy Florida’s counting issues in a practical manner, leaving voters without recourse. See *Bush v. Gore*, 531 U.S. 98, 121 (2000).

<sup>106</sup> See DOJ, *supra* note 55, at 14.

The FEC's coordination with other agencies is limited. Elections involve several regulatory challenges, including evolving technology, numerous modes of communication, and corruption. The vicissitudes and complexities of these issues necessitate coordination between agencies with subject-matter expertise. Additionally, the FEC's history as a chronically underfunded agency requires that external expertise be brought to bear on the regulatory challenges it faces.<sup>107</sup>

The key question is which agencies the FEC should coordinate and share authority with. The FTC and SEC could provide valuable expertise and exercise authority. The FTC would add value by coordinating and addressing the challenges faced by the FEC in regulating the internet and social media. Just recently, the FTC provided disclosure guidance on commercial advertising by social media influencers.<sup>108</sup> Though guidance documents are not binding, as regulations are, they indicate an effort on the FTC's part to address the challenges unique to social media. The FTC has regulated and prosecuted entities that work on elections. In 2019, it completed an investigation of Cambridge Analytica where it found that Cambridge Analytica engaged in deceptive practices to violate privacy laws and placed sanctions on the company.<sup>109</sup> Cambridge Analytica has also been accused of employing foreign nationals in U.S. campaigns, contrary to law.<sup>110</sup> The FTC is well-situated to provide expertise and potentially even share enforcement authority in federal election law.

The SEC may also be a useful partner, particularly in addressing the challenge of dark money. The SEC's mandate to address financial fraud often involves investigating complex methods of hiding money and identifying instances of laundering.<sup>111</sup> It would be well-equipped to provide guidance to the FEC on how to best trace sources of money, or how to create a system of disclosure that fosters true transparency. Furthermore, the SEC is already responsible for making reg-

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<sup>107</sup> See Levinthal, *supra* note 16.

<sup>108</sup> FTC, *Disclosures 101 for Social Media Influencers* (Nov. 2019), [https://www.ftc.gov/system/files/documents/plain-language/1001a-influencer-guide-508\\_1.pdf](https://www.ftc.gov/system/files/documents/plain-language/1001a-influencer-guide-508_1.pdf) [<https://perma.cc/Z6DS-JEVJ>].

<sup>109</sup> Cambridge Analytica, LLC, Docket No. 9383 (F.T.C. Nov. 25, 2019), [https://www.ftc.gov/system/files/documents/cases/d09389\\_comm\\_final\\_opinionpublic.pdf](https://www.ftc.gov/system/files/documents/cases/d09389_comm_final_opinionpublic.pdf) [<https://perma.cc/AGB2-77PQ>].

<sup>110</sup> Craig Timberg & Tom Hamburger, *Former Cambridge Analytica Workers Say Firm Sent Foreigners to Advise U.S. Campaigns*, WASH. POST (Mar. 25, 2018, 9:28 PM), [https://www.washingtonpost.com/politics/former-cambridge-analytica-workers-say-firm-sent-foreigners-to-advise-us-campaigns/2018/03/25/6a0d7d90-2fa2-11e8-911f-ca7f68bff0fc\\_story.html](https://www.washingtonpost.com/politics/former-cambridge-analytica-workers-say-firm-sent-foreigners-to-advise-us-campaigns/2018/03/25/6a0d7d90-2fa2-11e8-911f-ca7f68bff0fc_story.html) [<https://perma.cc/U4M4-7UGE>].

<sup>111</sup> See Bank Secrecy Act of 1970, Pub. L. No. 91-508, 84 Stat. 1114-36 (1970).

ulations that have an impact on corporate political spending, including those that could incentivize more dark-money spending.<sup>112</sup> Finally, the SEC is responsible for enforcing federal pay-to-play laws,<sup>113</sup> so it has familiarity with corruption of political officials, including through campaign contributions.<sup>114</sup> These are just two examples of agencies that could have overlapping authority with the FEC and that could play a meaningful role through coordination in enforcement and regulation.

### CONCLUSION

The FEC’s regulatory failure has had severe negative impacts on our federal elections. The agency’s failure to engage in meaningful rulemaking and enforcement, and failure to adapt to changes in technology and the proliferation of political advertising over the internet likely created an environment ripe for nefarious actors, like Russia, to interfere in the 2016 election. With this threat looming in 2020, in addition to the prospect of the most expensive campaign in history and the one with the most unregulated amount of “dark money,” there is tremendous urgency to reform how the government regulates federal election campaigns. By reforming the design of the FEC to share authority with other agencies, and by enabling deeper coordination with them, Congress can create a regulatory safety net to ensure that perhaps the most important aspect of our democracy, elections, do not remain unprotected from the influences of nefarious actors, both domestic and foreign.

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<sup>112</sup> Ciara Torres-Spelliscy, *A Trump Administration Plan that Could Boost Corporate ‘Dark Money’ in Elections*, BRENNAN CTR. FOR JUST. (Nov. 19, 2019), <https://www.brennancenter.org/our-work/analysis-opinion/trump-administration-plan-could-boost-corporate-dark-money-elections> [<https://perma.cc/E9HB-GEKN>].

<sup>113</sup> These laws regulate political contributions for entities conducting business with governments. *See generally* Lawrence H. Norton et al., *Pay-to-Play Laws Remain in the Spotlight: Government Contract Eligibility Hinges on Awareness and Compliance*, POL. L. BRIEFING (Sept. 24, 2019), <https://www.politicallawbriefing.com/2019/09/pay-to-play-laws-remain-in-the-spotlight-government-contract-eligibility-hinges-on-awareness-and-compliance/> [<https://perma.cc/SVX5-P8BR>].

<sup>114</sup> 17 C.F.R. § 275.206(4)–(5) (2019).

