Closing Loopholes for Coordination: Proposed Reforms to Federal Campaign Finance Laws

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INTRODUCTION

"Money, like water, will always find an outlet."[1]

Money in the U.S. campaign finance system has famously been described as "hydraulic," or similar to water.[2] First, like water, money constantly flows through its ecosystem.[3] Second, just as water gushing through a pipe floods to the nearest outlets, money flows to the most efficient places—in political campaigns, the most effective methods for influencing election outcomes.[4] Third, as outlets in a water pipe can be sealed to prevent the leaking of water, political money can be guided, regulated, and outlawed, although it will always find somewhere to flow.[5] The following case illustrates just one example of the need for campaign finance regulation.

In 2022, candidate for New York's third congressional district George Santos loaned a whopping $705,000 to his campaign from his own personal funds, thus bypassing any limitations on contributions arising from outside individuals or groups.[6] However, questions arose as to whether this amount truly originated from his personal bank account when a 2020 financial disclosure report revealed personal accounts belonging to Santos totaled only $55,000.[7] A complaint filed with the Federal Election Commission ("FEC" or "Commission") alleged that outside groups likely illegally funneled money into Devolder Organization LLC, a consulting organization formed by Santos in May 2021, with the purpose of Santos claiming millions

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[1] McConnell v. FEC, 540 U.S. 93, 224 (2003).

[2] Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1707, 1708 (1999); *see also McConnell*, 540 U.S. at 224 (describing money as "like water").

[3] Issacharoff & Karlan, *supra* note 2, at 1708.

[4] *See id*. at 1709.

[5] *See generally id*. at 1713.

[6] Complaint at 2–3, Campaign Legal Ctr. v. George Anthony Devolder-Santos, (FEC Jan. 9, 2023), https://campaignlegal.org/sites/default/files/2023-01/Campaign%20Legal%20Center%20-%20Santos%20Complaint%20%28Final%29.pdf.

[7] *Id*.

of dollars in "income" in 2021 and 2022 and then using that money for his campaign without restriction.[8]

The financial disbursements of George Santos' campaign also raised red flags. Of the forty disbursements between $199 and $200, thirty-seven were listed as costing exactly $199.99.[9] The high number of these disbursements, combined with the reported products and services that were unlikely to cost that amount,[10] suggested that Santos or his campaign intentionally falsified their financial reporting.[11] Even worse, certain disbursements by the campaign were seemingly made to pay for personal expenses, such as rent on a personal residence, in violation of multiple federal laws.[12] A recent report by the House Ethics Commission further found that certain campaign contributions were disbursed to Santos' personal account and used in part to make purchases at OnlyFans, Hermes, Sephora, and for Botox appointments.[13]

In January 2023, a complaint was filed by the Campaign Legal Center with the FEC against now-Representative Santos and his 2022 campaign.[14] While the FEC was investigating, but prior to any official enforcement action, the Justice Department's Public Integrity Section stepped in and asked the FEC to halt its proceedings.[15] In response to the claims of ethical violations and calls for his resignation, Santos announced his temporary leave from the House Committee on Small Business and the House Science,

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[8] *Id.* at 1–3.

[9] *Id.* at 3; *see also Devolder-Santos for Congress (C00721365)*, FED. ELECTION COMM'N, https://www.fec.gov/data/disbursements/?two_year_transaction_+period=2022&data_type=processed&committee_id=C00721365&min_date=01%2F01%2F2021&max_date=12%2F31%2F2022&min_amount=199&max_amount=200 (last visited May 10, 2023) (showing campaign disbursements between $199 and $200 for the period of 2019-2020).

[10] *See Devolder-Santos for Congress*, *supra* note 9 (listing a variety of disbursements at exactly $199.99, including for recipients such as Staples, Uber, Amtrak, Delta Airlines, and various restaurants).

[11] Complaint, *supra* note 6, at 3.

[12] *Id*.

[13] U.S. House of Representatives Committee on Ethics, Report: In The Matter of Allegations Relating to Representative George Santos (Nov. 9, 2023), https://ethics.house.gov/sites/ethics.house.gov/files/documents/ISC%20Report_0.pdf. The report also found that Santos lied about making a number of personal loans to his campaign and that were improperly repaid.

[14] *See* Complaint, *supra* note 6, at 1. Additionally, other claims of illegal behavior relating to campaign finances have been raised by members of the public. For example, U.S. Navy veteran Richard Osthoff alleged that Santos created a GoFundMe campaign to raise finances for a life-saving surgery for Osthoff's dog, but then kept the proceeds totalling over $3,000. *See* Karen Matthews & Wayne Perry, *Report: FBI investigating Santos fundraiser for sick dog*, ASSOCIATED PRESS (Feb. 2, 2023, 1:54 PM), https://apnews.com/article/politics-new-york-city-jersey-george-santos-surgery-f72a4d8a505783d7c558c8cbf4b6d55a.

[15] Isaac Stanley-Becker et al., *Justice Department asks FEC to stand down as prosecutors probe Santos*, WASH. POST (Jan. 27, 2023, 6:20 PM), https://www.washingtonpost.com/investigations/2023/01/27/santos-doj-investigation-fec/.

Space, and Technology Committee.[16] On May 9, 2023, federal prosecutors filed official criminal charges against Santos relating to his campaign finance filings.[17] Santos also faces an investigation by the House Ethics Committee and the New York Attorney General, as well as Brazilian authorities for an unrelated criminal case.[18] On October 2023, Santos pled not guilty to the federal charges, with a trial date set for September 9, 2024.[19] In addition, Santos announced in November 2023 that he will not seek reelection the following cycle.[20]

George Santos is just one of many recent cases involving allegations against political candidates and their campaigns, specifically being accused of engaging in unethical, and possibly illegal, behavior pertaining to campaign finance laws.[21] As potential representatives of a free and democratic nation, candidates should not be allowed to cheat the system or play unfair when it comes to fundraising and making expenditures for the purpose of being elected to hold public office.

This paper argues that current federal laws[22] leave open many loopholes that allow outside groups and campaigns to coordinate monetary

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[16] Kevin Freking, *Santos steps down from House panels amid ethics issues*, ASSOCIATED PRESS (Jan. 31, 2023 7:35 PM), https://apnews.com/article/george-santos-congress-house-committees-6e46e2badad39fb190d38105a800236f.

[17] Mark Morales et al., *Santos in federal custody as feds unseal 13-count indictment*, CNN POLS. (updated May 10, 2023, 3:42 PM), https://www.cnn.com/2023/05/09/politics/george-santos-charged-justice-department/index.html. At the time this article was written, Santos was indicted under two counts of making materially false representations to the House of Representatives, three counts of money laundering, seven counts of wire fraud, and one count of theft of public funds. Indictment at 11–16, United States v. Santos, No. 23-197 (E.D.N.Y. May 9, 2023), https://www.justice.gov/d9/2023-05/santos.indictment.pdf.

[18] Morales, *supra* note 16; *see also* Michael Balsamo et al., *Rep. George Santos faces federal criminal charges, AP sources say*, NEW YORK AP (May 10, 2023, 7:00 AM), https://apnews.com/article/george-santos-justice-department-new-york-7e16d39eea0fc577f78d17502a384084.

[19] Nicki Brown, *Rep. George Santos pleads not guilty to new charges*, CNN POLS. (updated Oct. 27, 2023, 1:25 PM), https://www.cnn.com/2023/10/27/politics/george-santos-plea/index.html.

[20] Olivia Beavers, *Santos says he won't run for reelection. GOP members want to expel him first*, POLITICO (updated Nov. 16, 2023, 11:58 AM), https://www.politico.com/news/2023/11/16/santos-says-he-wont-run-for-reelection-following-ethics-report-00127590#:~:text=Embattled%20GOP%20Rep.%20George%20Santos,remove%20him%20from%20his%20seat.

[21] *See* Kim Klacik for Congress, FEC RAD Referral No. 22L-08 (Sept. 6, 2022), https://www.fec.gov/files/legal/murs/8074/8074_05.pdf; Complaint at 1, AB PAC v. Donald J. Trump, 2023 WL 4560803 (D.D.C. July 17, 2023) (No. CV 22-2139 (TJK)); Bob Healey for Congress, FEC MUR No. 8056 (May 16, 2023), https://www.fec.gov/files/legal/murs/8056/8056_11.pdf; *Press Release: Former U.S. Congressional Candidate Pleads Guilty in Conduit Campaign Contribution Case*, OFF. OF PUB. AFFS. FOR U.S. DEP.'T OF JUST. (Mar. 8, 2023), https://www.justice.gov/opa/pr/former-us-congressional-candidate-pleads-guilty-conduit-campaign-contribution-case.

[22] For purposes of brevity, this paper will use the phrase "federal law" to refer broadly to the many relevant authorities in the campaign finance legal system. This includes legislation as passed by Congress

contributions and expenditures without punishment, and the FEC has become ineffective in enforcing even clear violations. First, section I will examine the history and background of federal campaign finance law, including legislative and judicial efforts, as well as the creation and structure of the FEC. Next, section II will define and explain coordination under campaign finance law, from sources including federal legislation, FEC regulations, federal courts, and various states. In addition, this section will provide the purpose for preventing and restricting coordination, as defined by the Supreme Court. Subsequently, section III will present various problems with the current approach to regulating coordination, including loopholes and proven cases of non-enforcement by the FEC. Section IV will then propose possible solutions to the problems presented by weak coordination laws and a lack of enforcement. This section will also examine and rebut counterarguments, including one raised by members of the Commission. Finally, section V will provide a brief conclusion.

I. THE HISTORY & BACKGROUND OF FEDERAL CAMPAIGN FINANCE LAWS

A. Legislative and Judicial Efforts on Campaign Finance

To obtain a comprehensive understanding of modern campaign finance laws, it is necessary to examine the history of their creation, their passage, and their many alterations. As explained below, the law of campaign finance is a creature of often-ambitious legislative efforts subjected to the reigning in of the judicial system.

In 1971, Congress accelerated its legislative campaign finance efforts when it passed the Federal Election Campaign Act ("FECA").[23] FECA consolidated multiple earlier reform efforts,[24] but also created new campaign rules, such as requiring the complete disclosure of all campaign expenditures and contributions and restricting expenditures on advertisements to be promulgated by the media.[25] FECA also provided for the creation of political action committees ("PACs") as an exception to the ban on direct

and implemented into statute; federal regulation, primarily from the FEC; and case law, principally from the Supreme Court. Both section headings and footnotes will provide further details as to which authority is being cited.

[23] Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1971) (codified with subsequent amendments at 52 U.S.C. §§ 30101-30146 (2014)).

[24] *See Mission and history*, FED. ELECTION COMM'N, https://www.fec.gov/about/mission-and-history/ (last visited May 10, 2023).

[25] Federal Election Campaign Act §§ 104, 201, 301.

contributions by unions and corporations.[26] However, FECA did not establish any independent agency to oversee or enforce its campaign regulations but instead relied on the Comptroller General for monitoring and the Department of Justice for enforcement.[27]

Following public backlash to and internal outrage at the 1972 Nixon presidential campaign Watergate scandal,[28] Congress passed significant amendments to FECA in 1974.[29] These revisions included allowing for judicial review over election law provisions, placing strict monetary caps on campaign expenditures and contributions in federal elections, redefining PACs, and expressing penalties for violations of the provisions.[30] Importantly, the 1974 amendments also provided for an independent agency to oversee and enforce the campaign regulations and any violations to the provisions, with four of its members appointed by Congress, which resulted in the creation of the Federal Election Commission ("the FEC").[31] Only one year later, the FEC opened its doors.[32]

In 1976, Senators Buckley and McCarthy brought a suit in *Buckley v. Valeo* to challenge provisions in the 1974 FECA amendments.[33] The Supreme Court reviewed the FECA amendments and held that the mandated disclosures and contribution limits served a legitimate government interest in protecting election integrity and thus were constitutional.[34] Nonetheless, the Supreme Court struck down FECA's expenditure limits set on campaigns, individual donors, and candidates as unconstitutional under First Amendment protections of speech and expression.[35] Additionally, the Court struck down FECA's congressional appointment of FEC Commissioners,

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[26] *Id.* §§ 205, 302–304.

[27] *See id*. §§ 307–309; *see also Appendix 4 The Federal Election Campaign Laws: A Short History*, FED. ELECTION COMM'N, https://transition.fec.gov/info/appfour.htm (last visited May 10, 2023).

[28] *See* Andrew Kohut, *From the archives: How the Watergate crisis eroded public support for Richard Nixon*, PEW RSRCH. CTR. (Sept. 25, 2019), https://www.pewresearch.org/short-reads/2019/09/25/how-the-watergate-crisis-eroded-public-support-for-richard-nixon/#:~:text=The%20public%20had%20changed%20its,at%20least%20to%20some%20extent; *see also* KEITH W. OLSEN, WATERGATE: THE PRESIDENTIAL SCANDAL THAT SHOOK AMERICA 84 (2003); THE FINAL REP. OF THE SELECT COMM. ON PRESIDENTIAL CAMPAIGN ACTIVITIES, S. Rep. No. 93-981 (June 27, 1974).

[29] Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (1974) (codified as amended in part at 52 U.S.C. §§ 30101-30146 (2014)); *see also Appendix 4*, *supra* note 25.

[30] Federal Election Campaign Act Amendments §§ 101–102, 201–204, 314–315.

[31] *Id*. §§ 310–313.

[32] *Mission and history*, *supra* note 22.

[33] *See* 424 U.S. 1, 143 (1976); *see also Appendix 4*, *supra* note 22.

[34] *Buckley*, 424 U.S. at 143.

[35] *Id*.

finding it unconstitutional under the separation of powers, given that the FEC exercised executive power.[36]

Moreover, in *Buckley*, the Court also provided a definition for expenditures.[37] Subject to limitations, expenditures would only encompass advertisements that "in express terms advocate the election or defeat of a clearly identified candidate for federal office."[38] For example, advertisements using language such as "support," "elect," or "[candidate name] for Congress" would qualify as express advocacy, and thus would constitute an expenditure not subject to limitations under FECA.[39] Defining express advocacy in this way allowed the Court to limit the reach of the law and conform with First Amendment protections.

Following *Buckley*, Congress knew that FECA fell short of achieving its goals. After campaign finance abuses in the 1996 federal elections, Congress passed its second major piece of legislation relating to campaign regulation – the Bipartisan Campaign Reform Act ("BCRA").[40] True to its name, BCRA constituted an effort stretching across the partisan aisle in both chambers and was respectively co-sponsored by Senators McCain, R-Ariz., and Feingold, D-Wis in the Senate,[41] as well as Representatives Shays, R-CT, and Meehan, D-MA in the House.[42]

Substantively, the legislation prohibited soft money donations to national political party committees, soft money contributions to and expenditures by federal candidates, and soft money expenditures for party-building activities.[43] BCRA defined "electioneering communications" as broadcast, cable, or satellite advertisements referring to specific candidates within thirty days of a primary election or sixty days of a general election, in comparison to issue-advocacy advertisements, which focus on specific

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[36] *Id*.; *see also Appendix 4*, *supra* note 25 (describing how this holding forced the FEC to halt all activity exercising executive power from March 22, 1976, until May 1976, when Congress made further amendments to FECA, including the procedure that the President would appoint six Commissioners that would be subject to confirmation hearings by the Senate).

[37] *Buckley*, 424 U.S. at 44.

[38] *Id*.

[39] *Id*. at 44 n.52.

[40] Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (codified at 52 U.S.C. § 30101, et seq.).

[41] S. 27, 107th Cong. (2001) (as introduced).

[42] H.R. 2356, 107th Cong. (2001) (as introduced).

[43] Bipartisan Campaign Reform Act §§ 101, 402. "Soft money" is referring to donations given to political parties typically from corporations or unions, for federal elections that are otherwise not subject to the limitations placed on "hard money." *See* Craig Holman, SYMPOSIUM ISSUE: Papers: *The Bipartisan Campaign Reform Act: Limits and Opportunities for Non-Profit Groups in Federal Elections*, 31 N. KY. L. REV. 243, 256 (2004).

policy positions, such as gun control, rather than specific candidates.[44] To close the loophole where unlimited soft money was spent on issue-ads for the purpose of attacking a candidate holding an opposing position on that policy issue, BCRA required that parties running ads which support or oppose any federal candidate do so with hard money.[45] BCRA further prevented unions and corporations from engaging in electioneering communications, except as through PACs.[46] Finally, although it increased individual contribution limits, BCRA set a baseline on the amount that contributors could give to candidates and political parties and set an aggregate restriction on how much money an individual contributor could donate within a two year period.[47]

Only one year later, over eighty plaintiffs and twelve lawsuits consolidated into one challenge against BCRA: *McConnell v. FEC*.[48] Plaintiffs attacked thirteen provisions of BCRA on grounds of it restricting free speech, preventing officials from helping party organizations, and infringing on political party fundraising, among other things.[49] After the U.S. District Court for the District of Columbia upheld a number of provisions and struck down others, the case was expedited for appellate review by the Supreme Court.[50]

In a fractured and lengthy opinion, the Court upheld the BCRA provisions prohibiting soft money donations and restricting electioneering communications to combat an appearance of undue influence over the government by large donors.[51] However, the Court also struck down numerous BCRA provisions, including the prohibition against minors making political contributions and the forcing of political parties to choose between making either independent or coordinated expenditures on behalf of candidates.[52] Notably, Justice Thomas dissented to argue that political

[44] Bipartisan Campaign Reform Act §§ 201–204; *see also* Strickland, *supra* note 41.
[45] *See* Bipartisan Campaign Reform Act § 101.
[46] *Id.* § 203.
[47] *Id.* § 307.
[48] 540 U.S. 93, 93 (2003); *see also McConnell v. FEC*, FED. ELECTION COMM'N, https://www.fec.gov/legal-resources/court-cases/mcconnell-v-fec/ (last visited May 10, 2023).
[49] *See McConnell*, 540 U.S. at 13 4 ("Plaintiffs mount a facial First Amendment challenge to new FECA § 323, as well as challenges based on the Elections Clause, U.S. Const., Art. I, § 4, principles of federalism, and the equal protection component of the Due Process Clause.").
[50] *Id.*
[51] Strickland, *supra* note 38.
[52] *Id.*

campaign speech deserved further protection under First Amendment principles and that the Court's holding in *Buckley* should be overruled.[53]

In 2010, the Supreme Court overturned part of *McConnell* when it heard one of the most well-known cases involving regulation of campaign finance – *Citizens United v. FEC*.[54] The case arose when the Citizens United organization filed an injunction against the FEC to prevent BCRA restrictions from applying to its film "Hillary: The Movie" on First Amendment grounds.[55] In a five-to-four vote, the Court held that First Amendment protections extended to corporations engaging in political speech by making independent expenditures such as broadcasts in candidate elections.[56] Thus, the Court struck down BCRA prohibitions on corporate independent expenditures and electioneering communications.[57]

Additionally, the Court limited the government's interest in regulating campaign contributions to the prevention of corruption – specifically, *quid pro quo* or its appearance.[58] It stated that a general anti-corruption interest was not sufficient to justify regulation and "independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption."[59]

Four years following *Citizens United*, another First Amendment challenge was brought against BCRA provisions in *McCutcheon v. FEC*.[60] There, an individual donor desired to give monetary contributions to the RNC, Republican committees, and Republican candidates in amounts that were permissible under BCRA's base limitations but in violation of BCRA's aggregate limitations.[61] Albeit only in a plurality opinion, the Supreme Court stated that the BCRA aggregate limitations failed to meet the government's restricted interest of preventing *quid pro quo* corruption –

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[53] *McConnell*, 540 U.S. at 276 (Thomas, J., dissenting). This continued a pattern of similar dissentions from Justice Thomas, *see e.g.,* Nixon v. Shrink Missouri Government PAC, 528 U.S. 377, 410-411 (Thomas, J., dissenting).

[54] 558 U.S. 310 (2010).

[55] *Citizens United*, 558 U.S. at 310. "Hillary: The Movie" was critical of and contained opinions as to the unfitness of Senator Hillary Clinton for president of the United States. *Id.* at 325.

[56] *Id*. at 319 (Kennedy, J., writing for the majority). Justices Roberts, Alito, Scalia concurred fully, while Justice Thomas joined all but Part IV of the Court's opinion. *id.* at 372, 480. Justices Stevens, Ginsburg, Breyer and Sotomayor dissented in part. *id.* at 393.

[57] *Id*. at 312–13. The majority's holding highlighted that as the First Amendment pertains to campaign finance restrictions, what matters is the protected speech and not the identity of the speaker. *See id.*

[58] *Id*. at 357.

[59] *Id*. at 314.

[60] 572 U.S. 185 (2014).

[61] *Id*

"dollars for political favors."[62] Further, the *McCutcheon* plurality found that the BCRA aggregate limitations unnecessarily imposed a ceiling on free speech without being closely tailored to its goal and that other alternative methods existed to combat election corruption.[63] In a dissenting opinion, Justice Breyer argued that the definition of corruption, which was reduced to being the only recognized legitimate government interest as set by the Court's own precedent, was too narrow to be effective.[64]

B. The FEC

Beyond legislative efforts and reactive rulings of the judicial system, modern campaign finance law also encompasses regulations set by the relevant authoritative agency. Here, that is the FEC. Due to the intricacies of campaign finance law, it is the FEC rather than Congress or the courts who typically parses the details of campaign finance law and applies such details to facts on a case-by-case basis. Further, as explained below, the numeric and political structure of the FEC causes enforcement issues, such as deadlock, which are necessary to understand to obtain a comprehensive picture of the modern field.

Following its creation and authorization by Congress, the FEC opened its doors in 1995.[65] Pursuant to FECA and BCRA and their associated amendments, the structure and makeup of the FEC was established by Congress.[66] The makeup of the FEC entails six Commissioners, with no more than three being allowed to originate from the same political party.[67] Currently, there are more than three hundred employees at the FEC with a three-three Republican-Democrat divide on the Commission, where Democrat Dara Lindembaum serves as the Chair and Republican Sean Cooksey serves as the Commission's Vice Chair.[68]

In addition, the details of terms served by the Commissioners were established by Congress. Each Commissioner is appointed by the acting President and must be confirmed by the Senate.[69] Commissioners serve in

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[62] *Id*. at 192–93.
[63] *Id*. at 223.
[64] *Id*. at 234, 244 (Breyer, J., dissenting).
[65] *Mission and history*, *supra* note 22; *see also Appendix 4*, *supra* note 25 (detailing that, notably, the decision in *Buckley* forced the FEC to stop all activity relating to executive power from March 22, 1976, until May 1976).
[66] *Mission and history*, *supra* note 22; *see also* 52 U.S.C. §§ 30106(a)–(f).
[67] 52 U.S.C. § 30106(a)(1).
[68] *Leadership and structure*, FED. ELECTION COMM'N, https://www.fec.gov/about/leadership-and-structure/ (last visited May 10, 2023).
[69] 52 U.S.C. § 30106(a)(1).

six-year terms which are staggered such that two seats are subject to presidential appointment every two years.[70] The Commissioner's Chair position rotates each year, with no Commissioner serving as Chair more than once per term.[71]

Regarding its duties, the Commission meets both in closed sessions, for cases involving confidential matters, and in public sessions, where Commissioners formulate policy and vote on legal and administrative matters.[72] At least four of the Commissioners must vote together for any official Commission action to be taken – including creating, amending, or repealing rules, issuing advisory opinions, or approving enforcement actions.[73] Where the Commission cannot reach a four-vote majority, there is "deadlock," frequently occurring through a three-to-three split.[74] This design was intended to encourage non-partisan decisions from the Commission,[75] and although this in practice creates frequent deadlocks and inaction,[76] there is disagreement as to whether this is an unfortunate side effect or an intended level of protection by Congress.[77]

The Commission follows a structured process to evaluate possible claims, engage in investigative matters, and make findings on cases. The process begins by the FEC's receipt of a complaint,[78] which is required to be made in writing, sworn to, and notarized, and must lay out the facts of the case as well as the alleged violations of law under the jurisdiction of the Commission.[79] Self-reported complaints should also be sent to the FEC and generally, the Commission will negotiate penalties between twenty-five to seventy-five percent lower than normal to reward the accountability of self-reporting violations.[80]

Once in receipt of a complaint, the FEC's Office of General Counsel ("OGC") undergoes review of the complaint to determine whether it meets the initial requirements, including whether the FEC has jurisdiction over the

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[70] *Id*. § 30106(a)(2)(A).

[71] *Id*. § 30106(a)(5).

[72] *Leadership and structure*, *supra* note 67.

[73] 52 U.S.C. § 30106(c).

[74] R. SAM GARRETT, CONG. RSCH. SERV., R40779, DEADLOCKED VOTES AMONG MEMBERS OF THE FEDERAL ELECTION COMMISSION (FEC): OVERVIEW AND POTENTIAL CONSIDERATIONS FOR CONGRESS 1–4 (2009), https://www.bradblog.com/wp-content/uploads/CRS_FEC_Deadlocks.pdf.

[75] *Leadership and structure*, *supra* note 67.

[76] *See infra* Section III and accompanying text.

[77] *See infra* Section IV and accompanying text.

[78] *Enforcing federal campaign finance law*, FED. ELECTION COMM'N, https://www.fec.gov/legal-resources/enforcement/ (last visited May 10, 2023).

[79] *How to file a complaint with the FEC*, FED. ELECTION COMM'N, https://www.fec.gov/legal-resources/enforcement/complaints-process/how-to-file-complaint-with-fec/ (last visited May 10, 2023).

[80] *Id*.

allegations.[81] If the complaint passes the initial requirements, the OGC assigns it a Matter Under Review ("MUR")[82] number and informs the complainant of the new status.[83] Further, the OGC must inform each respondent of the claim within five days by sending a copy of the complaint; respondents have fifteen days to respond in writing, arguing why no action should be taken by the Commission and informing it of any designation of counsel.[84] Following the passage of fifteen days, the OGC uses objective Commission criteria to evaluate the claim and either prioritize and refer the case or recommend its dismissal.[85]

If a case is referred by the OGC, the Commissioners will review and consider all available materials and subsequently vote to take one of the following initial actions: (i) find reason to believe, (ii) dismiss the matter, (iii) dismiss but send a caution letter, or (iv) find no reason to believe and close the case.[86] If the Commission votes initially to find reason to believe the allegations, the Commission will move to either open investigative proceedings or enter into conciliation discussions with respondents.[87]

At the choice of the Commission or the written request of the respondent, pre-probable cause conciliation negotiations may be pursued in lieu of investigative proceedings.[88] Discussions are limited to sixty days to reach a conciliation agreement between the OGC and the respondent.[89] If reached, an affirmative four-Commissioner vote is still required for the agreement to become effective and the matter to be resolved.[90]

Alternatively, an initial vote for reason to believe may be followed by investigative proceedings.[91] Such investigative proceedings are initiated by informing the respondent that the Commission voted affirmatively and found reason to believe the allegations [92] Respondents are provided an opportunity to reply, but may also be subpoenaed, interviewed, or audited by the Commission.[93] Following the completion of an investigation, the OGC either recommends pre-probable cause conciliation or recommends

[81] *Id*.
[82] *Enforcing*, *supra* note 77.
[83] *How to file*, *supra* note 78.
[84] *Id*.
[85] *Id*.
[86] *Id*.; *see also* 11 C.F.R. § 111 (2007) (governing complaints).
[87] *How to file*, *supra* note 78.
[88] *Id*.
[89] *Id*.
[90] *Id*.
[91] *Id*.
[92] *Id*.
[93] *How to file*, *supra* note 78.

that the Commission find probable cause to support a violation.[94] Regardless of the OGC's decision, the respondent is informed and given fifteen days to file a reply.[95] If requested, respondents may present oral arguments in response to members of the Commission in a probable cause hearing.[96]

Next, the Commission reviews the briefs of the OGC and respondents, and then votes as to whether there exists "probable cause to believe" that a violation occurred.[97] If the Commission votes affirmatively with four or more votes that there is not probable cause, the case is closed.[98] If, on the other hand, the Commission votes affirmatively with four or more votes that there is probable cause, then the OGC has thirty days to negotiate a conciliation agreement with the respondent.[99] Similar to a pre-probable cause conciliation agreement, a post-probable cause conciliation agreement requires four votes from the Commission to take effect, as well as signatures from the OGC and respondent.[100] If no agreement can be reached within the time limits set, the Commission is free to file suit against respondents in federal district court.[101]

II. COORDINATION

A. From FECA to BCRA: Legislative Reform Efforts

As explained above, Congress made its first large attempt at consolidating campaign finance reform, including contributions and expenditures between campaigns and outside groups, in 1971 through the passage of FECA.[102] However, FECA as originally written did not last long, and when the Supreme Court issued its opinion in *Buckley* that expenditures made in cooperation with a candidate should be subject to contribution limits, Congress soon after amended the FECA definition of "contribution" to include money spent by a group "in cooperation, consultation, or concert, with, or at the request or suggestion of" a candidate.[103] Congressional committee notes show that the legislature's purpose in making the

[94] *Id*.
[95] *Id*.
[96] *Id*.
[97] *Id*.
[98] *Id*.
[99] *How to file*, *supra* note 78.
[100] *Id*.
[101] *Id*.
[102] *See supra* Section I and accompanying text.
[103] 52 U.S.C. § 30116(a)(7)(B)(i).

amendment was to distinguish between the independent expressions of one's views and basically handing cash to a candidate.[104] As time went on, more cases challenged FECA and led to further amendments, and additional political scandals ensued surrounding campaign finance, ultimately leading to the creation of BCRA and its provisions on coordination.[105]

Section 202 of BCRA amended FECA by extending the prohibitions against coordinated communications except as contributions.[106] Specifically, BCRA added the following language:

> (C) if—
>
> (i) any person makes, or contracts to make, any disbursement for any electioneering communication (within the meaning of section 304(f)(3)); and
>
> (ii) such disbursement is coordinated with a candidate or an authorized committee of such candidate, a Federal, State, or local political party or committee thereof, or an agent or official of any such candidate, party, or committee;
>
> such disbursement or contracting shall be treated as a contribution to the candidate supported by the electioneering communication or that candidate's party and as an expenditure by that candidate or that candidate's party.[107]

Previously, FECA included a requirement that expenditures made in concert with or at the suggestion of a candidate, authorized committee, or political party committee, be labeled as "contributions."[108] However, BCRA altered this language to include in the definition and thereby regulate electioneering communications as coordinated behavior subject to

[104] H.R. REP. NO. 94-1057, at 59 (1976).
[105] *See supra* Section I and accompanying text.
[106] Bipartisan Campaign Reform Act, Pub. L. No. 107-155, 116 Stat. 81 (codified at 52 U.S.C. § 30101, et seq.).
[107] *Id*. § 202.
[108] See Federal Election Campaign Act, Pub. L. No. 92-225, 86 Stat. 11 (1972); *see also Appendix 4*, *supra* note 25 (describing various amendments to FECA throughout the 1970s).

contribution limits. [109] By making this change, BCRA broadened the applicable parties that could be involved in coordinated activities from the language used previously in FECA.[110]

B. Under the FEC, the Devil is in the Details

Beyond specific amendments to central pieces of legislation regulating campaign finance, federal and agency regulations convey additional details on coordinated communications. Under federal regulation, an independent expenditure is a purchase of a communication, such as an advertisement, through media that expressly advocates for the defeat or election of a candidate and is not made in coordination with the candidate or campaign.[111] Although independent expenditures are no longer subject to amount limitations, they are subject to reporting requirements.[112] Antithetical to independent expenditures, in-kind contributions are defined as non-monetary contributions, such as goods or services, to a campaign, or, as is the focus of this paper, expenditures made by individuals or outside groups in coordination with a candidate or campaign.[113] The FEC provides the federal definition of coordination as follows:

> [w]hen a committee, group, or individual pays for a communication that is coordinated with a campaign or a candidate, the communication is either an in-kind

[109] 52 U.S.C. §§ 30104(a)–(f) (establishing how any targeted advertisement promoting or opposing any specific candidate and broadcast within 30 days of the primary election or 60 days of the general election would be viewed as coordination under BCRA and be subjected to contribution limits). Additionally, BCRA outlawed such advertisements within the stated timeframe if directly paid for by unions or corporations in a federal election). 52 U.S.C. § 30118(a)–(b).

[110] *See* 52 U.S.C. §§ 30104(a)–(f); *see contra* Federal Election Campaign Act, Pub. L. No. 92-225, 86 Stat. 11 (1972) (originally prohibiting expenditures beyond a capped amount; accepting any prohibited contributions, including if secured by force; and providing disclosure requirements); *see also Appendix 4*, *supra* note 25 (describing various amendments to FECA throughout the 1970s).

[111] 11 C.F.R. § 100.16 (2003); *see also Making independent expenditures*, FED. ELECTION COMM'N, https://www.fec.gov/help-candidates-and-committees/making-independent-expenditures/ (last visited May 10, 2023).

[112] *Making independent expenditures*, *supra* note 110.

[113] 11 C.F.R. § 100.52(d), 104.13 (2014); *see also How to Report In-kind Contributions*, FED. ELECTION COMM'N, https://www.fec.gov/help-candidates-and-committees/filing-reports/in-kind-contributions/ (last visited May 10, 2023). The central difference between an independent expenditure and an in-kind contribution is that the value of an in-kind contribution counts against the contribution limits set by law for the current and subsequent election. *Id.* This may result in providing campaigns and candidates a reason to prefer independent expenditures and a large incentive to report contributions as such where applicable.

> contribution or, in some limited cases, a coordinated party expenditure by a party committee.
>
> Coordination means made in cooperation, consultation or concert with, or at the request or suggestion of, a candidate, a candidate's authorized committee, or their agents, or a political party committee or its agents.[114]

However, federal law and agency regulations do not conclude with a two sentence definition. FEC regulations specifically detail a three-part test to determine whether coordination has occurred.[115] Under this test, the three prongs must each be met for a communication to be considered coordinated and thus, be levied against contribution limits as an in-kind contribution.[116] The prongs are as follows: (i) the source of payment, (ii) the subject matter of the communication, and (iii) the interaction between the person paying for the communication ("the payer") and the candidate or candidate's agents.[117]

Regarding the first prong, that of payment, a communication is considered coordinated where it is paid for by an outside group, either in whole or in part.[118]

Under content, the second prong, a communication that satisfies any of the following descriptions may be considered coordinated: (i) an electioneering communication, (ii) campaign materials that are republished or redistributed and do not fall under an exception, (iii) express advocacy for the defeat or election of a candidate, (iv) the functional equivalent of express advocacy, or (v) a public referral to a candidate or political party within a specified countdown to the election.[119] As noted, FEC regulations provide a safe harbor exempting provision for republished campaign materials where the information used in the creation of the communication exists in "publicly available sources," such as press releases, interviews or

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[114] *Coordinated communications*, FED. ELECTION COMM'N, https://www.fec.gov/help-candidates-and-committees/candidate-taking-receipts/coordinated-communications/ (last visited May 10, 2023); *see also* 11 C.F.R. § 109 (2010).

[115] *Coordinated communications*, *supra* note 113.

[116] *Id*.

[117] *Id*.; *see also* 11 C.F.R. § 109.21 (2010).

[118] *Coordinated communications*, *supra* note 113. This definition excludes authorized committees and coordinated political party committees.

[119] *Id.*; *see also* 11 C.F.R. § 109.21(c) (2010).

speeches of the candidate, newspaper articles, or a candidate or political party's website.[120]

Finally, the third prong, conduct, is fulfilled if any of the following categories are present: (i) request or suggestion, (ii) material involvement, (iii) substantial discussion, (iv) employment of a common vendor, or (v) former employee or independent contractor.[121]

Under the first category of the conduct prong, if content is created or distributed at the request or suggestion of a candidate or a candidate's agent, or if the payer of the communication suggests its creation or distribution to the candidate or candidate's agent and they give assent, then the request or suggestion constitutes coordination.[122]

Regarding the category of material involvement, a communication is coordinated if a candidate or a candidate's agent was materially involved in any decisions regarding the communication's content, intended audience, means or mode, chosen media outlet, timing or frequency, or size, prominence where printed, or duration where broadcasted.[123]

As the third category's name suggests, a communication is considered coordinated if it was created or distributed after at least one substantial discussion between the payer or payer's agents and the candidate or candidate's agents.[124] Under FEC regulation, a discussion is considered substantial where information about the plans or needs of a campaign that is material to the creation or distribution of the communication is conveyed to the payer of the communication.[125]

For the employment of a common vendor to constitute a coordinated communication, all of the following must occur.[126] First, the payer contracts a commercial vendor to create or distribute a communication.[127] Second, the commercial vendor has a current or previous relationship with the candidate such that the vendor is in a position to acquire or has acquired information about the plans or needs of the campaign.[128] This relationship is defined by providing nine specific services related to campaigning within one hundred and twenty days before the communication's purchase.[129] Third, the vendor

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[120] *Coordinated communications*, *supra* note 113; *see also* 11 C.F.R. 109.23(b) (2006).
[121] *Coordinated communications*, *supra* note 113; *see also* 11 C.F.R. 109.21(d) (2010).
[122] *Coordinated communications*, *supra* note 113
[123] *Id*.
[124] *Id*.
[125] *Id*.
[126] *Id*.
[127] *Coordinated communications*, *supra* note 113; *see also* 11 C.F.R. 109.21(d) (2010).
[128] *Coordinated communications*, *supra* note 113
[129] *Id*.

uses or conveys the information about the plans or needs of the campaign to the payer and the information is material.[130] However, FEC regulation also provides a safe harbor provision in the employment of a common vendor where a firewall is implemented to prevent the flow of information from employees providing services to the campaign and those providing services to the outside group.[131]

Regarding the final category, conduct is coordinated where a former employee or independent contractor of the candidate, up to one hundred and twenty days prior to the purchase or distribution of the communication, uses or conveys information about the plans or needs of the campaign to the payer and the information is material.[132]

Even with the aforementioned and detailed three-pronged test, FEC regulations and federal law take a counterintuitive approach to certain behaviors that common sense would suggest as being coordinated. For example, federal candidates may fundraise directly for the SuperPACs that provide significant support for their campaigns without needing to report the raised funds as in-kind contributions or count their value against contribution limits.[133] In fact, the only restriction on this behavior is that the candidates follow source and amount limitations when soliciting from individuals.[134] However, attendance and speaking engagements at SuperPAC fundraisers which target corporations and labor organizations are allowed for federal candidates, at which contributions may be given without limit.[135]

C. The Federal Courts Restrain Efforts from Congress and Decisions by the FEC

As presented in Section I above, the Supreme Court of the United States has been heavily involved in interpreting and detailing matters of campaign law. Further, as it pertains to coordination specifically, both the Supreme

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[130] *Id*.
[131] *Id*.
[132] *Id*.
[133] *Fundraising for SuperPACs by federal candidates*, FED. ELECTION COMM'N, https://www.fec.gov/help-candidates-and-committees/making-disbursements-pac/fundraising-super-pacs-federal-candidates-nonconnected-pac/ (last visited May 10, 2023); *see also* FEC Advisory Opinions 2015-09, 2011-21, and 2011-12.
[134] *Fundraising for SuperPACs by federal* candidates*, supra* note 32 (explaining candidates may only solicit up to $5,000 from each individual donor under the Federal Election Campaign Act).
[135] *Id*.

Court and lower federal courts have played large roles in crafting its definition.

In *Buckley*, the Supreme Court stated that "all expenditures placed in cooperation with the consent of a candidate, his agents, or an authorized committee of a candidate" should be treated as contributions and subject to FECA limitations.[136] However, the converse is also true: "[t]he absence of prearrangement and coordination of an [independent] expenditure with the candidate . . . alleviates the danger that [legitimate independent] expenditures will be given as a *quid pro quo* for improper commitments from the candidate."[137] Therefore, as early as 1976, the Supreme Court recognized and legitimized the legal notion that outside, coordinated expenditures— understood as prearrangement, cooperation with, and with the consent of a candidate — present a corrupting danger and should be limited.

In 1996, the Supreme Court again considered the issue of coordinated contributions in *Colorado Republican Federal Campaign Committee v. FEC*.[138] There, the Court, in a plurality opinion, rejected the FEC's finding that all expenditures by a political party were automatically considered "coordinated" with its candidate due to a shared identity.[139] Rather, the plurality found that it was possible for political parties to make independent expenditures without the knowledge or consent of candidates and their campaigns.[140]

The underlying case was remanded to the Tenth Circuit, which chose to strike down limitations on coordinated expenditures between political parties and candidates. [141] The court reasoned that the FEC had "not demonstrated on remand that coordinated spending by political parties corrupts, or creates the appearance of corrupting, the electoral process," where parties exist to achieve electoral victory for their selected candidates.[142] However, when appealed back to the Supreme Court, the Justices voted five-to-four that coordinated expenditures, including those of a political party, are distinct from independent expenditures and may be limited to "minimize circumvention of the Act's contribution limits" without violating the First Amendment rights of the parties.[143]

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[136] *Buckley*, 424 U.S. at 78.
[137] *Id*. at 47.
[138] 518 U.S. 604 (1996).
[139] *Id*. at 608.
[140] *Id*.
[141] FEC v. Colo. Republican Fed. Campaign Comm., 213 F.3d 1221, 1232 (10th Cir. 2000).
[142] *Id*. at 1233.
[143] FEC v. Colo. Republican Fed. Campaign Comm. (Colorado II), 533 U.S. 431, 465 (2001).

After Congress passed BCRA, it ordered the FEC to issue new regulations on coordinated communications and repeal the old provisions.[144] The only guidance offered by Congress on this assignment provided that the new regulations "shall not require agreement or formal collaboration to establish coordination."[145] Congress' direction to the FEC to not include agreement as an element to coordination reached the Supreme Court in *McConnell*, where it rejected the notion that agreement was the line in the sand between coordination and independent expenditures.[146] Instead, the Court explained that:

> the rationale for affording special protection to wholly independent expenditures has nothing to do with the absence of an agreement and everything to do with the functional consequences of different types of expenditures . . . expenditures made after a "wink or nod" [are just] as useful to the candidate as cash.[147]

Thus, the Court recognized that in practice, coordination may not be an explicit agreement where cash changes hands, but an implied understanding between the parties, following which the payer takes action to benefit the candidate. Under the Court's rationale in *McConnell*, both situations require regulation. Further, when the *McConnell* plaintiffs argued that BCRA's definition of coordination as "expenditures made in cooperation, consultation, or concert" with a candidate or campaign was ambiguous, the Court disagreed, finding that common sense provided a clear understanding of the meaning.[148]

Following its congressional orders in BCRA, the FEC created new regulations concerning coordination, and did so quite narrowly.[149] In response, BCRA's sponsors in the House of Representatives, Congressmen Shays and Meehan, challenged the FEC's rules in *Shays v. FEC*.[150] The District Court for the District of Columbia's decision to invalidate the FEC's new regulations was upheld by the Court of Appeals in July 2005.[151] Although ultimately invalidating the provisions, the Court of Appeals found

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[144] Bipartisan Campaign Reform Act, Pub. L. No. 107-155 §214.
[145] *Id.*
[146] *McConnell*, 540 U.S. at 221.
[147] *Id*. at 221-22.
[148] *Id*. at 222.
[149] *See* Shays v. FEC, 414 F.3d 76, 97 (D.C. Cir. 2005).
[150] *Id*. at 76.
[151] *Id*. at 79.

that the FEC regulations did not violate congressional intent because BCRA provided too little guidance.[152] That said, the narrow regulations on coordination caused Judge Tatel to convey his disapproval, stating that "the FEC has in effect allowed a coordinated communication free-for-all for much of each election cycle."[153]

D. The Approaches of States

Although this paper focuses primarily on the laws, loopholes, and impacts of federal campaign finance regulation, it is also important to examine the approaches that states take to regulate coordinated communications as contributions in their respective elections. With the power to set their own definitions and standards, coordination laws vary widely across the states, with some having little to no regulation and others taking the forefront in our nation's coordination regulation, more so than the federal laws. These powerful regulations should be used as a model to reform the federal approach. In this section, selected state laws will be discussed to exemplify the wide range of approaches to coordination within the United States, with an emphasis on the necessity of the stronger regulations, and are listed in order of increasing strength.

1. Arkansas

Under Arkansas law, only advertisements containing express advocacy, where made with "arrangement, cooperation, or consultation" between a candidate and an outside group count as a coordinated expenditure.[154] Such communications are subject to a contribution limit of $2,000.[155] At least two efforts have been made by members of the Arkansas state legislature to embolden the campaign finance laws and specifically to close a loophole

[152] *Id.* at 97–98.

[153] *Id*. at 100 (explaining how Representatives Shays and Meehan challenged the FEC's electioneering communication 120 day time frame and "weak restraints applying outside of it," referring to the express advocacy test, which allowed political advertisements to not count towards contribution limits where they were focused on promoting or opposing issues rather than specific candidates or alternatively did not use the "magic words" to push for a candidate (such as "vote for [candidate]"). By allowing such a "functioning meaningless" test to stand as the threshold, the FEC was allowing for coordinated behaviors in the eyes of Judge Tatel). *See id.* at 99.

[154] *See* ARK. CODE § 7-6-201(11) (2012); *see also* ARK. ADMIN. CODE § 153.002-200(n) (2020); Ark. Ethics Comm'n, Ad. Op. No. 2006-EC-004 at 3–4 (2006).

[155] Ark. Ethics Comm'n, *supra* note 153, at 3.

where outside groups can coordinate with campaigns by using electioneering communications without disclosing such activity; however, both failed.[156]

2. New Mexico

Until recently, New Mexico had no codified provisions regarding coordinated communications related to campaign finance.[157] In October 2017, the New Mexico legislature passed a bill treating coordinated expenditures made at the request or suggestion of a candidate or committee, or in cooperation, consultation, or concert with, as in-kind contributions.[158] However, the only supplementing regulations involve possible coordination where campaign materials are republished, subject to a list of other factors.[159] In New Mexico, campaign finance reporting and overseeing is encompassed by the responsibilities of the Secretary of State's Office, rather than an additional organization,[160] and there are seemingly no cases of related investigation or enforcement in the history of the state.[161]

3. Missouri

Missouri also displays a weaker approach to regulating coordination in campaign finance laws. To begin, the state code fails to provide any explicit definition for coordination.[162] Rather, the state legislature codified a prohibition against any candidate for public office forming, controlling, and/or directing a continuing committee or PAC.[163]

However, this prohibition only goes so far. Outside groups are free to republish campaign materials as they please, so long as the materials contains disclosure of the identity of the sponsor.[164] Further, as to fundraising, candidates can even raise money for the PACs that support their

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[156] *See* Benjamin Hardy, *Senate rejects amended bill to close 'coordinated communications' loophole in campaign finance*, ARK. TIMES (Apr. 2, 2015, 11:21 PM), https://arktimes.com/arkansas-blog/2015/04/02/senate-rejects-amended-bill-to-close-coordinated-communications-loophole-in-campaign-finance; *see also* Benjamin Hardy, *Committee rejects bill to close 'coordination' loophole in campaign finance*, ARK. TIMES (Mar. 15, 2017, 8:26 PM), https://arktimes.com/arkansas-blog/2017/03/15/committee-rejects-bill-to-close-coordination-loophole-in-campaign-finance.

[157] *See* N.M. SEC'Y OF STATE'S OFFICE, GUIDE TO CAMPAIGN FINANCE AND CAMPAIGN REPORTING FOR CANDIDATES AND CAMPAIGN COMMITTEES 26 (2014).

[158] N.M. CODE R. § 1.10.13.28.

[159] N.M. CODE R. § 1.10.13.29(D).

[160] N.M. CODE R. § 1.10.13.1.

[161] *See After Citizens United: the Story in the States*, BRENNAN CTR. FOR JUST., https://www.brennancenter.org/sites/default/files/publications/After_Citizens_United_Appendix.pdf (last visited May 10, 2023).

[162] *See* MO. REV. STAT. § 130.011 (2007).

[163] MO. REV. STAT. § 130.011(10) (2007).

[164] MO. REV. STAT. § 130.031(8) (1999).

campaigns, so long as they are not involved in deciding how the PAC spends that money.[165] While coordinated expenditures are prohibited, coordinated fundraising is not.[166] This allows candidates to dine with donors at PAC events and mail financial solicitations containing PAC addresses, thereby directly raising money for the PACs who will, in turn, finance efforts supporting their campaigns.[167] By remaining one degree removed by fundraising for the PACs but not directing them on how to spend the money, these candidates do not engage in coordination under Missouri campaign finance law.

4. Maine

Unlike the states previously discussed, Maine demonstrates a stronger example on regulation of coordination under campaign finance laws. Under the Maine Clean Election Act, coordination is prohibited and defined as cooperation or consultation with the candidate, their committee, or their agent about making the expenditure.[168] Maine created the Commission on Governmental Ethics and Election Practices to oversee campaign rules, including coordination.[169] Additionally, Maine law presumes coordination where a prior employee of the candidate assists an outside group in creating advertisement supporting candidate.[170]

Unlike Missouri, Maine does not allow for candidates to fundraise for PACs and outside groups without being considered as direct contributions to the candidate, subject to restrictions.[171] Further, any communication which republishes, in whole or substantial part, a communication distributed or designed by the candidate, by an outside group is considered coordination.[172] More information on coordination, including examples, has been published by the Maine Ethics Commission in the Political Action

[165] *See* Mo. Ethics Comm'n, No. 1995.09.142 (describing an advisory opinion in which the Commission stated that there exists no prohibition against candidates fundraising or soliciting for campaign finance committees which are separate from their own candidate committee, even where the later behaviors of such a committee might benefit the candidate).

[166] *Id.; see also* MO. REV. STAT. § 130.011 (2007).

[167] Jordan Meier et al., *Missouri politicians get around contribution limits by using PACs*, COLUM. MISSOURIAN (June 23, 2020), https://www.columbiamissourian.com/news/state_news/missouri-politicians-get-around-contribution-limits-by-using-pacs/article_d5e141ac-9a1a-11ea-8c41-b7e826c28866.html.

[168] ME. REV. STAT. tit. 21-A, § 1125 (2021); *see also* ME. REV. STAT. tit. 21-A, § 1019-B (2021).

[169] *See* ME. REV. STAT. tit. 1, § 1002 (2007).

[170] 94-270 ME. CODE R. § 6(9)(B)(1) (2023) (establishing a term limit only extending to one year of former employment).

[171] ME. REV. STAT. tit. 21-A, § 1015(4) (2021).

[172] Michael J. Dunn, *Political Action Committee Guidebook*, ME ETHICS COMM'N 21–22 (2021), https://www.maine.gov/ethics/sites/maine.gov.ethics/files/inline-files/PAC%20Guidebook.pdf.

Committee Guidebook,[173] thus providing state-wide campaigns and outside groups with clear rules and guidance on the law.

5. California

Arguably the nation's strongest laws on coordination under campaign finance regulation come from California. There, coordination involving a candidate is defined as a communication made at the request, suggestion, or direction of, or in cooperation, consultation, or coordination with the committee for whose benefit the expenditure is made.[174] In 2015, the Fair Political Practices Commission revised the rules on coordination to make the prohibitive regulations even stricter.[175] Primarily, these revisions included detailing a list of behaviors that lead to a presumption of coordination by the Commission.[176] In making this presumption, the burden would shift to the outside group and candidate to show that illegal coordination in fact did not occur.[177]

Presumed coordination applies to the following examples of behavior, although this list is not exhaustive as to the California rules. Where campaign materials, including video footage filmed by candidates, is used by the campaign, outside groups cannot republish it without a label of coordination.[178] Where a candidate attends a fundraiser for a PAC or SuperPAC, or solicits funds for such an organization, expenditures will be presumed to be coordinated with the campaign.[179] Additionally, when expenditures are made by groups that are "established, run, or staffed in a leadership role" by a member of the candidate's immediate family or former staff, coordination will be presumed.[180]

E. The Purpose Behind Preventing Coordination

While the Supreme Court has made direct rulings on coordinated expenditures,[181] it has not explicitly ruled on all coordinated behaviors listed in recent FEC guidance. That said, in *McConnell*, the Court found that

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[173] *Id*. at 1–32.

[174] CAL. CODE REGS. § 18225.7 (West 2015); *see also Communications*, FAIR POL. PRACS. COMM'N. 2 (2020), https://www.fppc.ca.gov/content/dam/fppc/NS-Documents/TAD/Campaign%20Manuals/Manual_4/Manual_4_Ch_8_Communications.pdf.

[175] *See* CAL. CODE REGS. § 18225.7 (West 2015).

[176] *Id.*

[177] *Id.*

[178] *Id.* at § 18225.7(d)(4).

[179] *Id*. at § 18225.7(d)(5).

[180] *Id*. at § 18225.7(d)(6)–(7).

[181] *See, e.g.,Colorado I*, 518 U.S. 604 (1996);; *Colorado II*, 533 U.S. 431 (2001).

agreement is not a required element of coordination, as a "wink" or "nod" or implied understanding between an outside group and a campaign followed by an expenditure could have the same practical effect that the law aims to prevent, or at least, regulate and limit.[182] Since *McConnell* was only overturned in part,[183] this rationale appears to still hold weight and can be applied to other activities that suggest coordination but have not been deemed so by the highest court.

In cases involving coordinated expenditures and campaign violations more broadly, the Court has articulated specific, authorized purposes for the government to place restrictions or limitations on what campaigns and outside groups are allowed and prohibited from doing leading up to and during elections. In *Buckley*, the Court held that Congress has a valid "interest in stemming the reality or appearance of corruption," including *quid pro quo* corruption.[184] Thus, since 1976, the Court recognized a legitimate interest in combatting activity that leads to corruption in politics and also activity which leads to a public perception of corruption. Justice Kennedy interpreted this interest in his opinion in *McConnell* to refer to conduct which has "inherent corruption potential,"[185] or stated by his colleague:

> Justice Kennedy would limit Congress' regulatory interest *only* to the prevention of the actual or apparent *quid pro quo* corruption "inherent in" contributions made directly to, contributions made at the express behest of, and expenditures made in coordination with, a federal officeholder or candidate.[186]

Although rejected by the majority in *McConnell*,[187] Justice Kennedy had the last laugh when the Court heard *Citizens United* and explicitly limited the sufficiently important governmental interest of preventing corruption or

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[182] *McConnell v. FEC*, 540 U.S. 93, 221 (2003).

[183] *See Citizens United v. FEC*, 558 U.S. 310 (2010). (The arguments set forth in this paper admittedly place substantial weight on the opinions regarding coordination in *McConnell* that have not been overturned. It is true that the Court's makeup has changed since *McConnell* and that the current Court may not stand by the statements made by the *McConnell* Court. However, this paper does not seek to analyze what the current Court may decide in future cases; rather, it is based on the law as it currently stands.)

[184] *Buckley v. Valeo*, 424 U.S. 1, 47–48 (1976).

[185] *McConnell*, 540 U.S. at 297.

[186] *Id*. at 152.

[187] *See McConnell*, *id.*

the appearance of corruption in *Buckley* to *quid pro quo* corruption.[188] The Court further elaborated, "[t]he fact that speakers [i.e., those making contributions in favor of a campaign] may have influence over or access to elected officials does not mean that these officials are corrupt."[189]

Even though the Supreme Court has not stated a permissible scope in regards to coordination, it is likely that this narrow interest of preventing *quid pro quo* corruption, or the appearance of such, would also be the purpose and authorized means of regulation for coordination. Common sense shows how coordination between outside groups and a candidate or the candidate's campaign could certainly lead to *quid pro quo* corruption or its appearance. For example, where a candidate attends and speaks at a PAC or SuperPAC fundraiser and solicits money for such an organization, it is common sense that such candidate likely expects part of the funds raised to support her candidacy and campaign. In return for supporting a candidate's campaign, whether monetarily, through creating advertisements, or republishing campaign materials, it is also a reasonable assumption that the individuals running the PAC or SuperPAC will expect benefits from the candidate should the campaign be successful, ranging from insider access, to the candidate lobbying her fellow members of Congress on favored pieces of legislation, to appointments or appropriations. The possibilities are endless, more than reasonabley probable, and their appearance certainly exists.

III. PROBLEMS WITH THE CURRENT APPROACH

The current federal laws defining and regulating coordination between campaigns and outside individuals and groups pose numerous issues, both in possible loopholes that may be exploited in the future and illegal conduct that has occurred and gone without punishment.

A. Possible Exploitable Loopholes

1. The Agency of a Federal Candidate's "Non-Agent"

A coordinated communication only counts as a contribution where it was made involving an outside group and a candidate, a candidate's authorized committee, or the candidate's agent.[190] As codified, the FEC defines the

[188] *See Citizens United*, 558 U.S. at 359.
[189] *Id*.
[190] *Coordinated communications*, *supra* note 113; *see also* 11 C.F.R. § 109.20 (2006).

agent of a federal candidate as any individual who has "[a]ctual authority, either express or implied, to engage in any of the following activities on behalf of the candidate or officeholder:

- To solicit, receive, direct, transfer, or spend funds in connection with any election;
- To request or suggest that a communication be created, produced, or distributed;
- To make or authorize a communication that meets one or more of the content standards for coordination;
- To request or suggest that any other person create, produce, or distribute any communication;
- To be materially involved in decisions regarding the content, intended audience, means, media outlet, timing, frequency, size, prominence, or duration of a communication;
- To provide material or information to assist another person in the creation, production, or distribution of any communication; or
- To make or direct a communication that is created, produced, or distributed with the use of material or information derived from a substantial discussion about the communication with a different candidate."[191]

However, the breadth of the FEC's definition may have unintentionally created a loophole for unregulated coordination. This could occur in a situation where an individual has knowledge of the plans or needs of a campaign and takes one of the listed actions, but lacks the express or implied actual authority to "officially" act, at least in the eyes of the law, on behalf on the candidate.

Although hired campaign staffers qualify as having either express or implied actual authority,[192] the same is not necessarily true for unpaid volunteers and interns for the campaign. After all, many of these individuals only help out on one or a few occasions, and in limited capacities such as door knocking, phone banking, holding campaign signs outside of debates, or attending meet-and-greet events to increase crowd sizes. Even so, these individuals may still be privy to important details of the campaign, including

[191] 11 C.F.R. §§ 109.3(b), 300.2(b)(3) (2006); *see also Coordinated communications*, *supra* note 113.

[192] As listed in section II(B), there is also an entire section of FEC regulation protecting against the situation where a former employee or independent contractor either purchases a communication or shares material information with the purchaser. *Coordinated communications*, *supra* note 113; *see also* 11 C.F.R. § 109.21 (2006). The distinction between what is and is not regulated appears to reside in the payment and employment status of the individual; thus, campaign volunteers and unpaid interns would be excluded.

future events, unreleased advertisements, polling results, key talking points, and the needs and weaknesses of the campaign. Non-disclosure agreement implications aside, if even signed, volunteers or interns could seemingly take their knowledge on these campaign areas to an outside group, such as a PAC wanting to run a new advertisement to help the campaign, without violating any FEC coordination laws.

2. It's Not a "Substantial Discussion" Until Money Changes Hands

As discussed in Section II, coordinated communications require one or more substantial discussions to occur between the candidate or an agent of the candidate and the payer of the communication or the payer's agent.[193] Per FEC regulation, a discussion is substantial where "information about the plans, projects, activities or needs of the candidate or political party committee that is material to the creation, production or distribution of the communication is conveyed to the person paying for the communication."[194]

However, this appears to leave open at least one reasonable scenario where it is not clear that the FEC regulation would apply – where a conversation occurs prior to the "candidate" officially becoming a candidate in the eyes of the law. For example, it is reasonable to imagine a scenario where a person who is considering running for federal office, but has not yet announced her candidacy or begun campaigning, meets with a "friend" to discuss the pros, cons, and possible campaigns goals and challenges in an effort to determine whether or not she wants to run. The person considering running for office could choose to officially run soon after and the "friend" could create a PAC with the knowledge of which advertisements would be helpful to the campaign and how to target those advertisements, all seemingly without violating FEC regulation.

Per the FEC's own regulatory definition, an individual becomes a candidate only after receiving or making expenditures that exceed $5,000.[195] It is likely that conversations between a potential candidate and major political players, including possible donors, would occur before the "candidate" raised or spent $5,000. However, until that threshold is crossed, the individual is not a candidate, which is the term explicitly used by the FEC regulation, and therefore cannot engage in a substantial discussion.

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[193] *See supra* section II and accompanying text.

[194] *Coordinated communications*, *supra* note 113; *see also* 11 C.F.R. § 109.21 (2006).

[195] *Coordinated communications*, *supra* note 113; *see also How to Report Registering a Candidate*, FED. ELECTION COMM'N, https://www.fec.gov/help-candidates-and-committees/filing-reports/registering-candidate/#:~:text=An%20individual%20running%20for%20the,days%20after%20becoming%20a%20candidate (last visited May 10, 2023) (defining a candidate as an individual running for the House, Senate, or President and who has raised or spent more than $5,000).

Further, it follows that a candidate's agent cannot exist without there first existing a candidate.

3. Eight is the Name of the Game for Common Vendors

The use of a common vendor only qualifies as coordinated conduct if the vendor has a current relationship with the outside group and has or had a relationship with the candidate or party committee, such that "nine specific services related to campaigning and campaign communications" were rendered within one hundred and twenty days before "the purchase or public distribution of the communication."[196] While the specific number of nine services within one hundred and twenty days was likely an arbitrary settlement based on a needed compromise of the Commissioners, it provides an obvious loophole where a common vendor can service both the campaign and an outside group without using a firewall where the services to the campaign total eight or fewer.

4. Candidates can "Self"- Fund without Limit

Under FEC regulation, candidates may loan or outright contribute unlimited amounts of personal funds to their campaigns for campaign purposes.[197] The only restriction on this conduct is that the candidate must report these contributions to the FEC.[198] Under the applicable regulatory provisions, the definition of "personal funds" includes, but is not limited to:

- Assets which the candidate has a legal right of access to or control over, and which he or she has legal title to or an equitable interest in, at the time of candidacy,
- Income from employment,
- Income from trusts, if established before the election cycle,
- Income from trusts established by bequests (even after candidacy), and
- Personal gifts that had been customarily received by the candidate prior to the beginning of the election cycle.[199]

However, if an individual or entity "gives or loans the candidate money 'for the purpose of influencing any election for federal office,'" the funds

[196] *See supra* section II(B) and accompanying text.

[197] *Using the personal funds of the candidate*, FED. ELECTION COMM'N, https://www.fec.gov/help-candidates-and-committees/candidate-taking-receipts/using-personal-funds-candidate/ (last visited May 10, 2023).

[198] *Id*.

[199] *Id*.; *see also* 11 C.F.R. § 100.33(a)–(b) (2008).

must be reported as a contribution rather than a gift or loan.[200] This provision regulates – enforcement issues aside – the scenario where a large donor or group attempts to gift money to a candidate personally, with the understanding that the candidate will then funnel that money into the campaign while avoiding contribution limits.

What these provisions seemingly fail to regulate, on the other hand, is a loophole where a donor or outside group gifts assets or money to an individual prior to that individual officially becoming a candidate in the eyes of the law, with the understanding that the individual will put it in a personal account and at a later time give or loan it to the eventual campaign fund. Again, per the FEC's own definition, an individual becomes a candidate only after receiving or making expenditures that exceed $5,000.[201] A significant amount of time and effort is required to choose to run for office, to take the necessary actions leading up to an official announcement of candidacy, and even to fundraise or make expenditures for a campaign. It is likely that an individual intending or considering running for federal office would have conversations with large donors and influential groups prior to crossing the $5,000 threshold; additionally, if they are aware of the loophole, it is very possible they would take advantage of it.[202] This loophole may be more in a gray area than its peers, and the line between receipt of a gift as compared to a contribution is not brightly defined.[203] Yet, by the letter of the law, if the donor gifts money or assets to the individual prior to her crossing the candidacy threshold, it should not be considered coordination and count against contribution limits.[204]

Albeit involving a family matter rather than a PAC or non-familial donor, FEC Advisory Opinion 1988-7 seems to support this conclusion.[205] There, an "undeclared candidate" received cash gifts of $20,000 per year from his

[200] *Using the personal funds of the candidate, supra* note 198.

[201] *How to Report Registering a Candidate*, *supra* note 196.

[202] This could be similar to the Santos example described in the Introduction. However, there, it appears that Santos attempted to hide the outside groups' gifts by having them funnel it into his company prior to announcing his candidacy and then falsely reported those amounts as personal income. That situation can be distinguished from the loophole presented above, where an individual would receive a gift and cash that gift into their personal accounts prior to crossing the candidacy threshold and then donate the amount to their campaign.

[203] *See Using the personal funds of the candidate, supra* note 198; *see also* 11 C.F.R. §§ 100.33(a)–(b) (2008). If this loophole were to fail, it would likely be on this point.

[204] Factors that would likely be helpful in this situation include the donor making her intention explicit that the money or asset is a gift and there not existing evidence of the eventual candidate soliciting the money or asset .

[205] *See* FED. ELECTION COMM'N, ADVISORY OP.OPINION NO. 1988-7 (Mar. 29, 1988), https://www.fec.gov/files/legal/aos/1988-07/1988-07.pdf.

parents for three consecutive years.[206] The individual asked the FEC if he could contribute the cash gifts, as well as another $20,000 he expected to receive during the next year when he would file for candidacy, to his campaign as personal funds.[207] In response, the Commission concluded that the cash gifts given in the years before the individual declared candidacy were of a personal nature "rather than made in anticipation of or related to any campaign for Federal office" and allowed them to be given to the campaign as personal funds.[208] Relatedly, the Commission noted that an individual only crosses the line into candidacy following the receipt of contributions or making of expenditures in excess of $5,000.[209]

The Commission also granted permission for the $20,000 not yet received but expected for the year in which she would declare candidacy to be given as personal funds to the campaign, rather than counting them against contribution limits, citing a pattern of gifts from the individual's parents each year seemingly unrelated to the campaign.[210] This suggests another loophole: if a pattern of monetary gifts to an individual in years preceding a campaign run can be established, a monetary gift during the individual's actual candidacy could also possibly be categorized as being a personal fund not subject to contribution limits.[211]

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[206] *Id*.
[207] *Id*.
[208] *Id*.
[209] *Id*.
[210] *Id*.
[211] That said, a similar case with a pattern of monetary gifts from a PAC or non-familiar donor could be distinguished from the cited AO due to a lack of family connection, which could go towards it being a gift unrelated to campaigning. For example, FEC AO 1991-21 discussed a PAC in the process of terminating that desired to distribute its remaining funds to a state official who was not yet a federal candidate. There, the FEC Commission stated: "[i]f funds are being distributed to [the individual] in anticipation of or related to a possible Federal candidacy, then the Committee's distribution to him is subject to the limits of 2 U.S.C. 441a(a)(2)(A) and would not be considered personal funds under 11 CFR 110.10(b)." FED. ELECTION COMM'N, ADVISORY OP. NO. 1991-21 (Aug. 19, 1991), https://www.fec.gov/files/legal/aos/1991-21/1991-21.pdf. However, the FEC AOs are fact and case specific and only provide legal protection to those: (i) involved in the activity to which the AO is concerned, (ii) engaged in activity "indistinguishable in all its material aspects" from that described in the AO, and (iii) who act in good faith accordance with the AO. *See The advisory opinion process*, FED. ELECTION COMM'N, https://www.fec.gov/legal-resources/advisory-opinions-process/ (last visited May 10, 2023). Thus, while AOs may be informative or predictive of how the Commission would act, they are not binding on parties not directly involved in them.

B. Proven Problems with Enforcement, Even in the Face of Clear Violations

Beyond the letter of the law itself, a major issue with current federal campaign finance regulation lies in the inaction of the FEC. The even partisan split in FEC Commissioners, in combination with the requirement that one Commissioner break party lines in order for the Commission to take official action, has led to frequent partisan stalemates and little to no enforcement or explanation of campaign rules.[212] This occurs because the Commission frequently deadlocks at a three-to-three vote and is forced to dismiss the case in question.[213] Because the frequent three-to-three deadlocking reflects the partisan structure of the Commission's membership, some critics have stated that the structure "effectively incorporates gridlock into the enforcement process."[214] This leads to a lack of enforcement which impacts the election process because it allows self-interested candidates and campaigns to cheat the system.[215] Even those with good intentions may commit violations due to not understanding the convoluted laws and regulations, being misled by the non-uniform application of these rules by the FEC, and receiving no guidance from the FEC even after requesting it.[216]

One case of a clear violation of campaign law followed by a lack of enforcement or punishment by the FEC comes from the employment of a common vendor without proper utilization of the firewall exception. NRA affiliates – the NRA Institute for Legislative Action, a 501(c)(4) corporation, and the NRA Political Victory Fund, a PAC – as well as the SuperPAC America First Action, Inc. ("AFA") hired the political consultancy marketing group Starboard to create and distribute advertisements to support

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[212] *See* Daniel I. Weiner, *Fixing the FEC: An Agenda for Reform*, BRENNAN CENTER FOR JUSTICE (Apr. 30, 2019), https://www.brennancenter.org/our-work/policy-solutions/fixing-fec-agenda-reform; *see also No Bark, No Bite, No Point. The Case for Closing the Federal Election Commission and Establishing a New System for Enforcing the Nation's Campaign Finance Laws* PROJECT FEC 1, 8–9 (2002).

[213] 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, 456 (2017).

[214] *See* Amanda S. LaForge, Comment, *The Toothless Tiger–Structural, Political, and Legal Barriers to Effective FEC Enforcement: An Overview and Reccomendations*, 10 ADMIN. L.J. AM. U. 351, 359 (1996).

[215] *See* Weiner, *supra* note 213.

[216] *Id*.

campaigns of selected candidates.[217] Starboard subcontracted with a group known as Red Eagle to complete its projects.[218]

On their end, ccommittees for NRA-supported candidates, including the Senate campaign committees of Josh Hawley, Matt Rosendale, and Tom Cotton, also hired a political consultancy marketing group to create and distribute advertisements to support their own campaigns.[219] That marketing group, OnMessage, subcontracted with a group called American Media & Advocacy Group ("AMAG") to complete its projects.[220] For his presidential campaign, Donald Trump's campaign committee also placed advertisements with AMAG.[221]

However, in reality, AMAG and Red Eagle were the same entity – a vendor known as National Media that changed its name depending on if it was acting on behalf of candidates (AMAG) or the NRA affiliate groups (Red Eagle).[222] The same structure, that of a shell corporation, also existed between Starboard and OnMessage.[223] Both Starboard/OnMessage and Red Eagle/AMAG respectively listed the same corporate address, had the same leadership, and used the same employees, who would identify themselves from either organization depending on whether campaign or NRA/SuperPAC money was being used to purchase the advertisement.[224] Claims (without evidence) of a firewall aside, this structure obviously violated coordination rules, given that the same employees had access to communication with the outside groups and knowledge of the needs, plans, and strategies of the campaign.[225]

The non-partisan OGC of the FEC agreed, recommending that the Commission find reason to believe violations of prohibited in-kind contributions had occurred and had failed to be reported.[226] In the FEC's Statement of Reasons, Commissioner Ellen Weintraub stated that "[t]here is no question that common vendors were used and that certain employees of those vendors were on both sides of the asserted 'firewalls.'"[227]

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[217] Complaint at 11–12, *Giffords v. NRA*, No. 21-2887 (D.D.C. filed Nov. 2, 2021), https://campaignlegal.org/sites/default/files/2021-11/Giffords%20v.%20NRA%20Complaint%20%28filed%29.pdf.

[218] *Id*. at 12–14.

[219] *Id*.

[220] *Id*.

[221] *Id*. at 21–22.

[222] *Id.* at 13–14,

[223] *Id*. at 12–13.

[224] *Id*.

[225] *Id*. at 12.

[226] NRA Pol. Victory Fund, FEC MUR No. 742700330 (Sept. 30, 2022), https://www.fec.gov/files/legal/murs/7427/7427_66.pdf.

[227] *Id*.

Commissioner Weintraub further stated that the facts justified an investigation and were "sufficient to support reason to believe findings against the candidate committees."[228] However, even in the face of a clear violation, supported by the recommendation of the non-partisan OGC and at least one Commissioner, the FEC could not produce four votes to find probable cause to believe against the candidate committees, and instead, dismissed the case.[229]

A second case involving a lack of action by the FEC in response to a clear violation of federal campaign law can be seen in the Hillary Clinton presidential campaign. There, a SuperPAC known as Correct the Record spent millions of dollars on unpaid online communications for the Clinton campaign.[230] This expenditure did not count towards contribution limits for the Clinton campaign because the FEC provides a regulatory exception to coordination for unpaid internet communications.[231] However, the majority of the millions of dollars allegedly spent on the regulatory exception actually went towards funding campaign surrogate training, press messaging and outreach, and opposition research for the campaign.[232]

In reviewing the complaint and case materials, FEC staff attorneys found that there was likely a violation of federal law.[233] Nevertheless, the FEC deadlocked three-to-three in 2019, and thus decided it would not take any action.[234] In response, the Campaign Legal Center filed suit in federal court in the District of Columbia against the FEC for failure to uphold the law as required.[235] .[236] On December 8, 2022, the federal district court found that the FEC's dismissal of the complaint following the three-three deadlock was

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[228] *Id*.

[229] *Id*. However, the Commission did find reason to believe violations of making and failing to report excessive and prohibited in-kind contributions to multiple campaign committees through coordination by the AFA SuperPAC and a National Media official, John Ferrell, who was involved in placing ads for both AFA and campaign committees.

[230] Complaint at 4–7, Campaign Legal Ctr. v. Correct the Record (filed Oct. 6, 2016), https://campaignlegal.org/sites/default/files/10-06-16%20Correct%20the%20Record%2BClinton%20final.pdf; *see also CLC v. FEC,* Memorandum Opinion, Civ. Action No. 19-2336 (JEB) (filed Dec. 8, 2022), https://campaignlegal.org/sites/default/files/2022-12/Opinion_12-8-22.pdf.

[231] Complaint*, supra* note 237, at 4-7.

[232] Complaint*, supra* note 237, at 7–8.

[233] Brendan Quinn, *CLC Scores a Win Following FEC Inaction on Clinton Coordination Scheme*, CAMPAIGN LEGAL CENTER (Dec. 13, 2022), https://campaignlegal.org/update/clc-scores-win-following-fec-inaction-clinton-coordination-scheme.

[234] *Id*.

[235] *Id*.

[236] *Id*.

contrary to law and ordered the Commission to take action consistent with the court's order.[237]

A third example of a failure by the FEC to enforce the law under its jurisdiction was exemplified where a state official misleadingly raised funds for a state committee prior to officially declaring his federal candidacy, but while knowing that the funds were intended for such, and then had the funds transferred from the state committee to a PAC to support his eventual federal campaign. Such was the case of U.S. Representative Byron Donalds, R-Florida.[238] The following timeline illustrates the facts of the case as presented to the FEC Commission.

From 2016 to 2020, Byron Donalds served the 80th District of Florida as a state representative.[239] On August 22, 2019, Byron Donalds formed a state committee entitled Friends of Byron Donalds ("FBD") and listed himself as the committee chair.[240] Between September 2019 and January 2020, FBD raised over $98,000.[241] On January 3, 2020, Donalds resigned as the committee chair of FBD.[242] On the same date, FBD contributed more than eighty-eight percent of its raised funds to Conservatives for Effective Government ("CFEG"), another state committee.[243] Only three days later, on January 6, Donalds filed a statement of candidacy to run for the House of Representatives in Florida's 19th congressional district and designated Donalds for Congress as his principal campaign committee.[244]

On January 24, 2020, a federal independent expenditure-only political committee entitled Trusted Conservatives ("TC") filed its Statement of Organization with the FEC.[245] A few months later, on May 28, CFEG contributed over $100,000 to FBD.[246] However, FBD filed for its own

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[237] *Campaign Legal Ctr. v. FEC*, No. 1:19-cv-02336-JEB (D.D.C. filed Dec. 8, 2022), https://campaignlegal.org/sites/default/files/2022-12/Opinion_12-8-22.pdf.

[238] *Campaign Legal Ctr. v. Donalds*, FEC MUR No. 7783000062 (Nov. 10, 2020), https://www.fec.gov/files/legal/murs/7783/7783_13.pdf. Note the difference in this case as compared to the loopholes presented in sections III(A)(2) and (4): here, Donalds began raising money that was legitimately meant for his federal campaign, and thus crossed the regulatory threshold into becoming a candidate in 2019. His attempts at hiding his true intention for the funds by soliciting them for and funneling them into a state committee do not change that fact. In contrast, the section III(A)(2) loophole focuses on communications prior to crossing the threshold, while the section III(A)(4) loophole discusses an individual's *personal* receipt of *gifts*, either money or assets, prior to crossing the threshold.

[239] *Id*.

[240] *Id*.

[241] *Id*.

[242] *Id*.

[243] *Id*.

[244] *Campaign Legal Ctr. v. Donalds*, First General Counsel's Report, FEC MUR No. 7783000062 (Apr. 8, 2021).

[245] *Id*. at 7.

[246] *Id*.

disbandment as a state committee on June 4.[247] FBD's remaining funds were dispersed later that month, with over $100,000 of its funds being contributed to TC.[248] Throughout August 2020, every independent expenditure made by TC went to supporting Donalds or opposing his challengers in the race for the House of Representatives in Florida's 19th congressional district.[249] On August 18, Donalds won the Republican primary election and on November 3, Donalds won the general election.[250] A few weeks later, on November 17, 2020, TC filed to terminate itself as a federal independent expenditure-only political committee.[251]

In 2020, a complaint was sent to the FEC alleging numerous campaign law violations by Donalds, his campaign, and the aforementioned groups.[252] After review, the FEC OGC recommended finding reason to believe that violations were committed by Donalds and FBD.[253] However, when the case was subsequently sent to the Commission, it deadlocked three-to-three and dismissed the case.[254]

These examples of the Commission deadlocking, often by a three-to-three vote, on important cases involving obvious legal violations are unfortunately not rare. In a Congressional Research Service Report for Congress, an examination of voting records and advisory opinions of the Commission from July 2008 to June 2009 revealed that FEC deadlocked in approximately 13% of enforcement matters and 17% of advisory opinions.[255] In 2017, the office of FEC Commissioner Ann M. Ravel similarly conducted an analysis of Commission voting records from 2006 to 2016.[256] The study concluded that the FEC's votes on substantive enforcement matters deadlocked at an increasing rate over the decade.[257] Specifically, in 2006, the Commission deadlocked on just 2.9% on

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[247] *Id*.

[248] *Id*.

[249] *Id*. (The only other expenditures made by TC during this time were paying for administrative expenses.)

[250] Campaign Legal Ctr. v. Donalds, First General Counsel's Report, FEC MUR No. 7783000062 (Apr. 8, 2021).

[251] *Id* at 8.

[252] Complaint at 1–9, Campaign Legal Ctr. v. Donalds, (Aug. 18, 2020), https://campaignlegal.org/sites/default/files/2020-08/08-18-20%20Byron%20Donalds%20%28final%20signed%29.pdf.

[253] *Donalds*, Proposed FEC MUR No. 7783000062.

[254] *In re* Donalds, Amended Certification, FEC MUR No. 778300100 (Apr. 26, 2022), https://www.fec.gov/files/legal/murs/7783/778314.pdf.

[255] Garrett, *supra* note 73.

[256] *See* Office of Commissioner Ann M. Ravel, *Dysfunction and Deadlock: the Enforcement Crisis at the Federal Election Commission Reveals the Unlikelihood of Draining the Swamp*, FED. ELECTION COMM'N (2017).

[257] *Id*. at 1–4.

substantive enforcement matters, but that number jumped to 9.6% in 2012, 26.2% in 2013, and 30% in 2016.[258] While the Commission is thus not deadlocking in the vast majority of cases, this data reveals that nearly one-third of the Commission's substantive enforcement cases are being impacted by deadlock. This is a striking finding and reflects the systemic nature of the inefficiencies in FEC enforcement.

Moreover, as the number of deadlocks has increased, the amount of fines imposed and collected by the Commission has significantly dropped.[259] For instance, the FEC imposed more than five million dollars in civil penalties for substantive enforcement matters in 2006, but less than six hundred thousand dollars in 2016.[260] As the amount of money spent on political campaigning keeps drastically increasing,[261] it is worrisome that the civil penalties have not only failed to follow suit, but have plummeted.

IV. PROPOSED SOLUTIONS

While an extensive discussion of all possible reforms to campaign finance law and coordination provisions would prove an engaging thought experiment, this paper focuses on two proposed solutions: (1) creating stricter, bright-line laws on coordination, and (2) improving FEC enforcement.

A. Stricter, Bright-Line Laws

There are numerous loopholes under which campaigns and outside groups can engage in quasi-coordination without technically violating the letter of current federal law, just its intended protections.[262] Moreover, there is certainly reason to believe that campaigns and outside groups will take advantage of these loopholes if discovered, as evidenced by previous examples where secrecy was applied in an attempt to hide flagrant violations of the law.[263] Thus, there is a need for stricter laws to eliminate these loopholes. Additionally, given the complexity of federal campaign finance

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[258] *Id*. at 9. The 2017 Ravel report appears to provide the most up-to-date data on deadlocking statistics by the Commission.

[259] *Id*. at 11.

[260] *Id*.

[261] *See* Bill Allison, *Political Ad Spending for Midterms to Hit Record $9 Billion*, BLOOMBERG POLITICS (Aug. 10, 2022), https://www.bloomberg.com/news/articles/2022-08-10/political-ad-spending-for-midterms-set-to-hit-record-9-billion#xj4y7vzkg.

[262] *See supra* section III(A) and accompanying text.

[263] *See supra* section III(B) and accompanying text.

law and the often conflicting guidance promulgated in the FEC advisory opinions,[264] there is a need for brighter-line laws to increase clarity and understanding of the law. These rules necessarily must be applied in a uniform manner amongst all raised cases. Therefore, in order to close out as many coordinating loopholes as possible and prevent against *quid pro quo* corruption and its appearance, Congress and the FEC should create campaign laws that are stricter, clearer, and applied uniformly to all cases. Beginning with setting stricter regulations, Congress and the FEC should follow in the footsteps of the states which have implemented strong provisions against coordination.

First, like the legislative approaches in Maine[265] and California,[266] federal law should not allow candidates to have any involvement with fundraising for PACs, SuperPACs, or outside groups without being subject to contribution limits. Second, while federal law does currently regulate coordination where a current or former employer or independent contractor was involved in a communication with an outside group,[267] it should close the loophole involving campaign staff and volunteers by also codifying a cooling off period for such individuals before they may work for or communicate about the campaign with an outside group. Third, the FEC should remove its arbitrary timeline regarding a candidate or candidate's agent's previous relationship with a vendor in common with an outside group – if a current or previous relationship existed in *any* capacity, those vendor's employees should be immediately firewalled and the vendor, campaign, and outside group should carry the burden to prove that the firewall implemented was sufficient. Next, federal law should close the loophole where an individual can receive gifts of money or assets, cash them in a personal account, and then use them to fund a campaign without being subject to contribution limits by either broadening the definition of candidate to include individuals intending to run or who have announced candidacy but have not crossed the $5,000 threshold, or expressly limiting personal gifts as only being allowed to come from close friends or family.

Furthermore, federal law should narrow its current list of safe harbor exemptions as to the republication and distribution of campaign-published materials. While the republishing of "publicly available sources" likely

[264] *See supra* section III(A) and accompanying text.
[265] ME. REV. STAT. tit. 21-A, § 1015(4) (1995).
[266] CAL. CODE REGS. § 18225.7(d)(5) (1995).
[267] *See supra* section II(B) and accompanying text.

cannot be entirely prohibited under First Amendment grounds,[268] information directly created by and originating from a candidate's campaign, such as press releases, a candidate's website, graphics, and film or photographs taken for advertisements should be labeled as coordination when used by a PAC or outside group. Banning these items, except as in-kind contributions, goes towards the government's interest in regulating coordination, which is preventing the appearance of *quid pro quo* between the outside groups and campaigns. At the same time, this would allow for publicly available sources that were *not* directly created by or originated from the campaign, such as interviews with or articles written by members of the media, to be used.

Moreover, federal law should implement the presumption of coordination principle, seen most prevalently in California's laws.[269] Under the principle, certain actions carry a presumption that coordination has occurred and pass the burden to the candidate or campaign and outside group to prove otherwise. In addition, the burden to prove any exemptions to the prohibited conduct should also be placed on the campaign, outside group, and any related vendors. Federal law should include the aforementioned behaviors in its categorization of presumed coordination, as well as any expenditures made by groups that are established, run, or staffed in a leadership role by a member of the candidate's family or former staff or interns.

Implementing these suggested laws into the federal code would greatly increase the strength of the current regulations and close loopholes contrary to the intent of the law. Simultaneously, making the changes listed above and codifying the specific behaviors that carry a presumption of coordination would also create brighter-line rules, thus improving clarity of the law and the understanding of those subject to it. Finally, brighter-line rules lessen the ability of the Commission to deadlock on cases – at least when the Commissioners are acting in good faith.

B. Improving FEC Enforcement

The second half of the overarching problem with coordination regulation is the FEC's structure and enforcement, or lack thereof. Without the ability to fairly and effectively enforce the law, amending and passing stricter and clearer laws is pointless. Central issues regarding the FEC's structure and

[268] Nor does this paper argue that publicly available sources should be entirely prohibited from republication.

[269] CAL. CODE REGS. § 18225.7(d) (1995).

enforcement as it pertains to coordination regulation include the upward trend of deadlocking by the Commission on substantive enforcement matters, including cases of obvious violations.[270] This trend has peaked to the point where deadlocking occurs in nearly one-third of the substantive enforcement cases heard by the Commission.[271] Procedurally, these cases must be dismissed, without any punishment or civil fine imposed. To address problems surrounding the FEC and its historical ineffectiveness at enforcement – described by some critics as a "toothless tiger"[272] – this paper proposes a number of structural changes.

First, the FEC Chair should have a longer term and be given actual power.[273] Under these proposed reforms, the FEC Chair should supervise staff, oversee the budget and administrative responsibilities, and set and shape policy goals, providing a clear leader who can guide the agency.[274] Given that the FEC primarily utilizes executive powers, constitutionally speaking, the President should have the ability to appoint the Commission Chair.[275] However, the process should subject the nominee to approval by both the Senate and House, so that there would exist barriers to an individual being appointed by the President in order to carry out the President's partisan agenda, at least in theory. Practically speaking, there is no way to prevent the President from appointing the Chair as someone from his party who likely shares the same policy ideals and gets along with the President. Yet, by subjecting the nominee to approval by both the House and Senate, it reduces the risk of a partisan puppet being appointed.[276] The FEC Chair should serve the same term as the President: four years. Having four years rather than one year would allow the Chair to follow through on policy goals and ensure desired standards at the FEC are met.

Second, the number of commissioners should be altered so that it is an odd number – either five or seven – to reduce the equal partisan divide which is leading to deadlock on making decisions and enforcing the law.[277]

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[270] *See supra* section III and accompanying text.

[271] *See supra* section III and accompanying text.

[272] *See* LaForge, *supra* note 215, at 351.

[273] *See* Alvin Padilla-Babilonia, *Reforming the Federal Election Commission: Storable Voting*, 20 WYO. L. REV. 287, 312-13 (2020); *see also* La Forge, *supra* note 215 at 361–62.

[274] *See* LaForge, *supra* note 215 at 361–62; *contra* Bradley A. Smith, *Feckless: A Critique of Critiques of the Federal Election Commission*, 27 GEO. MASON L. REV. 503, 513 (2020).

[275] *See Buckley v. Valeo*, 424 U.S. 1, 6 (1976); *see generally* LaForge, *supra* note 215, at 362.

[276] Although it is true that this proposal does not completely eliminate the risk, as both chambers and the President could come from the same political party.

[277] *See* Weiner, *supra* note 213, at 6. In 2009, Senators McCain and Feingold introduced a bill to replace the six-member Commission with a three-member Federal Election Administration. *See* S. 1648,

However, having the extra Commissioner as either Republican or Democrat would lead to a partisan advantage and create even more problems; as such, the final Commissioner should identify and have a credible history as a political independent.[278] Certifying this history could include checking voting registration and records and past political donations and should go back at least six years so that three federal election cycles are covered. While the President has appointment power, this nominee should also be subject to approval by both congressional chambers and, if desired, a bipartisan committee could help vet potential nominees.[279] Depending on whether the ultimate number of Commissioners is five or seven, the voting requirement for passage for the Committee to act should either be three or four votes respectively, so that partisan divide cannot rule.

Third, the structure of several civil enforcement procedures at the FEC should be revamped. To allow for greater clarity of the law and increase behavior consistent with the law, the FEC should establish a department or formal procedure where campaigns or outside organizations seeking guidance in good faith on the often-convoluted measures can make informational requests.[280] Additionally, the FEC should formalize the now-common practice of lowering the penalty where campaigns and outside groups self-report possible violations in order to incentivize more individuals and campaigns to come forward, thereby increasing enforcement of the law.[281]

111th Cong. (2009). Such was a repeat attempt of similar efforts in the past. *See* H.R. 421, 110th Cong. (2007) and S. 478, 110th Cong. (2007); H.R. 5676, 109th Cong. (2006) and S. 3560, 109th Cong. (2006); H.R. 2709, 108th Cong. (2003) and S. 1388, 108th Cong. (2003). None of the aforementioned bills passed referral. While the suggestions of this paper agree with having an odd number of commissioners, keeping the number at five at minimum may help to combat any risk of appearance of political influence. *See also* Padilla-Babilonia, *supra* note 274, at 289.

[278] *See* Weiner, *supra* note 213, at 6. Being a political independent could mean affiliation with the Libertarian Party or another third party.

[279] *Id*.

[280] *Cf.* Weiner, *supra* note 213, at 8 ("[p]roviding an effective legal remedy for both complainants and alleged violators to obtain legal clarity if the Commission fails to act on an enforcement complaint within one year.").

[281] *See* Weiner, *supra* note 213, at 9; see also *Meredith Metzler, Policy Statement on self reporting of violations*, FEC (Mar. 22, 2007), https://www.fec.gov/updates/policy-statement-on-self-reporting-of-violations/; *Administrative fines*, FEC, https://www.fec.gov/legal-resources/enforcement/administrative-fines/ (last visited Nov. 16, 2023); Calculating administrative fines, FEC, https://www.fec.gov/legal-resources/enforcement/administrative-fines/calculating-administrative-fines/ (last visited Nov. 16, 2023).

C. Counterarguments

One counterargument to these proposals finds its roots in legislative intent: perhaps Congress planned for the FEC to display a non-insignificant level of inefficiency as a direct result of its partisan setup. Examining Congress' intentions behind establishing the FEC and its ultimate structure leads to the following facts. Post-Watergate and at the time of the 1974 amendments to FECA, members of Congress expressed their desire to see a Commission which would oversee campaign law, but emphasized its need to be non-partisan.[282] For example, the Senate Watergate Committee stated that a Commission not controlled by one partisan party would exemplify "the most significant reform that could emerge from the Watergate scandal."[283] Republican members of Congress wanted the Commission to be out of the control of one partisan affiliation because at the time, required disclosures were under the power of the Secretary of the Senate and the Clerk of the House, both Democrats.[284] On the flipside, Democrats also wanted to ensure independence of the agency because contribution and expenditure limits were under executive power, which was held by the Nixon administration.[285] Thus, both major political parties were concerned with preventing the agency from being controlled by one partisan side, who would then hold the power of enforcement.[286]

By establishing the Commission to have equal bipartisan membership, and requiring a bipartisan vote for the Commission to take action, neither the Republicans nor the Democrats could effectively take control of the agency.[287] Further, by keeping the Chair seat of the Commission temporary and rotating, the position was ensured to be fairly impotent.[288] Such designs by Congress may have intended for the Commission to naturally deadlock in three-to-three votes along partisan affiliation lines in order to prevent the takeover of one partisan group.[289]

Further, public support for this counterargument has been expressed by members of the Commission itself. Speaking of the FEC, Commissioner Lee E. Goodman told the New York Times, "Congress set up this place to

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[282] *See* Smith, *supra* note 275, at 513.
[283] S. Rep. No. 93-981 at 563 (1974).
[284] *See* Robert E. Mutch, *Campaigns, Congress and Courts: The Making of Federal Campaign Finance Law* 1–3, 83–84 (1988)..
[285] *Id*. at 86–87.
[286] *See* Smith, *supra* note 275, at 513.
[287] *Id*.
[288] 52 U.S.C § 30106(a)(5) (2018); *see also* Smith, *supra* note 275, at 513.
[289] *See* Smith, *supra* note 275, at 513.

gridlock. The agency is functioning as Congress intended."[290] Additionally, Commissioner Caroline C. Hunter stated: "[w]e're not interested in going after people unless the law is fairly clear, and we're not willing to take the law beyond where it's written."[291] Finally, given that Congress passed BCRA, and many of BCRA's provisions were vague, it is possible that Congress did not intend for clear-cut findings and strong enforcement of campaign law by the FEC in the majority of cases. If that is true, then passing the reforms suggested earlier in this section could go against congressional intent or turn what was only ever meant to be a small resource into a monster.

However, there is also evidence of congressional intent to empower the FEC and affect and enforce real campaign law. To begin, Congress itself established the FEC following political campaign scandals, including Watergate.[292] Thus, Congress recognized a real need for an agency to implement, oversee, and enforce campaign finance law. Given the heated outcry and investigatory reaction of members of Congress following the Watergate scandal,[293] it is not persuasive to state that the responding establishment of the FEC was for public perception only. Additionally, after passing BCRA, Congress instructed the FEC to issue new regulations on coordinated communications and repeal the old provisions, but provided very little guidance on how to draft the new regulations.[294] If Congress felt the need to limit the regulatory or enforcement power of the FEC, it would have drafted the language on coordination itself – likely as a weak or practicably unenforceable law. Further, Congress has granted the FEC power to impact the law both through regulation and advisory opinions.[295] Congress' establishment of the agency as a response to political campaign finance scandals, in combination with its granting of power to draft new regulations, reflects an intent that the agency hold legitimate power to oversee and enforce the law.

One additional and related objection to the proposals of this paper is that, congressional intent aside, structural reform to increase the effectiveness of the FEC should be prevented due to its risks against our democratic

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[290] Mark Hensch, FEC chief: We can't stop election abuse, THE HILL (May 3, 2015, 2:08 PM), https://thehill.com/blogs/ballot-box/fundraising/240896-fec-chief-we-cant-stop-2016-election-abuse/ (last visited Nov. 16, 2023).

[291] *Id*.

[292] *See* Strickland, *supra* note 41.

[293] *See* Olsen, *supra* note 26; *see also The Final Report*, *supra* note 26.

[294] Pub. L. No. 107-55 § 214.

[295] Michael M. Franz, *The Devil We Know? Evaluating the FEC as Enforcer* 6–7 (Sept. 16, 2009), https://www.ifs.org/wp-content/uploads/2012/11/FranzFEC2008.pdf.

system.[296] The rationale stands as follows. If the FEC is somewhat inefficient at regulating and enforcing the law, then there is little to no risk of it becoming too powerful of an entity.[297] An overly powerful entity could restrict the freedom of citizens and use executive power at an inappropriate level for a regulatory, albeit independent, agency, perhaps by creating or enforcing laws not authorized by Congress.[298] Further, if a partisan majority took control of such an overpowered entity, it could use the abilities of the agency to greatly benefit its own political party and candidates at the detriment of others.[299]

For example, by amending the FEC to have an odd number of Commissioners or to give the Chair actual power to guide policy at the agency, some commentators fear that such proposals "would give one major party or the other functional control of the entity responsible for interpreting, enforcing, and otherwise implementing federal campaign finance laws."[300] While such proposals could end the Commission's tendency to deadlock, there is a risk that one partisan affiliation would effectively take control of the FEC and use its power to benefit that political party and related candidates and campaigns.[301]

Such a scenario would be damaging to our democracy and encompasses risks ranging from the partisan group in control of the FEC allowing their own members to break the law without punishment, to imposing monetary penalties on campaigns of the opposite political party unfairly, to finding violations of federal law by members of the opposite party without reason. Perhaps the severe greatness of this risk outweighs the possible benefits of a more effective FEC — as one commentator put it, "the devil we don't know might be even worse than the one we do know."[302] One way to ensure that an agency does not amass too much power is by designing its structure in a way that makes taking affirmative action difficult. Therefore, the FEC's seemingly innate drive towards deadlocking rather than taking affirmative action in cases is not a flaw in its structure, but rather an intentional and desirable protection of rights against an entity and one political party amassing too much power to be used for self-interested gains.

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[296] Daniel P. Tokaji, *Beyond Repair: FEC Reform and Deadlock Deference*, *in* DEMOCRACY BY THE PEOPLE: REFORMING CAMPAIGN FINANCE IN AMERICA 172, 186-88 (Eugene D. Mazo & Timothy K. Kuhner eds., 2018).

[297] *Id*.

[298] *Id*.

[299] *Id*. at 186.

[300] *Id*.

[301] *Id*.

[302] *Id*. (citing Franz, *supra* note 296, at 187).

While such a risk is certainly possible, especially given the hard partisan divide in today's political system, progress and the prevention of corruption should not be obstructed due to fear of risks that, if realized, could be quickly stopped. Albeit from the judicial branch, the Supreme Court has stated that the purpose of regulating campaign finance law is to prevent *quid pro quo* corruption and its appearance.[303] Clarifying and strengthening the laws against coordination between campaigns and outside groups would increase understanding of the law and prevent loopholes where the law's intent at preventing corruption is violated. Similarly, increasing the Commission's ability to enforce these strengthened laws would also aid in preventing corruption and upholding justice, at least in theory.

These are noble and needed pursuits which justify taking a risk, especially when that risk can be quickly alleviated. If the counterargument's proponents' worst dreams were to come true and the FEC became too powerful, making decisions against campaigns contrary to the law, or experiencing a coup d'état and partisan capture by one dominant partisan group — which then used the agency's powers to the advantage of its own party and candidates — there would be a simple solution. Congress could simply strip the FEC of its power by passing new legislation or amending BCRA. For example, if having an odd number of Commissioners or a Chair with power actually led to partisan corruption, Congress could reinstate an even number of Commissioners or term out the Chair to bring the agency back to its comfort zone of deadlocking. Similarly, if the FEC transformed into a Goliath and threatened the ideals of democracy itself, Congress could immediately pass legislation and shut down the agency. Some critics are already calling for the FEC's elimination, thus recognizing the ability of Congress to do so.[304] While the aforementioned risks appear great, they could be quickly alleviated and therefore do not justify halting progress and preventing improvements in campaign finance.

V. CONCLUSION

Although only a few examples could be provided for brevity of this paper, candidates and outside groups are violating federal law on campaign finance coordination without FEC punishment, as well as finding loopholes to engage in conduct that is less-than-ethical, but technically within legal

[303] *See supra* section II(E) and accompanying text.

[304] *See Eliminating the FEC: The Best Hope for Campaign Finance Reform?* 131 HARV. L. REV. 1421 (2018).

bounds.[305] While justice may have been served in some of these examples — with federal prosecutors ultimately charging George Santos[306] and a district court forcing the hand of the FEC to act in the Clinton-Correct the Record case[307] — such resolutions do not always come about. Congress should tighten the federal laws regarding coordination and restructure the FEC so that the law can be enforced equally in all cases.

Although members of Congress and those involved in politics rarely admit to or are indicted for wrongdoing in the political system,[308] at minimum there is a public perception of corruption in politics[309] and an awareness of mutually beneficial relationships between campaigns, candidates, and those groups and individuals providing support, which can cross ethical lines.[310] Thus, there is real need to redraft coordination laws to be stricter and clearer, and redesign the FEC to prevent constant deadlocking and increase enforcement and advisement. Maintaining the status quo will only result in money continuing to act like water and flow through the dark backchannels and loopholes where it is guided by unethical candidates, campaigns, donors, and outside groups.

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[305] *See*, *infra*, Sections II and III.

[306] *See*, *infra*, Introduction.

[307] *See*, *infra*, Section III.

[308] *But see, e.g., Congressman Jeff Fortenberry Found Guilty of Concealing Facts and Lying to Investigators Probing Illegal Campaign Contributions*, UNITED STATES ATTORNEY'S OFFICE CENTRAL DISTRICT OF CALIFORNIA (Mar. 24, 2022), https://www.justice.gov/usao-cdca/pr/congressman-jeff-fortenberry-found-guilty-concealing-facts-and-lying-investigators; see also Hunter Schwarz, More than two dozen members of Congress have been indicted since 1980, THE WASHINGTON POST (July 29, 2015), https://www.washingtonpost.com/news/the-fix/wp/2015/07/29/more-than-two-dozen-members-of-congress-have-been-indicted-since-1980/.

[309] *See* Nathaniel Persily and Kelli Lammie, *The Law of Democracy: Campaign Finance After McCain-Feingold: Perceptions of Corruption and Campaign Finance: When Public Opinion Determines Constitutional Law*, 153 U. PA. L. REV. 119, 147 (2004) (detailing how a public poll rose from 22% in 1964 to 75% in 1994 on distrust of the government, from 31% in 1964 to 76% in 1994 on the government being run by a "few big interests," and from 25% in 1958 to 51% in 1994 on a perception of government leadership being crooked").

[310] *See id*. at 133 (noting that survey data was presented in *Daggett v. Comm'n on Governmental Ethics & Election Practices*, 205 F.3d 445, 457 (1st Cir. 2000) showing that 70% of respondents "believed that large campaign contributions were a major source of political corruption," as well as in Montana Right to Life Ass'n v. Eddleman, 343 F.3d 1085, 1093 (9th Cir. 2003), conveying that 78% of the state's voters believed money was "synonymous with power" and that 69% of state voters thought "elected officials gave special treatment" to large monetary supporters).