

The Biden Administration's Immediate Opportunity to Create A Pro-Enforcement Majority on the Federal Election Commission

February 1, 2021

The President has an immediate and unilateral opportunity to establish a solid and enduring pro-enforcement governing majority at the Federal Election Commission by replacing a commissioner whose term expires at the end of April – *if and only if* he is willing to bypass the informal appointment norms that have gridlocked the FEC to the GOP's benefit for years.

BACKGROUND

Statute: 52 USC §30106(a) of the Federal Election Campaign Act (FECA) establishes six seats on the FEC. Commissioners are appointed by the President and confirmed by the Senate. No more than three members of the Commission may be affiliated with the same political party. Commissioners serve in six-year terms. Commissioners cannot be reappointed, but they may serve past their terms' expiration until replaced by a Senate-confirmed presidential appointee.

Current personnel: In December 2020, three new members joined the Federal Election Commission, restoring its ability to exercise its most important powers.¹ All six seats on the Commission are now filled.² The Republican side has turned over entirely within the last nine months. Unfortunately, these new GOP commissioners appear to share their patron's – Sen. McConnell's – deep ideological hostility toward federal campaign-finance law enforcement.

Without action by the President, these new GOP FEC commissioners will almost certainly obstruct the agency just as well as Sen. McConnell's previous GOP commissioners did.³

Norms: Two key appointment norms have enabled this long-term obstruction:

1. ***The 3-3 partisan split, with three 'Democratic FEC seats' and three 'GOP FEC seats.'***

Nothing in the statute requires this lineup, and this norm has not been held to religiously. In fact, the Commission currently has three Republicans, two Democrats, and an independent, Steven T. Walther, whose name was put forward to President George W. Bush by Democratic Sen. Harry Reid. Though Walther is sometimes said to “hold a Democratic FEC seat,” no such thing exists under the statute.

2. ***The opposing-party consult: Presidents pick their party's nominees. Senate leadership of the other party picks theirs and sends them to the President.***

Sen. McConnell, perhaps the nation's foremost opponent of campaign-finance regulation, has largely controlled the GOP's nominations to the FEC since 2008. He has abused this prerogative, putting forth nominees who fundamentally oppose the

¹ For details and context, see “Federal Election Commission: Membership and Policymaking Quorum, In Brief,” Congressional Research Service, <https://fas.org/sgp/crs/misc/R45160.pdf>.

² The newest members are: Chair Shana M. Broussard (D), Vice Chair Allen Dickerson (R), and Commissioner Sean J. Cooksey (R). Commissioner James E. “Trey” Trainor III (R) was appointed in May 2020.

³ Former commissioners Donald F. McGahn II, Lee E. Goodman, Caroline C. Hunter, and Matthew S. Petersen.

FEC's mission. These GOP commissioners have largely been successful in their mission to grind the FEC's enforcement and regulatory functions to a halt.

These norms do not cut both ways equally. Republicans embrace the norms so tightly because they reap such a disproportionate share of their benefits. Adherence to the norms has wrought a poorly enforced campaign-financing system dominated by dark money, super PACs, and billionaire donors. That may generally be good for the GOP, but it is bad for democracy.

Terms: Commissioners serve out the remainder of the six-year term to which they are appointed, at which point a replacement may be appointed. The terms are staggered and expire on April 30 of odd-numbered years. This is the current lineup:

Terms ending April 30, 2021: Cooksey (R) and Walther (I)⁴
April 30, 2023: Trainor (R) and Broussard (D)
April 30, 2025: Dickerson (R) and Weintraub (D)⁵

*The 2021 seats present the Biden Administration with its opportunity. Cooksey was appointed in December 2020 to a term with just five months remaining in it. He can thus be replaced *this year* on May 1. Appointments are usually done in pairs; Walther has been in an expired term since 2009. Anyone sworn into either of those seats after May 1, 2021 can serve a full six years.*

DISCUSSION

H.R. 1 contains major FEC reforms. But passage of that bill will likely require major change to the Senate's filibuster rules – a far-from-certain outcome. The Biden Administration and Senate Democrats need not wait.

Appointing a pro-enforcement commissioner to GOP Commissioner Sean J. Cooksey's seat will shift the FEC from permanent 3-3 ideological gridlock to a solid 4-2 pro-enforcement majority. Three distinct and good options exist to accomplish this, depending on whether the President chooses to bypass (1) the 3-3 party-split norm, (2) the opposing-party consult norm, or (3) both.

To be clear: All these options represent a *serious* provocation to Sen. McConnell. Maintaining a neutered FEC is second in his heart only to stacking the federal judiciary. But if President Biden is serious about having campaign-finance law enforced during his Administration, he must be willing to cross Sen. McConnell one way or another. Every legislative or appointment path to effective campaign-finance law enforcement involves crossing Sen. McConnell.

Historically, campaign-finance law proponents have reckoned that crossing Sen. McConnell on the issue is not worth the war that would result. Over time, this has led to a campaign-finance system badly stacked against the average citizen. The corresponding drop in Americans' faith in their elections is paying bitter dividends. But Sen. McConnell's opposition to campaign-finance law enforcement is based on power, not ideology. The extent to which he will fight to the death over campaign-finance issues should signal that confronting him on these issues should be a *higher* priority for his opponents, not lower. Dodging the fight cements his advantages.

⁴ Walther's statutory term ended in 2009; he has served in holdover status since. The six-year term attached to the Commission seat he holds cycled around in 2015 and does again this year.

⁵ Likewise, Weintraub's statutory term ended in 2007 and cycled around in 2013 and 2019.

To be sure, it is not unknown for Democrats to play lip service to campaign-finance reform. And the Democratic election-law establishment has lost little sleep over the FEC’s dysfunction. But hopefully enough well-placed people within the Biden Administration and Congress are willing to spend the political capital necessary to take on the internal and external hurdles and enable the FEC to address its most significant enforcement matters and regulatory issues.⁶

If that optimism is warranted, these three variations on a theme will get the job done:

	Hold to opposing-party consult norm	Bypass opposing-party consult norm
Hold to 3-3 partisan-split norm	<p>Status quo. At best, the President could appoint a Democrat to one 2021 seat and ask Senate GOP leadership for a list of 10 acceptable candidates for the other seat in the hopes of finding the least anti-enforcement among them. This request will likely be ignored; GOP Commissioner Cooksey can serve until someone is nominated and confirmed to his seat; Republican Senate leadership would have zero incentive to put any names forward, and the President cannot force them to do so.</p> <p>Bad result: 3-3 D-R partisan split and no pro-enforcement majority. Continued gridlock.</p>	<p>1. President appoints a Democrat and a pro-enforcement Republican to the Commission without consulting Senate GOP leadership. Truly pro-enforcement Republicans are rare birds, but they do exist.</p> <p>Good result: 3-3 D-R partisan split and 4-2 pro-enforcement majority.</p> <p><i>This creates an FEC that looks much like the existing Commission from the outside but can enforce the law much more effectively.</i></p>
Bypass 3-3 partisan-split norm	<p>2. President appoints a Democrat and a pro-enforcement independent — or two pro-enforcement independents — to the Commission after consulting independent Sens. King & Sanders on the independent(s).</p> <p>Good result: 3-2-1 or 2-2-2 D-R-I partisan split, both with 4-2 pro-enforcement majority.</p> <p><i>This has good optics – why shouldn’t the nation’s independents have a voice? And why would the President consult GOP leadership when appointing independents? But consults have always been with the GOP – this would just barely hold to the norm.</i></p>	<p>3. President appoints a Democrat and a pro-enforcement independent to the Commission without opposing-party consults.</p> <p>Good result: 3-2-1 D-R-I partisan split and 4-2 pro-enforcement majority.</p> <p><i>The Commission has had three Republicans and only two Democrats for years; why not have an independent sitting on the Rs’ side of the aisle?</i></p>

CONCLUSION

Bypassing informal and disadvantageous appointment norms to replace FEC Commissioner Cooksey this spring will create immediate, substantial, and enduring improvements to the federal government’s ability to regulate and enforce federal campaign-finance law.

⁶ This memo assumes the reader’s background awareness of the FEC’s longtime dysfunction. For examples of significant regulatory opportunities that a functional FEC *could* pursue, see “CLC Rulemaking Letter to FEC,” Campaign Legal Center, Jan. 13, 2021, <https://campaignlegal.org/sites/default/files/2021-01/01-13-21%20CLC%20rulemaking%20letter%20to%20FEC.pdf>.