



Analysis of H.R. 1 (Part Two)

Establishing a Campaign Speech Czar and Enabling Partisan Enforcement: An Altered FEC Structure Poses Risks to First Amendment Speech Rights

Bradley A. Smith, Chairman

January 2019

Introduction

While most of the attention on H.R. 1 has focused on “hot” issues, such as earmarking government subsidies for political campaigns, gerrymandering, and new restrictions on grassroots organizations that engage in public affairs,¹ twenty pages of the bill are devoted to the unsexy, yet vitally important, issue of the Federal Election Commission’s (FEC) composition and operating procedures.²

If you’re a Democrat, do you think Donald Trump should be able to appoint a campaign speech czar to determine and enforce the rules on political campaigns? And if you’re a Republican, would you have wanted those rules enforced by a partisan selected by Barack Obama?

Of course not. That’s why for over 40 years, Republicans and Democrats have agreed that campaign regulations should be enforced by an independent, bipartisan agency. The Watergate scandal that forced Richard Nixon to resign the presidency showed the dangers of allowing one party to use the power of government against the other.³

As the late Sen. Alan Cranston (D-Ca.) warned during debate on legislation creating the agency, “We must not allow the FEC to become a tool for harassment by future imperial Presidents who may seek to repeat the abuses of Watergate. I understand and share the great concern expressed by some of our colleagues that the FEC has such a potential for abuse in our democratic society that the President should not be given power over the Commission.”⁴ That concern led to Congressional adoption of the present method of selecting Commission members.

Those concerns also caused Congress to structure the Federal Election Commission so that a president could not install a partisan majority that could abuse campaign regulations to bludgeon their opponents.

Bipartisanship is not easy. It requires both sides to recognize they will not always get their way. But for over 40 years, Republicans and Democrats were able to do it. Throwing that away and simply hoping a new agency will side with your preferred party is reckless and an enormous threat to the First Amendment.

In a nutshell, H.R. 1 does away with the FEC’s existing bipartisan structure to allow for partisan control of the regulation of campaigns and enables partisan control of enforcement. It also proposes changes to the law to bias enforcement actions against speakers and in favor of complainants.

1 See, e.g., Eric Wang, Analysis of H.R. 1 (Part One): “For the People Act” Replete with Provisions for the Politicians, Institute for Free Speech (Jan. 23, 2019), at https://www.ifs.org/wp-content/uploads/2019/01/2019-01-23_IFS-Analysis_US_HR-1_DISCLOSE-Honest-Ads-And-Stand-By-Every-Ad.pdf.

2 As the Institute for Free Speech (IFS) continues to analyze this and other sections of H.R. 1 that regulate First Amendment rights, it expects to release additional analyses of the bill. IFS’s written analyses may not address every concern it may have with the proposal, as the 570-page bill’s provisions are simply too numerous and complex to be able to effectively discuss the bill’s contents in their entirety.

3 See Scott Blackburn, Delusions about “Dysfunction”: Understanding the Federal Election Commission, Institute for Free Speech (Oct. 5, 2015), at https://www.ifs.org/wp-content/uploads/2015/10/2015-10-05_IFS-Issue-Brief_Blackburn_Delusions-About-Dysfunction-Understanding-The-FEC.pdf.

4 Legislative History of Federal Election Campaign Act Amendments of 1976, Federal Election Commission, at https://transition.fec.gov/pdf/legislative_hist/legislative_history_1976.pdf at 89.

Executive Summary

Specifically, H.R. 1 would:

- Transform the Federal Election Commission from a bipartisan, 6-member agency to a partisan, 5-member agency under the control of the president. This change could have the effect of decreasing the Commission's legitimacy by significantly increasing the likelihood that the agency's decisions will be made with an eye towards benefiting one political party, or, at best, be seen that way by the public.
- Empower the Chair of the Commission, who will be hand-picked by the president, to serve as a de facto "Speech Czar." In particular, the Chair would become the Chief Administrative Officer of the Commission, with the sole power to, among other things, appoint (and remove) the Commission's Staff Director, prepare its budget, require any person to submit, under oath, written reports and answers to questions, issue subpoenas, and compel testimony.
- Dispose of the requirement in existing law that the Commission's Vice Chair come from a different party than the Chair, further allowing power at the agency to be consolidated within one party.
- Time the enactment of this provision to ensure continued one-party control of the Commission. As a result, the president elected in 2020 will be able to ensure that his or her appointees constitute a majority of the Commission and the powerful Chair's Office through at least 2027, even if he or she is not re-elected in 2024.

Relatedly, this structure will result in all new regulations required under other provisions of H.R. 1 being written by the initial appointing president's team of the Chair, supportive commissioners, and their appointed General Counsel. These provisions can be written (and if necessary re-written) with a specific eye to the 2022 midterms and the 2024 and 2028 presidential races.

- Expand the General Counsel's power while eroding accountability among the Commissioners. In a departure from existing practice, H.R. 1 provides that the General Counsel may initiate an investigation if the Commission fails to pass a motion to reject the General Counsel's recommendation within 30 days. Such a change allows investigations to begin without bipartisan support while also allowing commissioners to dodge any responsibility for their decisions by simply not taking a vote and letting the General Counsel's recommendation take effect.

H.R. 1 also permits the General Counsel to issue subpoenas on his or her own authority, rather than requiring an affirmative vote by the Commission.

- Create new standards of judicial review that weaken the rights of respondents in Commission matters. If a respondent challenges in court a Commission decision finding that it violated the law, the court will defer to any reasonable interpretation the agency gives to the statute, but if the respondent wins at the Commission, no deference will be given to the FEC's decision, if challenged in court. This "heads I win, tails you lose" approach harms respondents and biases court decisions against speakers.
- Establish a non-binding "Blue Ribbon Advisory Panel" to aid the president in filling Commission vacancies that is exempt from the requirements of the Federal Advisory Committee Act, effectively creating an elite committee to debate in secret, on the public's dime, and with the imprimatur of the government, on whom the president should appoint to the agency.
- Hamstring the FEC in its advisory opinion process by mandating that interested parties who submit written comments to the Commission must be allowed to present testimony at meetings on advisory opinion requests. This change is akin to dictating to Congress who has a right to testify in committee hearings.

Analysis

I. Creating A Partisan FEC

A) Background

Title VI, Subtitle A of H.R. 1, dubbed the “Restoring Integrity to America’s Elections Act,” begins by abolishing the FEC’s historic, bipartisan structure.

Since it was created in 1974, the FEC has been a true bipartisan commission, with each major party effectively controlling 3 of its 6 seats. (Current law says that “[n]o more than 3 members of the [FEC] ... may be affiliated with the same political party.”)⁵ Under the post-Watergate statute creating the FEC, four votes are needed for the Commission to initiate investigations or to prosecute alleged violations.⁶ As a result, it is impossible for an investigation or prosecution of a Democratic campaign to go forward on the basis of Republican votes alone, and vice versa – there must be at least some bipartisan agreement that an investigation or charges are warranted.

Critics who favor more regulation of political speech have long complained that this bipartisan structure hampers FEC enforcement efforts and detracts from the legitimacy of the Commission. With 3 Republicans and 3 Democrats, the Commission, they argue, “frequently deadlocks” and is unable to move forward on enforcement matters.⁷ Effectively, two-thirds of commissioners must agree before the Commission moves forward. This critique, however, is wrong on several fronts.

First, any small commission requires a sizeable supermajority to operate, including commissions with an odd number of members. A five-member body requires a 60% majority; a three-member body requires a two-thirds majority.

But, in fact, tie votes have always been a small percentage of FEC votes. Historically, they have totaled approximately one percent to four percent of Commission votes on enforcement matters.⁸ During the peak years of alleged “gridlock” on the Commission, 2008-2014, they still totaled less than 15 percent of overall votes.⁹

Second, even when deadlocks occur, that does not leave an enforcement matter unresolved. Rather, it means that the FEC will not open an investigation, or will not prosecute an alleged violation, as the case may be. A 3-3 vote on such a motion means the motion fails – there is nothing mysterious or out of the ordinary about it. And since the goal is to assure some degree of bipartisan agreement before proceeding, that is the proper result.

That leads to the third and most important point: Although critics claim that tie-votes sap the FEC’s ability to enforce campaign finance laws, in fact, it is assuredly the opposite. The only reason that the FEC has any legitimacy is its bipartisan makeup. Particularly in the current environment, it is inconceivable that an agency empowered to make prosecutorial decisions about the legality of campaign tactics, communications, funding, and activities on a straight party-line vote would have any legitimacy.

B) Creating a Partisan Commission

1. Abandoning the FEC’s Equal Party Makeup

H.R. 1 does away with the FEC’s historic bipartisan makeup, creating a 5-member Commission and allowing a simple majority vote to launch an investigation or to prosecute an alleged violation.¹⁰

⁵ 52 U.S.C. § 30106(a)(1).

⁶ 52 U.S.C. § 30106(c).

⁷ See, e.g., Ann M. Ravel, *Dysfunction and Deadlock at the Federal Election Commission*, N.Y. TIMES (Feb. 20, 2017), at <https://www.nytimes.com/2017/02/20/opinion/dysfunction-and-deadlock-at-the-federal-election-commission.html> and Justin Miller, *Reform Advocates’ Elusive Goal: Fix the FEC*, THE AMERICAN PROSPECT (Mar. 3, 2016), at <https://prospect.org/blog/checks/reform-advocates%e2%80%99-elusive-goal-fix-fec>.

⁸ See, e.g., Bradley A. Smith, Opening Statement of Bradley A. Smith, Chairman of the Federal Election Commission Before the Senate Committee on Rules and Administration, Federal Election Commission (Jul. 14, 2004), at <https://www.fec.gov/resources/about-fec/commissioners/smith/smithstatement05.pdf>; Bradley A. Smith and Stephen M. Hoersting, A Toothless Anaconda: Innovation, Impotence and Overenforcement at the Federal Election Commission, ELECTION LAW JOURNAL (Vol. 1, No. 2, 2002), at <https://www.fec.gov/resources/about-fec/commissioners/smith/smitharticle01.pdf> at 159.

⁹ See, e.g., Lee E. Goodman, End of Year Statement from Chairman Lee E. Goodman, Federal Election Commission (Dec. 2014), at http://www.fec.gov/members/goodman/statements/LEG_Closing_Statement_Dec_2014.pdf at 2; Nicholas Confessore, *Election Panel Enacts Policies by Not Acting*, N.Y. TIMES (Aug. 25, 2014), at <https://www.nytimes.com/2014/08/26/us/politics/election-panel-enacts-policies-by-not-acting.html>.

¹⁰ H.R. 1 § 6002(a).

The bill attempts to cover this partisan makeup by providing that no more than two of the five commissioners may be members of any one political party. This means that the fifth member would have to be a member of a minor party, or a political independent. This is not, however, a barrier to partisan control. For example, under this criteria, Senator Bernie Sanders, who nearly gained the 2016 Democratic presidential nomination, would not count as a Democrat on the Commission (technically, Sanders remains an “independent”), allowing him to join two other Democrats in a Commission majority. The same would be true for Angus King, the Maine senator elected as an independent, but who caucuses with Democrats.

Indeed, the FEC currently has an independent serving, Commissioner Steven Walther. But Walther was nominated at the behest of former Democratic Senate Majority Leader Harry Reid, having served as Reid’s lead attorney in a 1998 recount election Reid won by just 428 votes.¹¹ Walther holds a “Democratic” seat on the Commission, and is regularly identified as a Democrat.¹² Under H.R. 1, Walther would be the “balance of power.” Does that really sound nonpartisan?

The Pew Research Center has found that roughly two-thirds of self-identified “independents” are reliable supporters of one of the two major parties, and tend to be so because they intensely dislike the other major party.¹³ In short, any president worth his salt would have no trouble finding an “independent,” or perhaps a Green or Libertarian, with views favorable to his or her party’s position, and inclined to particularly distrust the other major party. This is no recipe for nonpartisan enforcement.

What little fig leaf is added by having an “independent” member of the Commission can also be stripped away by the president. Under the current law, there must always be some level of bipartisan support for the Commission to undertake an investigation or prosecution. But H.R. 1 provides that a simple majority of sitting commissioners (but no less than three) constitutes a quorum and can take official action.¹⁴ Thus, merely by refusing to fill vacancies set aside for the opposition party or the nominally independent fifth member, the president can assure that his or her two party appointees – with or without the support of the nominal independent or any member of another party – can enact a partisan enforcement agenda.

It is hard to imagine a better way to spread distrust of federal regulation of campaign speech.

2. A More Powerful, Partisan Chair – A Campaign Speech Czar

Under the FEC’s longstanding structure, the Chair of the Commission is elected by the Commissioners themselves to a one-year term at the start of each year and can only serve as Chair once in a six-year term. The Vice Chair and Chair must be from different parties. The Chair is not devoid of added power, but to a substantial extent, the position is ceremonial, because almost all major decisions, including hiring and firing key staff, issuing subpoenas, initiating enforcement actions, and approving proposed budgets for submission, must be made by a majority Commission vote. Again, the obvious purpose is to legitimize the Commission by assuring that it does not operate as a partisan agency.

H.R. 1 would create a speech czar in the form of a much more powerful Chair, appointed by the president, who would dominate the Commission. Under the legislation, the Chair would become the “Chief Administrative Officer” of the Commission, with the sole power to appoint – and remove – the Commission’s Staff Director, prepare its budget, “require ... any person to submit, under oath, such written reports and answers to questions as the Chair may prescribe,” issue subpoenas, and compel testimony.¹⁵ The legislation would require the Chair to “consult” with other commissioners on these matters, but, in the end, the Chair would have full authority to act alone.¹⁶

About the only administrative act the Chair cannot do alone is appoint the agency’s General Counsel. The Chair must make the appointment, but at least two other commissioners (again, no required bipartisanship) must concur.¹⁷ Whether a majority of the Commission can appoint or dismiss the General Counsel over the Chair’s objections is not clear, but even if it can, no bipartisanship is required. The General Counsel has enormous influence on the Commission’s enforcement policies, and, as we will see below, H.R. 1 grants him or her even greater powers.

11 See Matt Bewig, Chair of the Federal Election Commission: Who Is Stephen Walther?, AllGov (May 16, 2017), at <http://www.allgov.com/news/top-stories/chair-of-the-federal-election-commission-who-is-steven-walther-170516?news=860181>.

12 That Commissioner Walther, after 13 years on the Commission, must still regularly make the point that he is not a registered Democrat illustrates that being an “independent” does not strip one of partisan leanings. See Tisha Thompson, et al., Deadlock: FEC Commissioners Say They’re Failing to Investigate Campaign Violations, NBC Washington (Sept. 19, 2016), at <https://www.nbcwashington.com/investigations/Deadlock-FEC-Commissioners-Say-Theyre-Failing-to-Investigate-Campaign-Violations-394014971.html>.

13 See Samantha Smith, 5 Facts about America’s political independents, Pew Research Center (Jul. 5, 2016), at <http://www.pewresearch.org/fact-tank/2016/07/05/5-facts-about-americas-political-independents/>.

14 H.R. 1 § 6002 (to be codified at 52 U.S.C. § 30106(a)(1)).

15 *Id.* § 6003 (to be codified at 52 U.S.C. § 30107(a)(1)(A)(i), (iii) and 52 U.S.C. § 30107(a)(1)(B)(ii), (iv)-(v)).

16 *Id.* (to be codified at 52 U.S.C. § 30107(a)(1)(A)).

17 *Id.* (to be codified at 52 U.S.C. § 30107(a)(1)(B)(i)).

The Chair's power to appoint the Staff Director may sound like an innocuous administrative post, but, in fact, this is a powerful position and one that, like the General Counsel, exercises considerable sway in the FEC's enforcement processes as well as administration. That is because the FEC's Audit and Reports Analysis divisions and its Alternative Dispute Resolution Office fall under the direction of the Staff Director. Commission audits are extremely time-consuming for the committees and campaigns that are audited, and may require them to reveal substantial information about their political strategies and tactics. Audits may uncover violations, intentional or inadvertent, leading to fines and penalties. The Reports Analysis Division is responsible for compliance with the law's extensive reporting requirements, and its efforts, too, often identify violations – typically inadvertent, but still leading to penalties and bad publicity. And the Alternative Dispute Resolution Office has been a highly successful program through which the Commission resolves many contested or inadvertent violations. Any of these offices could easily be subverted to partisan use by a presidentially-appointed Chair and his or her hand-picked Staff Director.

Thus, the Chair's sole power to appoint or dismiss the Staff Director is not merely a matter of administration, but a matter of enforcement and enforcement policy. What will be the criteria for selecting campaigns and committees to be audited? What violations will be a priority for the Reports Analysis Division? Once again, current law requires bipartisan agreement to appoint or dismiss the Staff Director, but H.R. 1 subjects the position to partisan control.

Finally, H.R. 1 does away with the provision in existing law that the Vice Chair come from a different party than the Chair.¹⁸ This further allows power to be consolidated within one party.

With the power to craft the agency budget, appoint the Staff Director at their sole discretion, appoint the General Counsel without bipartisan support, issue subpoenas, and compel testimony and reports on their sole authority, the Chair, appointed by the president, will be the single dominant member of the Commission, fully deserving of the speech czar label.

C) The Provision's Timing Is Intended to Ensure Ongoing One-Party Control of the Commission

While most provisions of H.R. 1 take effect in 2020, the provisions regarding FEC appointments take effect in 2021.¹⁹ This means the victor in the 2020 presidential elections will appoint all five commissioners and name the initial Chair of the reconstructed commission. Furthermore, this president will be able to assure that his or her appointees constitute a majority of the Commission through at least 2027, even if he or she is not re-elected in 2024. That president will also have appointed the "independent" commissioner and the powerful Chair's Office through at least 2030.²⁰ That Chair and his or her majority will then name the Staff Director and General Counsel.

That means that all the new regulations required under other provisions of H.R. 1 will be written by the initial appointing president's team of the Chair, supportive commissioners, and their appointed General Counsel, and can be written (and if necessary re-written) with a specific eye to the 2022 midterms and the 2024 and 2028 presidential races. That same group would also respond to Advisory Opinion Requests and approve or disapprove of all enforcement actions.

Working with these potential advantages, if that president is re-elected in 2024, he or she could appoint a Commission majority through 2033.

D) Summary

In sum, under the guise of fixing a non-problem (alleged "gridlock"), H.R. 1 abandons the longstanding idea of a nonpartisan FEC and establishes a five-member commission subject to de facto partisan control. It adds to that partisan structure by giving enormous power to the Chair, acting alone, to establish agency priorities, issue subpoenas, appoint the powerful Staff Director without consent of other commissioners, and appoint the General Counsel.

The end result will be to weaponize the FEC as a potential tool of partisan campaign finance law enforcement, eroding public trust in the legitimacy of the agency and in the fairness of the election process more generally.

II. Enhancing the General Counsel's Power and Eroding Commission Accountability

Historically, as with other FEC decisions, the decision to hire or fire an agency General Counsel has required some degree of bipartisan agreement. As we have seen, H.R. 1 would destroy that bipartisan requirement, allowing the president's appointed Chair to name the General Counsel with the support of any two of the other four commissioners appointed by that same president – and no bipartisan support.

¹⁸ *Id.* (to be codified at 52 U.S.C. § 30106(a)(5)(C)).

¹⁹ *Id.* § 6007(a).

²⁰ *Id.* § 6002 (to be codified at 52 U.S.C. § 30106(a)(2)(A)-(B)).

The General Counsel has always been a powerful voice at the agency, since that office, subject to Commission approval, investigates and prosecutes violations, litigates on behalf of the Commission, and drafts regulations and advisory opinions, among other duties. The FEC budget provides for just one attorney position directly under control of each commissioner (two for the Chair and Vice Chair – who, under the new structure, can both come from the president’s party), so commissioners are of necessity heavily reliant on the legal advice and recommendations of the General Counsel and his or her staff.

H.R. 1 enhances the power of the General Counsel in several ways.

First, under current law, the FEC does not launch an investigation without the approval of the Commission²¹ – again, an approval requiring bipartisan agreement. H.R. 1 provides, instead, that the General Counsel may initiate an investigation if the Commission fails to pass a motion to reject the General Counsel’s recommendation within 30 days.²² Not only does this allow investigations to begin without bipartisan support, but it also allows commissioners to dodge any responsibility for their decisions by simply not taking a vote and letting the General Counsel’s recommendation take effect.

Similarly, once an investigation is begun, H.R. 1 enhances the power of the General Counsel to issue subpoenas on his or her own authority. Under current law, subpoenas must be approved by the Commission. As a matter of efficiency, the FEC often authorizes the General Counsel to engage in broad discovery at the start of an investigation, without seeking approval at each step. But the Commission remains in the saddle. Under H.R. 1, the General Counsel need merely notify the Commission of his or her intent to conduct discovery, and unless a majority of the Commission affirmatively votes against the discovery within 15 days, the Counsel can proceed with whatever discovery is desired.²³ Again, the commissioners are absolved of the responsibility to vote on the matter, and the default option is to proceed with the investigation and subpoenas.

This section does include one of the few good provisions of this portion of H.R. 1 – extending the time for respondents to file briefs challenging the General Counsel’s recommendation to find a violation of the Federal Election Campaign Act from 15 to a more realistic 30 days,²⁴ but this minor technical change doesn’t even begin to offset the serious problems with the bill.

As with provisions for the appointment of the Commission itself, H.R. 1 is structured so that the party that gains initial control of the Commission will be able to keep its choice of a General Counsel in office through at least 2030 even if, and perhaps especially if, the General Counsel proves to be a rank partisan, and even if the presidency changes parties before then and the new president appoints a Chair from his or her own party.

III. New Standards of Judicial Review Weaken Rights of Respondents

The Federal Election Campaign Act has long included a provision allowing for citizen suits where the Commission has failed to act on a complaint, or the party believes the Commission has wrongfully dismissed the complaint.²⁵ In such cases, the complainant can file suit in the U.S. District Court for the District of Columbia. H.R. 1 appropriately increases the time that the Commission has to act on a complaint from an unrealistic 120 days to a more realistic one year,²⁶ but it’s downhill from there.

H.R. 1 provides that any such review into the lawfulness of the FEC’s dismissal of a complaint shall be decided under *de novo* review.²⁷ This means the Court gives no deference to any prior finding of the agency, but looks at the issue as if it were deciding the case in the first instance. This is contrary to the so-called *Chevron* doctrine that federal courts normally use when reviewing the decisions of administrative agencies, such as the FEC.

Under *Chevron* doctrine, if a statute is ambiguous, a court will defer to the agency’s reading of the law, unless it finds that the agency’s interpretation is clearly wrong. This is known as “*Chevron* deference.” Under *de novo* review, however, if the statute is ambiguous, the Court gives no deference to the agency’s reading of the law, but merely applies its own best reading of the statute. In recent years, *Chevron* doctrine has come under tremendous fire, primarily from conservatives, who have argued that it is the role of the courts to interpret statutes, and giving any special weight to the agency’s interpretation is not so much “deference” as “bias” in favor of one of the litigants – the government – on the exact issue in dispute.

We take no position in this analysis on the wisdom or validity of the *Chevron* doctrine. But regardless of how one feels about *Chevron* deference, H.R. 1 takes a curious approach. First, it is a partial, one-time invalidation of the *Chevron* doctrine for

21 52 U.S.C. 30109(a).

22 H.R. 1 § 6004 (to be codified at 52 U.S.C. § 30109(a)(2)(A)).

23 *Id.* (to be codified at 52 U.S.C. § 30109(a)(2)(B)).

24 *Id.* (to be codified at 52 U.S.C. § 30109(a)(3)(B)).

25 52 U.S.C. 30109(a)(8).

26 H.R. 1. § 6004 (to be codified at 52 U.S.C. § 30109(a)(8)(B)(i)).

27 *Id.* (to be codified at 52 U.S.C. § 30109(a)(8)(A)(ii), (B)(ii)).

a single agency. While Congress clearly has the power to set standards of judicial review, and thus to overturn the *Chevron* doctrine, H.R. 1 is critical of *Chevron* only to the extent that *Chevron* deference might actually work in favor of respondents at the Federal Election Commission. If a respondent challenges in court a Commission decision finding that it violated the law, the *Chevron* doctrine will apply, and the court will defer to any reasonable interpretation the agency gives to the statute. But if the respondent wins at the Commission – if the Commission determines that the respondent’s conduct is not illegal – then the *Chevron* doctrine does not apply, and no deference will be given to the FEC’s decision.²⁸ For respondents, it’s a “heads I win, tails you lose” approach.

Furthermore, it is not clear if *de novo* review applies only to legal questions, or also to questions of fact. The better reading, we think, is that it applies only to legal questions, but the language is not clear. Historically, of course, courts have always given deference to the determinations of the original fact finder.

The bill also provides that, in any case where the alleged violation might trigger a fine greater than \$50,000, the agency may not rely, even in part, on “prosecutorial discretion” in defending in court its decision not to proceed.²⁹ This runs contrary to longstanding administrative law doctrine that gives agencies the authority to decide what cases they wish to devote resources to. For example, imagine a losing presidential campaign that spent \$600 million, and an allegation that the campaign illegally coordinated just over \$25,000 in expenditures by an outside group – a violation that, if proven, could trigger a penalty over \$50,000.³⁰ The FEC might conclude that, though it believes the law was broken, the law is admittedly murky as to whether the conduct actually was illegal; the facts would be extremely difficult to prove; and the candidate lost and is not in office, nor likely to run again. In such circumstances, the FEC might conclude that it was not worth pursuing a violation for an amount that was less than one one-hundredth of the campaign’s total spending, in litigation that could last years and use up hundreds of thousands of taxpayer dollars in time and resources, with a relatively low probability of success. Prosecutorial discretion allows the agency to simply decline to prosecute, so that it can use its resources more effectively on other matters. H.R. 1 requires a zero-tolerance approach that would strip the agency of the discretion to decline to prosecute in order to efficiently manage resources. Eliminating prosecutorial discretion is akin to saying that a cop must ticket everyone going more than 5 miles per hour over the speed limit.

There is no evidence that the FEC has been abusing its discretion by dismissing major violations on the grounds of prosecutorial discretion, and no reason to abolish *Chevron* deference only in cases where the agency has interpreted the law in favor of the respondents.

In summary, H.R. 1 would rig judicial review in favor of punishing those who speak in a campaign context.

IV. Miscellaneous Mischief

Two other provisions of the “Restoring Integrity to America’s Elections Act,” embedded in the “For the People Act,” deserve mention.

First, while the Act leaves it to the president to appoint FEC commissioners – as, constitutionally, it must – it provides for a “Blue Ribbon Advisory Panel” to make non-binding recommendations to the president. The odd-numbered panel will consist of “retired Federal judges, former law enforcement officials, [and] individuals with experience in election law,” and will publicly recommend one to three candidates to the president for each seat.³¹ It’s not really clear what the purpose of the panel is, since the president is always free to consult whom he or she likes regarding appointments. Rather, it seems to be the hope of those desiring more speech regulations that they will be selected to the “Blue Ribbon Advisory Panel” and then be able to pressure the president to choose from among their preferred candidates for each position.

What is interesting about this provision is that it would exempt this “Blue Ribbon Advisory Panel” from the requirements of the Federal Advisory Committee Act, which exists precisely to assure that such advisory committees operate with transparency.³² It’s an interesting way to “restore integrity” to elections – by creating an elite committee to debate in secret, on the public’s dime, and with the imprimatur of the government, on whom the president should appoint.

Finally, H.R. 1 also hamstring the FEC in its advisory opinion process. Under the law, any party can request an opinion as to whether its proposed activities are legal. If the Commission gives the go-ahead, the requestor cannot later be prosecuted for that behavior, nor can others who operate on the same terms, and in good faith reliance on the Opinion. Advisory Opinion

²⁸ *Id.*

²⁹ *Id.* (to be codified at 52 U.S.C. § 30109(a)(8)(A)(ii)).

³⁰ For reference, Hillary Clinton’s 2016 presidential campaign spent \$768 million. See Christopher Ingraham, *Somebody just put a price tag on the 2016 election. It’s a doozy*, WASHINGTON POST (Apr. 14, 2017), at https://www.washingtonpost.com/news/wonk/wp/2017/04/14/somebody-just-put-a-price-tag-on-the-2016-election-its-a-doozy/?utm_term=.91558b0ec51d.

³¹ H.R. 1 § 6002 (to be codified at 52 U.S.C. § 30106(a)(3)(B)(i)-(ii)).

³² *Id.* (to be codified at 52 U.S.C. § 30106(a)(3)(B)(iv)).

Requests are public documents, and anyone can submit comments to the Commission making recommendations on how it should decide the request. The Commission then considers the request at an open, public meeting.

Over a decade ago, the Commission began to allow requestors to appear in person before the Commission. The logic was simple: frequently, as the Commissioners considered a request, new questions about the intended activity, or the requestor, would come to the fore. Typically, the requestor, or its attorney, would be seated in the public audience and could readily answer the question involved, but the Commission had no provision allowing them to testify, even for the limited purpose of answering the question on the spot. Thus, the matter would be delayed, and a written request would go out to the requestor seeking an answer, after which the matter would be re-scheduled for further debate at a later Commission meeting. Allowing the requestor to appear in person at the public hearing to answer such questions while the matter was debated was mere common sense and stopped some needless delays.

H.R. 1 would provide that, if the Commission allows a requestor to appear before it in person, it must also allow “an interested party who submitted written comments ... in response to the request ... to appear before the Commission to present testimony.”³³

Simply put, there is no real point to this provision, since these “interested parties” cannot answer the types of questions the Commission asks of requestors and have already submitted their views on the legal framework. On certain Advisory Opinion Requests, there may be a dozen or more commenters, pro and con, who would all have to be given an opportunity to appear. Of course, if the Commission felt it would be helpful to hear from such parties, it can alter its procedures to allow for it. But there is no need to tie the Commission’s hands with a blanket rule requiring this procedure. It would be a bit like dictating to Congress who has a right to testify in committee hearings. But securing the ability to testify orally on Advisory Opinion Requests has been a pet priority of leading groups that advocate for more speech regulations ever since the FEC began allowing requestors to appear in person.

The impetus for this proposal is well-known to the campaign finance bar – those advocating speech restrictions simply want an opportunity to further lobby the Commission to deny most requests to speak. That such an arcane provision made it into the bill is a clear sign that its contents were written by lobbyists from speech censorship groups.

Conclusion

The FEC “reform” provisions tucked into the “For the People Act” would, if enacted, abolish a bipartisan commission in favor of one under partisan control and beholden to the president, do away with checks and balances within the Commission, attempt to bias judicial proceedings against respondents, and hamstring the efficient operations of the agency. On the basis of this section of H.R. 1 alone, members of Congress and the public would be well-served to carefully scrutinize this legislation.

³³ *Id.* § 6005 (to be codified at 52 U.S.C. 30108(e)).

Published by the Institute for Free Speech. All information is from sources considered reliable, but may be subject to inaccuracies, omissions, and modifications.

The Institute for Free Speech is a nonpartisan, nonprofit 501(c)(3) organization focused on promoting and protecting the First Amendment political rights of speech, press, assembly, and petition.

Originally known as the Center for Competitive Politics, it was founded in 2005 by Bradley A. Smith, a former Chairman of the Federal Election Commission. The Institute is the nation's largest organization dedicated solely to protecting First Amendment political rights.

2019 Institute for Free Speech

Material from this document may be copied and distributed with proper citation.

124 S. West Street Suite 201
Alexandria, VA 22314
(703) 894-6800
www.ifs.org