The Federal Election Commission as Regulator: The Changing Evaluations of Advisory Opinions

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Federal election laws are dynamic and sensitive to how statutes and regulations are changed by Congress and interpreted by the courts and the Federal Election Commission (FEC). As such, political actors learn about permissible campaign strategies in an evolving regulatory context. This Article focuses on the relationship between the political actors charged with conforming to campaign finance laws and the chief regulator of such laws, the FEC. I examine over 1500 Advisory Opinion (AO) requests to the FEC between 1977 and 2012. AOs are specific requests to the FEC about the permissibility of proposed campaign activity. We can draw a number of important insights about the regulatory context from an examination of these AOs. First, we learn about the types of questions put forth by various political actors, which highlight areas of the law with some ambiguity. Second, we learn how the six commissioners interpret the law, and whether they do so with consensus or conflict. For decades, FEC commissioners interpreted the law with a great deal of consensus. More recently, however, the commissioners have conflicted at a much higher rate, often to the point of being unable to offer clear advice to political actors. The Article explores how these different periods inform an overall evaluation of the FEC as chief regulator.

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I. THE FEDERAL ELECTION COMMISSION AS REGULATOR: THE CHANGING EVALUATIONS OF ADVISORY OPINIONS

In 1992, the National Rifle Association (NRA) formally requested from the Federal Election Commission (FEC) an Advisory Opinion (AO) on how to pay for a number of advertisements set to air in the coming election campaign.[1] AOs are responses to specific requests to the FEC about the permissibility of proposed campaign activity. One proposed NRA radio ad was described as follows (quoting from AO 1992-23):

> [The ad] depicts a "Jeopardy" style quiz show in which the correct answer to each question asked during the ad is "Who is Congressman Beryl Anthony?" The categories used are "Exotic Locations," "Outlandish Pay Raises," and "Out of Touch." The "questions" used for each category are, respectively: (a) "He's spent over $35,000 of the taxpayers' money to travel to Switzerland, Thailand, Hong Kong, Australia and other exotic locations." (b) "He's voted to give himself a pay raise five times and now earns over $129,000 per year paid for by the taxpayers." (c) "He voted for a New York City style gun ban even though he claims to be a representative from Arkansas." After each correct answer is given, "Groans and Moans" are heard from the audience.[2]

The NRA initially planned to pay for the ads out of its hard money political action committee (PAC),[3] but it asked the FEC whether the absence of "express

1. Request by National Rifle Association Political Victory Fund at 1, FEC Advisory Op. No. 1992-23 (June 1, 1991), *available at* http://saos.nictusa.com/aodocs/1083260.pdf.

2. FEC Advisory Op. No. 1992-23, at 2 (1992), *available at* http://saos.nictusa.com/aodocs/1992-23.pdf.

3. "Hard" money is money raised and spent under federal campaign finance laws. This is money spent with the goal of electing or defeating a federal candidate. *See* FED. ELECTION COMM'N, THIRTY YEAR REPORT 19 (2005), *available at* http://www.fec.gov/info/publications/30year.pdf. "Soft" money commonly refers to money raised and spent without limit for advocating on behalf of public policies or nonfederal candidates. *See id.* at 7. A political action committee (PAC) is an interest group that uses hard money for candidate contributions or pro-candidate electioneering. *See id.* at 4–5. A longer treatment of campaign finance laws is beyond the scope of this Article, but for such a discussion, see Anthony Corrado, *Money and Politics: A History of Campaign Finance Law*, *in* THE NEW CAMPAIGN FINANCE SOURCEBOOK 7, 7–47 (Anthony Corrado et al. eds., 2005).

advocacy" messages in the proposed ads—ones asking people to vote against Congressman Anthony—meant that the ad could be considered "issue advocacy" and therefore paid for with corporate treasury funds.[4]

The FEC responded that all of the proposed ads were "express advocacy" messages, despite the absence of so-called "magic words" in the ads.[5] Writing for the FEC, FEC Chairwoman Joan Aikens (a Republican) noted in the AO:

> [T]he content and timing of these advertisements lead us to determine that they expressly advocate the election or defeat of a Federal candidate. All of the sample advertisements were run in close proximity to Congressman Anthony's election. . . . These ads encourage no action in connection with the issues mentioned (such as urging the Congressman to vote for or against specific bills).[6]

The single vote on the only draft AO considered by the FEC was 6–0.[7]

Twenty years later, in AO 2012-11, Free Speech—an unincorporated non-profit association—asked the FEC if its proposed print, radio, television, and online advertisements would be considered "issue advocacy," exempting the group from registering with the FEC and thus reporting its receipts and expenditures.[8] The FEC issued its AO after two deadlocked votes and two separate commissioner "statements."[9] The final AO, however, offered mixed

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4. *See* Request by National Rifle Association Political Victory Fund, *supra* note 1, at 1.

5. FEC Advisory Op. No. 1992-23, *supra* note 2, at 4–5. These "magic words" are: "vote for, elect, support, cast your ballot for, Smith for Congress, vote against, defeat, [and] reject." Buckley v. Valeo, 424 U.S. 1, 44 n.52 (1976) (internal quotation marks omitted). The legal line between political/express and issue advocacy was mixed at the time of the 1992 AO (and really still is). When the NRA asked for feedback, some prior legal decisions had pointed to the magic word distinction as a possible bright line. *See, e.g.*, FEC v. Mass. Citizens for Life, Inc., 479 U.S. 238, 249–51 (1986) (finding express advocacy absent *Buckley*'s magic words where material amounts to an explicit directive). *But see* FEC v. Furgatch, 807 F.2d 857, 864–65 (9th Cir. 1987) (suggesting factors beyond these magic words could be used in the advocacy determination).

6. FEC Advisory Op. No. 1992-23, *supra* note 2, at 4–5.

7. Vote, FEC Advisory Op. No. 1992-23 (Aug. 10, 1992), *available at* http://saos.nictusa.com/aodocs/1083262.pdf.

8. *See* FEC Advisory Op. No. 2012-11, at 1–3 (2012), *available at* http://saos.nictusa.com/aodocs/AO%202012-11.pdf. By 2012, the ability of interest groups to fund both express and issue advocacy with unlimited contributions without regard to source had been established with *Citizens United v. FEC*, 130 S. Ct. 876, 913 (2010). Still, Free Speech wanted:

> [T]o speak publicly without being subject to the lengthy and complicated regulations overseen by the FEC. The Commission's extensive regulations concerning speech about candidates and political issues severely hamper the ability of grassroots groups to exercise their protected First Amendment rights. Whether through the difficult-to-comply-with "political committee status" or the never-understood-and-never-explained "express advocacy" standard, the FEC's regulations effectively mute Free Speech from speaking publicly unless clear guidance and boundaries are established.

Request by Free Speech at 4, FEC Advisory Op. No. 2012-11 (Feb. 29, 2012), *available at* http://saos.nictusa.com/aodocs/1204965.pdf.

9. Vote, FEC Advisory Op. No. 2012-11 (Apr. 26, 2012), *available at* http://saos.nictusa.com/aodocs/1208012.pdf; Caroline C. Hunter et al., Statement on Advisory Opinion 2012-11 (Free Speech), (May 9, 2012), *available at* http://saos.nictusa.com/aodocs/1209339.pdf; Concurring

guidance. The commissioners agreed that some of the proposed ads were "express advocacy," but they disagreed and deadlocked on a number of other political ads,[10] including the following, the text of which read "[a]cross America, millions of citizens remain uninformed about the truth of President Obama. Obama, a President who palled around with Bill Ayers. Obama, a President who was cozy with ACORN. Obama, a President destructive of our natural rights. Real voters vote on principle. Remember this nation's principles."[11] The commissioners deadlocked also on whether the activities of the group required Free Speech to register with the FEC as a political committee.[12]

The outcomes in AOs 1992-23 and 2012-11 point to complex developments in federal election law over the intervening twenty year period regarding "express" and "issue" advocacy. Indeed, much had changed between 1992 and 2012. In the 1992 AO, the FEC reached bipartisan consensus to define the law in broad ways relative to interest groups and their advertisements. The timing of the ad was considered, for example, along with its perceived intended effect on voters.[13] Moreover, the AO was issued at a time when such questions were not really a major issue in American elections.[14] By 2012, commissioners understood the law

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Opinion of Ellen L. Weintraub, Vice Chair, and Commissioners Cynthia L. Bauerly & Steven T. Walther in Advisory Opinion 2012-11 (Free Speech), (May 9, 2012), *available at* http://saos.nictusa.com/aodocs/1209340.pdf. A deadlock is when the FEC does not get four of six commissioners to approve an action. *See* 2 U.S.C. § 437c(c) (2012) (outlining the need for the vote of four members of the FEC in order to take action). A commissioner will sometimes issue a concurring or dissenting statement alongside any official FEC actions.

10. *See* Vote, *supra* note 9 (reporting a deadlock vote on adopting either Draft B or C of FEC Advisory Op. No. 2012-11). *Compare* Draft B of Advisory Op. No. 2012-11, at 8–9, 9–10, 13–14, *available at* http://saos.nictusa.com/aodocs/1206386.pdf, *and* Draft C of Advisory Op. No. 2012-11, at 26–28, 29, 30–31, *available at* http://saos.nictusa.com/aodocs/1207876.pdf (both drafts agree that some advertisements constitute express advocacy; see sections "'Financial Reform' Radio and Newspaper Advertisements," "'Health Care Crisis' Radio and Newspaper Advertisements," "'Gun Control' Facebook Advertisement," and "'Ethics' Television Advertisement"), *with* Draft B of Advisory Op. No. 2012-11, at 6–8, 10–11, 11–13, 14–15, 15–16, *available at* http://saos.nictusa.com/aodocs/1206386.pdf, *and* Draft C of Advisory Op. No. 2012-11, at 26, 29, 29–30, 32, 32–33, *available at* http://saos.nictusa.com/aodocs/1207876.pdf (on the other hand, the drafts disagree on whether other advertisements constitute express advocacy; see sections "'Environmental Policy' Radio Advertisement," "'Environmental Policy' Facebook Advertisement," "'Gun Control' Television Advertisement," "'Budget Reform' Television Advertisement", and "'Educated Voter' Television Advertisement").

11. FEC Advisory Op. No. 2012-11, *supra* note 8, at 8–9.

12. *Compare* Draft B, *supra* note 10, at 21–27 (finding that Free Speech would need to register as a PAC) *with* Draft C, *supra* note 10, at 43–55 (finding that Free Speech would not need to register as a PAC).

13. FEC Advisory Op. No. 1992-23, *supra* note 2, at 4–5.

14. Indeed, from the time Congress reformed campaign finance laws in the 1970s to the middle of the 1990s, it seems that most federal electioneering by interest groups was funded through PACs with regulated contributions. For a variety of reasons, this changed in the 1990s, when "loopholes" in the law allowed both interest groups (beyond PACs) and political parties to raise and spend soft money for federal elections. These developments are explored in MICHAEL M. FRANZ,

very differently. To say that "real voters vote on principle" and that viewers should "[r]emember this nation's principles"[15] would seem to suggest a particular behavior in the ballot box. It is arguably more explicit than the NRA ad from the 1992 AO. And yet, the commissioners could not reach agreement (one way or the other). This was made more relevant by the incredible growth in spending by outside groups in federal elections in 2012.[16]

What explains the shift from a unanimous vote in 1992 to a deadlocked one on a very similar question twenty years later? The answer is not clear, though a number of political and legal trends provide some traction. One could point, for example, to a political environment in Washington more polarized and partisan than any in recent memory.[17] Such an environment may have affected the types of commissioners appointed by the president and confirmed by the Senate. The FEC was established in 1975[18] and is comprised of three Democratic and three Republican commissioners.[19] Any action to move forward requires four votes.[20] Republican commissioners may see their role now as less about implementing the broader will of Congress (in spite of their own view of the law) and more about limiting the law's application for any question not explicitly covered in the statute. Democratic commissioners may have mobilized in opposition to ward off the perceived erosion of existing regulations by Republican commissioners. This has happened alongside complex developments in the courts, which have made broad interpretations of the law, ones consistent with the 1992 NRA AO for example, less acceptable.[21] Tracing these developments is beyond the scope of this Article, but decisions such as *Citizens United v. FEC*[22] have inspired a vigorous debate about what limits there should be on the way interest groups advocate for federal candidates.[23]

CHOICES AND CHANGES: INTEREST GROUPS IN THE ELECTORAL PROCESS 22–29, 39–49, 95–117 (2008).

15. FEC Advisory Op. No. 2012-11, *supra* note 8, at 9.

16. *See* Michael M. Franz, *Interest Groups in the Electoral Process: 2012 in Context*, 10 FORUM 62, 62 (2013).

17. *See generally* NOLAN M. MCCARTY ET AL., POLARIZED AMERICA: THE DANCE OF POLITICAL IDEOLOGY AND UNEQUAL RICHES (Nolan McCarty et al. eds., 2006) (examining how increasing political polarization in recent decades has accompanied social and economic changes).

18. *See* Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, § 410, 88 Stat. 1263, 1304 (1974).

19. *See* 2 U.S.C. § 437c(a)(1) (2012).

20. *Id.* § 437c(c).

21. Such "broad interpretations" would include any attempts to resolve ambiguity in campaign finance laws on the side of tougher restrictions on how money can be raised and spent. *See, e.g.*, Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806, 2811–12, 2817–20, 2823–26, 2328–29 (2011); FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 452–54, 457 (2007).

22. Citizens United v. FEC, 130 S. Ct. 876 (2010).

23. *See generally S. 2219, The Democracy Is Strengthened by Casting Light on Spending in Elections Act of 2012 (DISCLOSE Act of 2012): Hearing on S. 2219 Before the S. Comm. on Rules & Admin.*, 111th Cong. (2012), http://www.rules.senate.gov/public/?a=files.serve&file_id=9b559943-7e01-48d6-a3fe-0344ec3b6412 (discussing potential legislation requiring that interest groups disclose their major

Indeed, the FEC is often at the center of complex legal debates, ones ranging from the limits placed on parties and interest groups in their electioneering to the application of existing regulations on emerging technologies. These questions are raised also amidst changing political and legal environments. Consequently, the job of the FEC is not an easy one.

To investigate the FEC as chief regulator of federal campaign finance laws, this Article examines over 1500 AO requests to the FEC between 1977 and 2012. One can draw a number of important insights about the regulatory context from an examination of said AOs. First, we learn about the types of questions put forth by various political actors, which highlight areas of the law with some indistinctness. Second, we learn how the six commissioners interpret the law, and whether they do so with consensus or conflict. We can also trace the level of such conflict across time. This second question is of utmost importance, as it addresses the issue of how successfully commissioners can administer and enforce election law.[24] Many argue that the FEC is a flawed agency, and there are consistent calls for an alternative regulatory model.[25] The analysis here offers some insight on the efficacy of such a change.

II. WHAT ARE ADVISORY OPINIONS?

AOs are responses to specific requests to the FEC about the permissibility of proposed campaign activity.[26] The powers and responsibilities of the FEC relative to AOs are laid out in 2 U.S.C. § 437(f), which includes a ten-day comment period on draft AOs under consideration and a sixty-day limit on the time between a request and an issued AO.[27] The importance of FEC-issued AOs extends beyond the specific circumstances of the request but implicates also the actions of other political actors who may seek to behave in similar ways. AOs act

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funders in their electioneering activities); *Are Super PACs Harming U.S. Politics?*, U.S. NEWS & WORLD REP., http://www.usnews.com/debate-club/are-super-pacs-harming-us-politics (compiling commentary of authors in favor of and against limits on interest group spending after *Citizens United*) (last visited Feb. 8, 2013).

24. This Article does not consider FEC actions on enforcement and/or rule making. There is some empirical work on the former, but not as much the latter. *See, e.g.*, Michael M. Franz, *The Devil We Know? Evaluating the Federal Election Commission as Enforcer*, 8 ELECTION L.J. 167, 173–85 (2009) (investigating FEC-released enforcement data between 1996 and 2004 for bias and effectiveness); Todd Lochner et al., *Wheat from Chaff: Third-Party Monitoring and FEC Enforcement Actions*, 2 REG. & GOVERNANCE 216, 221–31 (2008) (examining patterns of FEC sanction strategies and their effectiveness); Todd Lochner & Bruce E. Cain, *Equity and Efficacy in the Enforcement of Campaign Finance Laws*, 77 TEX. L. REV. 1891, 1905–27 (1999) (discussing and evaluating the means by which the FEC enforces election laws).

25. *See, e.g.*, Todd Lochner, *Overdeterrence, Underdeterrence, and a (Half-Hearted) Call for a Scarlet Letter Approach to Deterring Campaign Finance Violations*, 2 ELECTION L.J. 23, 24, 31–36 (2003) (suggesting new sanctioning methods to improve FEC enforcement of election laws).

26. *See* FED. ELECTION COMM'N, *supra* note 3, at 10.

27. If a request is made within sixty days of an election, the FEC must respond within twenty days. 2 U.S.C. § 437f(a)(2) (2012).

then as "signals" to the political community about how the law is interpreted by the six sitting commissioners.

Commissioner Caroline Hunter made this point clear in her dissenting statement in 2010-19, which concerned disclaimer requirements for "text ads" generated by Google searches.[28] Hunter believed the issued AO did not offer clear guidance to other political actors in similar circumstances. She wrote:

> [T]he Commission's advisory opinions are not limited in their application only to the specific requester, but to all other parties who are similarly situated. Were AOs so limited in their effect, the [Federal Election Campaign] Act would not provide for a ten-day comment period on all AO requests for "any interested party." Nor would the Commission provide for another opportunity for the public to comment on draft responses to advisory opinion requests.
>
> Obviously, the Act and agency procedures provide for public comment because the conclusions the Commission reaches in any AO usually have broader application to the general public. Moreover, this understanding of the role of advisory opinions is not merely academic. In practice, experienced campaign finance professionals also believe that AOs apply to more than only the specific requesters.[29]

As such, AOs are important in establishing both the kinds of campaign activities that political actors might see as falling in some gray area of existing law but also the orientation of the FEC to these gray areas. In short, these AOs have wide-ranging applications and meaning.

AOs and relevant supplementary documentation are available from the FEC's website.[30] All of the AOs between 1977 and 2012 were downloaded for this analysis.[31] Coders relied on a coding sheet that captured among other factors, the requestor's identity (i.e., candidate, party, or interest group), the purpose of the request, the length of the final letter from the FEC, all recorded votes on the approved AO after 1989, the number of other AOs cited by the FEC in offering its opinion, and the final FEC AO (i.e., did the FEC approve or deny the request).[32]

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28. Statement for the Record by Commissioner Caroline C. Hunter in Advisory Opinion 2010-19 (Google), (Dec. 17, 2010), *available at* http://saos.nictusa.com/aodocs/1158399.pdf.

29. *Id.* at 2 (footnotes omitted). A similar defense of the "signal" notion of AOs appears in Concurring Opinion of Scott E. Thomas, Chairman, & Danny Lee McDonald, Commissioner, FEC Advisory Op. No. 1999-11, at 2–4 (1999), *available at* http://saos.nictusa.com/aodocs/1006875.pdf.

30. *FEC Advisory Opinion Search System*, FED. ELECTION COMM'N, http://saos.nictusa.com/saos/searchao (last visited Mar. 6, 2013).

31. As of this writing, FEC Advisory Op. No. 2012-35 (2012), *available at* http://saos.nictusa.com/aodocs/AO%202012-35.pdf, was the last coded AO.

32. The coded data and code sheet are available from the author on request.

Figure 1 shows the number of issued AOs through 2012.[33] In the earliest days after the passage of amendments to the Federal Election Campaign Act in 1974,[34] the FEC issued between 60 and 120 AOs each year.[35] That number has steadily declined to around twenty-five over the course of the last five to eight years. In no year since 1996 has the FEC issued more than forty AOs.

On the other hand, issued AOs have become more complex. Figure 2 plots the average length of issued AOs in each year between 1977 and 2012. An issued AO amounts to a letter from the FEC to the requester reviewing the questions posed and offering guidance on whether the proposed activities are permissible and on what grounds. In the early days of issued AOs, the average length of an AO was between 750 and 1000 words. AO length increased steadily through 2003 when the average AO was over 2500 words. The average length dropped slightly in 2004 after passage of the Bipartisan Campaign Reform Act (BCRA) in 2002.[36] Mean length increased again, though, to over 2600 words in 2012.

One interpretation of this increased length is a change in the style of issued AOs, from a cursory review of requestors' questions to a much lengthier summary of proposed questions. This style change likely accounts for some of the increase, as commissioners have come to draft AOs that can be read and understood by other political actors (in light of their "signal" quality noted by Commissioner Hunter above). Another interpretation, however, is that more recent requested AOs tread into areas where the law is unclear, but where there is either some judicial precedent or related AOs with slightly different circumstances. Consider questions of new technologies. As these develop and offer new chances to raise funds or reach voters (e.g., through text messaging), prior court decisions and/or AOs on other technologies (e.g., soliciting funds through web sites) might provide some guidance, but still leave the legality of new practices open to question. This requires the FEC to traverse more history and to provide more thorough legal justification in its interpretation, which in turn lengthens its issued letter.

An additional way to assess this change in length is to look at the average number of AOs cited by the FEC in its issued AOs. Figure 3 does this for each year between 1977 and 2012, and it illustrates a pattern of increased citations through 2002, when the average AO cited about seven related requests. In 2003

33. An earlier analysis of mine reviewed the process of coding AOs between 1977 and 2003, and the analysis in the section that follows updates some of the trends noted there. FRANZ, *supra* note 14, at 145–70.

34. Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (1974).

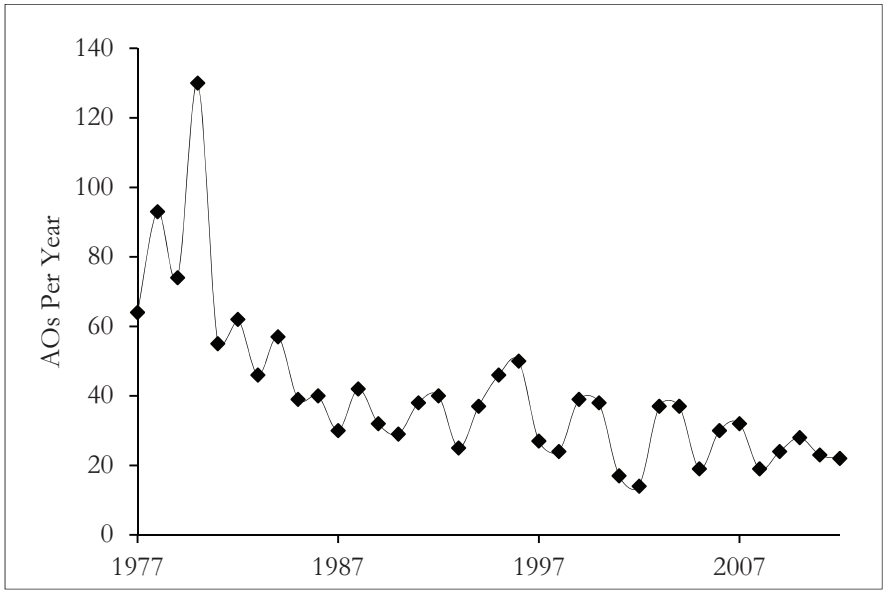
35. This figure does not include any requests for AOs that were withdrawn before the FEC could issue guidance, or any AOs not issued because of a deadlock.

36. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (2003), *invalidated in part by* Citizens United v. FEC, 130 S. Ct. 876 (2010). This was the first major reform of federal campaign finance laws since 1976. The new law prevented parties from raising and spending soft money and limited how interest groups could spend soft money close to an election. *Id.*

the number of cited AOs drops—likely the consequence of "uncharted territory" with the changes in BCRA—but by 2012, AOs again cited about five AOs on average. This increase suggests that AOs have changed not only in style, but reflect a longer history relating to new and innovative requests. Many proposed political actions are simply more complicated given the context of forty years of campaign finance law and jurisprudence.

One particular value in the trends noted in Figure 3 is the interrelatedness of many AOs, which implies that questions posed by requestors are not often isolated matters on arcane sections of campaign finance law (which would devalue any academic focus on them). They instead often concern real areas of legal uncertainty, ones with implications for other substantive and related questions.[37] All told, these trends suggest a fount of data on areas of confusion in the law, in addition to ample opportunity to establish areas of conflict at the FEC on interpretations.

Figure 1: Issued Advisory Opinions per Year[38]



37. Figure 3 also implies a related visual mapping that might be useful. A network graph where each cited AO is mapped onto a two-dimensional space, and where AOs that cite that AO are placed close to it on the space, would establish the various cluster of related AOs. A graph of this sort is available from the author on request.

38. Source: Federal Election Commission. Note: Totals do not include withdrawn or deadlocked requests.

Figure 2: Average Advisory Opinion Length per Year[39]

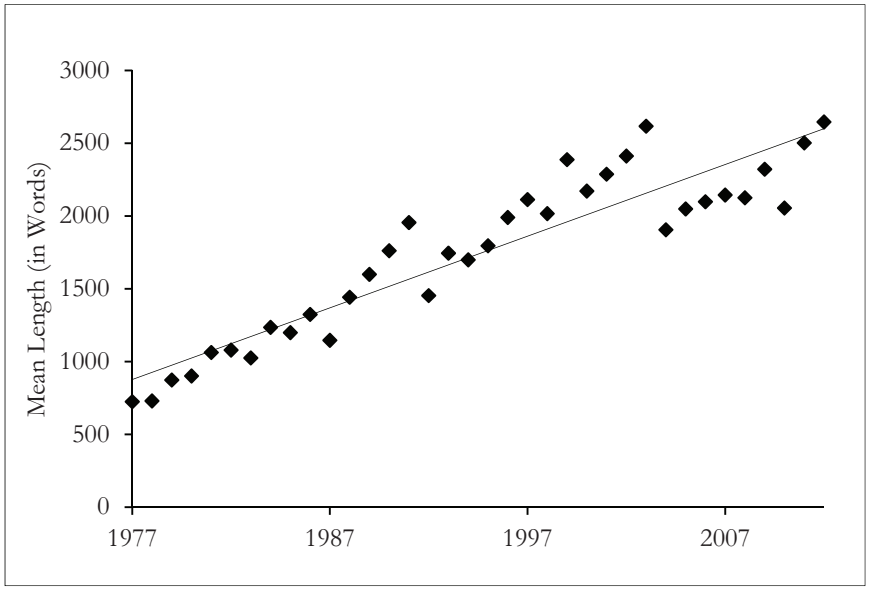
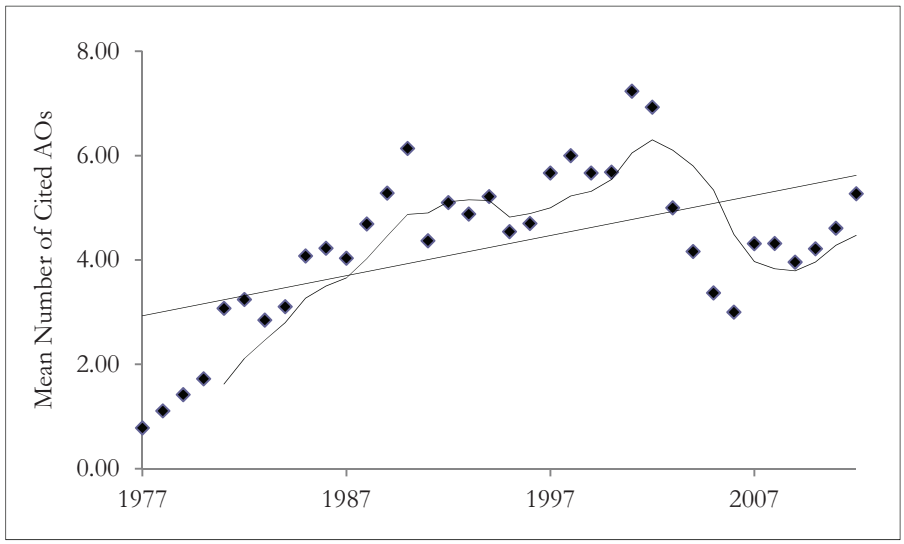


Figure 3: Average Number of Cited Advisory Opinions per Year[40]



39. Source: Federal Election Commission and author coding. Note: Fitted line is bivariate linear regression.

40. Source: Federal Election Commission and author coding. Note: Fitted lines are bivariate linear regression and five-year moving average.

III. ANALYSIS: WHAT DO ADVISORY OPINIONS REVEAL ABOUT THE LAW?

One value in looking at AOs is seeing what sorts of questions are common and how this varies across time. Coders for this project assessed each AO on up to five areas. They used a list of fifty-two content codes, assessed from reading a sample of AOs across the thirty-five year period under consideration. The categories range from the broad (e.g., a question concerning how to make or receive contributions) to the more specific (e.g., a question on whether an organization meets the requirements of being a media outlet, exempting it from campaign finance laws).

Table 1 splits AOs into three time periods: 1977–1989; 1990–1999; 2000–2012. It aggregates the number of AOs that reference each content area and reports the top fifteen areas for each time period. The reported percentages refer to the total number of issued AOs that focused on those top fifteen areas. Underlined entries are ones mentioned only in that time period, meaning all others were in the top fifteen for at least two time periods.

Table 1: Focus of Advisory Opinions[41]

Question About . . .	**Number of Mentions**	**Percent of Total**
1977–1989 (Time Period 1)		
Contributions (made or received)	244	31.94%
Solicitation of funds	139	18.19%
Filing obligations (i.e., what is reportable)	78	10.21%
Use of funds (i.e., campaign funds)	64	8.38%
Committee designation (i.e., must group register)	62	8.12%
Handling of debts	57	7.46%
Issue advocacy/express advocacy/GOTV	54	7.07%
Definition of restricted class	51	6.68%
Fund transfers	48	6.28%
Affiliation between committees	46	6.02%
Fund-raising	42	5.50%
Use of excess campaign funds	42	5.50%
Rules on funding or running ads	35	4.58%
Committee organization (i.e., name of group)	30	3.93%
Permissible campaign activity	30	3.93%
Number of decided AOs	764	

41. Percentages do not add up to 100 because AOs are coded on up to five categories. Underlined entries are ones only mentioned in top fifteen in one time period.

Table 1 *(continued)*

Question About . . .	Number of Mentions	Percent of Total
1990–1999 (Time Period 2)		
Contributions (made or received)	66	18.59%
Solicitation of funds	58	16.34%
Committee designation (i.e., must group register)	39	10.99%
Use of funds (i.e., campaign funds)	39	10.99%
Filing obligations (i.e., what is reportable)	38	10.70%
Affiliation between committees	33	9.30%
Use of soft money	30	8.45%
Definition of membership	27	7.61%
Issue advocacy/express advocacy/GOTV	26	7.32%
Use of excess campaign funds	26	7.32%
Fund raising	25	7.04%
Definition of restricted class	21	5.92%
Loans	17	4.79%
Committee organization (i.e., name of group)	15	4.23%
Fund transfers	14	3.94%
Number of decided AOs	355	
2000–2012 (Time Period 3)		
Contributions (made or received)	70	20.59%
Use of funds (i.e., campaign funds)	53	15.59%
Solicitation of funs	52	15.29%
Committee designation (i.e., must group register)	41	12.06%
Use of soft money	36	10.59%
Internet	35	10.29%
Fund raising	28	8.24%
Affiliation between committees	27	7.94%
Filing obligations (i.e., what is reportable)	24	7.06%
Definition of restricted class	22	6.47%
Bundling	22	6.47%
Rules on funding or running ads	21	6.18%
Issue advocacy/express advocacy/GOTV	20	5.88%
Rules for 527s and 501c groups	19	5.59%
Definition of "personal use" for funds	19	5.59%
Number of decided AOs	340	

The results demonstrate considerable consistency across time, with some notable exceptions. Questions about how PACs, candidates, and parties can make and receive regulated contributions are at the top of the list, involving thirty-two percent of AOs in the 1977 to 1989 period and about twenty percent thereafter. Because making and receiving contributions is highly regulated by federal campaign finance laws, it makes sense that requestors would ask a lot of questions about the permissibility of certain action in that regard. It is the number one issue mention across all three periods. However, it is worth noting its higher rate of mention in the earlier time period. This demonstrates that questions have diversified in subsequent years. Questions pertaining to the solicitation of regulated funds (i.e., can a PAC or candidate raise money in a particular way) are the second most often-cited questions, accounting for about fifteen to eighteen percent of all questions in each time period.

One might also note the consistency of issue-advocacy-related questions in all three periods. About six to seven percent of all AOs in each time period refer to questions about the boundary between regulated express advocacy and protected issue-related speech.[42] This is particularly important to note because such questions did not merely arise in the middle of the 1990s, roughly the time when their frequency vexed campaign finance reformers, but were at issue as far back as the late 1970s. The same is similarly true for party soft money requests, but that issue is not in the top fifteen mentions in time period 1 (though it is just outside the top twenty in time period 1, with nineteen requests).[43]

Table 1 obviously hides a lot in the nature of AOs. This reflects the trade-off of studying these AOs qualitatively or quantitatively. Indeed, there are lots of interesting specifics in these AOs, from whether a candidate can raise funds with credit cards[44] to whether someone can contribute via text message.[45] Indeed,

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42. *See* Corrado, *supra* note 3, at 33 (describing the rise of issue-advocacy advertising designed to circumvent express-advocacy restrictions).

43. Frequency of requests by issue need not be taken as an indicator of an AO's relevance. For example, the party soft money requests of the late 1970s were monumental in providing the parties guidance on how to raise funds outside of federal regulations. *See* FEC Advisory Op. No. 1978-10 (1978), *available at* http://saos.nictusa.com/aodocs/1978-10.pdf; *see also* FEC Advisory Op. No. 1978-09 (1978), *available at* http://saos.nictusa.com/aodocs/1978-09.pdf; FEC Advisory Op. No. 1978-50 (1978), *available at* http://saos.nictusa.com/aodocs/1978-50.pdf; FEC Advisory Op. No. 1978-78 (1978), *available at* http://saos.nictusa.com/aodocs/1978-78.pdf. A useful AO-level metric might be the number of times an AO is cited by other AOs. For example, FEC Advisory Op. No. 1978-09 has been referenced in twelve other AOs through 2012. *See FEC Advisory Opinion Search System*, FED. ELECTION COMM'N, http://saos.nictusa.com/saos/searchao (search "Go to AO number" for "1978-09"; then follow "Other AOs Citing to this AO" hyperlink) (last visited Mar. 6, 2013) (listing FEC Advisory Op. Nos. 1978-50, 1978-89, 1982-17, 1982-38, 1983-15, 1988-33, 1991-14, 1991-22, 1997-18, 1994-04, 2005-02, and 2008-06).

44. *See* FEC Advisory Op. No. 1978-68 (1978), *available at* http://saos.nictusa.com/aodocs/1978-68.pdf.

many AOs raise novel questions about the applicability of campaign finance laws, questions that Congress could never have imagined when drafting the law in the 1970s. AOs subsequently put the FEC in the middle of a range of thorny legal questions.

Table 2: Identity of Requestors

Sponsor	Number of Requests	Percent of Total
1977–1989		
Candidate	333	43.64%
Party	61	7.99%
Interest group	354	46.40%
Other	15	1.97%
1990–1999		
Candidate	130	36.72%
Party	59	16.67%
Interest group	157	44.35%
Other	8	2.26%
2000–2012		
Candidate	104	30.77%
Party	63	18.64%
Interest group	152	44.97%
Other	19	5.62%

Note: "Other" in this table refers to a request from an individual or a mix of the above requestors.

Another useful pattern concerns requestor identity. Who is making the bulk of requests over time, and has that frequency changed? Table 2 uses the same time periods, but shows the frequency of requestor sponsorship. Between 1977 and 1989, candidates and interest groups accounted for forty-four and forty-six percent of all requests, respectively. Since the 1980s, however, candidate share of requests have declined to thirty-seven percent in time period 2 and thirty-one percent since 2000. Party requests have jumped from eight percent to seventeen percent (time period 2) and nineteen percent (time period 3). This shift in requestors is likely driven by the changes in campaign finance laws. The rules for

45. *See* FEC Advisory Op. No. 2012-26 (2012), *available at* http://saos.nictusa.com/aodocs/AO%202012-26.pdf; FEC Advisory Op. No. 2012-28 (2012), *available at* http://saos.nictusa.com/aodocs/AO%202012-28.pdf.

candidates have not changed much since 1974, in the sense that contribution limits and reporting requirements have been a constant. On the other hand, the rules for parties have changed a lot in the last thirty years (the consequence of a series of congressional actions and judicial decisions), and the boundary for interest groups between regulated and unregulated behavior has consistently been at issue.[46]

IV. ANALYSIS: WHAT DO ADVISORY OPINIONS REVEAL ABOUT THE FEDERAL ELECTION COMMISSION?

Patterns in AO focus and requestor identity are important in tracking ambiguities in the law, but ultimately many question the value in preserving the current structure of the FEC. Changing the FEC structure is a common recommendation of many seeking more aggressive campaign finance laws.[47] What do AOs reveal about the nature of the FEC as a regulatory agency?

This is a hard question to answer, in no small part because of the complexity of many campaign-finance-related questions and the diversity of perspective on how to interpret the law. Nonetheless, one purpose of the six-member bipartisan FEC is to demand some cross partisan cooperation. Because the law requires four votes to act,[48] three-to-three deadlocks are an indication of an inability to offer advice on the nature of the law. Indeed, the question of what a three-to-three vote means is more than academic. Does it imply an allowance for any proposed activity, largely because the FEC was unable to say "no"? Or is it a "non-opinion" that preserves the legal ambiguity?[49]

One thing we can be sure of is that FEC AOs issued with limited dissent across partisan lines are a sign of a functional agency. How often do we see such behavior, though? Is there a change in the content of FEC votes? The FEC's extensive archive of issued AOs includes recorded votes on all AOs back to 1990.[50] I collected each recorded vote, and Figure 4 aggregates by year the number of yes and no votes on all issued AOs back to 1990. It consequently shows the

46. The changes for parties include the ability to raise and spend soft money and the ability to use hard money to advocate independently for candidates. For a review of these changes, see Anthony Corrado, *Party Finance in the Wake of BCRA: An Overview*, *in* THE ELECTION AFTER REFORM: MONEY, POLITICS AND THE BIPARTISAN CAMPAIGN REFORM ACT 19, 22, 30–31 (Michael J. Malbin ed., 2006). For a review of changes for interest groups, see MARK J. ROZELL, CLYDE WILCOX & MICHAEL M. FRANZ, INTEREST GROUPS IN AMERICAN CAMPAIGNS: THE NEW FACE OF ELECTIONEERING 60–67 (3d ed. 2012).

47. *See, e.g.*, Kenneth A. Gross, *The Enforcement of Finance Rules: A System in Search of Reform*, 9 YALE L. & POL'Y REV. 279, 286–90 (1991); John McCain, *Reclaiming Our Democracy: The Way Forward*, 3 ELECTION L.J. 115, 118–20 (2004).

48. 2 U.S.C. § 437c(c) (2012).

49. The answer to these questions is actually unclear.

50. *FEC Advisory Opinion Search System*, FED. ELECTION COMM'N, http://saos.nictusa.com/saos/searchao (last visited Mar. 6, 2013).

percentage of all recorded votes that are dissensions. Figure 5 shows the percentage of votes that are unanimous.[51]

The trends in both figures point to important developments. In Figure 4, the percentage of votes that were dissensions only exceeded ten percent once prior to 2003, but has only been below ten percent in three years since. The five-year moving average demonstrates a consistent increase in overall dissensions since 2000, such that by 2012 nearly one-quarter of all votes were no votes. In total, between 1990 and 2005 the percentage of dissensions was eight percent of all votes. The number is just under eighteen percent since 2006—a more than one hundred percent relative jump. In Figure 5, the trend in unanimous votes on AOs is also suggestive. Between 1990 and 2005 the average percentage of votes in any year that were unanimous was seventy-six percent. Since then, the number has dropped to just fifty-five percent.[52]

One weakness in these data is the absence of votes prior to 1990, which the FEC has not yet posted to its site. Another metric that provides more coverage, then, is the percentage of AOs in each year that deadlock. For this, we need not have the recorded votes but the final AO itself, which in the case of a deadlock reports to the requestor that the FEC could not reach the required four votes for action. This is reported in Figure 6 for the entire period back to 1977. But for 1989 and 1994, the percentage of AO requests that deadlock never exceeded six percent before 2006. Since 2006, however, deadlocks have only dropped below six percent in one year, 2008. And in three of the last four years, the FEC has deadlocked on more than ten percent of requests, including nearly twenty percent in 2012. In total, between 1977 and 2012, the FEC has deadlocked on 55 of over 1500 AOs, which is 3.7 percent. The jump in recent years, then, is a dramatic one.

It is important again to reiterate the challenges of studying these issues quantitatively; such analyses miss the nuance in specific cases. Fifty-five deadlocks may not seem like a lot in the context of over 1,500, but each AO is not equal in its importance or reach. The Appendix lists the fifty-five deadlock AOs along with

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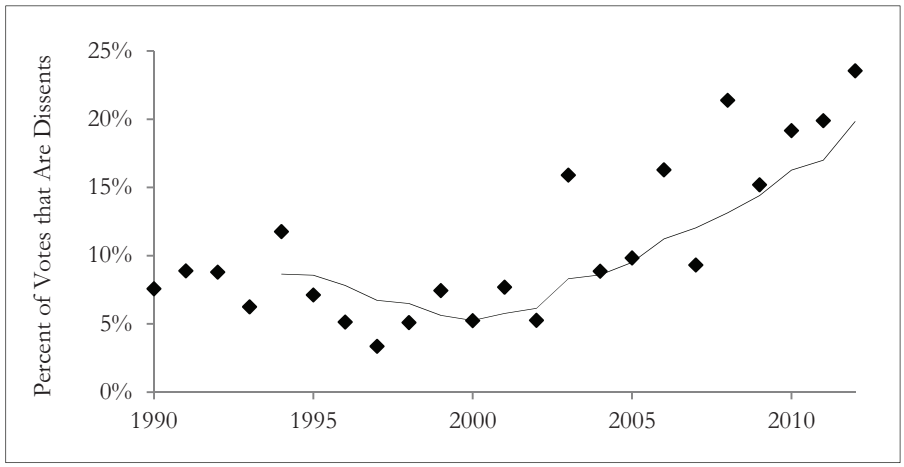
51. At some points in the FEC's history there have been only five sitting commissioners, the consequence of a delay in Senate confirmations. Franz, *supra* note 24, at 176. Five-to-zero decisions in these instances are treated as unanimous. In making these calculations, only the percentage of AOs with zero dissents was counted. The number of absences or abstentions on each vote does not bear on the calculation. In other words, a 5-0-1 vote is counted as unanimous. If one re-conceptualizes the meaning of unanimity to include no dissensions, abstentions, or absences, one still finds a slight decline in unanimity in recent years.

52. One might wonder only about the final vote to issue the AO. The final vote is on whether to send a particular draft to the requestor, which is what stands as the real test of whether the FEC can offer advice in a clear way. The trends outlined in Figures 4 and 5 hold if we restrict the analysis to just those final votes, though dissensions are a bit lower and unanimity is a bit higher. It should also be noted that there is really no trend in the average number of votes recorded on each AO by year. There appears to be a slight increase in the average number of votes since 2008 (between 1.3 and 1.7), which followed a time of infrequent votes in the late 1990s; however, the average number of votes in the early 1990s resembles the more recent period.

identifiers for the sponsor and the focus. Fourteen requests have concerned candidates (twenty-five percent) while thirty-eight have involved interest groups (seventy percent). The clear balance, then, is to deadlock on what outside groups have proposed, but even among these, the focus of the requests ranges quite a bit.[53]

Figure 4: Percent of All Votes that Are Dissents[54]



53. Is there a way to measure the importance of AO requests to the larger political community? One metric is the number of external comments the FEC receives on various draft AOs. These are almost always conveyed to the FEC prior to any action taken by the commissioners and usually recommend a specific course of action (e.g., approve or deny a specific request; or approve or deny a particular draft AO). Fortunately, along with FEC votes on all AOs, the FEC makes public these formal communications. Again the data are limited to AOs back to 1990. I collected the number of unique communicators on each AO. These could be reform organizations (e.g., the Center for Responsive Politics), other candidates and parties, and sometimes even interested citizens. I cross tabulated the number of dissensions on the final vote for each AO with an indicator of whether the FEC received any formal communication from an interested party. On the 539 AOs that were issued unanimously, the FEC received external feedback on only eighty-nine (16.5%). On all others that involved at least one dissension, which amounts to 116 AOs, the FEC received at least one comment on fifty-eight of them (50%). This is clear evidence that the FEC conflicts more often on requests that have larger meaning to the broader political community. I thank Richard Briffault for suggesting this measure.

54. Source: Federal Election Commission and author coding. Note: Fitted line is five-year moving average.

Figure 5: Percent of Votes that Were Unanimous[55]

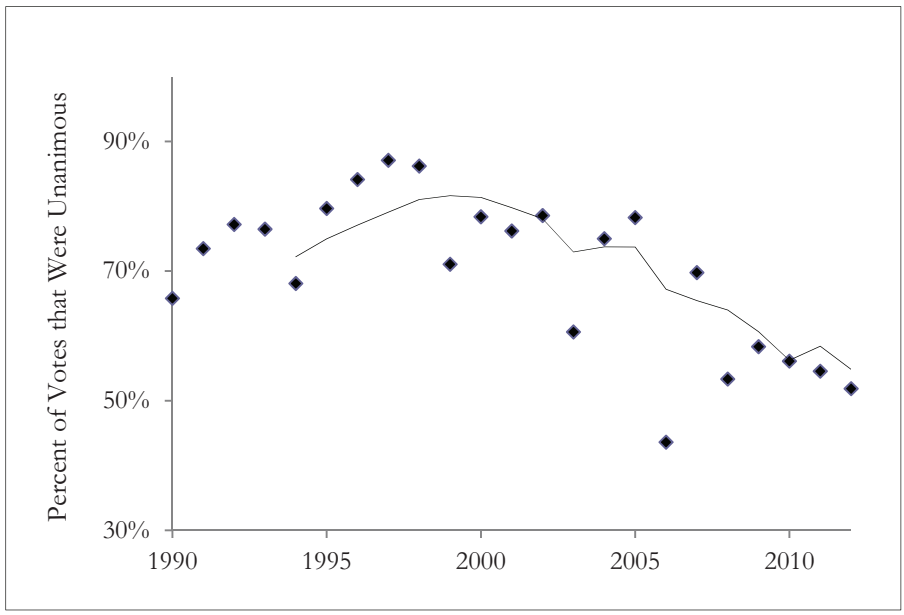
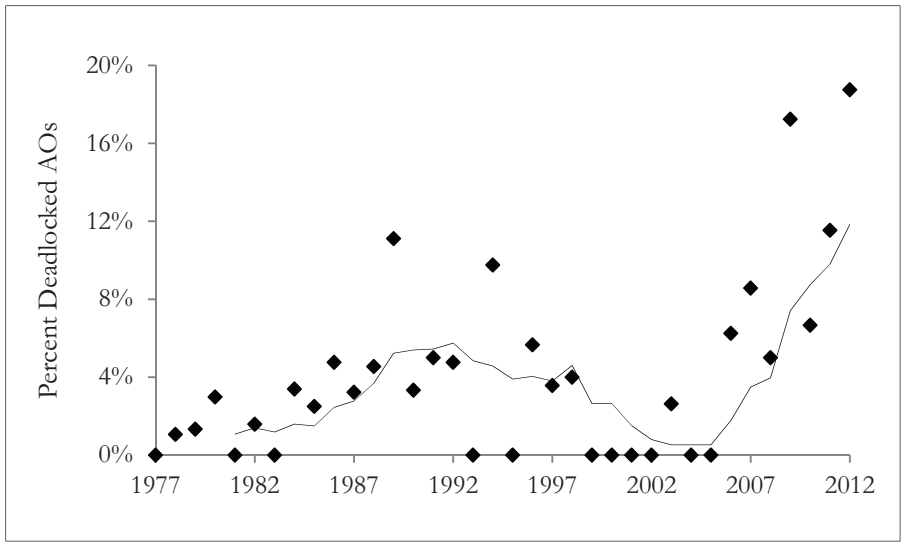


Figure 6: Percent Deadlocked Advisory Opinions per Year[56]



55. Source: Federal Election Commission and author coding. Note: Fitted line is five-year moving average.

56. Source: Federal Election Commission and author coding. Note: Fitted line is five-year moving average.

There is also the issue of the partisan nature of FEC voting. Are deadlocks partisan? Or do commissioners cross party lines at a nontrivial rate? Table 3 shows a cross tabulation of dissents from Republican and Democratic commissioners. There is at least one dissent in over thirty percent of all AO votes since 1990, but of these, only 28 of 288 votes have involved any bipartisanship. Eleven of these involve one Democratic and one Republican dissension, while only five votes are deadlocks (three total dissensions) resulting from two commissioners of one party joining one of the other. (Twelve votes involve more than three dissensions.) Across all 953 recorded votes, 16.3% involve two or more commissioners of just one party dissenting. All of this suggests that FEC conflict lines up along partisan lines, although it should be noted of the 288 votes with any dissensions, 104 (eleven percent) involved only one dissenting commissioner.

Table 3: Dissensions in Commission Voting by Party[57]

		Republican Dissensions				
		0	1	2	3	Total
Democratic Dissensions	0	665	47	30	35	777
		69.80%	4.90%	3.10%	3.70%	81.50%
	1	57	11	3	4	75
		6.00%	1.20%	0.30%	0.40%	7.90%
	2	47	2	0	7	56
		4.90%	0.20%	0.00%	0.70%	5.90%
	3	44	1	0	0	45
		4.60%	0.10%	0.00%	0.00%	4.70%
Total		813	61	33	46	953
		85.30%	6.40%	3.50%	4.80%	100.00%

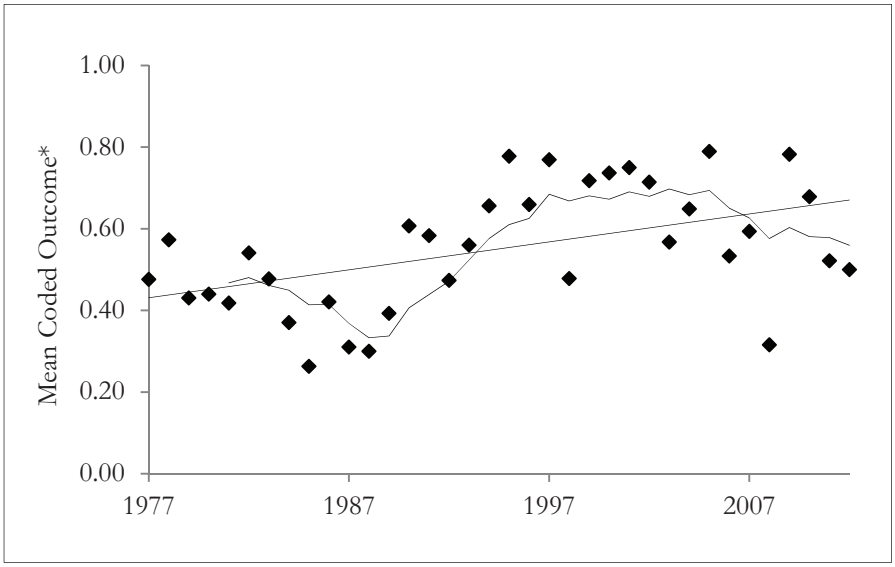
Note: Votes are on any recorded action in all Advisory Opinions between 1990 and 2012.

To this point, the evidence clearly demonstrates increased conflict at the FEC, but there is still more data we can bring to bear on the matter. The trends noted refer to recorded votes, which make no mention to the actual advice given to requestors. Each AO was additionally coded on whether the FEC approved (coded as one) or denied (coded as negative one) the requested political activity.[58] To capture mixed AOs, a third category was assigned for AOs where the outcome is a mix of approval and denial (or as will be discussed below, approval and

57. Source: Federal Election Commission and author coding.
58. Deadlocks are not included here. These could be coded as losses, though.

deadlock)—this was coded as zero. Figure 7 aggregates those trends by year back to 1977.

Figure 7: Mean Coded Outcome on Issued Advisory Opinions[59]



Across all of the coded AOs—nearly 1500 in total—the FEC approved about sixty-six percent. They denied requests about fifteen percent of the time, and they provided mixed AOs in about sixteen percent of the requests. The trend in Figure 7, however, suggests three rough "time periods" of FEC decision making. In the early years of issued AOs, the FEC tended to offer a range of AOs, including its fair share of "no" AOs. The mean outcome on issued AOs through 1989 was 0.40 on the −1 to 1 scale. Clearly the FEC was more likely to approve the request in all years, but in the first decade of this time series, the FEC was more critical than in later years.[60] From 1990 to about 2005, however, the FEC issued "yes" AOs at a much higher frequency. The mean outcome by 2000 was about 0.70 on the three-point scale. Indeed, across all types of requests, the FEC at this time was far more permissive in what it approved. By 2012, however, that trend had reversed, and the FEC was offering a bit more mixed guidance on

59. Source: Federal Election Commission and author coding. Note: Fitted lines are bivariate linear regression and five-year moving average. * −1 = loss; 0 = mix; 1 = win.

60. One might also look for divergence in outcomes by sponsor. Even when accounting for requestor identity, the trends noted in Figure 7 are still evident. What does seem to be the case, though, is that approval rates tended to increase more strongly for groups and parties over time, while not increasing as starkly for candidates.

average. This is made evident by the dip in the moving average, such that by 2012 the mean outcome was just over 0.50.

It would be a mistake, however, to attribute this recent change to a more aggressive FEC bent on reining in innovative requests. Only a close reading of the AOs can make this clear, however. What coders discovered, and what was wholly foreign to issued AOs in the early years of this time series, was a tendency for the FEC to issue an AO on only part of the request and to deadlock on other questions posed. AO 2012-11, the Free Speech AO noted at the beginning of this Article, is a good example.[61] In these cases, the FEC agrees to issue a formal AO, but notes that some of the questions were not resolved with the requisite four commissioner votes. Such AOs were coded as mixed outcomes. All told, seventeen of the fifty-five AOs with mixed outcomes since 2003 were those so coded because of a deadlock on part of the request.

These more recent years, then, amount to a unique time period, where the FEC admits in many AOs that it could not reach agreement on part of its deliberations.[62] Whereas the FEC before 1989 might be described as an aggressive regulator with the goal of stopping the development of many loopholes in election law, the FEC after 2006 is best characterized as conflicted and increasingly unable to offer clear and unidirectional advice.

Consider the words of election lawyer, Bob Bauer, who reached this same conclusion in 2009, not from a deeply empirical look at the data but from his own detailed knowledge of FEC behavior:

> Republicans have not, as might be imagined, aspired to an emasculated agency. On the contrary, the Republican Party struck an alliance in the 1970s with liberal Democrats to pursue an independent enforcement agency. Opposing them were old-line members like Democrat Wayne Hays, Chairman of the Rules Committee, who despised the very notion of the agency—and then the agency—without apology. Yet for Republicans, no reform accepted in the Watergate period of reforms was as important as an independent enforcement body. . . .
>
> The split provided for by law in the Commissioner membership, limiting any one party to three seats, was proof that Congress was under no illusion that the agency would escape the temptations and pressures of partisanship. The law provided that each party could check the excesses of the other. But for many years, while partisanship was hardly absent from the agency's deliberations or actions, voting patterns showed a

61. FEC Advisory Op. No. 2012-11, *supra* note 8.

62. *See, e.g.*, FEC Advisory Op. No. 2012-11, *supra* note 8, at 1, 7, 10–11; FEC Advisory Op. No. 2012-19, at 1, 4 (2012), *available at* http://saos.nictusa.com/aodocs/AO%202012-19.pdf; FEC Advisory Op. No. 2012-27, at 1, 3–7 (2012), *available at* http://saos.nictusa.com/aodocs/AO%202012-27.pdf.

> degree of bi-partisanship that would today count as something remarkable.[63]

There is one final investigation worth noting. Knowing that conflict in FEC voting runs along the partisan divide (see again Table 3), is it possible that this partisanship also lines up with the party of the AO requestor? That is, are Democratic commissioners more likely to object when a Republican Party committee or candidate asks for advice? This is a bit harder to assess by looking just at votes, since votes on various drafts of AOs might be more or less favorable to the requestor. (The FEC often considers multiple draft AOs. Some versions may be more permissive or restrictive than others.) On the other hand, we can restrict the analysis to final votes on requests, where the coding noted earlier established the direction of the outcome (approval, denial, or mixed approval). A partisan pattern of voting would suggest that on votes to approve a request, commissioners of the other party would be more likely to object. And on votes to prevent action, these same commissioners would be less likely to object. Such patterns would be somewhat damaging evidence of a partisan bias in FEC voting patterns.

Table 4 shows the breakdown for dissensions conditional on whether the dissents are from commissioners of the same or other party as the requestor. It also shows the breakdowns depending on whether the request was approved or faced some objection from the FEC. (Denials and mixed approvals are combined for this analysis.) The results suggest barely any evidence of a partisan pattern, however. On the one hand, commissioners of the same party as the requestor are less likely to object when an AO is approved. In 91.7% of these cases they all vote to approve, compared to 81.7% when the request is denied or given mixed approval. That is, objections are more common when the response is less than favorable for the requestor. But this pattern is almost identical for commissioners of the other party.[64]

All told, commissioners of the same party as the requestor are only 3.6% more likely (91.7% to 88.1%) to unanimously approve of a request than commissioners of the other party. That seems hardy worth fretting about, though. Yes, dissensions and deadlocks are up, and all of this lines up along partisan lines.

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63. Robert F. Bauer, *The Republican Commissioners and the Meaning of the Deadlocks at the FEC*, MORE SOFT MONEY HARD L.: WEB UPDATES (May 18, 2009), http://www.moresoftmoneyhardlaw.com/news.html?aid=1452. Bauer no longer maintains the blog, but the full archive of posts is still available at the site.

64. What if one restricts the analysis to final votes on deadlocked AOs for parties and candidates? As the Appendix shows, there are only fourteen such cases since 1990 (including the two jointly sponsored by an interest group). One of these involved a third party candidate. In five of the remaining twelve cases, the recorded vote is a unanimous one to close out the request. This means the FEC could not reach agreement but never formally recorded a deadlocked vote, making it difficult to establish the nature of the opposition among the commissioners. Seven of the others involved a partisan deadlock, and one involved a bipartisan deadlock. This is just not enough data to leverage a fair inference.

Those trends are concerning enough. But this final set of evidence is a breath of fresh air. Conflict seems more likely to be over principle—that seems a reasonable inference to draw from the data in Table 4, at least—over serving the partisan ends of the various requestors.

Table 4: Dissensions in Commission Voting by Party of Commissioner and Requestor[65]

		From Commissioners of Same Party		From Commissioners of Other Party	
		Loss or Mixed Approval	Win	Loss or Mixed Approval	Win
Dissensions on Final Vote	0	67	177	66	170
		81.70%	91.70%	80.50%	88.10%
	1	10	12	12	18
		12.20%	6.20%	14.60%	9.30%
	2	5	4	4	5
		6.10%	2.10%	4.90%	2.60%
Total		82	193	82	193
		100.00%	100.00%	100.00%	100.00%

Note: Final votes for requests initiated by Democratic and Republican candidates or parties for Advisory Opinions between 1990 and 2012.

V. DISCUSSION AND IMPLICATIONS

What are observers of campaign finance laws and their enforcement to make of these results? Do they point to any particular deficiency and bias at the FEC? The answer depends on the emphasis one gives to the findings. On the one hand, a decline in unanimity at the FEC and an increase in deadlocks—not trends confined to AOs but to enforcement matters[66]—suggest a problem at the FEC that demands a solution. The relative consensus that once was an FEC norm has been shattered by an increase in deadlocks, no more visible than the all-time high in 2012.

A Congressional Research Service (CRS) report in 2009 on deadlocks at the FEC (authored by R. Sam Garrett) highlighted three courses of action for Congress: maintain the status quo, conduct oversight of FEC behavior (e.g., by putting pressure on FEC nominees to pay fealty to consensus building), or pursue legislative change in the structure of the FEC (e.g., changing from a six-member

65. Source: Federal Election Commission and author coding.

66. *See* Franz, *supra* note 24, at 176–77.

board to a three-member board).[67] On the issue of legislative change, the CRS report noted that Congress could legislate specifically in the areas where FEC deadlocks are most common.[68] On the other hand, as Garrett notes (and as the Appendix here shows) "legislating individual policy issues would not necessarily address the fact that the Commission deadlocked on a variety of issues, which suggests that structural reform could be more expedient route [sic] to curtailing deadlocked votes."[69]

Such structural reform brings its own set of challenges, however. Former FEC lawyer Stephen Hoersting had this to say about the question in an August 2012 National Review article, which focused on FEC regulations defining coordination between an outside group and a candidate or party:

> Campaign-finance restrictions are designed to advance progressivism . . . . But those who would prefer an FEC structured to act more forcefully . . . should remember that an equally divided commission regulating politics is still better than an odd-numbered commission, and that no one who treasures open debate should want to see presidential campaigns regulated by an agency resembling today's National Labor Relations Board [which has five members].[70]

Hoersting points out that structural solutions aimed at more aggressive enforcement may not lead to an agency that gains the respect of campaign finance reformers, and it most certainly would raise the ire of conservative activists.[71] Putting aside the near impossibility of such structural change—given the opposition to the FEC among many senators[72]—the key issue is whether

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67. R. SAM GARRETT, CONG. RESEARCH SERV., R40779, DEADLOCKED VOTES AMONG MEMBERS OF THE FEDERAL ELECTION COMMISSION (FEC): OVERVIEW AND POTENTIAL CONSIDERATIONS FOR CONGRESS 13–15 (2009), *available at* http://congressional.proquest.com/congressional/docview/t21.d22.crs-2009-gvf-0660 (last visited Mar. 30, 2013). Reducing the number of commissioners to an odd number will surely reduce deadlocks, but it does not end the possibility. Strategic abstentions or absences by commissioners may reduce the number of recorded votes on AOs and enforcement matters to an even number. The analysis of all recorded votes on AOs suggests this is a nontrivial matter. Twenty-nine percent of all votes since 1990 experienced some abstentions or absences by commissioners. On the other hand, of AOs with more than one abstention or absence, thirty-one of the forty-seven votes involved commissioners of both parties.

68. *Id.* at 15.

69. *Id.*

70. Stephen M. Hoersting, *Was 'Understands' Coordinated?*, NAT'L REV. ONLINE (Aug. 16, 2012, 4:00 AM), http://www.nationalreview.com/content/was-'understands'-coordinated. The NLRB has no shortage of its critics, given its role in adjudicating labor-management issues in the private sector. It has also been criticized as being a tool of Democratic administrations and the political left. *See, e.g.*, Steven Greenhouse, *Labor Board Member Resigns over Leak to G.O.P. Allies*, N.Y. TIMES, May 28, 2012, at B3.

71. *See* Hoersting, *supra* note 70.

72. *See* Josh Israel & Aaron Mehta, *Withdrawn FEC Nominee Laments "Broken" Confirmation Process*, CENTER FOR PUB. INTEGRITY (Oct. 7, 2010, 1:00 PM), http://www.publicintegrity.org/2010/10/07/2450/withdrawn-fec-nominee-laments-broken-confirmation-process.

structural change will reestablish the consensus previously evident in FEC proceedings.

At the end of the day, the larger message may be that conflict at the FEC is merely another example of partisan polarization that has affected congressional behavior,[73] judicial decision making,[74] and even law clerk hiring patterns at the Supreme Court.[75] And very few scholars and policy makers have designed workable pathways to reducing such polarization. In that vein, it might be useful to consider the FEC as more a reflection of the larger political culture than itself a cause of the dysfunction. Consider again the three periods suggested with Figure 7. At the time the FEC was more critical of AO requests (pre-1990), congressional polarization was less severe and the flow of money in elections was not as intense.[76] The FEC became more permissive in the 1990s at the same time that control of Congress became more uncertain and as the demand for money in elections intensified.[77] In this time frame, the FEC as constituted could probably not have stemmed such a surge in demand for electoral cash—the electoral stakes between 1994 and 2000 were simply too high to both Democrats and Republicans. Finally, deadlocks gripped the FEC at the same time that polarization handicapped Congress. Indeed, it is hard to expect any bipartisan cooperation at a time when congressional leaders across the aisle are in such stark opposition.

Arguing that the FEC reflects the larger culture does not absolve it of responsibility for the spike in deadlocks, however, but it does contextualize the patterns noted here. Garrett's CRS report included the option to "maintain the status quo" at the FEC.[78] There is much to appreciate in this. The FEC continues

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73. *See* Thomas E. Mann & Norman J. Ornstein, IT'S EVEN WORSE THAN IT LOOKS: HOW THE AMERICAN CONSTITUTIONAL SYSTEM COLLIDED WITH THE NEW POLITICS OF EXTREMISM 152–56 (2012).

74. *See* David Paul Kuhn, *The Incredible Polarization and Politicization of the Supreme Court*, THE ATLANTIC (June 29, 2012, 10:29 AM), http://www.theatlantic.com/politics/archive/2012/06/the-incredible-polarization-and-politicization-of-the-supreme-court/259155.

75. *See* Adam Liptak, *A Sign of the Court's Polarization: Choice of Clerks*, N.Y. TIMES, Sept. 7, 2010, at A1.

76. *See* FRANZ, *supra* note 14, at 161–64 (determining, based on statistical analysis, that the FEC was less likely to approve interest group requests pre-1990 than it was in the late 1990s); MCCARTY ET AL., *supra* note 17, at 23–54 (showing evidence that congressional polarization became more severe during the 1990s). For the claim about a less intense flow of money, consider data located in the "Historical Elections" section of the Center for Responsive Politics website. *Historical Elections*, CENTER FOR RESPONSIVE POL., http://www.opensecrets.org/bigpicture/index.php (last visited Feb. 6, 2013). The amount of money spent in federal elections has steadily increased. *Id.*

77. *See* FRANZ, *supra* note 14, at 36–39.

78. R. SAM GARRETT, *supra* note 67, at 13.

to provide guidance in the vast majority of requested AOs, for example. And they still issue the majority of these decisions unanimously.[79]

Still, one response to a more sanguine view of the FEC is that Republican commissioners are attempting to subvert the law with their votes on AOs, enforcement matters, and rule making. That is, there may less ambiguity in the law than Republican commissioners are asserting publicly, and they may be using AO requests to undermine congressional intent.[80] This makes regulatory deficiency in this context particularly problematic given its relationship to the integrity of the electoral process. This may be true, though the efficacy of such a charge likely requires a case-by-case analysis of FEC decision making. Counting deadlocks is not enough to establish that Republican commissioners are railroading congressional intent. And even if this is a larger project motivated by a more conservative orthodoxy, Republican commissioners often release supporting statements in AOs that make clear the legal foundation for their dissensions.[81]

There is another point worth remembering. Commissioners are appointed by the Senate and have been described as tools of incumbent legislators.[82] To the extent that that is true, the appointing Senate deserves its share of the blame for any deficiency in the way the FEC functions. Indeed, the FEC operated in 2008 without a quorum of four members, as the Senate stalled on replacing commissioners whose terms had expired.[83] Much blame indeed can be levied at Congress for its oversight of the FEC.

Still, structural change remains attractive to reformers. One might consider here the evidence from the states. The fifty states are both a good and bad place to look for comparisons. On the one hand, the states have remarkable diversity of enforcement mechanisms. For example, nineteen states assign enforcement of state campaign finance laws to the secretary of state (and his or her office), the attorney general, or some other single administrator.[84] This makes these single

79. Figure 5 showed the trends in unanimous voting on all recorded votes. If one restricts the analysis to the vote to issue an AO, unanimity is down from eighty percent prior to 2005 to about seventy percent thereafter. That is still a decline, but seventy percent remains a high number.

80. Richard L. Hasen, *The FEC Is as Good as Dead*, SLATE (Jan. 25, 2011, 10:13 AM), http://www.slate.com/articles/news_and_politics/jurisprudence/2011/01/the_fec_is_as_good_as_dead.html.

81. Donald F. McGahn, *Reject the FEC's Activist Overreach*, POLITICO (July 14, 2009, 4:52 AM), http://www.politico.com/news/stories/0709/24874.html.

82. *See, e.g.*, William C. Oldaker, *Of Philosophers, Foxes, and Finances: Can the Federal Election Commission Ever Do an Adequate Job?*, 486 ANNALS AM. ACAD. POL. & SOC. SCI. 132, 143 (1986).

83. Eliza Newlin Carney, *The Endless FEC Fight*, NAT'L J. (June 16, 2008), http://www.nationaljournal.com/columns/rules-of-the-game/the-endless-fec-fight-20080616.

84. These states are: AL, AZ, CO, DE, ID, MA, MI, MS, MT, ND, NH, NM, NV, OR, PA, SD, UT, VT, and WY. Information from the states comes from a comparison of state laws, accessed in part through the Campaign Disclosure Project's website. *The Campaign Disclosure Law Database*, CAMPAIGN DISCLOSURE PROJECT, http://disclosure.law.ucla.edu (last visited Mar. 6, 2013). For a comparison of states that assign enforcement of campaign finance laws to a particular agency, see *id.* (select in the dropdown under letter "Y" "1. What is the name of the regulatory agency or entity that

administrators the type of "top dog" enforcers that many in the reform community might want to see at the national level.[85] Twenty-two states have enforcement and oversight commissions made up of an odd number of commissioners,[86] which has the effect of reducing the likelihood of partisan stalemates in commissioner decision making. Only nine states have commissions comprised of an even number of members[87]—two states have four-member commissions,[88] four have six members,[89] and three have eight members.[90] This simple comparison makes clear how the FEC is a structural outlier; its bipartsian six-member make-up is only mirrored in four states (Missouri, Wisconsin, Minnesota, and Iowa).[91]

And the initial evidence in the evaluation of these different structures is telling. (A caveat on the analysis that follows. The state-level comparisons are on enforcement of state campaign finance infractions. This is not a clean comparison with the FEC AO process, which involves a pre-election evaluation of proposed action. Still, the analysis is instructive of the success or failure, more broadly, of alternative regulatory models.) In 2012, the Center for Public Integrity released a report on each state's Corruption Risk.[92] The state rankings used a variety of

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oversee campaign disclosure?"; then follow "select all" hyperlink) (last visited Mar. 6, 2013). Not all states have information listed through this link, however. Nor does the site describe the structure of any agencies or commissions assigned the task of enforcement. I then searched for each state's enforcement agency by visiting all state government websites to fill in any ambiguities or gaps in the information from the Campaign Disclosure Project.

85. This statement is not exactly right. Some may hope for a single election law administrator whose *sole* function is administering and enforcing campaign finance laws. *See, e.g.*, Richard L. Hasen, *Beyond the Margin of Litigation: Reforming U.S. Election Administration to Avoid Electoral Meltdown*, 62 WASH. & LEE L. REV. 937, 973 n.148 (2005). Only three states have such a person: DE, MT, and MA. For an explanation of how this data was collected, see *supra* note 85 and accompanying text.

86. These states are: AK, AR, CA, CT, FL, GA, HI, KS, KY, LA, MD, ME, NC, NE, NJ, OH, OK, SC, TN, VA, WA, and WV. *See supra* note 85 and accompanying text.

87. These states are: IA, IL, IN, MN, MO, NY, RI, TX, and WI. *See supra* note 85 and accompanying text.

88. These states are: IN and NY. *See supra* note 84 and accompanying text.

89. These states are: IA, MN, MO, and WI. *See supra* note 84 and accompanying text.

90. These states are: IL, RI, and TX. *See supra* note 84 and accompanying text.

91. *Board Members*, IOWA ETHICS & CAMPAIGN DISCLOSURE BOARD., http://www.state.ia.us/government/iecdb/board/board_members.htm (last visited Feb. 9, 2013); *Board Members*, MINN. CAMPAIGN FIN. & PUB. DISCLOSURE BOARD., http://www.cfboard.state.mn.us/BoardMembers.htm (last visited Feb. 9, 2013); *About the Missouri Election Commission*, MO. ETHICS COMMISSION, http://www.mec.mo.gov/EthicsWeb/MecCommissioners.aspx#Section3 (last visited Feb. 9, 2013); *Members of the Government Accountability Board*, WIS. GOV'T ACCOUNTABILITY BOARD., http://gab.wi.gov/about/members (last visited Feb. 9, 2013).

92. State reports are located at the Center for Public Integrity's State Integrity Investigation website. *Your State*, ST. INTEGRITY INVESTIGATION, http://www.stateintegrity.org/your_state (last visited Feb. 6, 2013). The analysis that follows relies on six questions under the Political Financing section of each state's ranking. The rankings come from the Center for Public Integrity's reading of what a small number of individuals (e.g., reporters, commission members, and watchdog groups) in each state believed to be the effectiveness or deficiencies of the different enforcement and oversight

metrics, but six questions asked of representatives in each state focused on the enforcement agency in charge of the state's election laws. States were evaluated on a 0–100 scale on the perceived effectiveness of the enforcement agency in the initiation of investigations and assessment of fines for parties and candidates who violated state campaign finance laws, and for whether the agency audited party and candidate contribution and expenditure reports. For states with a "top dog" enforcer, the average score in the corresponding nineteen states was thirty-five. For states with an odd number of commission members, the average score was a much higher sixty-one. And for the nine states with an even number of commissioners, the average ranking was forty-eight.[93]

This is suggestive of the potential benefits that might come from a structural change at the FEC. A word of caution, however: in reading the qualitative assessments of different state enforcement commissions (accessed in each state's ranking) it is clear that states are often considered effective or ineffective as a consequence of different issues—available budgets, the campaign finance culture in the states, and the number of staff, all things that are independent of commission structure. Moreover, what some would argue in a state as evidence of effective enforcement (timely investigations of complaints from third parties), others in a different state might see as a weakness (the reliance on third party initiations of complaints over a random audit power).[94] All told, however, the analysis of state regulatory models highlights not only the FEC's unique establishment as an even number commission, but it also suggests that assessments of the FEC—the Center's scores are probably best understood as "reputation" scores—might be improved were it to be a five- or seven-member board. This sort of comparison with state agencies is ripe for a more thorough investigation.

VI. A FINAL WORD

In the end, a qualitative and quantitative analysis of AOs is useful for a number of reasons. As noted, one sees both changes in the nature of questions raised by political actors, but also shifts in the evaluations of AOs. In particular, we see a notable and clear increase in conflict among commissioners, particularly conflict that leads to partisan deadlock.[95] Ultimately, the real question is whether

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mechanisms. *See About the State Integrity Investigation*, ST. INTEGRITY INVESTIGATION, http://www.stateintegrity.org/about (last visited Feb. 6, 2013).

93. Data for each state is available from the author on request. The differences noted across states do not control statistically for each Commission's budget or the means by which commissioners are appointed (e.g., by gubernatorial or legislative appointment).

94. Indeed, the quantitative scores assigned to each state on each composite metric were based on the anecdotal insights offered by reporters, commission members, and watchdog groups in each state. *See State Integrity Investigation Methodology FAQ*, ST. INTEGRITY INVESTIGATION, http://www.stateintegrity.org/methodology (last visited Mar. 6, 2013).

95. One reaction to some of the data offered here might be to minimize a focus on

we learn anything from these data about the ability of the FEC to offer guidance to candidates, parties, and interest groups. One view is that the FEC offers clear signals in most cases, even as the law has become more complicated and more background is necessary in offering such guidance (see Figures 2 and 3). On the other hand, the muddled guidance in more recent years is a sign that the FEC needs to change. Conflict and deadlocks send a signal that the law can be skirted, and with little likelihood of penalty after the fact. Of course, as the law develops in the context of judicial decision making and developments in technology, consensus is a lot to expect perhaps. The FEC has a tough job, and there is a lot of complexity and ambiguity in the law. It is worth remembering that a wholesale change in the FEC structure might bring with it unforeseen and unwanted complications.

dissensions in voting by commissioners. One or two dissensions are not a concern so long as four votes are achieved for action. Moreover, four votes is itself a sign of bipartisan cooperation, if only minimal cooperation. Such a caveat is good one, though even a singular focus on deadlocks still reveals a troubling development in recent years at the FEC.

Appendix:

Deadlocked Advisory Opinions[96]

Advisory Opinion	Sponsor	Purpose
1980-136	Candidate	Candidate's use of valuable donated artwork to settle or pay campaign debts owed to creditors
1986-35	Candidate	Corporate TV station's offer of free, thirty-second commercial time slots to candidate's campaign committee
1986-43	Candidate	Former candidate committee's purchase of office and fund-raising services from corporation partly owned by same candidate
1989-31	Candidate	Application of California campaign finance statutes to a House candidate's principal campaign committee
1994-38	Candidate	Application of California campaign finance statutes to a House candidate's principal campaign committee
2003-38	Candidate	Use of campaign funds for redistricting activities
2006-31	Candidate	Rates for purchased ads
2008-02	Candidate	Receipt of salary by former homemaker running for federal office
2009-11	Candidate	Use of funds for documentary
2009-17	Candidate	Donation of campaign funds to charity
2009-25	Candidate	Transfer of nonfederal funds to federal account
2012-20	Candidate	Definition of electioneering communication
1978-81	Group	Unclear
1980-13	Group	Application of regulations to course in campaign management
1980-15	Group	Production and distribution of ads about voter registration and voting
1980-66	Group	Corporation use of comic character in public campaign to encourage voting and voter registration
1982-43	Group	Unclear
1984-04	Group	Unclear

96. Source: Federal Election Commission.

Appendix *(continued)*

Advisory Opinion	Sponsor	Purpose
1984-09	Group	Unclear
1985-36	Group	Preparation and sale of political ads
1987-09	Group	Ability to make independent expenditures for candidates it solicited contributions for
1988-16	Group	Political ads
1988-30	Group	Corporate newsletter article explaining separate segregated fund and its importance
1989-11	Group	Establishment of PAC by a partnership
1989-23	Group	Contribution "check-off" system to a PAC
1989-24	Group	Ability of employees to wear PAC pin to promote solicitation
1990-28	Group	Use of telephone 900 lines to promote candidates
1991-30	Group	Grassroots lobbying and whether it qualifies as expenditures for elections
1992-26	Group	Donation of broadcast time to federal candidates
1994-04	Group	Question about partisan communications and solicitation
1994-18	Group	Definition of membership
1996-06	Group	Solicitation to PAC of U.S. domestic subsidiary of a foreign corporation
1997-24	Group	Conversion of separate segregated fund into a nonconnected committee
1998-06	Group	Definition of restricted class for wholly owned domestic subsidiary of a foreign corporation
2006-09	Group	Acceptance of bundled contribution from partnership
2007-25	Group	Status of group as a corporation
2007-32	Group	Political committee status of group
2007-35	Group	Use of campaign funds for legal expenses of federal officeholder
2009-03	Group	Charitable matching program for contributions to PAC
2009-28	Group	Bundling

Appendix *(continued)*

Advisory Opinion	**Sponsor**	**Purpose**
2010-20	Group	Fund raising by super PACs
2011-09	Group	Disclaimers on Facebook ads
2011-16	Group	Repayment of loans
2011-23	Group	Ads by super PACs
2012-01	Group	Establishment of super PAC
2012-08	Group	Use of web platform for bundling
2012-24	Group	LLC's publication and marketing of candidate's autobiography
2012-29	Group	Hosting events that will feature federal candidates
2010-25	Group and Candidate	Distribution of documentary
2012-25	Group and Candidate	Joint fund raising between a candidate and PAC, and between a regulated PAC and independent-expenditure-only PAC
1979-45	Party	Unclear
1991-40	Party	Status of joint-fund-raising committee
1992-39	Party	Party coordinated expenditures in 1992 Georgia Senate general election run-off.
1996-30	Party	Independent expenditures for House and Senate candidates
1996-32	Party	Committee's proposed transfer of certain funds from its nonfederal to its federal account