



Deadlocked Votes Among Members of the Federal Election Commission (FEC): Overview and Potential Considerations for Congress

(name redacted)

Analyst in American National Government

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Summary

In the mid-1970s, Congress designed the Federal Election Commission (FEC) to be a bipartisan independent regulatory agency. The agency's structure is intended to guard against partisan enforcement of campaign finance law. Consequently, the six-member Commission has been evenly divided among Democrats and Republicans. The Federal Election Campaign Act (FECA) also requires that the Commission muster at least four votes to exercise core functions—meaning that no measure can advance without at least some bipartisan support.

Perhaps because of that structure, however, the Commission has been criticized for sometimes failing to achieve consensus on key policy issues, resulting in what are typically termed *deadlocked* votes, in which matters of law or regulation may be left unresolved. In August 2009, citing deadlocks and other issues, Senators Feingold and McCain introduced legislation (S. 1648) to restructure the agency.

Although the topic of deadlocked votes arises frequently, empirical analyses of the phenomenon are rare. Those that exist focus on older data. Accordingly, this report asks whether deadlocks are as common as popular wisdom suggests and whether deadlocks fall along party lines. Both points are commonly cited (although often without quantitative data) in anecdotal accounts. The report addresses those questions by providing an overview of deadlocks in rulemakings, enforcement matters, and advisory opinions (AOs) during the current Commission's first year in office—from July 2008 through June 2009—when concern over deadlocks has most recently reemerged. Although this report examines deadlocks that can occur during rulemakings, enforcement matters, and AOs, it is not intended to provide an exhaustive account of Commission operations, procedures, or processes.

The data show that deadlocks occurred throughout the current Commission's first year in office, but they affected a minority of the matters considered. Specifically, deadlocks occurred in about 13% of matters under review (MURs) and in about 17% of AOs. No deadlocks occurred on rulemakings. Those issues on which deadlocks occurred, however, featured staunch disagreement among Commissioners and reflected apparently unsettled positions on some major policy questions. In addition, when deadlocks occurred, Commissioners always voted in partisan blocs. Deadlocked votes can be interpreted from various perspectives, which may influence whether Congress decides to maintain the status quo or pursue oversight or legislative action.

This report will be updated periodically to reflect new data or as developments warrant.

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Introduction

Congress established the Federal Election Commission (FEC) via the 1974 Federal Election Campaign Act (FECA) amendments.¹ The six-member independent regulatory agency is responsible for civil enforcement of the nation's campaign finance law. The Commission also administers public financing of presidential campaigns (applicable to participating candidates) and presidential nominating conventions.² In addition to enforcement and regulatory duties, the FEC conducts a variety of outreach and educational activities.

Under FECA, no more than three Commissioners may be affiliated with the same political party.³ In practice, the Commission has been divided equally among Democrats and Republicans. Affirmative votes from at least four commissioners are required to (among other duties): make, amend, or repeal rules, issue advisory opinions (AOs), and approve enforcement actions.⁴ (For the purposes of this report, enforcement actions can include finding “reason to believe” FECA has been violated, which can prompt an enforcement investigation.⁵) Matters without at least four votes for or against an action can have the effect of leaving questions of law, regulation, or enforcement unresolved, as some view the issues in question as having been neither approved nor rejected.⁶

Throughout its history, the Commission has been criticized for failing to reach at least a four-vote consensus on some key policy and enforcement issues, resulting in what are commonly termed *deadlocked* votes.⁷ The issue of deadlocked votes has received renewed attention since late June

¹ FECA is 2 U.S.C. 431 et seq. The 1974 amendments were P.L. 93-443. The Commission was originally composed of six members and two ex officio members (the Clerk of the House and Secretary of the Senate). Two Commissioners were appointed by the President, two by the President Pro Tempore of the Senate, and two by the Speaker of the House. Congressional appointments were based on leadership recommendations. In *Buckley v. Valeo* (1976), 424 U.S. 1, the Supreme Court of the United States invalidated the original congressional-appointments structure. On *Buckley*, see CRS Report RL30669, *The Constitutionality of Campaign Finance Regulation: Buckley v. Valeo and Its Supreme Court Progeny*, by (name redacted). In 1993, the U.S. Court of Appeals for the D.C. Circuit held the ex officio appointments unconstitutional. See *FEC v. NRA Political Victory Fund*, 6 F.3d 821 (D.C. Cir. 1993). Today, although congressional leaders may influence FEC nominations, they are presidential appointments.

² See CRS Report RL34534, *Public Financing of Presidential Campaigns: Overview and Analysis*, by (name redacted) and CRS Report RL34630, *Federal Funding of Presidential Nominating Conventions: Overview and Policy Options*, by (name redacted) and (name redacted).

³ 2 U.S.C. § 437c(a)(1).

⁴ See 2 U.S.C. § 437c(c); 2 U.S.C. § 437d(a)(6)-2 U.S.C. § 437d(a)(9); and 2 U.S.C. § 437g(a); and CRS Report RS22780, *The Federal Election Commission (FEC) With Fewer than Four Members: Overview of Policy Implications*, by (name redacted).

⁵ Finding reason to believe (RTB) does not necessarily mean that a violation has occurred. Rather, it is the threshold at which an investigation could begin. See 2 U.S.C. § 437g(a)(2). In cases in which the Commission believes the facts are clear, it might choose to proceed directly to attempt to negotiate a conciliation agreement, for example, rather than first conducting an investigation. Therefore, not all RTB findings generate investigations. For an overview, see Federal Election Commission, *Filing a Complaint*, brochure, Washington, DC, June 2008, pp. 3-4, http://www.fec.gov/pages/brochures/complaint_brochure.pdf.

⁶ Practitioners reportedly have different interpretations of deadlocked votes. In enforcement matters, for example, some practitioners reportedly view deadlocks as an opportunity to challenge the boundaries of the law (because no violation was found), whereas others regard deadlocks as leaving the issue unresolved. See Kenneth P. Doyle, “Increasing Prevalence of Split FEC Votes On Key Issues Could Shape Next Campaigns,” *Daily Report for Executives*, April 9, 2009, p. C-1.

⁷ For an overview, see, for example, Michael M. Franz, “The Devil We Know? Evaluating the FEC as Enforcer,” (continued...)

2008, when most of the current Commissioners took office (see **Table 1**), and following a six-month loss of the agency’s policymaking quorum.⁸

Table 1. Current Members of the Federal Election Commission

Commissioner	Date Confirmed	Term Expires	Party Affiliation
Cynthia L. Bauerly	06/24/2008	04/30/2011	Democrat
Caroline C. Hunter	06/24/2008	04/30/2013	Republican
Donald F. McGahn	06/24/2008	04/30/2009 (remains in holdover status)	Republican
Matthew S. Petersen	06/24/2008	04/30/2011	Republican
Steven T. Walther	06/24/2008	04/30/2009 (remains in holdover status)	Democrat
Ellen L. Weintraub	03/12/2003	04/30/2007 (remains in holdover status)	Democrat

Source: Legislative Information System nominations database. CRS added party affiliation based on the seating chart distributed at FEC meetings and based on various media accounts.

Some deadlocked votes among current (and previous) Commissioners were marked by controversy and apparently staunch, public disagreement. For example, two enforcement cases—one involving the 527 organization⁹ the November Fund and another involving Arjinderpal Sekhon, a former congressional candidate—featured an exchange of sharply worded “statements of reasons” articulating Commissioners’ justifications for their votes. In the November Fund case, which focused on whether the organization should have registered with the Commission as a political committee, a deadlock resulted in the Commission rejecting an already-signed conciliation agreement.¹⁰ In the Sekhon case, a deadlock forced the Commission to refund a civil-

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Election Law Journal, vol. 8, no. 3 (2009), pp. 167-187; Thomas E. Mann, “The FEC: Administering and Enforcing Campaign Finance Law,” in *The New Campaign Finance Sourcebook*, Anthony Corrado, Thomas E. Mann, Daniel R. Ortiz, and Trevor Potter (Washington: Brookings Institution Press, 2005), pp. 239-241; and Scott E. Thomas and Jeffrey H. Bowman. 2000. “Obstacles to Effective Enforcement of the Federal Election Campaign Act.” *Administrative Law Review* 52(2): 575-608.

⁸ Commissioner Walther had previously served on the Commission. For background on the transition from the previous Commission to the one that took office in June 2008, see CRS Report RS22780, *The Federal Election Commission (FEC) With Fewer than Four Members: Overview of Policy Implications*, by (name redacted).

⁹ As the term is commonly used, 527 refers to groups registered with the Internal Revenue Service (IRS) as *political organizations* that seemingly intend to influence federal elections. By contrast, *political committees* (which include candidate committees, party committees, and political action committees) are regulated by the FEC and federal election law. There is a debate regarding which 527s are required to register with the FEC as political committees. For additional discussion, see, for example, CRS Report RS22895, *527 Groups and Campaign Activity: Analysis Under Campaign Finance and Tax Laws*, by (name redacted) and (name redacted); and CRS Report R40091, *Campaign Finance: Potential Legislative and Policy Issues for the 111th Congress*, by (name redacted).

¹⁰ Commissioners Bauerly and Weintraub characterized the November Fund deadlock as a “dramatic departure...from the Commission’s prior enforcement efforts and the law itself.” Bauerly and Weintraub also stated that “Our colleagues’ refusal to accept the signed conciliation agreement with the November Fund amounts to a refusal to enforce the law.” Commissioners Hunter, McGahn, and Petersen characterized the notion that they were refusing to enforce the law as an “overly simplistic allegation” and contended that “we were unable to divine a coherent and sound legal theory upon which to impose the limitations of ‘political committee’ status upon The November Fund,” and, therefore, (continued...)

penalty check that had already been submitted.¹¹ Amid deadlocks in these and other cases, some Members of Congress, media organizations, and interest groups began to comment on what was characterized as the “increasingly public and acrimonious” nature of deadlocked votes.¹² In August 2009, citing deadlocks and other issues, Senators Feingold and McCain introduced legislation (S. 1648) to restructure the agency.¹³ Deadlocks also reportedly motivated congressional concern about FEC nominations.¹⁴

Although the topic of deadlocked votes arises frequently, empirical analyses of the phenomenon are rare. Those that exist rely on older data.¹⁵ Nonetheless, it is clear that deadlocked votes are sometimes controversial and are a regular topic of interest among those who monitor the Commission. What is less clear, however, is whether deadlocks are common or whether deadlocks fall along party lines. Both points are commonly cited (although often without quantitative data) in anecdotal accounts.¹⁶

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to find that FECA had been violated. See Cynthia L. Bauerly and Ellen L. Weintraub, *Statement of Reasons of Commissioners Cynthia L. Bauerly and Ellen L. Weintraub*, Federal Election Commission, document no. 28044222186 accompanying MUR 5541, December 19, 2008, pp. 1, 6, <http://eqs.sdrdc.com/eqsdocs/28044222185.pdf>; and Matthew S. Petersen, Caroline C. Hunter, and Donald F. McGahn, *Statement of Reasons of Vice Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Donald F. McGahn*, Federal Election Commission, document 29044223820, accompanying MUR 5541, January 22, 2009, p. 1, <http://eqs.sdrdc.com/eqsdocs/29044223819.pdf>.

¹¹ Commissioners Bauerly and Weintraub characterized the deadlock as perhaps “the most inexplicable resolution of a Matter Under Review” during their tenures and argued that “despite a clear and undisputed violation of the law, the Commission effectively tore up the [conciliation] agreement and closed the file with no action taken.” Commissioners Petersen, Hunter, and McGahn countered that the MUR “presents an enforcement action that should have been handled differently from start to finish” and “highlights a troubling disparity in campaign finance law: rote enforcement of hyper-technical rules often has an unfair impact on inexperienced political participants.” See Cynthia Bauerly and Ellen L. Weintraub, *Statement of Reasons: Commissioner Cynthia L. Bauerly [and] Commissioner Ellen L. Weintraub*, Federal Election Commission, document 29044242537, Washington, DC, June 2, 2009, pp. 1-2, <http://eqs.sdrdc.com/eqsdocs/29044242536.pdf>; and Matthew S. Petersen, Caroline C. Hunter, and Donald F. McGahn II, *Statement of Reasons: Vice Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Donald F. McGahn II*, Federal Election Commission, document 29044243960, accompanying MURs 5957 and 6031, Washington, DC, June 24, 2009, p. 1, <http://eqs.sdrdc.com/eqsdocs/29044243959.pdf>. On the check being refunded, see Letter from Audra L. Wassom, Acting Assistant General Counsel, FEC, to Daljit Kaur Sekhon, Treasurer, Committee to Elect Sekhon for Congress, November 7, 2008, <http://eqs.sdrdc.com/eqsdocs/28044220541.pdf>.

¹² Dan Eggen, “McCain, Feingold Team Up Again Over FEC,” *Washington Post*, July 3, 2009, p. A2.

¹³ Senator Russ Feingold, remarks in the Senate, *Congressional Record*, daily edition, vol. 155 (August 7, 2009), p. S 9083.

¹⁴ According to media reports, Senators Feingold and McCain stated that they would place a hold on FEC nominee John Sullivan, due in part to concern about deadlocks. See, for example, Kenneth P. Vogel and Mainu Raju, “John McCain, Russ Feingold reunite to block Barack Obama’s FEC pick,” *Politico.com*, July 1, 2009, <http://www.politico.com/news/stories/0609/24393.html>; Dan Eggen, “McCain, Feingold Team Up Again Over FEC,” *Washington Post*, July 3, 2009, p. A2; and Greg Vadala, “McCain and Feingold Use ‘Hold’ to Pressure Obama on FEC Picks,” *CQ Today Online News*, July 1, 2009, <http://www.cq.com/document/display.do?dockey=/cqonline/prod/data/docs/html/news/111/news111-000003157755.html@allnews&metapub=CQ-NEWS&searchIndex=0&seqNum=1>. It is unclear, however, whether a hold, which is an informal process, was actually placed on the nomination. On holds generally, see CRS Report 98-712, “*Holds in the Senate*,” coordinated by (name redacted).

¹⁵ See, for example, Michael M. Franz, “The Devil We Know? Evaluating the FEC as Enforcer;” Todd Lochner and Bruce E. Cain, “Equity and Efficacy in the Enforcement of Campaign Finance Laws,” *Texas Law Review*, vol. 77, no. 7 (June 1999), pp. 1891-1942; and Robert E. Mutch. 1988. *Campaigns, Congress, and Courts: The Making of Federal Campaign Finance Law* (Westport, CT: Praeger), p. 103.

¹⁶ See, for example, *ibid* and Kenneth P. Doyle, “Increasing Prevalence of Split FEC Votes On Key Issues Could Shape Next Campaigns,” *Daily Report for Executives*, April 9, 2009, p. C-1.

This report addresses those questions by exploring deadlocks in rulemakings, enforcement matters, and AOs during the current Commission's first year in office—from July 2008 through June 2009. In doing so, the report presents data on how many issues—and which ones—resulted in deadlocked votes. Matters¹⁷ (rulemakings, enforcement actions, or advisory opinions (AOs)) voted on by the Commission are the unit of analysis.¹⁸ As such, the quantitative analysis that follows is based on the number of rulemakings, enforcement actions, and AOs the Commission considered during the period—not the number of individual votes that occurred on each issue.¹⁹

Although this report examines deadlocks that can occur during rulemakings, enforcement matters, and AOs, it is not intended to provide an exhaustive account of Commission operations, procedures, or processes. As such, detailed discussion of Commissioners' deliberations, the FEC enforcement process, or other issues that might be relevant for the broader context in which some deadlocks arise is beyond the scope of this report.

The following analysis is based on data provided by the FEC and on other publicly available FEC documentation.²⁰ Although certain matters remain outside the public record (e.g., votes on negotiations over civil-penalty amounts), the data presented here account for all publicly available deadlocks that occurred during the year under review. The analysis also provides an overview of the policy or legal issues considered in each of those deadlocks.

The data show that although deadlocks occurred throughout the year, they occurred in a minority of the matters the Commission considered. Those issues on which deadlocks occurred, however, featured strong disagreement among Commissioners and reflected apparently unsettled positions on some major policy questions, such as: political committee status, when particular activities triggered filing requirements or other regulation, and questions related to investigations and other enforcement matters. In addition, the deadlocks that did occur always fell along partisan lines.

If Congress chooses to examine FEC deadlocked votes, a variety of perspectives and options could be relevant, as discussed at the end of this report.

¹⁷ The word *matter* here refers to a data observation in the social science sense (i.e., a case). *Matter* is not intended to imply that the observations include only matters under review (MURs).

¹⁸ In social science research, the unit of analysis refers to the object being studied.

¹⁹ Some academic research has employed votes as the unit of analysis rather than matters (e.g., MURs). See, for example, Michael M. Franz, "The Devil We Know? Evaluating the FEC as Enforcer." Others, however, at least partially use MURs as the unit of analysis. See, for example, Todd Lochner and Bruce E. Cain, "Equity and Efficacy in the Enforcement of Campaign Finance Laws;" and Todd Lochner, Dorie Apollonio, and Rhett Tatum, "Wheat From Chaff: Third-Party Monitoring and FEC Enforcement Actions," *Regulation & Governance*, vol. 2 (2008), pp. 216-233. Scholarly research on the FEC enforcement process—particularly deadlocks—is so limited that there appears to be no standard unit of analysis. However, analyzing individual votes rather than cases could arguably diminish the prominence of deadlocked votes. Because the Commission typically holds several votes on a matter, deadlocks as a percentage of all votes would be expected to be lower than when using the unit of analysis employed in this report (deadlocks as a percentage of matters rather than votes). For example, Franz found that deadlocks occurred in less than 4% of MUR votes between 1996 and 2004. As noted below, this report finds that deadlocks occurred in 13.1% of MUR matters between July 2008 and June 2009.

²⁰ The data do not address issues the Commission has not made public (e.g., votes on proposed civil-penalty amounts).

What are *Substantive Deadlocks*?

This report discusses *substantive deadlocks* (or simply *deadlocks*).²¹ As used here, the term means votes that precluded the Commission from reaching a consensus about how to proceed on a rulemaking, enforcement action, or AO. This includes 3-3 tie votes and 2-2, 2-3, 3-2 split votes that had the same effect as a tie (i.e., cases in which at least one Commissioner recused or otherwise did not vote). Substantive deadlocks are rarely the *final* vote on a matter, as the Commission usually votes to close the file after a substantive deadlock has occurred.²² In the cases explored here, however, the deadlocked vote essentially halted substantive Commission action on the matters in question.

No Deadlocks on Rulemakings

During the first year of the current Commission, no substantive deadlocks occurred on rulemaking issues. During the period, the FEC held votes on four rulemakings: reporting bundled campaign contributions, extension of the Administrative Fine Program (AFP), repealing increased contribution limits following the Supreme Court’s invalidation of the so-called Millionaire’s amendment, and adjusting certain penalties for inflation.²³

Although the FEC was able to reach agreement on these four issues, the lack of deadlocks does not necessarily indicate that no conflicts exist on rulemakings. In fact, only one of the four rulemakings (the bundling regulations) approved during the period was controversial. Other rulemaking matters remain open—perhaps because consensus has not been reached.²⁴ In short, it might be expected that no deadlocks occurred on rulemakings given that Commissioners appear to value consensus surrounding rulemakings and might, therefore, postpone formal consideration of proposed rules until at least a four-vote majority can be attained.

Deadlocks in Enforcement Matters

As the data in **Table 2** and **Figure 1** show, evaluating the frequency of substantive deadlocks depends on what segment of the data is analyzed. FEC enforcement actions are handled through

²¹ These are terms employed in this report; they are not necessarily terms of art.

²² Despite deadlocks on previous issues, votes to close the file typically include at least a four-vote majority.

²³ See Federal Election Commission, “Reporting Contributions Bundled by Lobbyists, Registrants and the PACs of Lobbyists and Registrants,” 74 *Federal Register* 7285, February 17, 2009; Federal Election Commission, “Extension of Administrative Fines Program,” 73 *Federal Register* 72687, December 1, 2008; Federal Election Commission, “Repeal of Increased Contribution and Coordinated Party Expenditure Limits for Candidates Opposing Self-Financed Candidates,” 73 *Federal Register* 79597, December 30, 2008; and Federal Election Commission, “Civil Monetary Penalties Inflation Adjustments,” 74 *Federal Register* 31345, July 1, 2009. For additional discussion on recent rulemakings and other campaign finance issues, see CRS Report R40091, *Campaign Finance: Potential Legislative and Policy Issues for the 111th Congress*, by (name redacted). On invalidation of the Millionaire’s amendment, which had permitted additional fundraising in certain cases, see CRS Report RS22920, *Campaign Finance Law and the Constitutionality of the “Millionaire’s Amendment”: An Analysis of Davis v. Federal Election Commission*, by (name redacted).

²⁴ For example, rulemakings on hybrid political advertising and federal election activity—both potentially controversial topics—remain open. The Commission’s list of open and recently completed rulemaking actions is available at http://www.fec.gov/law/law_rulemakings.shtml.

three mechanisms: the Administrative Fine Program (AFP), alternative dispute resolution (ADR), and matters under review (MURs). It is perhaps unsurprising that no substantive deadlocks occurred in AFP cases, which are limited to comparatively simple matters involving late filings. Similarly, although ADR cases can involve a variety of issues, the program is designed to facilitate negotiation that leads to relatively speedy resolution on fairly simple cases.²⁵ Both the administrative fine and ADR programs typically involve cases that can be closed with little controversy and without the complexity and potential litigation involved in some MURs.

By contrast, MURs can be complex and cumbersome. They may entail lengthy investigations or audits, protracted negotiations between the Commission and respondents, substantial civil penalties, or litigation—although the pace can vary depending on individual circumstances. Votes on each of those elements (where applicable)—and others—can generate deadlocks if the questions under consideration are controversial. Unlike ADR and AFP matters, MURs are also likely to involve cases in which facts or substantial questions of law or policy are in dispute. Substantive deadlocks occurred in approximately 13% of publicly available MURs closed between July 2008 and June 2009. Substantive deadlocks occurred in about 6% of cases during the period if the data are combined to include action on MURs, AFP, and ADR cases.

Table 2. Substantive Deadlocks in Publicly Available FEC Enforcement Matters Closed July 1, 2008-June 30, 2009

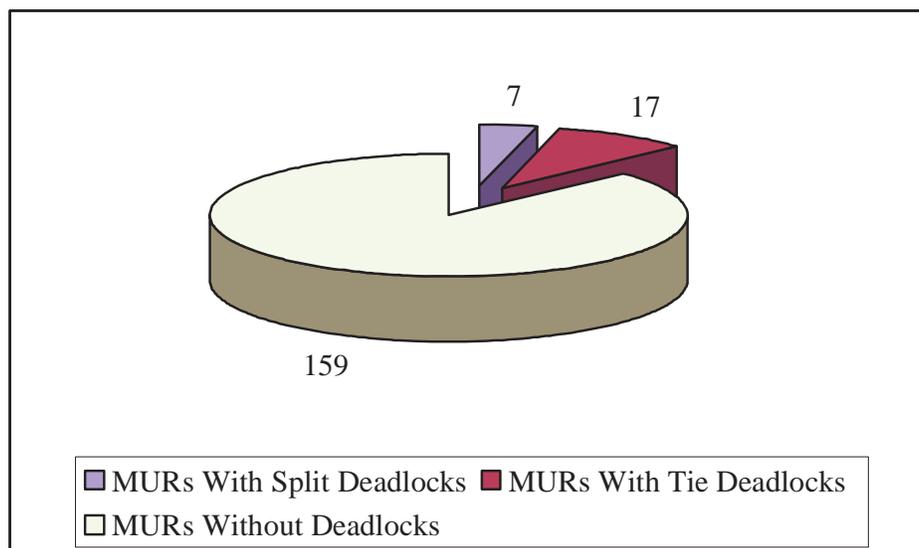
Enforcement Type	Substantive Deadlocks Resulting from Split Votes	Substantive Deadlocks Resulting from Tie Votes	All Substantive Deadlocked Votes	Total Number of Enforcement Matters	Percentage of Split Votes Occurring in All Matters	Percentage of Tie Votes Occurring in All Matters	Percentage of Substantive Deadlocks Occurring in All Matters
Matters Under Review	7	17	24	183	3.8%	9.3%	13.1%
Administrative Fines	0	0	0	162	0%	0%	0%
Alternative Dispute Resolution	0	0	0	62	0%	0%	0%
All Enforcement Matters	7	17	24	407	1.7%	4.2%	5.9%

Source: CRS analysis of data provided by the Office of Legislative Affairs, FEC. Totals in the *Matters Under Review*, *Administrative Fines*, and *Alternative Dispute Resolution* rows are taken from the FEC data. CRS calculated all percentages in the table, data in the *All Enforcement Matters* row, and in the *Total Number of Enforcement Matters* column.

Note: All percentages in the table are rounded. The *All Substantive Deadlocked Votes* and *Percentage of Substantive Deadlocks Occurring in All Matters* combine tie and split votes (both of which result in deadlocked votes).

²⁵ For an overview of the ADR, see Federal Election Commission, *Alternative Dispute Resolution Program*, brochure, Washington, DC, December 2002, http://www.fec.gov/pages/brochures/adr_brochure.pdf.

Figure 1. Substantive Deadlocks in Publicly Available Matters Under Review (MURs) Closed July 1, 2008-June 30, 2009



Source: CRS analysis of data provided by the Office of Legislative Affairs, FEC

Note: The data reflect the total number of MURs considered during the period, not the total number of individual votes on those MURs.

Deadlocks in Advisory Opinions

Advisory opinions (AOs) allow requesters to ask the Commission for guidance about how campaign finance law applies to a specific situation. Typically, requesters use AOs to determine whether a planned campaign activity is permissible. The degree to which AOs are controversial can vary substantially depending on the request and complexity of the issues involved. As **Table 3** shows, substantive deadlocks affected 5 of 29 (17.2%) AOs considered during the period. In three of those cases, however, the Commission was able to reach sufficient agreement to issue partial guidance.

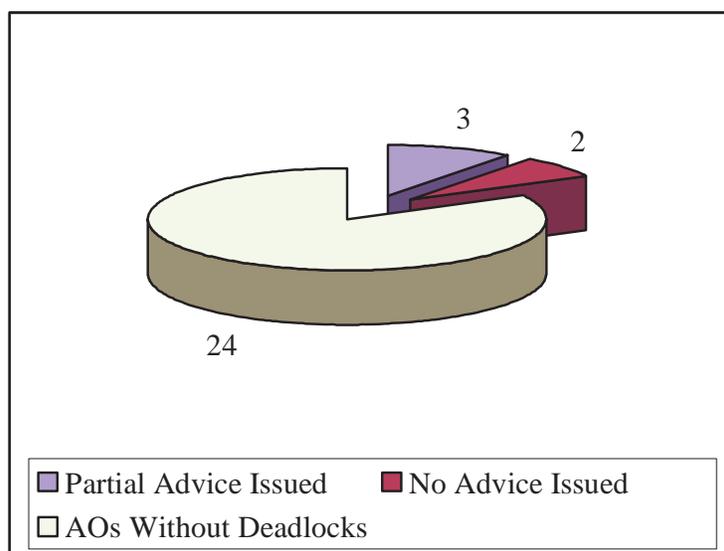
Table 3. Substantive Deadlocks in FEC Advisory Opinions Considered July 1, 2008- June 30, 2009

All Substantive Deadlocks Resulting in Partial Advice Issued	All Substantive Deadlocks Resulting in No Advice Issued	All Substantive Deadlocks Resulting in No or Partial Advice Issued	Total Advisory Opinions Considered	All Substantive Deadlocks Resulting in Partial Advice as a Percentage of All Advisory Opinions Considered	All Substantive Deadlocks Resulting in No Advice as a Percentage of All Advisory Opinions Considered	All Substantive Deadlocks Resulting in No or Partial Advice as a Percentage of All Advisory Opinions Considered
3	2	5	29	10.3%	6.9%	17.2%

Source: CRS analysis of data provided by the Office of Legislative Affairs, FEC, June 4, 2009. CRS calculated all percentages in the table and the data in the *Total Advisory Opinions Considered* column.

Notes: All percentages in the table are rounded.

Figure 2. Substantive Deadlocks in FEC Advisory Opinions Considered July 1, 2008- June 30, 2009



Source: CRS analysis of data provided by the Office of Legislative Affairs, FEC

Note: The data reflect the total number of AOs considered during the period, not the total number of individual votes on those AOs.

Party Affiliation and Deadlocks

It is unclear whether substantive deadlocks occurred *because* of party affiliation, but every deadlock during the review period involved party-line votes. As noted previously, Commissioners

Bauerly, Walther, and Weintraub are widely regarded as Democratic appointees; Commissioners Hunter, McGahn, and Petersen are widely regarded as Republican appointees. Notes accompanying the FEC data and a review of the individual vote certifications make clear that in every instance in which a deadlock occurred—whether on MURs or AOs—Democratic and Republican Commissioners voted in partisan blocs (although not every Commissioner voted in every case). In addition, in each case of a deadlocked vote in a MUR, Democratic votes would have resulted in additional enforcement action, while Republican votes would not. In most cases, this meant that Democratic Commissioners “voted to approve” Office of General Counsel (OGC) enforcement recommendations, while Republican Commissioners voted against those recommendations. In some cases, however, Democratic Commissioners voted to pursue additional enforcement despite OGC recommendations to the contrary.²⁶

Cases and Issues Involving Deadlocks: A Brief Overview

As noted previously, especially in complex matters, the Commission can hold multiple votes on various issues associated with particular cases. In enforcement matters, for example, the Commission might vote on whether to: proceed with an investigation, accept factual and legal analyses, accept proposed conciliation agreements, etc. Motions, made by Commissioners, determine exactly what the Commission is considering during individual votes. For example, in the American Future Fund case (MUR 5988), the Commission deadlocked 3-3 on a motion containing six elements, including finding “reason to believe”²⁷ that multiple provisions of FECA and FEC regulations had been violated, approving a factual and legal analysis, and other issues.²⁸ Deadlocks on AOs were also typically complicated; in some cases, disagreement occurred over competing drafts or amendments.

Exploring the intricacies of individual motions and votes is beyond the scope of this report. It is clear, however, that deadlocks are not confined to a single policy issue. **Table 4** provides an overview of the 24 MURs in which substantive deadlocks occurred; **Table 5** does so for the five AOs.²⁹ (Multiple MURs listed on one line in **Table 4** indicate that the Commission handled those issues as a single matter.) As the tables show, deadlocks occurred throughout the year and involved a variety of respondents and issues. Deadlocks affected MURs on a variety of campaign spending issues and political committee status (e.g., whether groups regulated primarily under Sections 527 or 501(c) of the Internal Revenue Code (IRC) should have registered with the Commission as political committees), and other issues. The AOs in question also concerned various issues, particularly questions related to how campaign funds could be raised or spent.

²⁶ For example, OGC recommended against additional enforcement action in MURs 6047, 6051, 6052, and 6096. In those cases, Republican Commissioners “voted to approve the General Counsel’s recommendations to dismiss the matters [while Democratic Commissioners] voted to pursue further enforcement actions.” See Federal Election Commission, *Selected Split Votes in Matters Under Review (MURs) Closed and Made Publicly Available July 1, 2008 through June 30, 2009*, p. 1; provided by the Office of Legislative Affairs, FEC, July 2009.

²⁷ As noted previously, finding reason to believe (RTB) does not necessarily mean that a violation has occurred.

²⁸ See Federal Election Commission, *Amended Certification*, in the Matter of MUR 5988, document 29044232281, March 17, 2009 (certification date), p. 1, <http://eqs.nictusa.com/eqsdocs/29044232280.pdf>.

²⁹ Some cases, which are listed on the same line in the table, were handled together.

Because most cases involved multiple elements, the information in the tables is provided for illustrative purposes, but is not intended to provide a detailed overview of each case.³⁰ In addition, in some cases, deadlocks appear to have had more to do with whether an investigation should proceed or whether a penalty was appropriate than with the substance of the policy or legal issue in the MUR or AO. Therefore, although the tables note the major policy or legal issues affected by deadlocks, those issues were not necessarily the cause of the deadlocked vote that halted Commission action.

Table 4. Overview of Substantive Deadlocks in Publicly Available Matters Under Review (MURs) Closed July 1, 2008-June 30, 2009

MUR numbers	MUR Name ^a	Vote Date	Vote Outcome	Major Issue in MUR
5541	The November Fund	10/21/2008	3-3	Political committee status
5572	David W. Rogers	02/10/2009	3-3	Permissible use of mailing list
5642	George Soros	11/18/2008	3-3	Reporting requirements
5694 and 5910	Americans for Job Security, Inc.	02/25/2009	3-3	Political committee status
5878	Arizona State Democratic Central Committee	11/18/2008	3-3	Permissible contributions
5898	Ryan Pennington	09/10/2008	3-3	Permissible use of campaign funds
5937	Romney for President	01/28/2009	3-3	Permissible contributions
5945	Kiernan Michael Lalor	02/03/2009	3-3	Reporting requirements
5957	Committee to Elect Sekhon for Congress	09/11/2008, 10/21/2008	3-3	Reporting requirements
5971	Lindsey Graham for Senate	09/10/2008	3-3	Permissible use of campaign funds
5988	American Future Fund	02/25/2009	3-3	Political committee status
5993	Ed Fallon	03/10/2009	3-3	Permissible contributions
6056	Protect Colorado Jobs, Inc.	03/11/2009	3-3	Permissible contributions
6047	Vernon Jones for Georgia	04/21/2009	3-3	Required disclaimers

³⁰ For example, cases involving political committee status typically involve not only whether an entity meets the FECA definition of *political committee*, but also whether filing requirements or limitations on restrictions on sources or contribution amounts were violated.

MUR numbers	MUR Name ^a	Vote Date	Vote Outcome	Major Issue in MUR
6096	Americans for Limited Government Research Foundation	04/21/2009	3-3	Permissible use of contribution information
6051 and 6052	Wal-Mart Stores, Inc.	04/15/2009	3-3	Permissible expenditures
6082	Majority Action	04/15/2009	2-2	Political committee status
5724	Jim Feldkamp for Congress	10/07/2008	3-2	Permissible contributions
5835	Democratic Congressional Campaign Committee	02/10/2009	2-3	Required disclaimers
5842	Economic Freedom Fund	04/14/2009	3-2	Political committee status
5935	Rep. Kirsten E. Gillibrand	03/18/2009	2-3	Permissible contributions; required disclaimers
5977 and 6005	American Leadership Project	02/25/2009	2-3	Political committee status
6062	Harry Truman Fund	04/21/2009	2-3	Political committee status
6094	American Leadership Project	05/12/2009	2-3	Political committee status

Source: Data provided by the Office of Legislative Affairs, FEC; and MUR documentation obtained via the Enforcement Query System (see notes below).

Notes: All entries in the table are taken from the FEC data except the *Major Issue in MUR* column, which is based on CRS analysis of publicly available documents obtained through the Commission's Enforcement Query System or other public sources. In particular, CRS relied on Commissioners' statements of reasons and Office of General Counsel reports to ascertain the major issue addressed in each MUR. However, the entries in the *Major Issue* column are not intended to describe every policy issue related to each case. In addition, the deadlock did not necessarily occur over the issue reflected in the *Major Issue* column.

- a. MUR names are taken verbatim from the data supplied by the FEC Office of Legislative Affairs. In some cases, respondents not listed here were also included in the MUR.

Table 5. Overview of Substantive Deadlocks in Publicly Available Advisory Opinions Considered July 1, 2008-June 30, 2009

AO numbers	AO Name ^a	Vote Date	Vote Outcome	Major Issue in AO
2008-07	Vitter	08/21/2008	3-3 on unanswered question; partial advice issued	Permissible expenditure
2008-15	National Right to Life Committee, Inc.	10/23/2008	3-3 on unanswered question; partial advice issued	Electioneering communications
2009-03	ICE, Inc.	04/21/2009	3-3; no advice issued	Charitable matching program
2009-04	Franken/DSCC	03/19/2009	2-3 and 2-1 split on unanswered question; partial advice issued	Recount fund
2009-11	Kerry	06/25/2009	No advice issued ^b	Permissible expenditure

Source: All entries in the table are taken from the FEC data except the *Major Issue in AO* column, which is based on CRS analysis of publicly available documents obtained through the Commission’s AO database or other public sources, including the *summary* entry accompanying each AO on the FEC website. However, the entries in the *Major Policy Issue* column are not intended to describe every policy issue related to each case. In addition, the deadlock did not necessarily occur over the issue reflected in the *Major Issue* column.

- a. AO names are taken verbatim from the data supplied by the FEC Office of Legislative Affairs. In some cases, respondents not listed here were also included in the AO.
- b. This AO is included in the data provided to CRS by the FEC and is, therefore, considered a deadlock for the purposes of this report. At the June 25, 2009, meeting, the Commission determined that none of the proposed draft AOs could obtain the support of at least four Commissioners and, as it has occasionally done in the past, voted (5-0) to instruct the Office of General Counsel to issue a letter explaining that agreement could not be reached. In this case, a deadlock arguably did not occur because no vote leading to a deadlock was held, even though it was obvious that a deadlock would have occurred if such a vote had been held. Some of this information comes from CRS analysis of an audio recording of the June 25 meeting. The audio is available via the FEC website at http://www.fec.gov/audio/2009/20090625_01.mp3.

Considerations for Congress

Perspectives on Deadlocked Votes

As Congress determines whether oversight or other action regarding deadlocked votes is necessary, a threshold issue may be to consider whether deadlocks represent a public policy concern and if so, how. On one hand, occasional deadlocks could be expected given the complexity (and sometimes controversy) embodied in federal campaign finance law and regulation. Also, Congress appears to have anticipated that the Commission might be unable to reach consensus in some controversial cases, and perhaps even intended for deadlocks to occur. According to one analysis, “In order to ensure that the Commission would not become a vehicle for partisan purposes, the Congress created an unusual conflict within the FEC.”³¹ Commenting

³¹ Scott E. Thomas and Jeffrey H. Bowman. 2000. “Obstacles to Effective Enforcement of the Federal Election Campaign Act.” *Administrative Law Review* 52(2): 575-608.

on the four-vote requirement, former Commissioner Scott E. Thomas and his executive assistant, Jeffrey H. Bowman, continued, “These provisions were specifically designed to ensure that formal action on a matter before the Commission could go forward only on the affirmative vote of a mixed majority of Commission members.”³² In addition, deadlocks might even be viewed as positive, particularly if enforcement actions being considered are perceived as unwarranted or excessive.

On the other hand, substantive deadlocks mean that the Commission has been unable to reach consensus about some element of law or regulation. Even if the Commission is in agreement about a particular element of law or regulation generally, deadlocks can signal disagreement about how law and regulation apply to particular circumstances. As a result, at least in specific instances, substantive deadlocks prevent campaign finance law from being enforced or preclude those seeking guidance from clearly knowing whether their planned activities will run afoul of the law. Indeed, in the cases discussed above, the Commission was unable to reach consensus on major questions of campaign finance law and policy, such as: political committee status, determining civil penalties, and whether particular activities trigger reporting or other requirements under FECA.

In addition, there is some evidence that deadlocks may be on the rise. For example, although external examinations of deadlocks are rare, a recent scholarly study found that between 1996 and 2004, deadlocks on MURs occurred in 4.6% of cases—well below the 13.1% figure reported here for 2008-2009.³³ If deadlocks are, in fact, on the rise over time (a question that would require additional data to assess), Congress may wish to examine the Commission’s long-term ability to reach consensus and to consider whether that ability enhances or inhibits campaign finance regulation.

Policy Options

Maintain the Status Quo

As the data show, during the current Commission’s first year, substantive deadlocks occurred in about 13% of votes in MURs and less than 6% of all enforcement actions when combining MURs with ADR and AFP cases. By extension, the Commission *did not* deadlock in almost 87% of MURs and 94% of enforcement actions overall. Therefore, if Congress determined that action were warranted only if deadlocks occupied a sizable portion of Commission business (e.g., a large plurality or majority), the quantitative data could be interpreted to suggest that congressional action is not needed—at least based on the time frame examined here. In addition, despite some deadlocks on key issues, during the same period the Commission was able to reach consensus on a wide variety of other cases—including some that were also potentially controversial.³⁴

³² Ibid.

³³ Michael M. Franz, assistant professor of government and legal studies, Bowdoin College, provided the 4.6% figure (e-mail correspondence with the author, September 22, 2009). See also Bernie Becker, “Election Commission Decisions Deadlocking on Party Lines,” *New York Times*, September 27, 2009, p. 20, national edition; and Michael M. Franz. 2009. “The Devil We Know? Evaluating the Federal Election Commission as Enforcer.” *Election Law Journal* 8(3): 167-187.

³⁴ For example, the Commission reached majority agreement on controversial bundling regulations and on Sen. (continued...)

Conduct Oversight

Congress may wish to explore FEC deadlocks through oversight—either with or without other legislative action. On a related note, the Senate could also choose to examine deadlocks as part of its advice and consent responsibilities surrounding FEC nominees. Oversight would provide an opportunity to learn more about how and why deadlocks occur, and to assess whether additional congressional action or internal reform, such as changes in Commission enforcement procedures or practices, is needed. Oversight has the potential advantage of addressing deadlocks without necessarily inviting the stalemate that often accompanies campaign finance legislation.

Oversight would also permit Congress to determine whether a recent procedural change at the Commission has any affect on deadlocked votes. Specifically, in July 2009, the Commission announced a pilot program to permit AO requesters to appear before the Commission to answer questions about the requests.³⁵ This initiative is designed to address the “frustrat[ing]” situation in which requesters or their attorneys were in the audience during open meetings at which AOs were considered, but were not permitted to answer questions Commissioners raised.³⁶ If the pilot program provides greater clarity about specific facts surrounding AOs, the potential for deadlocks might be reduced—at least in cases in which deadlocks occur because of uncertainty or misimpression. Oversight alone, however, would not necessarily reduce the number of deadlocks or otherwise change agency practices or behavior.

Pursue Legislative Change

At least two broad legislative options are open to Congress. First, Congress could restructure the Commission in an effort to avoid deadlocks. In August 2009, Senators Feingold and McCain introduced S. 1648, a bill that would replace the six-member FEC with a three-member Federal Election Administration (FEA). Similar legislation has been introduced since 2003.³⁷

Restructuring the FEC in any form that eliminated an even number of Commissioners could reduce or eliminate the potential for deadlocks.³⁸ Revamping the agency, however, would entail reforms well beyond addressing the comparatively narrow topic of deadlocked votes. In addition,

(...continued)

McCain’s decision to withdraw from the presidential public financing program in 2008. On the bundling regulations, see Federal Election Commission, “Reporting Contributions Bundled by Lobbyists, Registrants and the PACs of Lobbyists and Registrants,” 74 *Federal Register* 7285, February 17, 2009; and CRS Report R40091, *Campaign Finance: Potential Legislative and Policy Issues for the 111th Congress*, by (name redacted). On presidential public financing, see CRS Report RL34534, *Public Financing of Presidential Campaigns: Overview and Analysis*, by (name redacted).

³⁵ The Commission is also considering procedural changes that could affect enforcement matters. For an overview, see Steven T. Walther, *Agency Procedures Recommendations*, Federal Election Commission, Memorandum from the Chairman to the Commission, Washington, DC, June 23, 2009, <http://www.fec.gov/law/policy/enforcement/2009/recommendationssummary.pdf>.

³⁶ Federal Election Commission, “Advisory Opinion Procedure,” 74 *Federal Register* 32160, July 7, 2009.

³⁷ See H.R. 421 (Meehan) and S. 478 (McCain) from the 110th Congress; H.R. 5676 (Shays) and S. 3560 (McCain) from the 109th Congress; and H.R. 2709 (Shays) and S. 1388 (McCain) from the 108th Congress. None of these bills advanced beyond referral.

³⁸ It is also possible that restructuring would eliminate the evenly divided partisan structure of the current Commission. As proposed in S. 1648, the three members of the FEA could not be of the same political party. See proposed Sec. 352 of the bill.

a legislative overhaul of the agency is likely to be controversial. Particularly in recent Congresses, even arguably modest efforts to change campaign finance law have typically been seen as potential legislative vehicles for those wishing to pursue broad policy reform.³⁹ No major campaign finance legislation has been enacted since the 2002 Bipartisan Campaign Reform Act (BCRA).⁴⁰ This context suggests that efforts to revamp the FEC may be difficult. On the other hand, the cyclical nature of support for campaign finance reform legislation suggests that changing the Commission—or pursuing other major policy goals—could be accomplished provided sufficient demand exists within Congress or perhaps the broader public sphere.

Second, Congress could pursue legislation to clarify those issues on which deadlocks have occurred. Overall, deadlocks appear not to be isolated to particular policy or legal issues. The political committee issue provides a prominent example. By providing clearer guidance to the Commission, legislation to clarify when 527s⁴¹ and 501(c)⁴² organizations must register as political committees might reduce the potential for deadlocked enforcement. Nonetheless, pursuing legislative clarity on controversial issues might not be practically attainable in all circumstances. For example, partially because of the controversy surrounding the political committee issue, legislation concerning 527s has not been enacted in recent Congresses.⁴³ In addition, 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 to curtailing deadlocked votes.

Conclusion

The data presented above suggest that substantive deadlocks occurred throughout the current Commission's first year in office, but Commissioners reached consensus far more frequently than not. Between July 2008 and June 2009, substantive deadlocks occurred in about 13% of MURs and about 17% of AOs. No deadlocks occurred on rulemakings. Nonetheless, substantial disagreement occurred on some issues. Deadlocks always occurred in partisan blocs, and the tone of debate surrounding deadlocks received prominent attention in Congress and the media. A variety of options are available to Congress if it chooses to address the deadlocks issue, ranging from maintaining the status quo to clarifying those areas of the law on which deadlocks occur or restructuring the agency.

³⁹ See, for example, CRS Report R40091, *Campaign Finance: Potential Legislative and Policy Issues for the 111th Congress*, by (name redacted).

⁴⁰ P.L. 107-155; 116 Stat. 81. BCRA amended FECA.

⁴¹ As noted previously, 527 refers to groups registered with the Internal Revenue Service (IRS) as *political organizations* that seemingly intend to influence federal elections. By contrast, *political committees* (which include candidate committees, party committees, and political action committees) are regulated by the FEC and federal election law. There is a debate regarding which 527s are required to register with the FEC as political committees. For additional discussion, see, for example, CRS Report RS22895, *527 Groups and Campaign Activity: Analysis Under Campaign Finance and Tax Laws*, by (name redacted) and (name redacted); and CRS Report R40091, *Campaign Finance: Potential Legislative and Policy Issues for the 111th Congress*, by (name redacted).

⁴² On 501(c) organizations generally, see, for example, CRS Report RL33377, *Tax-Exempt Organizations: Political Activity Restrictions and Disclosure Requirements*, by (name redacted).

⁴³ A detailed discussion of *political committee* status, 527s, and 501(c)s is beyond the scope of this report. See, for example, CRS Report RS22895, *527 Groups and Campaign Activity: Analysis Under Campaign Finance and Tax Laws*, by (name redacted) and (name redacted); and CRS Report R40091, *Campaign Finance: Potential Legislative and Policy Issues for the 111th Congress*, by (name redacted).

Author Contact Information

(name redacted)
Analyst in American National Government
[redacted]@crs.loc.gov, 7-....

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