

Reforming The FEC: Bipartisan Compromise Is Essential

By **Robert Lenhard** (October 27, 2020, 6:04 PM EDT)

As Election Day nears, former commissioners of the Federal Election Commission discuss the biggest issues facing the FEC, which has been without a quorum since July.

The most important issue for commissioners of the Federal Election Commission, when I was there and now, is whether they can find goals that they want to achieve together, and, if so, how they go about doing that.

The agency is unique in its leadership: There are six commissioners, no more than three of whom can be from a single political party, and the agency requires the affirmative votes of four commissioners to do almost everything. So bipartisan compromise is essential to the agency's functioning.

This is made more complicated because the agency's mission is to regulate politics in a political town, and, unlike some agencies or departments, there is no interest group that supports its mission. So it has an especially challenging, but not impossible, task.

In 2006, I joined the FEC with two other new commissioners. This fact was enormously influential in how the commission operated while I was there. In part, this is because when making decisions, some commissioners, both Republicans and Democrats, had experience with agency practices and procedures and could serve as a voice for why things were done the way they were. This often involved deeper underlying reasons or implications to the process of decision making that was initially apparent.

But we also had three new commissioners, from both sides of the aisle, who wanted to drive the process, and for whom "we have always done it this way" was not always a persuasive argument. So there was a fluidity and energy to decision making that was important and that may reappear as the president fills the three empty seats and considers replacing the two commissioners whose terms have expired.

At the time I was at the FEC, the agency finished the rulemakings that followed the passage of the Bipartisan Campaign Reform Act of 2002, generated substantial enforcement matters, passed regulations regarding use of the internet in federal elections, and addressed the consequences of the U.S. Supreme Court decision in *Wisconsin Right to Life v. FEC* in 2007, as well as the U.S. District Court for the District of Columbia decisions in *Emily's List v. FEC* in 2008 and *Shays v. FEC* in 2004.



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Today, the agency has before it similarly weighty issues. How should it address use of the internet, the disclosure of the sources of money spent in federal races, the presence of foreign nationals in American politics, the scope of the media exemption in the digital age, how data is used and reported, and the rules for super political action committees are but a few examples. How the agency interacts with the courts and the U.S. Department of Justice will also be an important substantive issue for the commissioners.

But whether they are able to address any of these issues, or others of their own choosing, will turn on a more fundamental question: How do they work together? Because an affirmative decision requires the vote of four of the six commissioners, decision making at the FEC is an intensely personal process, and how the commissioners manage that process will be the single most important decision they make.

During my time on the commission, there was a mixture of commissioners who would join to get to four votes, and more recently, there has been more block voting by the Republicans and Democrats.

Neither system guarantees or precludes success, but both require a successful management of conflict if the commissioners are to be able to join together to issue decisions. This is not easy. There is a certain degree of satisfaction in saying what you believe and letting the chips fall where they may. Or to conclude that if the agency deadlocks, so be it, at least something bad did not happen.

And it is comforting to know that it is almost always the unreasonable recalcitrance of your opponents that explains why things failed. But all of these choices also bring a cost when the next contentious matter comes before the agency.

Add to that the process constraints. To comply with the Sunshine Act, four commissioners may only gather to discuss substantive issues at a formal meeting, and then, it is to decide on matters for which there is not yet consensus. Put more simply, the commissioners tend to all get together as group only when there is something about which to fight.

How commissioners manage those conflicts is important in determining their ability to engage in constructive decision making on an ongoing basis. One truism I left the FEC with was that if you fight a lot, the next fight is easier, and if you do a lot of deals, the next deal is easier. How the commissioners go about managing early decisions may help set a tone for some time to come.

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Disclosure: Robert Lenhard's practice focuses on advising politically active organizations, corporations, trade associations, individuals and political entities including Joe Biden's presidential campaign. This article was written in his individual capacity and not on behalf of his firm or any client.

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