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

R. Sam Garrett
Analyst in American National Government

August 26, 2009
Summary

In the mid-1970s, Congress designed the Federal Election Commission (FEC) to be a bipartisan independent regulatory agency. By congressional design, 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 exploring deadlocked votes 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.

The data show that deadlocked votes occurred throughout the current Commission’s first year in office, but they represented a minority of the Commission’s votes during the review period. 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.
Deadlocked Votes Among Members of the Federal Election Commission

Introduction

Congress established the Federal Election Commission (FEC) via the 1974 Federal Election Campaign Act (FECA) amendments. 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. 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. 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. (For the purposes of this report, enforcement actions can include finding “reason to believe” FECA has been violated, which prompts an enforcement investigation.) 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.

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. 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 L. Paige Whitaker. 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.


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).

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.

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>
<thead>
<tr>
<th>Commissioner</th>
<th>Term Expires</th>
<th>Date Confirmed</th>
<th>Party Affiliation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cynthia L. Bauerly</td>
<td>04/30/2011</td>
<td>06/24/2008</td>
<td>Democrat</td>
</tr>
<tr>
<td>Caroline C. Hunter</td>
<td>04/30/2013</td>
<td>06/24/2008</td>
<td>Republican</td>
</tr>
<tr>
<td>Donald F. McGahn</td>
<td>04/30/2009</td>
<td>06/24/2008</td>
<td>Republican</td>
</tr>
<tr>
<td>Matthew S. Petersen</td>
<td>04/30/2011</td>
<td>06/24/2008</td>
<td>Republican</td>
</tr>
<tr>
<td>Steven T. Walther</td>
<td>04/30/2009</td>
<td>06/24/2008</td>
<td>Democrat</td>
</tr>
<tr>
<td>Ellen L. Weintraub</td>
<td>04/30/2007</td>
<td>03/12/2003</td>
<td>Democrat</td>
</tr>
</tbody>
</table>

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 organization 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.\(^9\) In the Sekhon case, a deadlock forced the Commission to refund a civil-

---

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 R. Sam Garrett.

9 As the term is commonly used, 527 refers to groups registered with the Internal Revenue Service (IRS) as political organizations. Although 527s influence federal elections in some cases, their activities generally fall outside the confines of federal election law and FEC regulation. By contrast, political committees (which include candidate committees, party committees, and political action committees) are regulated by the FEC and federal election law. Although political committees are 527s for tax purposes, not all 527s are political committees. For additional discussion, see, for example, CRS Report RS22895, *527 Groups and Campaign Activity: Analysis Under Campaign Finance and Tax Laws*, by L. Paige Whitaker and Erika K. Lunder; and CRS Report R40091, *Campaign Finance: Potential Legislative and Policy Issues for the 111th Congress*, by R. Sam Garrett.

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, 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/28044222186.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.
penalty check that had already been submitted. 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. In August 2009, citing deadlocks and other issues, Senators Feingold and McCain introduced legislation (S. 1648) to restructure the agency. Deadlocks also reportedly motivated congressional concern about FEC nominations.

Although the topic of deadlocked votes arises frequently, empirical analyses of the phenomenon are rare. Those that exist rely on older data. 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.

This report addresses those questions by exploring deadlocked votes in rulemakings, enforcement matters, and AOs during the current Commission’s first year in office—from July 2008 through June 2009.


The following analysis is based on data provided by the FEC and on other available FEC documentation. 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 deadlocked votes occurred throughout the year, they constituted a minority of the Commission’s votes. 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.

**What are Substantive Deadlocks?**

This report discusses substantive deadlocks (or simply deadlocks). 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 advisory opinion (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. In the cases explored here, however, the deadlocked vote essentially halted substantive Commission action on the matters in question.

**No Deadlocked Votes 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.

---

17 The data do not address issues the Commission has not made public (e.g., votes on proposed civil-penalty amounts).
18 These are terms employed in this report; they are not necessarily terms of art.
19 Despite deadlocks on previous issues, votes to close the file typically include at least a four-vote majority.
Although the FEC was able to reach agreement in 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.  

**Deadlocked Votes 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 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 a relatively speedy resolution that emphasizes negotiation between the Commission and the parties involved. Both the administrative fine and ADR programs typically involve cases that can be closed with little controversy and without the Commission’s full enforcement resources.

By contrast, MURs involve the Commission’s full enforcement process and may entail substantial civil penalties or litigation. The cases can be complex and cumbersome. 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.

(...continued)

Whitaker.

21 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.

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

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

**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).

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

![Pie chart showing MURs with split deadlocks, tie deadlocks, and without deadlocks](chart.png)

**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.
Deadlocked Votes on 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. 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 Publicly Available FEC Advisory Opinions Considered July 1, 2008-June 30, 2009

<table>
<thead>
<tr>
<th>All Substantive Deadlocks Resulting in Partial Advice Issued</th>
<th>All Substantive Deadlocks Resulting in No Advice Issued</th>
<th>Total Advisory Opinions Considered</th>
<th>All Substantive Deadlocks Resulting in Partial Advice as a Percentage of All Advisory Opinions Considered</th>
<th>All Substantive Deadlocks Resulting in No Advice as a Percentage of All Advisory Opinions Considered</th>
<th>All Substantive Deadlocks Resulting in No or Partial Advice as a Percentage of All Advisory Opinions Considered</th>
</tr>
</thead>
<tbody>
<tr>
<td>3</td>
<td>2</td>
<td>5</td>
<td>29</td>
<td>10.3%</td>
<td>6.9%</td>
</tr>
</tbody>
</table>

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 Publicly Available 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 Deadlocked Votes

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.23

Cases and Issues Involving Deadlocked Votes:
A Brief Overview

Deadlocked votes typically occurred on motions containing multiple provisions. 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”24 that multiple provisions of FECA and FEC regulations had been violated, approving an OGC factual and legal analysis, and other issues.25 Deadlocks on AOs were also typically complicated; in some cases, disagreement occurred over competing drafts or amendments.

Table 4 provides an overview of the 24 MURs in which substantive deadlocks occurred; Table 5 does so for the five AOs.26 (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.

---

23 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.

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


26 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. In addition, in some cases, deadlocks appear to have had more to do with whether an investigation should proceed or whether a penalty should be levied than with the substance of the policy or legal issue in the MUR or AO.

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

<table>
<thead>
<tr>
<th>MUR numbers</th>
<th>MUR Name*</th>
<th>Vote Date</th>
<th>Vote Outcome</th>
<th>Major Issue in MUR</th>
</tr>
</thead>
<tbody>
<tr>
<td>5541</td>
<td>The November Fund</td>
<td>10/21/2008</td>
<td>3-3</td>
<td>Political committee status</td>
</tr>
<tr>
<td>5572</td>
<td>David W. Rogers</td>
<td>02/10/2009</td>
<td>3-3</td>
<td>Permissible use of mailing list</td>
</tr>
<tr>
<td>5642</td>
<td>George Soros</td>
<td>11/18/2008</td>
<td>3-3</td>
<td>Reporting requirements</td>
</tr>
<tr>
<td>5694 and 5910</td>
<td>Americans for Job Security, Inc.</td>
<td>02/25/2009</td>
<td>3-3</td>
<td>Political committee status</td>
</tr>
<tr>
<td>5878</td>
<td>Arizona State Democratic Central Committee</td>
<td>11/18/2008</td>
<td>3-3</td>
<td>Permissible contributions</td>
</tr>
<tr>
<td>5898</td>
<td>Ryan Pennington</td>
<td>09/10/2008</td>
<td>3-3</td>
<td>Permissible use of campaign funds</td>
</tr>
<tr>
<td>5937</td>
<td>Romney for President</td>
<td>01/28/2009</td>
<td>3-3</td>
<td>Permissible contributions</td>
</tr>
<tr>
<td>5945</td>
<td>Kiernan Michael Lalor</td>
<td>02/03/2009</td>
<td>3-3</td>
<td>Reporting requirements</td>
</tr>
<tr>
<td>5957</td>
<td>Committee to Elect Sekhon for Congress</td>
<td>09/11/2008, 10/21/2008</td>
<td>3-3</td>
<td>Reporting requirements</td>
</tr>
<tr>
<td>5971</td>
<td>Lindsey Graham for Senate</td>
<td>09/10/2008</td>
<td>3-3</td>
<td>Permissible use of campaign funds</td>
</tr>
<tr>
<td>5988</td>
<td>American Future Fund</td>
<td>02/25/2009</td>
<td>3-3</td>
<td>Political committee status</td>
</tr>
<tr>
<td>5993</td>
<td>Ed Fallon</td>
<td>03/10/2009</td>
<td>3-3</td>
<td>Permissible contributions</td>
</tr>
<tr>
<td>6056</td>
<td>Protect Colorado Jobs, Inc.</td>
<td>03/11/2009</td>
<td>3-3</td>
<td>Permissible contributions</td>
</tr>
<tr>
<td>6047</td>
<td>Vernon Jones for Georgia</td>
<td>04/21/2009</td>
<td>3-3</td>
<td>Required disclaimers</td>
</tr>
<tr>
<td>6096</td>
<td>Americans for Limited Government Research Foundation</td>
<td>04/21/2009</td>
<td>3-3</td>
<td>Permissible use of contribution information</td>
</tr>
</tbody>
</table>

*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.
### Deadlocked Votes Among Members of the Federal Election Commission

<table>
<thead>
<tr>
<th>MUR numbers</th>
<th>MUR Name*</th>
<th>Vote Date</th>
<th>Vote Outcome</th>
<th>Major Issue in MUR</th>
</tr>
</thead>
<tbody>
<tr>
<td>6051 and 6052</td>
<td>Wal-Mart Stores, Inc.</td>
<td>04/15/2009</td>
<td>3-3</td>
<td>Permissible expenditures</td>
</tr>
<tr>
<td>6082</td>
<td>Majority Action</td>
<td>04/15/2009</td>
<td>2-2</td>
<td>Political committee status</td>
</tr>
<tr>
<td>5724</td>
<td>Jim Feldkamp for Congress</td>
<td>10/07/2008</td>
<td>3-2</td>
<td>Permissible contributions</td>
</tr>
<tr>
<td>5835</td>
<td>Democratic Congressional Campaign Committee</td>
<td>02/10/2009</td>
<td>2-3</td>
<td>Required disclaimers</td>
</tr>
<tr>
<td>5842</td>
<td>Economic Freedom Fund</td>
<td>04/14/2009</td>
<td>3-2</td>
<td>Political committee status</td>
</tr>
<tr>
<td>5935</td>
<td>Rep. Kirsten E. Gillibrand</td>
<td>03/18/2009</td>
<td>2-3</td>
<td>Permissible contributions; required disclaimers</td>
</tr>
<tr>
<td>5977 and 6005</td>
<td>American Leadership Project</td>
<td>02/25/2009</td>
<td>2-3</td>
<td>Political committee status</td>
</tr>
<tr>
<td>6062</td>
<td>Harry Truman Fund</td>
<td>04/21/2009</td>
<td>2-3</td>
<td>Political committee status</td>
</tr>
<tr>
<td>6094</td>
<td>American Leadership Project</td>
<td>05/12/2009</td>
<td>2-3</td>
<td>Political committee status</td>
</tr>
</tbody>
</table>

**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.

a. MUR names are taken verbatim from the data supplied by the FEC Office of Legislative Affairs.
Table 5. Overview of Substantive Deadlocks in Publicly Available Advisory Opinions Considered July 1, 2008-June 30, 2009

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

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.

a. AO names are taken verbatim from the data supplied by the FEC Office of Legislative Affairs.

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.” 28 Commenting on the four-vote requirement, former Commissioner Scott E. Thomas and his executive assistant,

Thomas 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.” 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. As a result, at least in specific circumstances, 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 less than 4% of cases—well below the 13% figure reported here for 2008-2009. 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.

---

29 Ibid.
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 for learn more about how and why deadlocks occur, and to assess whether additional congressional action or internal reform 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.32 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.33 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 deadlocked votes 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 2003.34

Restructuring the FEC in any form that eliminated an even number of Commissioners could reduce or eliminate the potential for deadlocks.35 Revamping the agency, however, would entail reforms well beyond addressing the comparatively narrow topic of deadlocked votes. In addition, 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.36 No major campaign finance legislation has been enacted since the 2002 Bipartisan Campaign Reform Act

---

34 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.
35 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.
36 See, for example, CRS Report R40091, Campaign Finance: Potential Legislative and Policy Issues for the 111th Congress, by R. Sam Garrett.
(BCRA). 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, deadlocked votes appear to supersede individual policy or legal issues. Some issues, however, were recurring themes in deadlocked votes. The political committee issue provides a prominent example. By providing clearer guidance to the Commission, legislation to clarify when 527s and 501(c) 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. 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.

---

37 P.L. 107-155; 116 Stat. 81. BCRA amended FECA.
38 As noted previously, 527 refers to groups registered with the Internal Revenue Service (IRS) as political organizations. Although 527s influence federal elections in some cases, their activities generally fall outside the confines of federal election law and FEC regulation. By contrast, political committees (which include candidate committees, party committees, and political action committees) are regulated by the FEC and federal election law. Although political committees are 527s for tax purposes, not all 527s are political committees. For additional discussion, see, for example, CRS Report RS22895, 527 Groups and Campaign Activity: Analysis Under Campaign Finance and Tax Laws, by L. Paige Whitaker and Erika K. Lunder; and CRS Report R40091, Campaign Finance: Potential Legislative and Policy Issues for the 111th Congress, by R. Sam Garrett.
39 On 501(c) organizations generally, see, for example, CRS Report RL33377, Tax-Exempt Organizations: Political Activity Restrictions and Disclosure Requirements, by Erika K. Lunder.
40 A detailed discussion of political committee status, 527s, and 501(c) 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 L. Paige Whitaker and Erika K. Lunder; and CRS Report R40091, Campaign Finance: Potential Legislative and Policy Issues for the 111th Congress, by R. Sam Garrett.
Author Contact Information

R. Sam Garrett
Analyst in American National Government
rgarrett@crs.loc.gov, 7-6443