

Notes

THE UNLIKELY HEROES OF FAIR ELECTIONS: CONTEMPORARY THIRD-PARTY ENFORCEMENT OF CAMPAIGN FINANCE VIOLATIONS

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ABSTRACT

It is uncontroversial that the Federal Election Commission fails to enforce campaign finance law adequately. This Note contributes to this discussion by analyzing more than four thousand summaries of standard enforcement proceedings to demonstrate the distribution of enforcement at the Federal Election Commission. This analysis indicates that the percentage of internally generated standard enforcement proceedings has declined precipitously, while the number of standard enforcement proceedings initiated each year has remained relatively constant. At present, the agency initiates very few standard enforcement proceedings.

Instead, third-party enforcers fill the enforcement void. Third-party enforcers are members of the public that monitor political actors to detect and subsequently enforce campaign finance violations informally and formally. Often, these third-party enforcers are political actors themselves motivated by the pursuit of partisan political gain. Third-party enforcers can enforce serious campaign finance violations because of robust disclosure law and recent technological advancements that have rendered campaign finance information readily accessible to the public for the first time.

In light of these changes, this Note evaluates the literature on third-party enforcement of campaign finance violations. This Note finds that

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the highly critical literature overlooks many of the benefits of third-party enforcement. While the practice has drawbacks, third-party enforcement is a much more forceful deterrent to potential violators than internally generated enforcement. Consequently, this Note argues that third-party enforcement advances fair federal elections, and the Federal Election Commission should alter its Enforcement Priority System to capitalize on third-party enforcement and improve enforcement at the agency overall.

INTRODUCTION

On the last day of the 2012 Republican National Convention, Sheelah Kolhatkar, a journalist, attended a fundraiser unbeknownst to her host, Karl Rove.¹ Rove hosted the fundraiser in support of American Crossroads and Crossroads Grassroots Policy Strategies (“Crossroads GPS”).² At the event, Rove briefed Crossroads’ donors on the organizations’ plan to win back the Senate majority.³

While the briefing was at times unseemly,⁴ it would have stayed within the bounds of campaign finance law, but for the following

1. Complaint at Ex. D, Crossroads Grassroots Pol’y Strategies, MUR 6696 (FEC Nov. 15, 2012) [hereinafter Crossroads GPS Complaint], <https://www.fec.gov/files/legal/murs/6696/15044385000.pdf> [<https://perma.cc/DY7R-BDSM>]. Kolhatkar claims that she attended the fundraiser as a “guest of a significant Republican donor who knew that [she] was a journalist” and that she was not “presented with . . . restrictions regarding the information [she] heard” at the event. *Id.* Kolhatkar acknowledges that “Crossroads disputes this version of events.” *Id.*

2. *See id.* (pointing out how members of Congress and staff at the fundraiser spoke in support of both American Crossroads and Crossroads GPS). *See generally* Richard L. Hansen, Opinion, *Karl Rove’s Crossroads GPS Manages To Make It Even Harder To Find the Dark Money in U.S. Politics*, L.A. TIMES (Feb. 11, 2016, 11:23 AM), <https://www.latimes.com/opinion/op-ed/la-oe-hasen-green-light-for-more-dark-money-20160212-story.html> [<https://perma.cc/25YU-EVHS>] (“Shortly after the Citizens United decision, Rove set up a Republican super PAC called American Crossroads. It wasn’t raising as much as Rove wanted, in part because some donors wanted to contribute anonymously. So Rove set up a sister organization — Crossroads GPS . . .”). American Crossroads spent roughly \$104 million in independent expenditures in the 2012 election cycle. American Crossroads’ Independent Expenditures for the 2012 Cycle, OPENSECRETS.ORG, <https://www.opensecrets.org/pacs/indexpend.php?cycle=2012&cmte=C00487363> [<https://perma.cc/8JA8-VZZ7>]. Crossroads GPS spent roughly \$71 million in independent expenditures that same cycle. Crossroads GPS’s Outside Spending Summary for the 2012 Cycle, OPENSECRETS.ORG, <https://www.opensecrets.org/outsidespending/detail.php?cmte=C30001655&cycle=2012> [<https://perma.cc/87MK-BLKN>].

3. *See* Crossroads GPS Complaint, *supra* note 1 (noting that “Rove handled the Senate math” during the briefing on the fifteen competitive Senate races).

4. *See id.* (recounting how Senator Rubio, who kicked off the briefing, joked about Crossroads’ legal pitfalls, asking the audience, “Did I break any laws, in that speech?” to audience applause, and recalling a crass comment made by Governor Barbour).

exchange about the Ohio Senate race. As Kolhatkar later reported in an article published in Bloomberg Businessweek,

Rove said that he'd had a call from an unnamed out-of-state donor who told him, "I really like Josh Mandel," referring to the Ohio treasurer attempting to unseat Democrat Sherrod Brown. The donor, Rove said, had asked him what his budget was in the state; Rove told him \$6 million. "I'll give ya \$3 million, matching challenge," Rove said the donor told him. "Bob Castellini, owner of the Cincinnati Reds, is helping raise the other \$3 million for that one."⁵

Simply, Rove claimed that a mystery donor contributed \$3 million to Crossroads GPS for the purpose of supporting Treasurer Mandel in his race against Senator Brown. The Federal Election Campaign Act of 1971 ("FECA") requires social welfare organizations, including Crossroads GPS, to disclose their donors who contribute "for the purpose of furthering an independent expenditure."⁶ When Crossroads GPS declined to disclose the identity of the \$3 million mystery donor in its FEC filings, Citizens for Responsibility and Ethics in Washington ("CREW") filed a complaint.⁷ CREW's complaint then triggered initiation of a Matter Under Review ("MUR"), a standard FEC enforcement proceeding.⁸ And, with that, the *Citizens for Responsibility and Ethics in Washington v. Federal Election Commission (Crossroads GPS)*⁹ proceedings began.¹⁰

5. *Id.*

6. 52 U.S.C. § 30104(c)(2)(C).

7. See Crossroads GPS Complaint, *supra* note 1, at 10–11 (claiming that "Crossroads GPS knowingly and willfully failed to identify the person who made \$3 million in contributions for the purpose of furthering the independent expenditures Crossroads GPS made in the Ohio Senate race" because "Crossroads GPS spent \$6,363,711 on independent expenditures opposing Sen. Brown," "filed nine reports disclosing its independent expenditures in Ohio," and "[n]one of the reports identified the person who made \$3 million in contributions for the purpose of furthering those independent expenditures").

8. *Id.* at 1. See generally FEC, GUIDEBOOK FOR COMPLAINANTS AND RESPONDENTS ON THE FEC ENFORCEMENT PROCESS 7 (2012) [hereinafter FEC, GUIDEBOOK 2012] ("If the complaint is deemed sufficient, [the Office of Complaints Examination and Legal Administration] assigns the complaint a Matter Under Review ("MUR") number, informs the complainant that the complaint has been received and . . . will notify him or her once the entire matter has been resolved.").

9. *Citizens for Resp. & Ethics in Wash. v. FEC (Crossroads GPS)*, 971 F.3d 340 (D.C. Cir. 2020).

10. For a description of how Sheelah Kolhatkar's reporting "triggered" the claim, see *Citizens for Resp. & Ethics in Wash. v. FEC*, 316 F. Supp. 3d 349, 357–58 (D.D.C. 2018), *aff'd*, 971 F.3d 340 (D.C. Cir. 2020).

The *Crossroads GPS* proceedings provide an example of third-party enforcement of campaign finance violations. Third-party enforcement describes a situation where an agency partly outsources its monitoring responsibility to the public and receives complaints as a means of triggering enforcement.¹¹ Third-party enforcers, like journalists (think Kolhatkar) and good government groups (think CREW), are the heroes who rise to the monitoring challenge from among the public.¹² They monitor the regulated community to detect and report legal violations to the respective regulatory agency, thereby spurring further investigation and, ultimately, enforcement against those who violate the law.¹³

Several scholars have labeled third-party enforcement of campaign finance violations “problematic.”¹⁴ Skeptical of politically motivated third-party enforcers,¹⁵ these scholars argue that third-party enforcers of campaign finance violations distort enforcement processes

11. See Todd Lochner, Dorie Apollonio & Rhett Tatum, *Wheat from Chaff: Third-Party Monitoring and FEC Enforcement Actions*, 2 REGUL. & GOVERNANCE 216, 217 (2008) [hereinafter Lochner et al., *Wheat from Chaff*] (“Third-party monitoring, whereby an agency relies upon other actors to bring legal violations to its attention, can be particularly problematic.” (citing EUGENE BARDACH & ROBERT A. KAGAN, GOING BY THE BOOK: THE PROBLEM OF REGULATORY UNREASONABLENESS 166–71 (1982))).

12. Many scholars use the term “third-party monitoring” instead of “third-party enforcement” to distinguish between monitoring and sanctioning processes. See, e.g., *id.* (using the terms “third-party monitoring” and “third-party monitors”). Monitoring is the process of detecting regulatory violations. *Id.* Sanctioning is “coercion” employed to correct detected regulatory violations. EUGENE BARDACH & ROBERT A. KAGAN, GOING BY THE BOOK: THE PROBLEM OF REGULATORY UNREASONABLENESS 123 (Routledge 2017) (1982) [hereinafter BARDACH & KAGAN, GOING BY THE BOOK]. This Note uses the term “third-party enforcement,” instead of “third-party monitoring,” because third-party enforcers of campaign finance violations engage in both monitoring and sanctioning. See Todd Lochner & Bruce E. Cain, *The Enforcement Blues: Formal and Informal Sanctions for Campaign Finance Violations*, 52 ADMIN. L. REV. 629, 651 (2000) [hereinafter Lochner & Cain, *Enforcement Blues*] (“In addition to the formal sanctions of civil and criminal penalties, campaign enforcement relies upon the informal sanctions of public opinion; those who break the law . . . may suffer at the polls as a result of public reaction to their infraction.”).

13. See *infra* Part II.B; Lochner et al., *Wheat from Chaff*, *supra* note 11, at 218 (“Regardless of sanctioning strategy, a regulator must first discover wrongdoing . . .”).

14. *Id.* at 217.

15. Cf. Todd Lochner, Ellen Seljan, Walker Davis, Benjamin Bardman & Rafael Swit, *Calculating, Credible, or Both? Third-Party Monitors and Repeat Players in Federal Campaign Finance Enforcement*, 20 ELECTION L.J. 178, 180 (2021) [hereinafter Lochner et al., *Calculating, Credible, or Both?*] (“Anecdotes . . . suggest that campaign finance monitoring likely is conducted by one’s political opponents, hardly a surprising conclusion given both the incentive to discredit the opposition and the potential that campaign finance scandals may negatively affect perceptions of electability.” (citations omitted)).

by inundating the FEC with, at best, “very transparent – and hence most likely trivial – violations”¹⁶ and, at worst, frivolous allegations of violations.¹⁷ The FEC, in turn, must expend its resources sifting through these frivolous complaints, instead of pursuing potentially more serious violations of the law.¹⁸ As a result, third-party enforcement of campaign finance violations is on a long list of structural issues plaguing the FEC, an agency that has been called “feckless”¹⁹ and “failed.”²⁰

Contrary to the pre-existing literature,²¹ however, third-party enforcers often pursue serious campaign finance violations. Serious campaign finance violations involve fraud, wrongdoing, or a lot of spending.²² *Crossroads GPS*, for instance, was serious in that it involved a lot of spending. In 2020, after eight years of litigation, the District of Columbia Circuit affirmed a district court ruling in favor of CREW, invalidating a forty-year-old FEC rule that had paved the way for *Crossroads GPS* and other organizations that do not disclose their

16. Lochner & Cain, *Enforcement Blues*, *supra* note 12, at 635.

17. *Id.* at 641.

18. Lochner et al., *Wheat from Chaff*, *supra* note 11, at 218; see Todd Lochner, *Overdeterrence, Underdeterrence, and a (Half-Hearted) Call for a Scarlet Letter Approach to Deterring Campaign Finance Violations*, 2 ELECTION L.J. 23, 26 (2003) (“[S]anctioning trivial or accidental violations saps the ability of the FEC to concentrate its efforts Unfortunately, the FEC’s heavy reliance on third-party monitoring . . . has worked to ensure that the most obvious, and often least severe, infractions will be referred to the General Counsel.”); BARDACH & KAGAN, *GOING BY THE BOOK*, *supra* note 12, at 166 (“[C]omplainants . . . can tie up inspectors on legally unfounded or substantively trivial claims, or divert their energies toward enterprises with comparatively decent compliance records. . . . Even valid complaints may divert agency resources . . .”).

19. Editorial, *The Feckless F.E.C., Rebuked*, N.Y. TIMES (Sept. 23, 2016), <https://www.nytimes.com/2016/09/24/opinion/the-feckless-fec-rebuked.html> [<https://perma.cc/B9YD-X7AZ>]; see Michael M. Franz, *The Devil We Know? Evaluating the Federal Election Commission as Enforcer*, 8 ELECTION L.J. 167, 186 (2009) (“So long as the FEC is forced to expend enforcement resources on frivolous or politically motivated complaints, efficiency will be reduced.”).

20. Franz, *supra* note 19 (quoting John McCain, Opinion, *Paying for Campaigns: McCain Eyes Next Target*, USA TODAY, Nov. 4, 2004, at A27).

21. See, e.g., Todd Lochner & Bruce E. Cain, *Equity and Efficacy in the Enforcement of Campaign Finance Laws*, 77 TEX. L. REV. 1891, 1904 (1999) [hereinafter Lochner & Cain, *Equity and Efficacy*] (“Many complaints issued by third parties may lack merit, thus forcing the agency to expend resources responding to trivial or frivolous complaints.”).

22. See Ben Gaskins, Ellen Seljan, Todd Lochner, Katie Kowal, Zane Dundon & Maya Gold, *From the FEC to the Ballot Box: Voter Accountability for Campaign Finance Law Violations*, 47 AM. POL. RSCH. 1000, 1013 (2019) [hereinafter Gaskins et al., *From the FEC to the Ballot Box*] (listing “scandals dealing with fraud and financial wrongdoing” and those “involving larger sums of money” as more egregious violations).

donors to spend \$1 billion on federal elections since 2010.²³ Now, they must disclose their donors, implicating millions of dollars in political spending each election cycle.²⁴

As explained in this Note, third-party enforcers often pursue serious campaign finance violations because they have the tools and motivation to do so. First, due to changes in disclosure law and technological advancements, third-party enforcers now have access to the information needed to pursue serious violations.²⁵ Second, politically motivated third-party enforcers specifically strive to pursue serious, rather than “frivolous,” violations, as these violations gain more traction with voters.²⁶ Therefore, the political motivations of third-party enforcers, with qualification,²⁷ are beneficial to the enforcement of campaign finance law,²⁸ particularly when taking into account the current enforcement context of federal campaign finance violations.

23. See *Citizens for Resp. & Ethics in Wash. v. FEC* (*Crossroads GPS*), 971 F.3d 340, 343 (D.C. Cir. 2020) (holding that 11 C.F.R. § 109.10(e)(1)(vi) (2019) “conflicts with the plain terms of the [FECA’s] broader disclosure requirements”); Michael Beckel, *Dark Money Spending Since Citizens United Set To Eclipse \$1 Billion*, ISSUE ONE (Sept. 10, 2020), <https://www.issueone.org/dark-money-spending-since-citizens-united-set-to-eclipse-1-billion> [<https://perma.cc/MV92-YQ4S>] (“Total dark money spending since the U.S. Supreme Court’s *Citizens United* decision in 2010 will soon eclipse \$1 billion . . .”).

24. See *Crossroads GPS*, 971 F.3d at 354 (“FECA . . . unambiguously requires an entity making over \$250 in [independent expenditures] to disclose the name of any contributor whose contributions during the relevant reporting period total \$200, along with the date and amount of each contribution.”). Compare Dave Levinthal & Sarah Kleiner, *Supreme Court Lets Stand a Decision Requiring ‘Dark Money’ Disclosure*, ATLANTIC (Sept. 18, 2018), <https://www.theatlantic.com/politics/archive/2018/09/supreme-court-lets-stand-a-decision-requiring-dark-money-disclosure/570670> [<https://perma.cc/7SUZ-BL3K>] (claiming that the district court’s decision required “politically active nonprofit groups to disclose the identity of any donor giving more than \$200 when those groups advertise for or against political candidates”), with Brad Smith, *CREW v. FEC’s Impact on Independent Expenditures and Donor Privacy, Explained*, INST. FOR FREE SPEECH (Sept. 3, 2020), <https://www.ifs.org/blog/crew-fec-decision-impact-disclosure> [<https://perma.cc/DQ2A-2E7B>] (“[T]he D.C. Circuit’s opinion should not be read as requiring forced disclosure of all donors to nonprofit groups, but only of ‘contributions,’ i.e., donations for the purpose of influencing an election.”).

25. See *infra* Part II.

26. Cf. Gaskins et al., *From the FEC to the Ballot Box*, *supra* note 22, at 1026–27 (testing the effect of media coverage of campaign finance violations, finding that “voter response [was] somewhat proportional to the severity of the allegation”).

27. See *infra* Part III.A.

28. See *infra* Part III.B.

During the 2020 election cycle, the United States set staggering records in political spending on federal campaigns.²⁹ Candidates and outside groups spent around \$6.6 billion on the presidential race, which is “more than was spent on the White House race and every congressional campaign combined in 2016.”³⁰ And “[n]ine of the 10 most expensive Senate races ever” took place during the 2020 election cycle.³¹ At the same time, the FEC failed to enforce campaign finance law adequately.³² The FEC initiated only 13 percent of standard enforcement proceedings over the last decade, leaving much of the work of enforcing campaign finance violations to third-party enforcers.³³

This Note argues that, considering the contemporary enforcement context, third-party enforcement at the FEC advances fair elections. First, Part I explores enforcement at the FEC. In doing so, it provides analysis of 4,380 summaries of closed MURs published by the FEC to demonstrate the distribution of FEC enforcement. This analysis indicates that, while the number of MURs initiated each year has remained relatively constant since the late 1990s, the percentage of internally generated MURs has declined precipitously. As the FEC

29. See, e.g., *2020 Election To Cost \$14 Billion, Blowing Away Spending Records*, OPENSECRETS.ORG (Oct. 28, 2020, 1:51 PM), <https://www.opensecrets.org/news/2020/10/cost-of-2020-election-14billion-update> [<https://perma.cc/HE4V-246J>] (“The 2020 election is more than twice as expensive as the runner up, the 2016 election. In fact, this year’s election will see more spending than the previous two presidential election cycles combined.”).

30. Shane Goldmacher, *The 2020 Campaign is the Most Expensive Ever (By a Lot)*, N.Y. TIMES (Oct. 28, 2020), <https://www.nytimes.com/2020/10/28/us/politics/2020-race-money.html> [<https://perma.cc/ZS6M-RMJD>].

31. Karl Evers-Hillstrom, *Most Expensive Ever: 2020 Election Cost \$14.4 Billion*, OPENSECRETS.ORG (Feb. 11, 2021, 1:14 PM), <https://www.opensecrets.org/news/2021/02/2020-cycle-cost-14p4-billion-doubling-16> [<https://perma.cc/Z8KD-S2LJ>].

32. See, e.g., OFF. OF COMM’R ANN M. RAVEL, *FEC, DYSFUNCTION AND DEADLOCK: THE ENFORCEMENT CRISIS AT THE FEDERAL ELECTION COMMISSION REVEALS THE UNLIKELIHOOD OF DRAINING THE SWAMP 1* (2017) (“[The] Commission is not performing the job that Congress intended, and violators of the law are given a free pass.”). For a review of the leading theories as to why the FEC does not enforce campaign finance law, see *infra* Part I.A.II.

33. See *Closed Matters Under Review*, FEC, <https://www.fec.gov/data/legal/search/enforcement> [<https://perma.cc/4TQP-6E97>] (while the data in this Note was scraped, the same data can be collected by hand; in the “Case Open Date Range,” enter 01/01/2010 for “Beginning” and 12/31/2010 for “Ending”; repeat this query for each year from 2010 to 2018; to collect your data, count the number of all MURs opened each year and those initiated by the FEC during the same time period; then divide the number of all MURs by those initiated by the FEC). For more information on the data used in this Note, see *infra* Part I.B.

initiates fewer and fewer MURs, third-party enforcement plays an increasingly important role in deterring campaign finance violations.

Next, Part II focuses on third-party enforcement. This Part outlines how third-party enforcers pursue serious campaign finance violations, and yet, the literature on third-party enforcement overlooks its benefits. Part III explains why that literature is wrong. Considering third-party enforcement's elevated importance in deterring campaign finance violations, this Part argues that contemporary third-party enforcement bolsters fair elections. Last, Part IV proposes altering the FEC's Enforcement Priority System to capitalize on third-party enforcement.

I. ENFORCEMENT AT THE FEC, A FAILED AGENCY

Enforcement processes at the FEC may begin in four different ways: (1) a third-party enforcer files a complaint with the FEC alleging a campaign finance violation; (2) the FEC detects a violation on its own; (3) another government agency detects and then refers a violation to the FEC; or (4) a political actor self-reports a violation.³⁴

Third-party enforcers and the FEC initiate almost all standard enforcement proceedings.³⁵ Within the FEC, the Reports Analysis Division and the Audit Division detect "potential violations through a review of a committee's reports or through a Commission audit,"³⁶ respectively. Since 1979, the Audit Division lacks random audit authority but maintains the authority to audit a handful of entities.³⁷

34. FEC, *GUIDEBOOK 2012*, *supra* note 8, at 5.

35. Franz, *supra* note 19, at 175. According to my analysis, the Department of Justice initiates around 2 percent of standard enforcement matters. *See infra* notes 74–83 and accompanying text for a discussion of the data analyzed in this Note. And self-reporting accounts for only 0.1 percent of standard enforcement matters, as there were only five sua sponte reports out of the 4,546 summaries of closed MURs. *See infra* notes 74–83.

36. *Enforcing Federal Campaign Finance Law*, FEC, <https://www.fec.gov/legal-resources/enforcement> [<https://perma.cc/9YRA-9YB5>]. Anecdotally, the FEC is good at enforcing campaign finance violations that could be flagged electronically by a computer program, such as contributing over the legal limits and failing to file 48-hour reports. Zoom Interview with Samantha McClain, Former Rsch. Dir., DCCC (July 14, 2021). This pattern, in conjunction with the massive amount of disclosure reports filed with the agency and the paucity of the agency's budget, has led some political actors to guess that the FEC does not analyze disclosure reports by hand at all and instead runs computer programs that detect some violations. *Id.*

37. *See* AUDIT DIV., FEC, *THE FEC AUDIT PROCESS: WHAT TO EXPECT 2* (2012), https://www.fec.gov/resources/cms-content/documents/audit_process.pdf [<https://perma.cc/J7RJ-WXPL>] ("Other than the mandatory audits of publicly financed Presidential campaigns and national party convention committees, Section 438(b) of the Federal Election Campaign Act

These divisions within the FEC refer detected violations to the Office of General Counsel (“General Counsel”) to proceed with enforcement through one of the FEC’s enforcement processes.³⁸

This Part first details the FEC’s enforcement processes that are utilized after a third-party enforcer or the FEC detects a violation. Next, it reviews the most common criticism of FEC enforcement. Last, this Part contributes data on FEC enforcement with this criticism in mind. Lending support to arguments that the FEC is unwilling or unable to adequately enforce campaign finance law, analysis of the data reveals that the FEC initiates very few standard enforcement proceedings on its own. The FEC has initiated ever fewer standard enforcement proceedings over the last several decades, a trend that, in theory, could continue to the point where internal enforcement is practically nonexistent.

A. *Background on the Enforcement of Campaign Finance Law*

1. *Enforcement Processes at the FEC.* In response to continued criticism, the FEC has altered its enforcement processes over time.³⁹ At present, there are three different enforcement processes at the FEC, varying in speed and strength: the Administrative Fine, Alternative Dispute Resolution (“ADR”), and Matter Under Review (“MUR”) processes. The Administrative Fine and ADR processes are alternatives to the traditional MUR process,⁴⁰ intended to expedite enforcement of trivial violations.⁴¹

(FECA) allows the Commission to audit a committee if its reports do not meet the threshold requirements for substantial compliance . . .”).

38. FEC, GUIDEBOOK 2012, *supra* note 8.

39. *See, e.g., Federal Election Law Enforcement* (C-SPAN television broadcast Dec. 13, 1993), <https://www.c-span.org/video/?52961-1/federal-election-law-enforcement> [<https://perma.cc/AH9K-XY9Q>] (listing changes implemented to address the “simply overwhelming” enforcement workload and the resulting “lengthy delays . . . unacceptable to the Commission and staff”).

40. FEC, GUIDEBOOK 2012, *supra* note 8, at 23–25; *FEC Enforcement Programs*, FEC, <https://www.fec.gov/press/resources-journalists/fec-enforcement-programs> [<https://perma.cc/7KBX-MCY6>].

41. *See* Administrative Fines, 65 Fed. Reg. 31,787, 31,787 (May 19, 2000) (codified at 11 C.F.R. pt. 104, 111) (“[C]ivil money penalties for violations of the reporting requirements of the FECA . . . are intended to expedite and streamline the Commission’s enforcement procedures.”); Agency Procedures, 73 Fed. Reg. 74,494, 74,495 (Dec. 8, 2008) (“The ADR program was established . . . to promote compliance with the law ADR results in an expeditious resolution that allows participants in the program to have an active role in shaping the settlement, and, as a result, reducing costs for respondents and the Commission.”); OFF. OF COMM’R ANN M. RAVEL, *supra* note 32, at 6 (“Matters that are less complicated, depending on the circumstances, may be

Implemented in May 2000, the Administrative Fine process handles the most trivial of campaign finance violations.⁴² Specifically, it handles “(1) failure to file reports on time, (2) failure to file reports at all, and (3) failure to file 48-Hour Notices of contributions”⁴³ by shelling out “automatic ‘parking ticket’ fines” for these violations.⁴⁴ “By most impressionistic accounts, the structural change has been a success, moving minor violations outside of the MUR process and allowing more time for more serious and consequential enforcement cases.”⁴⁵

The ADR and MUR processes handle all other campaign finance violations. To determine whether and which enforcement process to initiate, the General Counsel rates a matter under the Enforcement Priority System (“EPS”).⁴⁶ “The EPS is a comprehensive case management system that . . . is designed to focus the Commission’s limited resources on significant cases”⁴⁷ The EPS supplies objective criteria against which the General Counsel rates a matter.⁴⁸ These criteria have changed over time.⁴⁹ And although the EPS is

referred to an Alternative Dispute Resolution program or the Commission’s Administrative Fines Program.” (emphasis omitted)).

42. See FEC, PRIORITY LEGISLATIVE RECOMMENDATIONS 1 (2001), <https://www.fec.gov/resources/cms-content/documents/legrec2001.pdf> [<https://perma.cc/JJ27-9PME>] (explaining that the Administrative Fines program was implemented to address violations of filing deadlines).

43. FEC, GUIDEBOOK 2012, *supra* note 8, at 24.

44. *Lochner et al.*, *Wheat from Chaff*, *supra* note 11.

45. Franz, *supra* note 19, at 172.

46. See FEC, GUIDEBOOK 2012, *supra* note 8, at 11 (stating that the OGC uses the EPS to evaluate and prioritize matters).

47. Brief for the FEC, *Judicial Watch, Inc. v. FEC*, 180 F.3d 277 (D.C. Cir. 1999) (No. 98-5355), 1998 WL 35240183, at *30 n.6. The General Counsel began using the EPS as an exercise of the FEC’s broad prosecutorial discretion. *Id.* at *28.

48. See FEC, GUIDEBOOK 2012, *supra* note 8, at 11 (“OGC evaluates the complaint and response, if any, using objective criteria approved by the Commission under its Enforcement Priority System.”).

49. Compare Press Release, FEC, FEC Strengthens Enforcement by Implementing Prioritization of Cases (Dec. 13, 1993), https://www.fec.gov/resources/news_releases/1993/19931213_Enforcement.pdf [<https://perma.cc/NG29-AP5D>] (announcing, along with the creation of the EPS, that the FEC would consider the following factors: “the presence of knowing and willful intent; the apparent impact the alleged violation had on the election; the amount of money involved; the age and timing of the violation; and whether a particular legal area needs special attention”), with Memorandum from Lois G. Lerner, Acting Gen. Couns., FEC, on the Modifications to the Enforcement Priority System and Public Financing Enforcement Priority System for Media Exemption Cases to the FEC (Jan. 26, 2001), https://www.fec.gov/resources/cms-content/documents/letter_to_Committee_on_House_Administration_July_25_2013.pdf

confidential,⁵⁰ the FEC discloses that some of the criteria supplied by the EPS are whether “a substantial amount of activity [is] involved, [the] high legal complexity, the presence of possible knowing and willful intent, and potential violations in areas that the Commission has set as priorities.”⁵¹

After rating matters under the EPS, the General Counsel dismisses low-rated matters, among others, and may pursue more highly rated matters.⁵² Remedied violations, “low-rated” matters, and “stale cases” (more highly rated matters that remain unassigned to enforcement staff due to resource constraints) are typically dismissed.⁵³ At this time, some highly rated matters may be referred to ADR, an “option extended to appropriate cases,”⁵⁴ which “seeks cooperative, expedient resolution to low-level violations.”⁵⁵ ADR employs remedial measures and settles matters before the FEC has to take any further

[<https://perma.cc/CH6Q-6X5D>] (adding a factor to the EPS in order to dismiss “cases clearly falling within the media exemption”).

50. See Memorandum from FEC on MUR Closeout Procedures Training: Public Record Review Process (Mar. 11, 2009), https://www.fec.gov/resources/cms-content/documents/additional_enforcement_materials.pdf [<https://perma.cc/LB2W-FGH2>] (listing the following redactions from public records: “FEC deliberative process – anything [the General Counsel] recommended to the Commission that was rejected. (FOIA Exemption 5)” and “How the Commission determines civil penalties (legal strategy) (FOIA Exemption 5) (Note- The calculations used to determine the opening offer is kept off under FOIA Exemption 5. . . .)”); E-mail from Katrina Sutphin, FOIA/PA Attorney, FEC (May 20, 2021, 9:24 AM) (on file with author) (denying a FOIA request for “[a] copy of all of the Enforcement Priority System criteria that the FEC currently uses to rate enforcement matters,” under Exemption 7(E)).

51. FEC, *GUIDEBOOK* 2012, *supra* note 8, at 11.

52. See *id.* (“In general, matters that are deemed high priority . . . are preliminarily assigned to the Enforcement Division. Matters not warranting the further use of Commission resources are recommended for dismissal.”).

53. Press Release, FEC, Compliance Cases Made Public (Apr. 15, 2003) [hereinafter Press Release, FEC, Compliance Cases Made Public], <https://www.fec.gov/updates/compliance-cases-made-public-40> [<https://perma.cc/SJ6D-YZMH>]. The FEC may pursue low-rated matters if resources permit. FEC, *FEC Targets Higher-Priority Enforcement Cases*, RECORD, Sept. 1994, at 3, 3, <https://www.fec.gov/resources/record/1994/september1994.pdf> [<https://perma.cc/CH2Q-R489>].

54. *Alternative Dispute Resolution*, FEC, <https://www.fec.gov/legal-resources/enforcement/alternative-dispute-resolution> [<https://perma.cc/B3EC-8863>]; see also Press Release, FEC, FEC Alternative Dispute Resolution Program Continues To Show Impressive Results (Jan. 23, 2008), <https://www.fec.gov/updates/fec-alternative-dispute-resolution-program-continues-to-show-impressive-results> [<https://perma.cc/3WPP-D3FB>] (“For a case to be considered for ADR treatment, a respondent must express willingness to engage in the ADR process, agree to set aside the statute of limitations while the case is being resolved and participate in mediation, if appropriate.”).

55. Lochner et al., *Wheat from Chaff*, *supra* note 11.

action.⁵⁶ If a matter is highly rated under the EPS, assigned to enforcement staff, and inappropriate for ADR, then the MUR process may begin in earnest.⁵⁷ The MUR process, the standard enforcement process, handles all “novel, complex, or sophisticated matters.”⁵⁸

If the General Counsel decides to resolve a matter through the MUR process, the enforcement process slows down immensely, as a quorum of commissioners must vote to approve each subsequent step of the proceedings.⁵⁹ First, a quorum must vote to find “reason to believe” that the respondent violated campaign finance law.⁶⁰ Then, after investigation by FEC staff, a quorum must vote to find probable cause that a violation has occurred.⁶¹ Next, a quorum must vote to open settlement negotiations to resolve the matter.⁶² Last, if the negotiations fail, a quorum must vote to file a lawsuit instead.⁶³ If the commissioners deadlock in their votes or vote against proceeding at any point in this process, the MUR may be dismissed.⁶⁴

2. *Criticism of Enforcement at the FEC.* Criticism of FEC enforcement is relentless.⁶⁵ While “critics differ as to the causes of the problem, almost all agree that the FEC fails to effectively enforce the

56. See FEC, GUIDEBOOK 2012, *supra* note 8, at 23 (noting that the ADR was created to encourage settlements outside the regular enforcement process). If ADR fails, though, “the matter is returned to the traditional MUR” process. Lochner et al., *Wheat from Chaff*, *supra* note 11, at 220.

57. FEC, GUIDEBOOK 2012, *supra* note 8, at 11.

58. OFF. OF COMM’R ANN M. RAVEL, *supra* note 32, at 6.

59. See *id.* at 6–7 (noting that an affirmative vote of four commissioners is needed at each stage, providing opportunities for commissioners to block action).

60. *Id.* at 6.

61. *Id.*

62. *Id.*

63. *Id.*

64. FEC, GUIDEBOOK 2012, *supra* note 8, at 5; see *id.* at 7 (“Importantly, at every stage discussed above, the affirmative vote of four commissioners is necessary to move forward. This provides ample opportunity for commissioners to block action by splitting 3-to-3.”); see also Press Release, Ellen L. Weintraub, Vice Chair, FEC, Statement on the D.C. Circuit’s Decision in *Crew v. FEC* (June 22, 2018), https://www.fec.gov/resources/cms-content/documents/2018-06-22_ELW_statement_re_CREWvFEC-CHGO.pdf [<https://perma.cc/F7S3-KTPF>] (referring to the phenomenon as “deadlock-driven FEC dismissals”).

65. Jennifer A. Heerwig & Katherine Shaw, *Through a Glass, Darkly: The Rhetoric and Reality of Campaign Finance Disclosure*, 102 GEO. L.J. 1443, 1477 (2014).

law.”⁶⁶ There are three common camps of criticism.⁶⁷ The first holds that the FEC is unwilling to enforce the law.⁶⁸ Proponents of this camp argue that a cohort of commissioners “routinely thwarts, obstructs, and delays action” on enforcement matters because they are ideologically opposed to enforcement.⁶⁹ The second camp holds that the FEC wants to effectively enforce the law but lacks the tools necessary to do so.⁷⁰ Here, proponents argue that enforcement at the FEC is ineffective because the “chance is slim that violations will be detected . . . and any resulting penalty will probably come long after.”⁷¹ For example, on several occasions, the FEC has lacked the quorum necessary to initiate enforcement.⁷² Last, the third camp holds that the FEC overzealously enforces the law, chilling protected speech in the process.⁷³

As demonstrated in the next Section of this Note, the enforcement record at the FEC supports arguments that the FEC is unwilling or unable to adequately enforce campaign finance law. Consequently, this Note lends equal support to the first and second camps of criticism.

66. Lochner & Cain, *Equity and Efficacy*, *supra* note 21, at 1893 (citation omitted).

67. See Lochner et al., *Wheat from Chaff*, *supra* note 11, at 219 (presenting this useful framing of criticism leveled at the FEC).

68. *Id.* (citation omitted).

69. OFF. OF COMM’R ANN M. RAVEL, *supra* note 32.

70. See Lochner et al., *Wheat from Chaff*, *supra* note 11, at 219 (explaining that the second camp views the FEC as lacking the necessary enforcement tools).

71. Kenneth A. Gross, *The Enforcement of Campaign Finance Rules: A System in Search of Reform*, 9 YALE L. & POL’Y REV. 279, 286–87 (1991).

72. R. SAM GARRETT, CONG. RSCH. SERV., R45160, FEDERAL ELECTION COMMISSION: MEMBERSHIP AND POLICYMAKING QUORUM, IN BRIEF 6 (2020) [hereinafter GARRETT, MEMBERSHIP AND POLICYMAKING QUORUM]. The FEC lacked a quorum for the third time in its history. *Id.* at 1; Fredreka Schouten, *Senate Confirms New Members and Restores Power to Long-Hobbled Federal Election Commission*, CNN (Dec. 9, 2020, 5:30 PM), <https://www.cnn.com/2020/12/09/politics/senate-confirms-fec-members/index.html> [<https://perma.cc/W8SV-RND5>]. The FEC is led by six commissioners. *Leadership and Structure*, FEC, <https://www.fec.gov/about/leadership-and-structure> [<https://perma.cc/X5U7-EKRP>]. The FECA requires a quorum of at least four agreeing votes for the FEC to take any kind of official action. See 52 U.S.C. § 30106(c) (“All decisions of the Commission with respect to the exercise of its duties and powers under the provisions of this Act shall be made by a majority vote of the members of the Commission.”). Without a quorum, the FEC cannot “hold hearings, issue rules, and enforce campaign finance law.” GARRETT, MEMBERSHIP AND POLICYMAKING QUORUM, *supra*, at Summary (emphasis added). “Although new enforcement or policy matters cannot advance until a quorum is reconstituted, a repopulated commission could consider older matters,” so, at best, lack of a quorum creates a backlog of enforcement matters, *id.* at 8; at worst, lack of quorum results in the complete failure of the FEC to enforce campaign finance law.

73. See Lochner et al., *Wheat from Chaff*, *supra* note 11, at 219 (noting that the third camp views the FEC as chilling legitimate behavior by pushing the limits of enforcement).

B. Enforcement at the FEC by the Numbers

This Note provides analysis of 4,380 summaries of closed MURs, the standard enforcement process at the FEC, to demonstrate the distribution of internally generated and third-party-generated enforcement at the FEC. For closed MURs as far back as 1977,⁷⁴ the FEC discloses a summary of a closed MUR within thirty days of notifying the parties involved in the proceeding that the case has been closed.⁷⁵ In each summary, the FEC discloses the respondents, complainants, subject, disposition, and documents pertaining to the MUR.⁷⁶ The respondents are those alleged to have violated campaign finance law; the complainant is the party who filed the MUR; the subject, if provided, is a one or two-word categorization of the alleged violation; and the documents are the filings.⁷⁷ Each closed MUR has an open and close date.⁷⁸ The open date is “within a few days of the Complaint,” and the close date records the MUR’s last certification.⁷⁹

The data used in this Note denotes parties involved in closed MURs from 1987 to 2018.⁸⁰ The MUR number, respondents, complainants, and open and close dates for the summaries of closed MURs from 1987 to 2020, beginning with MUR #2465 and ending with

74. *Closed Matters Under Review*, FEC, <https://www.fec.gov/data/legal/search/enforcement> [<https://perma.cc/8JTU-WZEN>].

75. *FEC Enforcement Programs*, FEC, <https://www.fec.gov/press/resources-journalists/fec-enforcement-programs> [<https://perma.cc/438W-5V8M>].

76. For an example of a closed MUR, see Crossroads Grassroots Pol’y Strategies, MUR 6696 (FEC Nov. 15, 2012), <https://www.fec.gov/files/legal/murs/6696/15044385000.pdf> [<https://perma.cc/DY7R-BDSM>].

77. *Glossary of Terms*, FEC, <https://eqs.fec.gov/eqs/terms.html> [<https://perma.cc/EP65-2KR7>]; *FEC Enforcement Programs*, FEC, <https://www.fec.gov/press/resources-journalists/fec-enforcement-programs> [<https://perma.cc/438W-5V8M>].

78. E-mail from Jason Bucelato, Senior Pub. Affs. Specialist, FEC (Sept. 14, 2020, 11:47 AM) (on file with author).

79. *Id.*

80. This Note excludes data from 2019 to 2021 because many cases initiated in these years are likely ongoing. See Memorandum from Lisa J. Stevenson, Acting Gen. Couns., Charles Kitcher, Acting Assoc. Gen. Couns. for Enf’t, and Jeff S. Jordan, Acting Assoc. Gen. Couns. for Enf’t, to the Comm’n on the Status of Enforcement – Fiscal Year 2020, Fourth Quarter (7/1/20–9/30/20) (Nov. 2, 2020) [hereinafter *FEC Memorandum on the Status of Enforcement*], https://www.fec.gov/resources/cms-content/documents/4th_Quarter_Status_of_Enforcement_2020.pdf [<https://perma.cc/CJC3-VVH2>] (reporting that the “Average Days from Receipt to Closing” cases was 530 in fiscal year 2020, 630 in fiscal year 2019, and 436 in fiscal year 2018). As summaries of ongoing cases are not publicized by the FEC, Lochner et al., *Calculating, Credible, or Both?*, *supra* note 15, the summaries of closed MURs from these years may fail to elucidate an overview of the MURs initiated in these years.

MUR #7704, were scraped⁸¹ on September 8, 2020. It produced results for 4,546 summaries of closed MURs.⁸² For all summaries of archived closed MURs, the data includes open and close dates; for all summaries of closed MURs that are not archived, the data includes proxy “open” and “close” dates, as the specific open and close dates are not included in the summaries of those closed MURs.⁸³ Instead, the data includes dates of two associated document entries as proxies.

The data reveals that, while the number of MURs initiated each year has remained relatively constant since the late 1990s, the percentage of internally generated MURs has declined precipitously over time. Figure 1 plots the number of closed MURs initiated each year, according to their actual or proxy open and close dates.⁸⁴ As shown in Figure 1, many more MURs were filed yearly in the late 1980s and 1990s than in recent years. After reaching a peak of around 300 MURs filed in 1994, there was a steep decline in the number of MURs

81. *Scraping*, DICTIONARY.COM, <https://www.dictionary.com/browse/scraping> [<https://perma.cc/BM9Y-6TU2>] (defining scraping as “the process of extracting data from a digital source for automated replication, formatting, or manipulation by a computer program, as in data mining or website data analysis”).

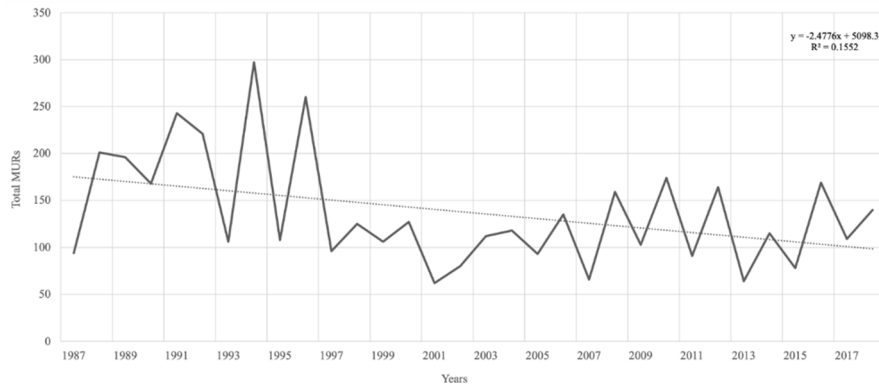
82. As you will see below, when excluding data from closed MURs from 2019 and 2020, the total number of summaries of closed MURs analyzed becomes 4,380.

83. MURs closed before 1999 are archived, and later MURs are not archived. See E-mail from Jason Bucelato, Senior Pub. Affs. Specialist, FEC (Sept. 28, 2020, 9:10 AM) (on file with author). Summaries of archived closed MURs look a little bit different than other summaries. First, summaries of archived closed MURs include their open and close dates, while summaries of other closed MURs do not. Compare Seminole Tribe of Fla., MUR 2465 (FEC May 1, 1990), <https://www.fec.gov/data/legal/matter-under-review/2465> [<https://perma.cc/N2KH-7BPT>], with Tiffany for Wis., Inc., MUR 7704 (FEC Aug. 6, 2020), <https://www.fec.gov/data/legal/matter-under-review/7704> [<https://perma.cc/Q425-P3V8>]. The open and close dates for those MURs are still available, though, when browsing through the search results for closed MURs. See *Closed Matters Under Review*, FEC, <https://www.fec.gov/data/legal/search/enforcement> [<https://perma.cc/KVM4-K896>]. Second, summaries of archived closed MURs provide a link to case documents in one file. Summaries of other closed MURs include a log of linked documents, denoting the type, date, and title of each document. Compare Seminole Tribe of Fla., MUR 2465 (FEC May 1, 1990), <https://www.fec.gov/data/legal/matter-under-review/2465> [<https://perma.cc/N2KH-7BPT>], with Tiffany for Wis., Inc., MUR 7704 (FEC Aug. 6, 2020), <https://www.fec.gov/data/legal/matter-under-review/7704> [<https://perma.cc/Q425-P3V8>].

84. Since some of the dates correspond to the actual open and close dates of the closed archived MURs, while others refer to the dates of documents associated with the closed MURs, the data in general and this Figure in particular should not be relied on as a reference for the specific number of MURs initiated in a given year. Although Figure 1 is not a perfect record of the number of MURs initiated each year, this Figure is a reliable mapping of trends over time because it provides information about when more than four thousand MURs were initiated.

initiated each year.⁸⁵ The number of MURs initiated per year has remained relatively constant since around the late 1990s, at around 100 to 150 MURs initiated per year.

Figure 1: Matters Under Review Initiated per Year

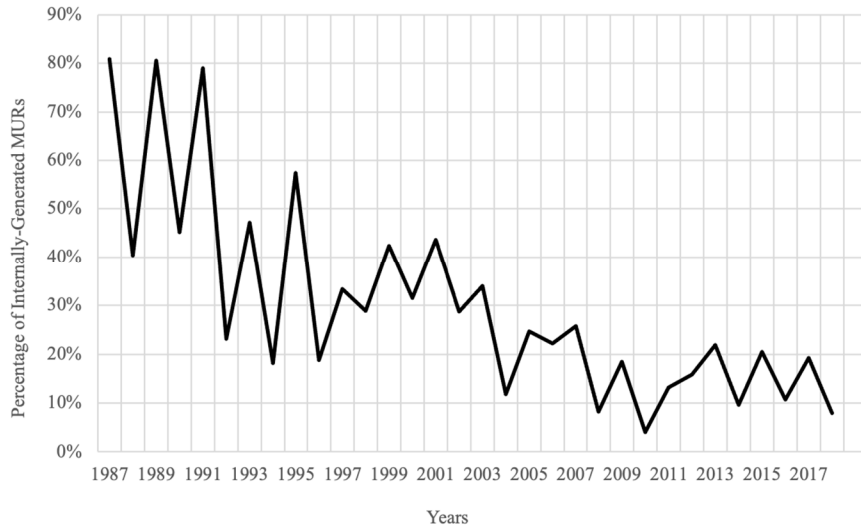


At the same time, in contrast to the consistency seen in Figure 1, the percentage and number of internally generated MURs have both declined. Figure 2 plots the percentage of internally generated closed MURs in comparison to all closed MURs.⁸⁶ Figure 2 shows a precipitous decline in the percentage of internally generated MURs since the 1980s, dipping below 10 percent of all MURs multiple times over the past two decades.

85. This decline could be the result of the Administrative Fines and ADR processes at the FEC that were implemented to direct complaints away from the MUR process. *See supra* notes 40–56 and accompanying text.

86. Closed MURs that either do not list a complainant or list the FEC as the complainant are internally generated. E-mail from Jason Bucelato, Senior Pub. Affs. Specialist, FEC (Sept. 3, 2020, 3:46 PM) (on file with author). As a result, MURs initiated by the following complainants were recorded as internally generated: none (blank), Audit Division, Reports Analysis Division, or FEC. While Figure 2 is also not a perfect record of the percentage of internally generated MURs initiated each year, this figure reliably maps the trends of internally generated MURs over time.

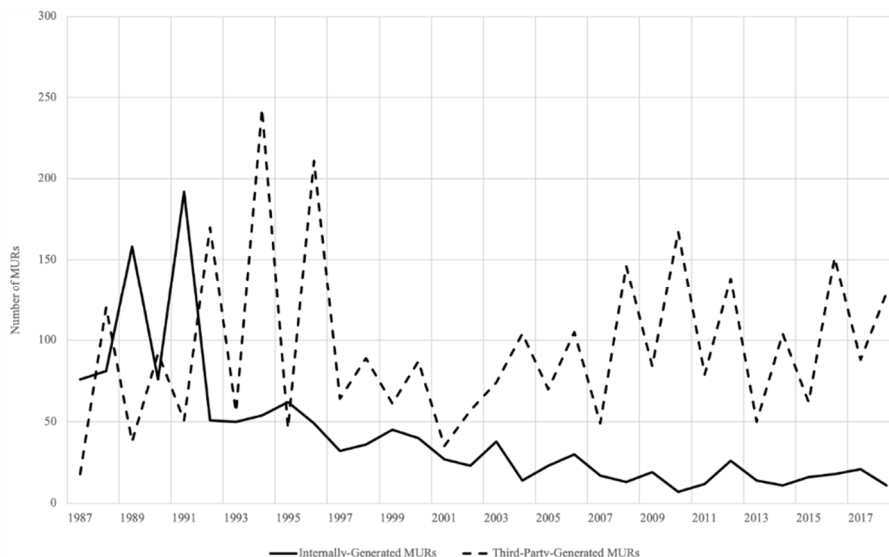
Figure 2: Percentage of Internally Generated Matters Under Review per Year



This decline is attributable to both decreasing internally generated MURs and increasing third-party-generated MURs. Figure 3 plots the number of internally generated and third-party-generated MURs over time.⁸⁷ After peaking around two hundred MURs in 1991, the number of internally generated MURs declined steadily, hitting a low of just seven internally generated MURs initiated in 2010. Simultaneously, since the early 2000s, third-party-generated MURs increased overall. The increase in third-party-generated MURs appears to be less drastic and more variable than the steady decrease in internally generated MURs, apparent in Figure 3.

87. MURs initiated by complainants other than the FEC, Department of Justice, or sua sponte were recorded as initiated by third-party enforcers. This Figure should not be relied on as a reference for the specific number of MURs initiated in a given year. *See supra* note 84.

Figure 3: Internally & Third-Party-Generated Matters Under Review per Year



Moreover, review and analysis of more than four thousand summaries of closed MURs indicates that, while the number of MURs initiated each year has remained relatively constant since the late 1990s, the percentage of internally generated MURs has declined precipitously. The FEC initiates very few MURs on its own. This finding aligns with the handful of studies on contemporary third-party enforcement at the FEC,⁸⁸ and it lends support to arguments that the FEC is unwilling or unable to adequately enforce campaign finance law.⁸⁹

88. See Lochner et al., *Calculating, Credible, or Both?*, *supra* note 15, at 184 (“Very few FEC-initiated cases are ultimately decided in the MUR program, . . . whereas this is the most common venue for the enforcement of third-party-initiated allegations. Indeed, of the total 1,237 cases heard under the MUR track, 87 percent (1,077) were brought by third parties.”); Franz, *supra* note 19, at 174 (mapping the distribution of complainants).

89. See *supra* Part I.A.2.

II. DISCLOSURE BEGETS EFFECTIVE CONTEMPORARY THIRD-PARTY ENFORCEMENT

While the data shows that internally generated enforcement at the FEC has deteriorated, legal developments have allowed third-party enforcers to step in and fill the void. The FECA,⁹⁰ in addition to establishing the FEC, created contemporary disclosure law.⁹¹ Disclosure law helps facilitate two processes that ensure that information travels from political actors to voters.⁹² First, political actors report their campaign contributions and expenditures to the FEC, and second, the FEC disseminates that information to the public.⁹³

As this Part explains, disclosure law and technological advancements have had a synergistic effect on disclosure; the combination of robust disclosure law and recent technological advancements renders massive amounts of campaign finance information readily available to third-party enforcers for the first time. This Part delineates how contemporary third-party enforcers use this information to effectively detect and enforce campaign violations informally and formally. Despite this, several scholars dismiss third-party enforcement as ineffective and detrimental to enforcement at the FEC overall. The final Section of this Part will explain why those assumptions are incorrect.

A. *Background on Disclosure Law*

Disclosure law has developed over time, whereas much of campaign finance law has crumbled. The nine times that the U.S. Supreme Court tested the FECA and its later amendments, the Court struck down an array of provisions contained within these laws but

90. Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (codified as amended at 52 U.S.C. §§ 30101–30146).

91. See *Mission and History*, FEC, <https://www.fec.gov/about/mission-and-history> [<https://perma.cc/5NV5-2VHV>] (“Congress consolidated its earlier reform efforts in the Federal Election Campaign Act . . . Congress amended the Federal Election Campaign Act in 1974 to set limits on contributions by individuals, political parties and PACs. The 1974 amendments also established an independent agency, the FEC.”).

92. See Richard Briffault, *Campaign Finance Disclosure 2.0*, 9 ELECTION L.J. 273, 276 (2010) (“Disclosure is a shorthand term for what is really a two-step process: reports by electoral actors to a government agency concerning campaign contributions and expenditures, and dissemination of that information to the public.”).

93. *Id.*

consistently upheld their disclosure provisions.⁹⁴ The Court determined, at least in part, that because disclosure law was so robust, additional campaign finance restrictions were unnecessary to advance government interests and, therefore, too speech restrictive.⁹⁵

As a result of the expansion of disclosure law over time, political actors report a lot of data to the FEC.⁹⁶ Congressional campaign committees, for instance, must file quarterly, pre-primary, pre-general, and post-general election disclosure reports, among others.⁹⁷ These reports detail every contribution received, including the name, occupation, employer, and mailing address of the contributor, the date and amount of the contribution, and the aggregate amount of the contributor's contributions.⁹⁸ As noted, *Crossroads GPS* now requires

94. *Id.* at 274; *see, e.g.*, *Buckley v. Valeo*, 424 U.S. 1, 51, 84, 143 (1976) (per curiam) (striking down expenditure limits and the appointment procedures for FEC commissioners, while upholding disclosure requirements); *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 241–43, 263 (1986) (finding the FECA's ban on direct corporate expenditures unconstitutional as applied to Massachusetts Citizens for Life); *Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 613 (1996) (finding the party expenditure limits unconstitutional as applied); *McConnell v. FEC*, 540 U.S. 93, 201–02 (2003) (upholding disclosure requirements enacted under the Bipartisan Campaign Reform Act of 2002 ("BCRA")), *overruled by Citizens United v. FEC*, 558 U.S. 310 (2010); *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 455–57 (2007) (finding BCRA's electioneering communication restrictions unconstitutional as applied to Wisconsin Right to Life's advertising); *Citizens United*, 558 U.S. at 365, 370–71 (striking down prohibitions against corporate expenditures, while upholding disclosure requirements); *McCutcheon v. FEC*, 572 U.S. 185, 223–24, 227 (2014) (plurality opinion) (striking down aggregate contribution limits, while praising disclosure requirements). *But see* *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 437 (2001) (rejecting a facial challenge to party coordinated spending limits); *Beaumont v. FEC*, 539 U.S. 146, 149–50, 163 (2003) (upholding a prohibition against corporate contributions to nonprofit advocacy corporations); *Davis v. FEC*, 554 U.S. 724, 728–29, 740, 744 (2008) (striking down the "Millionaire's Amendment" and its corresponding disclosure requirements).

95. *See* Heerwig & Shaw, *supra* note 65, at 1459 ("[N]ot only did the Court conclude that BCRA's disclosure requirements passed constitutional muster, but the existence and content of those requirements was arguably a critical component of the Court's conclusion that the substantive limitation violated the First Amendment."); *see also* *McCutcheon*, 572 U.S. at 224 (plurality opinion) ("With modern technology, disclosure now offers a particularly effective means of arming the voting public with information. In 1976, the Court observed that Congress could regard disclosure as 'only a partial measure.' . . . Today, given the Internet, disclosure offers much more robust protections against corruption.")

96. *See* Briffault, *supra* note 92, at 273 (describing the origins and development of disclosure law).

97. *See Filing Candidate Reports*, FEC, <https://www.fec.gov/help-candidates-and-committees/filing-reports> [<https://perma.cc/QE3B-YM4C>].

98. *See Recording Receipts*, FEC <https://www.fec.gov/help-candidates-and-committees/keeping-records/recording-receipts> [<https://perma.cc/MG9M-ZWB7>], requiring this information if the contributor's aggregate contribution exceeds \$200. If the aggregate contribution is less than

disclosing contributors to independent expenditures as well.⁹⁹ Robust disclosure law facilitates the first process of disclosure: political actors report their campaign contributions and expenditures to the FEC.¹⁰⁰

Before the technological advancements of electronic filing and online disclosure, however, the FEC did not effectively disseminate disclosed campaign finance information to the public, stymying the second process of disclosure. Before 1997, all political actors filing under the FECA filed paper records of their disclosure reports.¹⁰¹ If a member of the public wanted to see these reports, that person would travel to the FEC's office and then "laboriously examine, and, for a fee, copy microfilmed campaign finance reports."¹⁰² As a result, comprehensively analyzing disclosure reports was "almost impossible."¹⁰³

To further the disclosure purposes of the FECA, the FEC permitted political actors to electronically file their disclosure reports beginning in 1997.¹⁰⁴ In 2001, the FEC began requiring House and

\$200, then only the amount, date of receipt, contributor's name, and mailing address may be required for the contribution. *Id.*

99. See *Citizens for Resp. & Ethics in Wash. v. FEC (Crossroads GPS)*, 971 F.3d 340, 354 (D.C. Cir. 2020) ("FECA (c)(1) unambiguously requires an entity making over \$250 in IEs to disclose the name of any contributor whose contributions during the relevant reporting period total \$200, along with the date and amount of each contribution.").

100. As is apparent from the *Crossroads GPS* proceedings, however, sometimes political actors do not abide by disclosure requirements. See *id.* at 344; Heerwig & Shaw, *supra* note 65, at 1480–81, 1483 (finding that "contributor compliance with disclosure requirements is often minimal," pointing to one contributor who listed his employer as "'Dunder Mifflin'—the fictional office supply company featured on the popular television show *The Office*"). In addition to outright noncompliance with disclosure law, partial compliance is a persistent problem. Heerwig & Shaw, *supra* note 65, at 1480–81.

101. FEC, *Final Rules on Electronic Filing*, RECORD, Oct. 1996, at 3, 3, <https://www.fec.gov/resources/record/1996/oct96.pdf> [<https://perma.cc/3VCJ-R7A2>] ("On August 15, 1996, the FEC published new rules implementing an electronic filing system for campaign finance reports filed with the agency (61 FR 42371). The electronic filing system will be in place in time for the 1997-98 election cycle (i.e., for reports covering activity after December 31, 1996).").

102. Briffault, *supra* note 92, at 277 (quoting CAMPAIGN FIN. INST. TASK FORCE ON DISCLOSURE, WEBSITE WOES: THE FEDERAL NON-SYSTEM FOR CAMPAIGN FINANCE DISCLOSURE 5 (2002), <http://www.cfinst.org/disclosure/pdf/WebsiteWoes.pdf> [<https://perma.cc/7W9M-98XC>]).

103. *Federal Election Commission Records Room* (C-SPAN television broadcast June 24, 1993), <https://www.c-span.org/video/?43738-1/federal-election-commission-records-room> [<https://perma.cc/3K5V-N86F>].

104. See *Electronic Filing of Reports by Political Committees*, 61 Fed. Reg. 42,371, 42,372 (Aug. 15, 1996) (codified at 11 C.F.R. pt. 104) ("The system will also provide the public with more complete on-line access to reports on file with the Commission, thereby furthering the disclosure purposes of the [FECA].").

presidential candidates (who raise or spend more than \$50,000 in contributions or expenditures) to electronically file their reports.¹⁰⁵ The Senate only followed suit in 2018.¹⁰⁶

Additionally, well into the 2010s, the online disclosure portal of the FEC website, where the agency publishes disclosure reports, was inaccessible to most of the public.¹⁰⁷ “Using the files involve[d] downloading thousands or possibly millions of records, having access to a software program capable of reading a large amount of data (generally beyond the capacity of Microsoft Excel), and then creating a corresponding ‘data dictionary’ for the disclosure information to be properly formatted.”¹⁰⁸ The FEC has since changed its website to make the data more accessible—no special software programs or data dictionaries required.¹⁰⁹ Instead, the FEC publishes the disclosed campaign finance data online in an easily searchable and downloadable format.¹¹⁰

While a political actor could once rest assured that their disclosed campaign finance information was “unlikely to be seen by anyone,”¹¹¹ that is no longer the case. Contemporary disclosure law requires political actors to disclose a lot of campaign finance information to the

105. See Dorothy Yeager, *Mandatory Electronic Filing*, FEC (Mar. 1, 2011), <https://www.fec.gov/updates/mandatory-electronic-filing> [<https://perma.cc/5L2A-YSRB>] (requiring all federal filers, apart from Senate campaigns, to electronically file reports).

106. See Michael Beckel, *Senate Candidates To Begin E-Filing Campaign Finance Reports After Issue One-Backed Policy Is Signed into Law*, ISSUE ONE (Sept. 21, 2018), <https://www.issueone.org/senate-candidates-to-begin-e-filing-campaign-finance-reports-after-issue-one-backed-policy-is-signed-into-law> [<https://perma.cc/U5Q2-79P8>] (“U.S. Senate candidates will begin electronically filing their campaign finance reports in October thanks to a provision contained in an appropriations bill signed into law today by President Donald Trump.”).

107. See Heerwig & Shaw, *supra* note 65, at 1486 (“The bulk of . . . disclosure data, including information about the sources from which a candidate has received money over time . . . [we]re formatted as raw text files—to the untrained eye, they appear[ed] as long rows of jumbled letters and numbers.”).

108. *Id.*

109. See Fredreka Schouten, *Exclusive: FEC Overhauls Website To Make It Easier To Track Campaign Money*, USA TODAY (Oct. 27, 2015, 11:51 AM), <https://www.usatoday.com/story/news/politics/elections/2015/10/27/fec-updates-website-2016-election/74672832> [<https://perma.cc/458B-CWAQ>] (“On the new site, information about all the candidates running for a single office is grouped together, allowing users to see at a glance who is seeking the presidency . . . and how their fundraising compares with rivals. The updated version also boasts a streamlined, easy-to-read look.”).

110. See *Campaign Finance Data*, FEC, <https://www.fec.gov/data> [<https://perma.cc/X4D6-E29N>].

111. William McGeeveran, *Mrs. McIntyre’s Checkbook: Privacy Costs of Political Contribution Disclosure*, 6 U. PA. J. CONST. L. 1, 11–12 (2003).

FEC. The FEC, in turn, effectively disseminates that information to the public using new technologies. Together, robust disclosure law and technological advancements render massive amounts of campaign finance information readily available for the first time.

B. Third-Party Enforcers Rely Upon Disclosed Information

Third-party enforcers are some of the members of the public that will analyze the disclosed campaign finance information disseminated by the FEC. Third-party enforcers are individuals and entities, apart from the FEC and the Department of Justice, that enforce campaign finance violations.¹¹² They consist of private citizens, good government groups (like CREW), political parties, and campaigns.¹¹³

More often than not, third-party enforcers are themselves political actors, meaning those involved in partisan politics, like political parties and campaigns.¹¹⁴ The literature on third-party enforcement acknowledges, but actually underestimates, the frequency with which third-party enforcers are political actors. The literature usually looks solely to the reported identity of a complainant to determine the source of a complaint.¹¹⁵ Looking solely at the reported identity, however, fails to account for the prevalent practice of *indirectly* filing complaints.¹¹⁶ For example, political actors may indirectly file by passing along complaints to apparently neutral parties to file with the FEC.¹¹⁷

112. See *supra* note 11 and accompanying text.

113. Cf. Lochner et al., *Calculating, Credible, or Both?*, *supra* note 15, at 179 (comparing the quality of complaints lodged by different kinds of third-party enforcers).

114. See Gross, *supra* note 71, at 284 (1991) (noting that FEC complaints are filed “often by opposing candidates or by the opposing political party”); cf. Lochner et al., *Calculating, Credible, or Both?*, *supra* note 15 (“Anecdotes . . . suggest that campaign finance monitoring likely is conducted by one’s political opponents . . .” (citations omitted)). Usually, they are political researchers, employed by political parties and campaigns to conduct opposition research that is then used to make out a case against their opponents. Interview with Samantha McClain, *supra* note 36; Sarah Isgur, *How Opposition Research Happens*, DISPATCH (Feb. 12, 2020), <https://thedispatch.com/p/how-opposition-research-happens> [<https://perma.cc/QBW8-Y3P9>].

115. See Lochner & Cain, *Enforcement Blues*, *supra* note 12, at 637 & n.23 (finding that an opposition party filed more than half of MURs sampled based alone on the identity of complainants). *But see* Lochner et al., *Calculating, Credible, or Both?*, *supra* note 15, at 191 (listing the steps taken in their study to attempt to look past the reported identity of the complainant to determine the source of a complaint).

116. Acknowledging this underestimation and recognizing that third-party enforcers are very often political actors allows for a more accurate assessment of the efficacy of third-party enforcement.

117. Interview with Samantha McClain, *supra* note 36. The practices of the Democratic Congressional Campaign Committee (“DCCC”) provide one telling example. The DCCC has a

All types of third-party enforcers, political actors among others, analyze disclosure reports to detect campaign finance violations and file related complaints. CREW, which filed the complaint against Crossroads GPS and which generally “monitors the campaign finance activities of those who run for federal office,”¹¹⁸ acknowledged that “the FECA-mandated disclosure reports are the only source of information CREW can use to determine if an individual or entity is complying with the FECA.”¹¹⁹ When analyzing information from these reports, third-party enforcers look for discrete violations and trends of violations occurring over time.¹²⁰ They may also compare their analyses with those of organizations like the Center for Responsive Politics that analyze the same data and publish their analyses online.¹²¹

very large in-house research department. See Shira Toeplitz, *An Inside Look at the DCCC Research Department*, ROLL CALL (Apr. 20, 2012, 5:39 PM), <https://www.rollcall.com/2012/04/20/an-inside-look-at-the-dccc-research-department> [<https://perma.cc/6BTM-N5ZF>] (“[T]he DCCC boasts the largest in-house research department of the four Congressional campaign committees.”). In 2018, the DCCC won the House majority partly by focusing on the “culture of corruption” of House Republicans and emphasizing their campaign finance violations. See Mike DeBonis, *National Democrats Start Spending Big Money on Anti-Corruption Message*, WASH. POST (Sept. 13, 2018, 2:39 PM), <https://www.washingtonpost.com/politics/2018/09/13/national-democrats-start-spending-big-money-anti-corruption-message> [<https://perma.cc/34NU-R6PD>] (explaining that House Democrats highlighted “scandals,” including the campaign finance scandal of Rep. Hunter, in its campaign advertising); Press Release, Dep’t of Just., Rep. Duncan D. Hunter and Wife Indicted for Converting Hundreds of Thousands of Dollars in Campaign Funds and Falsifying Campaign Finance Records (Aug. 21, 2018), <https://www.justice.gov/usao-sdca/pr/rep-duncan-d-hunter-and-wife-indicted-converting-hundreds-thousands-dollars-campaign> [<https://perma.cc/HE8B-PXN2>] (“U.S. Rep. Duncan D. Hunter and his wife, Margaret E. Hunter, were indicted by a federal grand jury today on charges that they converted more than \$250,000 in campaign funds to pay for personal expenses and filed false campaign finance records with the Federal Election Commission.”). FEC complaints alleging campaign finance violations thereby bolstered their messaging. While there were several FEC complaints filed against House Republicans during the 2018 cycle, the DCCC, its staff, and outside counsel were not listed as complainants on any of the complaints filed. Instead, other, neutral parties filed these complaints. Interview with Samantha McClain, *supra* note 36.

118. Crossroads GPS Complaint, *supra* note 1, at 1.

119. *Id.* at 2.

120. See Steven D’Amico, Opinion, *I Ran Oppo Research Against Donald Trump. He Has No Idea What He’s Talking About.*, POLITICO MAG. (July 15, 2017), <https://www.politico.com/magazine/story/2017/07/15/i-ran-oppo-research-against-donald-trump-he-has-no-idea-what-hes-talking-about-215381> [<https://perma.cc/KUF3-ZEZB>] (“Public records research and tracking opponents’ statements have yielded some of the most memorable opposition research attacks over the years. . . . A review of campaign finance disbursements unearthed John Edward’s infamous \$400 haircut.”).

121. *Cf.* *McCutcheon v. FEC*, 572 U.S. 185, 224 (2014) (plurality opinion) (“With modern technology, disclosure now offers a particularly effective means of arming the voting public with information. . . . Reports and databases are available on the FEC’s Web site almost immediately

Additionally, third-party enforcers typically have access to research subscriptions, which are useful, though imperfect, tools to develop incomplete data reported to the FEC.¹²²

After a third-party enforcer detects a campaign finance violation, the third-party enforcer will enforce the campaign finance violation informally or formally.¹²³ Informally, they “enforce” campaign finance law by publicizing alleged campaign finance violations, potentially prompting formal enforcement, in the hopes of punishing violators at the polls.¹²⁴ To do so, the third-party enforcer will prepare a research document that explains the alleged campaign finance violation to a lay audience, along with support from the public record to substantiate the claim.¹²⁵ The third-party enforcer will then pitch the story to a journalist in the hopes of prompting news coverage of the violation, purchase advertising, or otherwise draw attention to the transgression in order to influence voters.¹²⁶ Formally, third-party enforcers generate complaints that they file directly or indirectly with the FEC. The third-party enforcer will write a complaint, translating the same information that would be provided to a journalist for consideration by the FEC.¹²⁷

after they are filed, supplemented by private entities such as OpenSecrets.org and FollowTheMoney.org.”).

122. Cf. Hilary Krieger, *An Introduction to the Dark Arts of Opposition Research*, FIVETHIRTYEIGHT (Oct. 31, 2017, 10:56 AM), <http://53eig.ht/2ieztyb> [<https://perma.cc/9ZQX-4A4J>] (explaining that the research process often begins with “an exhaustive Lexis Nexis search”).

123. Lochner & Cain, *Enforcement Blues*, *supra* note 12, at 630.

124. Cf. *id.* at 630, 651–53 (“[C]ampaign enforcement relies upon the informal sanctions of public opinion; those who break the law not only face the prospect of fines if found guilty, but they also may suffer at the polls as a result of public reaction to their infraction.”); Gaskins et al., *From the FEC to the Ballot Box*, *supra* note 22, at 1026–27 (finding that a voter’s perception of a candidate changed when the voter was confronted with news stories about a candidate’s campaign finance violations).

125. Interview with Samantha McClain, *supra* note 36; see also Isgur, *supra* note 114 (“[Researchers] put together a ‘book’ . . . A researcher will start by cataloging everything the opponent has said . . . Every public record that can be found . . . will be used to find contradictions and inconsistencies.”).

126. Interview with Samantha McClain, *supra* note 36; see Isgur, *supra* note 114 (“Once the book is put to bed, it gets handed off to the communications team to get it out there. . . . And the information in the book can end up a lot of places: television ads, debate preparation, speeches, direct mail, and—of course—news stories.”). Most researchers will not personally pitch the piece, rather they will assist a communications specialist, who will do the talking. Interview with Samantha McClain, *supra* note 36.

127. Interview with Samantha McClain, *supra* note 36. Third-party enforcers may hire attorneys to write and file their complaints. *Id.*

Then, the FEC formally enforces campaign finance law through administrative and civil penalties.¹²⁸

Moreover, contemporary third-party enforcers have ready access to reliable campaign finance information. Third-party enforcers rely upon this disclosed campaign finance information to identify and call attention to serious campaign finance violations.

C. *Third-Party Enforcement at the FEC in the Literature*

Despite third-party enforcers' increased access to reliable campaign finance information, the scholarly sentiment towards third-party enforcement is lukewarm at best. Third-party enforcement is generally seen as a necessary evil. Third-party enforcement is "necessary" because of the resource constraints of regulators.¹²⁹ To effectively regulate, a regulatory agency must simultaneously monitor, investigate, and enforce—a task that requires a "larger, better trained staff" and "larger budget" than is often available.¹³⁰ Third-party enforcement is an efficient way to deploy the limited "time, knowledge, and money" of a regulatory agency.¹³¹

Third-party enforcement is deemed a necessary evil, though, because it can lead to unreasonable regulatory outcomes. Scholars argue that regulation is unreasonable whenever "compliance would entail costs that clearly exceed the resulting social benefits."¹³² Third-party enforcement may promote regulatory unreasonableness because it "can tie up inspectors on legally unfounded or substantively trivial claims."¹³³ When inspectors are tied up with trivial violations, they

128. See FEC, GUIDEBOOK 2012, *supra* note 8, at 5 ("With the limited exception of the Administrative Fine program . . . , the Commission does not impose fines for violations of the campaign finance laws. Rather, the Commission seeks the payment of civil penalties through voluntary settlements (called conciliation agreements) with respondents."). While informal and formal enforcement go hand in hand, this Note focuses primarily on formal enforcement.

129. See Lochner et al., *Wheat from Chaff*, *supra* note 11 ("[B]ecause most of the time agency officials are significantly outnumbered by the groups they regulate, resource constraints affect their ability to monitor, investigate, and enforce the law.").

130. *Id.*; BARDACH & KAGAN, GOING BY THE BOOK, *supra* note 12, at 161.

131. See BARDACH & KAGAN, GOING BY THE BOOK, *supra* note 12, at 160, 165–66 ("No matter how intimidating an agency's armory of sanctions, the question always remains of where and how to deploy inspectorial resources. . . . [C]omplainants can be a valuable extension of the inspectorate's capacity for gathering information about actual or potential harms.").

132. *Id.* at 6. Regulators, instead, should strive to punish violations associated with serious social harms and forbear punishment of trivial violations. *Id.*

133. *Id.* at 166.

cannot pursue more serious violations.¹³⁴ Consequently, third-party enforcement in theory skews the enforcement agenda of a regulatory agency toward unreasonableness.

Previous studies of third-party enforcement at the FEC specifically are consistent with this theory and portray the practice as a structural deficiency, hindering enforcement at the FEC.¹³⁵ In 1999, before the FEC implemented the Administrative Fine and ADR processes, one study found that third-party-generated MURs “accounted for just over 88% of all claims resulting in a ‘No Reason to Believe’ disposition.”¹³⁶ From this finding, the authors claimed that third-party enforcement skews the enforcement agenda of the FEC toward trivial violations.¹³⁷

Even after the FEC implemented the Administrative Fine and ADR processes, institutional mechanisms to contend with the third-party-enforcement skew,¹³⁸ studies still found that third-party enforcement hindered enforcement at the FEC. In 2008, Todd Lochner and his co-authors analyzed MURs from 1999 to 2004, finding that third-party enforcement “greatly reduces the ability of the agency to filter out insignificant claims,” even after implementation of the Administrative Fine and ADR processes.¹³⁹ Further, they postulated that these alternative processes may even incentivize more complaints concerning trivial violations because, unlike prior to the implementation of these process, these trivial violations could now lead to fines, rather than outright dismissal.¹⁴⁰

134. *Id.*

135. Lochner and Cain studied third-party enforcement at the FEC in 1991 and 1993. Lochner & Cain, *Equity and Efficacy*, *supra* note 21, at 1909. Lochner et al. studied third-party enforcement from 1999 to 2004. Lochner et al., *Wheat from Chaff*, *supra* note 11, at 216. Michael Franz also studied third-party enforcement from 1996 to 2004. Franz, *supra* note 19, at 173. Lochner et al. studied third-party enforcement from 2006 to 2012. Lochner et al., *Calculating, Credible, or Both?*, *supra* note 15, at 179.

136. Lochner & Cain, *Equity and Efficacy*, *supra* note 21, at 1920.

137. *Id.* at 1935.

138. *See* Franz, *supra* note 19, at 172 (recounting how the FEC implemented both the Administrative Fine and ADR processes to quickly dispose of minor campaign finance violations).

139. Lochner et al., *Wheat from Chaff*, *supra* note 11, at 230.

140. *See id.* (“To the extent that these new programs increased the investigation and sanction of low-level offenses (which they did), they created additional incentives for regulated groups to report one another – and generated more complaints that . . . focus the FEC’s attention on obvious infractions typically discovered by third-party monitoring.”). *But see* Franz, *supra* note 19 (finding that efficiency at the FEC improved with implementation of the Administrative Fine

Finally, after a long gap in the literature, in 2020, a new study presented a less negative assessment of third-party enforcement at the FEC. Lochner, writing with new co-authors, published a study of third-party enforcement from 2006 to 2012, seeking to determine whether some third-party enforcers file more veracious and serious complaints than others.¹⁴¹ A complaint was coded as veracious if the FEC found that there was a “Reason to Believe” that a campaign finance violation had occurred.¹⁴² A complaint was coded as trivial if it was ultimately “dismissed or result[ed] in fines less than \$1,000.”¹⁴³ The study found that repeat players, like “parties, interest groups, and incumbent campaigns,”¹⁴⁴ “lodge somewhat higher quality complaints than unaffiliated individuals or challenger campaigns,” as these third-party enforcers were more likely to file veracious complaints and less likely to file trivial complaints.¹⁴⁵

Even though Lochner et al. determined that some third-party enforcers are better than others, they continued to malign third-party enforcement at the FEC overall. The study concluded, like the previous studies on third-party enforcement, that third-party enforcers “are no substitute for an adequately funded agency with independent investigative authority,”¹⁴⁶ and they went so far as to refer to the most successful of third-party enforcers as “the best house in a bad neighborhood.”¹⁴⁷ Accordingly, it could seem as though all hope is lost for effective enforcement of federal campaign finance violations, but, for the reasons discussed below, this conclusion is incorrect.

and ADR processes but acknowledging that “politically motivated complaints” continued to reduce the efficiency of enforcement at the FEC).

141. Lochner et al., *Calculating, Credible, or Both?*, *supra* note 15, at 179.

142. *See id.* at 190 (“For veracity, our aim is to measure whether an alleged violation in fact took place. Given the potentially political nature of FEC enforcement, however, this concept is illusive to capture. Our best approximation is . . . the Office of General Counsel’s ‘Reason to Believe’ (RTB) designation.”).

143. *Id.*

144. *Id.* at 179.

145. *Id.* at 179, 191–92.

146. *Id.* at 195.

147. *Id.* at 194.

D. Flawed Assumptions of the Previous Studies on Third-Party Enforcement

The previous studies on third-party enforcement at the FEC relied upon flawed assumptions that negatively portray the practice and almost entirely ignore its benefits. This Section will address each of the following assumptions in turn: (1) the FEC reaches the “right” conclusion; (2) the “right” conclusion is the legally correct conclusion; and (3) third-party enforcement is successful only when enforcers reach the “right” conclusion.

First, studies on third-party enforcement relied upon the flawed assumption that the FEC is an impartial arbiter that reaches the “right” conclusion on any given enforcement matter.¹⁴⁸ The FEC often avoids reaching conclusions, let alone the correct legal conclusion, because it dismisses meritorious complaints within their prosecutorial discretion.¹⁴⁹ The literature ignores this point when evaluating third-party-generated matters relative to internally generated matters. For example, in one study, Lochner et al. coded cases that were “dismissed or result[ed] in fines less than \$1,000” as trivial.¹⁵⁰ This study then determined that the FEC detects more serious campaign finance violations than third-party enforcers because internally generated MURs result in fines 62 percent of the time, while third-party-generated MURs result in fines less than 10 percent of the time.¹⁵¹ As explained in Part I.A, the FEC dismisses “low-rated” MURs under the EPS, a confidential system that includes FEC “priorities” as a plus-factor.¹⁵² Naturally, internally generated matters are going to be

148. While outside of the scope of this Note, it should also be noted that the FEC is a political body with a partisan split. See *Leadership and Structure*, FEC, <https://www.fec.gov/about/leadership-and-structure> [<https://perma.cc/N2HE-2PK5>] (“Commissioners are appointed by the President and confirmed by the Senate. . . . [N]o more than three Commissioners can represent the same political party. . . .”). Consequently, it may not reach the “right” conclusion on enforcement matters because of political influences. See OFF. OF COMM’R ANN M. RAVEL, *supra* note 32 (claiming that the FEC is not performing properly because of obstruction by a bloc of three Commissioners on account of their ideological opposition to campaign finance law).

149. See *Judicial Watch, Inc. v. FEC*, 10 F. Supp. 2d 39, 43 (D.D.C. 1998), *rev’d*, 180 F.3d 277 (D.C. Cir. 1999) (“In the exercise of its prosecutorial discretion, the Commission relies on its Enforcement Priority System and is forced to dismiss dozens of administrative complaints each year without ever having the opportunity to investigate their allegations.”).

150. Lochner et al., *Calculating, Credible, or Both?*, *supra* note 15, at 190.

151. *Id.* at 185.

152. See *supra* notes 46–51 and accompanying text.

dismissed less frequently than third-party-generated matters when part of their evaluation is alignment with internal priorities.

Further, some campaign finance violations that lead to fines of more than \$1,000 are trivial. As mentioned in Part I.A, the Administrative Fine process imposes “automatic ‘parking ticket’ fines” for filing offenses.¹⁵³ These parking tickets can quickly add up to more than \$1,000. For example, candidate committees that have to file 48-Hour Notices are charged \$146 for each late notice they file, “plus 10% of the dollar amount of the contributions not timely reported.”¹⁵⁴ At this rate, two untimely reported contributions from political action committees could meet the \$1,000 threshold.¹⁵⁵ Moreover, “[s]eventy-four percent of FEC-initiated cases originate from . . . Administrative Fines,”¹⁵⁶ so it is likely that many internally generated matters that result in fines over \$1,000 are filing violations. These filing offenses are the most trivial of campaign finance violations and the least important to voters.¹⁵⁷

For these reasons, a complaint that is “dismissed or result[ed] in fines less than \$1,000” is not necessarily trivial, and a complaint that results in fines more than \$1,000 could very well be trivial. Thus, assuming that the FEC reaches the correct conclusion in dismissing cases and doling out fines leads to erroneous conclusions about the efficacy of third-party enforcement relative to internally generated enforcement.

Second, the previous studies relied upon the flawed assumption that a complaint is trivial unless it reaches the correct legal conclusion.¹⁵⁸ A third-party complaint can allege a serious campaign finance violation and simultaneously be wrong as a matter of law.

153. See *supra* note 44 and accompanying text.

154. *Calculating Administrative Fines*, FEC, <https://www.fec.gov/legal-resources/enforcement/administrative-fines/calculating-administrative-fines> [<https://perma.cc/4SE9-87GE>]. Further, the penalty “increases by 25% for each time a prior fine was assessed under the Administrative Fine Program during the current and previous two-year election cycles.” *Id.*

155. See *Contribution Limits*, FEC, <https://www.fec.gov/help-candidates-and-committees/candidate-taking-receipts/contribution-limits> [<https://perma.cc/4ZBX-S42W>] (indicating that multicandidate political action committees and party committees could contribute \$5,000 per election to candidate committees during the 2020 election cycle).

156. Lochner et al., *Calculating, Credible, or Both?*, *supra* note 15, at 183.

157. See Gaskins et al., *From the FEC to the Ballot Box*, *supra* note 22, at 1016 (“The sole exception—unsurprisingly, because it is a minor offense—was that accusations of late filing did not appreciably affect vote intentions.”).

158. See *supra* notes 141–142 and accompanying text.

Crossroads GPS provides such an example. At the time CREW alleged that Crossroads GPS had violated campaign finance law by failing to disclose its \$3 million mystery donor, the FEC interpreted the FECA in a way that insulated Crossroads GPS from having to disclose the mystery donor.¹⁵⁹ Therefore, CREW's legal argument was technically wrong, until the District of Columbia Circuit reversed course.¹⁶⁰ Within the fluid and contested legal landscape of campaign finance law,¹⁶¹ assuming that an FEC complaint that reaches the purportedly wrong legal conclusion is frivolous obscures the actual rate of meritorious complaints and fails to account for complaints that are filed to challenge campaign finance law.

Third, and last, the previous studies also relied upon the flawed assumption that the success of third-party enforcement depends wholly upon formal enforcement outcomes. Third-party enforcers are often referred to simply as third-party monitors in scholarship because they “may only take note of legal or ethical infractions They neither make rules nor unilaterally impose costs on wrongdoers.”¹⁶² This definition applies when one commonly conceptualizes costs outside of the political context. But when one conceptualizes costs within this context, third-party enforcers clearly impose costs on violators through informal and formal enforcement alike.

159. *See supra* notes 23–24. In assessing CREW's complaint, the FEC reported that the record reflects that an unnamed individual contributed to Crossroads in furtherance of Crossroads' effort to support a clearly identified federal candidate. Nonetheless, because the relevant information does not reasonably suggest that the donor made a contribution “for the purpose of furthering the reported independent expenditure,” it does not appear that Crossroads was required to identify that contributor on its relevant independent expenditure report or reports under the applicable Commission regulation.

First Gen. Couns.'s Rep. at 2, Crossroads Grassroots Pol'y Strategies, MUR 6696 (FEC Mar. 7, 2014), <https://www.fec.gov/files/legal/murs/6696/15044385153.pdf> [<https://perma.cc/DY7R-BDSM>].

160. *See* Citizens for Resp. & Ethics in Wash. v. FEC (*Crossroads GPS*), 971 F.3d 340, 343 (D.C. Cir. 2020) (“CREW then brought this action in the district court, seeking to have the Rule's circumscribed disclosure mandate declared invalid as inconsistent with the statute. The district court agreed with CREW We read the statute the same way and thus affirm the district court's decision.”).

161. Cf. Robert Barnes, Supreme Court Strikes Down Limits on Federal Campaign Donations, Wash. Post (Apr. 2, 2014), https://www.washingtonpost.com/politics/supreme-court-strikes-down-limits-on-federal-campaign-donations/2014/04/02/54e16c30-ba74-11e3-9a05-c739f29ccb08_story.html [<https://perma.cc/DY6N-JPG9>] (“The Supreme Court's divisive decision Wednesday striking down a Watergate-era limit on campaign contributions was the latest milestone for conservative justices who are disassembling a campaign finance regime they feel violates free-speech rights.”).

162. *E.g.*, Lochner et al., *Calculating, Credible, or Both?*, *supra* note 15.

When a politically motivated third-party enforcer files an FEC complaint,¹⁶³ the third-party enforcer is seeking formal enforcement, and an FEC fine would be an advantageous outcome. But an FEC fine, in and of itself, is often not the primary outcome sought.¹⁶⁴ Instead, the desired outcome is publicity, ideally in the form of a front-page news story and a headline about the alleged campaign finance violation.¹⁶⁵ The third-party enforcer can then use the story in television and digital advertising to influence voters.¹⁶⁶ Formal enforcement is relevant to the extent that it makes the campaign finance violation alleged more newsworthy and, therefore, more likely to garner that desired front-page news story.¹⁶⁷ Should a third-party enforcer find success in pitching their news story and running their advertisements, forcing violators to address and counter these messages can be much more costly, in both a monetary and political sense, than an FEC fine.¹⁶⁸

Moreover, whether one agrees or disagrees with the assumptions made in the previous studies on third-party enforcement, most of these

163. Third-party enforcers are often political actors. *See supra* Part II.B.

164. This point is especially true given the long timelines for formal enforcement. *See* FEC Memorandum on the Status of Enforcement, *supra* note 80 (reporting that cases took on average 530 days in fiscal year 2020). Often, formal enforcement comes long after the completion of the election cycle when the alleged violation occurred. Gross, *supra* note 71, at 286.

165. *See* Crossroads GPS Complaint, *supra* note 1, at 2 (“Publicizing campaign finance violations and filing complaints with the FEC serves CREW’s mission of keeping the public informed about individuals and entities that violate campaign finance laws and deterring future violations of campaign finance law.”); *cf.* ALAN HUFFMAN & MICHAEL REJEBIAN, WE’RE WITH NOBODY 9 (2012) (explaining that opposition research, “when significant, . . . form[s] the basis for poll questions, news conferences, direct mail pieces or TV ads”).

166. *Cf.* R. SAM GARRETT, CONG. RSCH. SERV., R44319, THE FEDERAL ELECTION COMMISSION: ENFORCEMENT PROCESS AND SELECTED ISSUES FOR CONGRESS 6 (2015) (“[C]ampaigns and other political actors routinely publicize complaints they have filed . . .”).

167. *See* Gaskins et al., *From the FEC to the Ballot Box*, *supra* note 22, at 1001 (acknowledging that the media does not cover campaign finance violations evenly in that the “media are more likely to cover campaign finance impropriety in more high-profile cases and when the violation is more severe”).

168. For example, U.S. Senate candidate Theresa Greenfield imposed costs on Senator Joni Ernst by running advertisements, highlighting that “Ernst was caught knowingly accepting illegal contributions from corporations.” *See* Molly Duffy, *Fact Checker: Theresa Greenfield Blasts Joni Ernst over ‘Illegal Contributions’*, GAZETTE (July 27, 2020, 9:00 AM), <https://www.thegazette.com/campaigns-elections/fact-checker-theresa-greenfield-blasts-joni-ernst-over-illegal-contributions> [<https://perma.cc/QAB8-JP77>]. Ernst and outside groups supporting Ernst spent incredible sums to counter this messaging in a very competitive Senate race. *See* Erin Murphy, *U.S. Senate Race Sets \$234 Million Record in Iowa*, GAZETTE (Nov. 1, 2020, 5:45 AM), <https://www.thegazette.com/subject/news/government/greenfield-ernst-senate-money-election-20201101> [<https://perma.cc/29ZL-RBKS>].

studies are dated.¹⁶⁹ In the contemporary context, the practice of third-party enforcement differs significantly from its previous iterations because both the enforcement context and the practices of third-party enforcers have changed over time. As will be seen in Part III, in the contemporary enforcement context, third-party enforcement plays a significant and beneficial role in enforcing campaign finance violations.

III. THIRD-PARTY ENFORCEMENT ADVANCES FAIR ELECTIONS

In addition to relying upon flawed assumptions, the previous studies on third-party enforcement overlook some of the drawbacks and many of the benefits of the practice in the contemporary enforcement context. At present, the regulatory stakes have never been higher for the FEC. This is clear from the record high rate of political spending seen in the 2020 election cycle.¹⁷⁰ But, at the same time, the FEC fails to adequately enforce campaign finance law, and third-party enforcers fill the resulting enforcement void. In light of this context, this Part first outlines some of the potential drawbacks of third-party enforcement. Then it shows that the positives of third-party enforcement outweigh these issues and ultimately promote fair elections because, at the end of the day, third-party enforcement is a much more forceful deterrent of campaign finance violations than internally generated enforcement.

A. *Drawbacks of Contemporary Third-Party Enforcement*

The highly critical literature on third-party enforcement at the FEC focuses on the drawbacks of the practice. Before outlining the overlooked benefits of third-party enforcement, this Section outlines two commonly overlooked drawbacks of the practice. First, this Section explains how third-party enforcers enforce campaign finance violations unevenly, a significant, overlooked criticism of the practice. Second, this Section notes how opposition to disclosure could make headway, a real threat to the efficacy of the practice.

169. See *supra* note 135 (*Equity and Efficacy in the Enforcement of Campaign Finance Laws* was published twenty-two years ago; *Wheat from Chaff: Third-Party Monitoring and FEC Enforcement Actions* was published thirteen years ago; *The Devil We Know? Evaluating the Federal Election Commission as Enforcer* was published twelve years ago; but *Calculating, Credible, or Both? Third-Party Monitors and Repeat Players in Federal Campaign Finance Enforcement* was published just a year ago).

170. Evers-Hillstrom, *supra* note 31.

1. *An Overlooked Criticism: Uneven Enforcement.* Third-party enforcers enforce campaign finance violations unevenly in both predictable and unpredictable ways in the contemporary enforcement context. First, limits on investigative tools produce predictable underenforcement of certain campaign finance violations and political actors. For example, third-party enforcers struggle to enforce campaign finance violations that cannot be proven through information in the public record.¹⁷¹ Thus, some campaign finance violations, like the prohibition against personal use of campaign funds,¹⁷² will go underenforced or unenforced informally and formally.

Just as some campaign finance violations are underenforced, some political actors may be undermonitored. Enforcing campaign finance violations can be expensive.¹⁷³ Generally, it requires political actors to pay full-time researchers to devote their time and energy to learn about campaign finance law and to monitor potential violators.¹⁷⁴ The most successful researchers also usually have access to paid research subscriptions to aid their pursuits.¹⁷⁵ If researchers spot a campaign finance violation, their political employers may want to hire attorneys to write the related FEC complaint and review the advertisements publicizing the complaint.¹⁷⁶ In this way, political actors must raise and spend campaign funds to enforce campaign finance violations, which could prevent underfunded political actors from effectively monitoring and publicizing the political spending of better funded opponents.

Second, political motivations may cause third-party enforcers to enforce campaign finance violations in unpredictable ways. Politically motivated third-party enforcers want to enforce campaign finance law in order to win elections. This poses a problem for the efficacy of third-party enforcement because while enforcing the campaign finance violations of one's opponent is often conducive to winning an election, sometimes it is not. Enforcing campaign finance violations of an

171. Interview with Samantha McClain, *supra* note 36.

172. See A.P. Dillon, *Cal Cunningham Now Facing FEC Complaint in Addition to Military Investigations*, N. STATE J. (Oct. 14, 2020), <https://nsjonline.com/article/2020/10/cal-cunningham-now-facing-fec-complaint-in-addition-to-military-investigations> [<https://perma.cc/NZ25-943S>] (discussing an FEC complaint against a U.S. Senate candidate where the legal issue turned on whether the travel expenses paid by the campaign were for campaign or purely personal activity).

173. See HUFFMAN & REJEBIAN, *supra* note 165, at 27 (“Opposition research can be expensive—tens of thousands for a congressional campaign or hundreds of thousands of dollars for a presidential campaign—which is why it’s most often used in big-ticket races.”).

174. See *supra* note 117 and accompanying text for an example of a research department.

175. See *supra* note 114.

176. Interview with Samantha McClain, *supra* note 36.

opponent may be disadvantageous when it could distract from a more compelling media narrative or when it could backfire, encouraging an opponent to investigate one's own campaign finance violations. In these instances, third-party enforcers may refrain from enforcing detected campaign finance violations. Therefore, because third-party enforcers enforce campaign finance violations unevenly, third-party enforcement fails to meet the ideal of entirely neutral internal enforcement, even though third-party enforcers have access to reliable campaign finance information at present.

2. *An Impending Pitfall? Opposition to Disclosure.* Looking forward, opposition to disclosure could make headway in light of the amplified effects of disclosure law and a changing Court.¹⁷⁷ Technological advancements, including electronic filing and online disclosure, have amplified the effects of disclosure law.¹⁷⁸ Some argue that “the easy online availability of disclosed campaign finance information . . . heightens concerns about the potential for disclosure to chill constitutionally protected speech.”¹⁷⁹

Compelled by freedom of speech and privacy concerns, some scholars and jurists have even called for limiting or eliminating disclosure requirements.¹⁸⁰ If disclosure requirements are limited or eliminated, third-party enforcers would be stripped of the information that they rely upon to enforce campaign finance violations.¹⁸¹ Limiting disclosure requirements would likely lead to substantively worse third-party enforcement; eliminating disclosure requirements would likely decimate third-party enforcement. Consequently, rising opposition to disclosure law is a real threat to the efficacy of third-party enforcement.

177. The Court has not considered a disclosure law case since the appointments of Justices Neil Gorsuch, Brett Kavanaugh, and Amy Coney Barrett.

178. See *supra* Part II.

179. See Briffault, *supra* note 92, at 274; see also McGeeveran, *supra* note 111, at 7 (“If unthinking support for disclosure is widespread, silence about its privacy costs is nearly universal.”).

180. See Briffault, *supra* note 92, at 295–303 (delineating alternatives to contemporary disclosure law, including “The Anonymity Alternative” and other reforms that would roll back disclosure requirements); *Citizens United v. FEC*, 558 U.S. 310, 482–83 (2010) (Thomas, J., dissenting) (“The success of . . . intimidation tactics has apparently spawned a cottage industry that uses forcibly disclosed donor information to *pre-empt* citizens’ exercise of their First Amendment rights. . . . These instances of retaliation sufficiently demonstrate why this Court should invalidate mandatory disclosure and reporting requirements.”).

181. See *supra* Part II.B.

B. Overlooked Benefits of Contemporary Third-Party Enforcement

That being said, in the contemporary enforcement context, the benefits of third-party enforcement outweigh these drawbacks. Third-party enforcement is ultimately beneficial for the pursuit of fair elections. Presently, “few FEC-initiated cases are ultimately decided in the MUR program . . . whereas this is the most common venue for the enforcement of third-party-initiated allegations.”¹⁸² While it is difficult to measure accurately the rate of serious third-party-generated complaints, the rate of third-party-generated MURs far outpaces internally generated MURs.¹⁸³ As the MUR process handles the most serious campaign finance violations, third-party enforcers are likely pursuing serious campaign finance violations.¹⁸⁴

Third-party enforcers are motivated to pursue more serious campaign finance violations to respond to public demand. A common concern about disclosure requirements is that they “end up compelling the disclosure of information that most of the public do not care about very much.”¹⁸⁵ As explained in Part II, third-party enforcers are often political actors, conducting opposition research to campaign against their opponents. Their ultimate goal is to win elections, so these third-party enforcers focus on issues that the electorate cares most about.¹⁸⁶ While third-party enforcers enforce campaign finance violations unevenly, these third-party enforcers are at least actively trying to publicize the kinds of campaign finance violations that voters care about. Therefore, third-party enforcers serve an important filtering role that the FEC does not (because the FEC cannot disclose information about an enforcement matter until it is closed¹⁸⁷), and some uneven third-party enforcement may be attributable to public demand.

Most importantly, the threat of enforcement by the FEC, unlike in the past, is no longer an effective deterrent of campaign finance violations. The FEC is initiating fewer and fewer MURs each year, as

182. Lochner et al., *Calculating, Credible, or Both?*, *supra* note 15, at 184.

183. *See supra* Part I.B.

184. *See supra* notes 57–58 and accompanying text.

185. BARDACH & KAGAN, *GOING BY THE BOOK*, *supra* note 12, at 249.

186. *Cf.* Isgur, *supra* note 114 (quoting a “former Republican operative” who said “[m]aximum impact” is the “[m]ost important consideration” in determining how to utilize opposition research).

187. Lochner et al., *Calculating, Credible, or Both?*, *supra* note 15.

shown in Part I.B. “[I]t is impossible to account for the underlying incidence of campaign finance violations that occur,”¹⁸⁸ but political actors are likely violating campaign finance law at a rate consistent with or maybe even higher than historical trends due to recent unprecedented political spending.¹⁸⁹ At the same time, the FEC is not detecting and enforcing these violations. It is overwhelmingly unlikely that the FEC will investigate a given political actor, and political actors know this.¹⁹⁰ Consequently, the forceful deterrent of the threat of detection is almost entirely lacking at the FEC,¹⁹¹ while third-party enforcement, though predictably and unpredictably uneven, is a real threat.

Because the threat of FEC enforcement is diminished, politically motivated third-party enforcers surely do not have to file “frivolous” complaints to misdirect the FEC. Previous studies suggest that since “an hour of the FEC’s time spent on dealing with a frivolous complaint against an opponent means one less hour they can spend investigating you,” politically motivated third-party enforcers file “frivolous” complaints to misdirect the FEC.¹⁹² In the contemporary context, though, it would be a waste of time for the third-party enforcers to misdirect the FEC with “frivolous” complaints, given that the FEC initiates so few enforcement proceedings anyway.¹⁹³ Further, even if the previous studies are correct and third-party enforcers file some “frivolous” complaints, the FEC uses its prosecutorial discretion to dismiss these complaints, and, unlike in the past, the Administrative Fine and ADR processes can dispose of these complaints.¹⁹⁴

188. *Id.* at 187.

189. *See supra* notes 29–31 and accompanying text.

190. *Cf.* Gaskins et al., *From the FEC to the Ballot Box*, *supra* note 22, at 1005 (“[A]most no one believes that the FEC at present credibly deters would-be violators.”). For example, the FEC has not found probable cause of a violation of coordination laws since the *Citizens United* decision in 2010. FEC, RESPONSES TO QUESTIONS FROM THE COMMITTEE ON HOUSE ADMINISTRATION 24 (May 1, 2019), https://www.fec.gov/resources/cms-content/documents/FEC_Response_to_House_Admin.pdf [<https://perma.cc/VPG5-L8P2>]. Therefore, a political actor does not need to worry about the FEC enforcing coordination laws against them.

191. *See, e.g.*, Lochner et al., *Wheat from Chaff*, *supra* note 11, at 218 (“[T]he probability of detection can be more important in deterring legal violations than the probability or severity of sanction.” (citation omitted)).

192. Lochner et al., *Calculating, Credible, or Both?*, *supra* note 15, at 182–83.

193. *But see* Gaskins et al., *From the FEC to the Ballot Box*, *supra* note 22, at 1027 (“[I]f an allegation and a conviction are synonymous in the eyes of the voters, there are strong incentives to bring overzealous and possibly frivolous accusations against one’s political opponents.”).

194. *See supra* Part I.A.I.

Moreover, the FEC appears unwilling or unable to enforce the law. Third-party enforcers, in contrast, pursue serious campaign violations because they have the tools and motivation to do so.¹⁹⁵ While third-party enforcement is “no substitute for an adequately funded agency with independent investigative authority,”¹⁹⁶ at present, it is the primary deterrent against violating campaign finance law. The FEC rarely detects and enforces campaign finance violations; third-party enforcers detect and enforce, albeit unevenly. Therefore, while third-party enforcement is imperfect, contemporary third-party enforcement advances the pursuit of fair federal elections. And it will likely continue to do so, unless the Court or Congress limits or eliminates disclosure law. With that potential pitfall in mind, third-party enforcement is beneficial to the enforcement of campaign finance law overall in the contemporary enforcement context.

IV. PROPOSALS TO IMPROVE ENFORCEMENT AT THE FEC

Not only does third-party enforcement advance fair elections, but it also highlights ways in which the FEC can improve its enforcement processes and strive for fairer elections. The FEC should capitalize on the benefits of third-party enforcement. To do so, the General Counsel of the FEC should alter its EPS.¹⁹⁷ The General Counsel “rates all incoming cases against objective criteria” supplied by the EPS.¹⁹⁸ MURs with high ratings are investigated; MURs with low ratings are dismissed.¹⁹⁹ Since the FEC utilizes the EPS as part of its prosecutorial discretion,²⁰⁰ ensuring that the General Counsel changes the EPS may require an executive or congressional mandate.²⁰¹ Whether mandated to do so or not, the General Counsel should alter their EPS in two ways. First, third-party complaints should be rated according to their use of evidence in the public record. Second, alleged campaign finance

195. See *supra* Part II.

196. Lochner et al., *Calculating, Credible, or Both?*, *supra* note 15, at 195.

197. See FEC, GUIDEBOOK 2012, *supra* note 8, at 11 (“[The Office of General Counsel] evaluates the complaint and response, if any, using objective criteria approved by the Commission under its Enforcement Priority System.”).

198. Press Release, FEC, Compliance Cases Made Public, *supra* note 53.

199. *Id.*

200. See *supra* note 149 and accompanying text.

201. Since the EPS is confidential, *supra* note 50, the public will only know of alterations to the EPS if there is an executive or congressional mandate calling for an alteration, or if the FEC discloses relevant information.

violations that implicate new campaign technologies should be more highly rated. The commissioners will have to approve these alterations and may seek public comment on them.²⁰²

First, at the outset, the General Counsel should consider whether a third-party complaint can be substantiated by information in the public record when rating a complaint under the EPS. “Frivolous” complaints are presumably based upon bad evidence or no evidence at all, while meritorious complaints are based on information in the public record. As a preliminary matter then, the General Counsel should rate a third-party complaint according to its use of evidence in the public record,²⁰³ rating a complaint higher based upon the quantity and quality of such evidence.²⁰⁴ In reviewing a complaint, the General Counsel should ask: is this the kind of information that the complainant would be able to find online (or elsewhere)? If the answer is yes, then this would weigh in favor of investigating the complaint. While some serious campaign finance violations cannot be proven based upon the public record alone,²⁰⁵ this alteration to the EPS would fast-track

202. The FEC has “broad discretion to determine how to proceed with respect to complaints.” Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process, 72 Fed. Reg. 12,545, 12,545 (Mar. 16, 2007). The EPS is an exercise of this discretion, *see id.* at 12,545–46, and the FEC can alter the EPS as it sees fit, *cf.* FEC, GUIDEBOOK 2012, *supra* note 8, at 11 (noting that the EPS’s “objective criteria [are] approved by the Commission”). In 2003 and 2008, the FEC chose to seek public comment on alterations to the objective criteria considered under the EPS. *See* Enforcement Procedures, 68 Fed. Reg. 23,311, 23,314 (May 1, 2003) (“Should the Commission give lesser or greater priority to cases that require complex investigations and/or raise issues where there is little consensus . . . ? Since cases involving these issues often involve large amounts of spending, . . . should these be the cases given high priority?”); Agency Procedures, 73 Fed. Reg. 74,494, 74,498 (Dec. 8, 2008) (same).

203. The FEC has used a similar approach to filter out other kinds of complaints categorically. In 2001, the General Counsel proposed altering the EPS and the Public Financing Enforcement Priority System to allow for “quickly disposing of matters clearly falling within the media exemption regulations.” Memorandum from Lois G. Lerner, Acting Gen. Couns., FEC, to FEC on Modifications to the Enforcement Priority System and Public Financing Enforcement Priority System for Media Exemption Cases (Jan. 26, 2001), https://www.fec.gov/resources/cms-content/documents/letter_to_Committee_on_House_Administration_July_25_2013.pdf [<https://perma.cc/JDN4-2TK5>]. The General Counsel proposed categorizing complaints that “clearly” fell within the media exemption to be identified under “Category A. Initial Considerations - Preliminary” and to be “included in the next case closing report” before further EPS ranking. *Id.* The method proposed here would maintain a rating system, rather than a categorical approach.

204. Third-party enforcers monitor, build, and substantiate campaign finance complaints with information from common research subscriptions and services (OpenSecrets.org, Political MoneyLine, LexisNexis, among many others) that are less reliable than public records. *See supra* note 122 and accompanying text. For this reason, the rating system should account for the quality, as well as the quantity, of substantiation.

205. *See supra* notes 171–172 and accompanying text.

meritorious complaints, with the added benefit of sifting out “frivolous” third-party complaints.

Second, the General Counsel should weigh the implication of new technologies, like digital advertising, as an objective criterion under the EPS. Political spending on digital advertising is skyrocketing.²⁰⁶ In 2012, digital advertising comprised just 1.4 percent of all political spending, at around \$159 million.²⁰⁷ In 2016, digital advertising comprised 14 percent of all political spending, at around \$1.4 billion.²⁰⁸ As this trend will likely continue, and assuming that more campaign spending leads to more campaign finance violations, the FEC should shift its attention to this next frontier.²⁰⁹

To do so, the General Counsel should rate a complaint that involves new technologies more highly under the EPS. This alteration to the EPS capitalizes on third-party enforcement, as third-party enforcers are more knowledgeable about new technologies and, therefore, more likely to detect campaign finance violations involving new technologies than the FEC.²¹⁰ The FEC should investigate these matters in order to familiarize itself with the issues arising in new technologies and to increase its efficiency over the long run, preparing for a future political landscape where even more political spending is directed toward new campaign technologies.

Moreover, these are just two examples of how the FEC can alter the EPS to capitalize on the benefits of third-party enforcement. These simple and noncontroversial alterations could improve the efficacy and efficiency of FEC enforcement overall.

CONCLUSION

During the 2020 election cycle, when there was unprecedented political spending on federal campaigns, enforcement at the FEC was,

206. See Erika Franklin Fowler, Michael M. Franz & Travis N. Ridout, *Online Political Advertising in the United States*, in *SOCIAL MEDIA AND DEMOCRACY* 128 (Nathaniel Persily & Joshua A. Tucker eds., 2020) (documenting that in 2018, digital spending accounted for more than 20 percent of all political ad spending).

207. *Id.*

208. *Id.*

209. See *id.* at 120 (“The importance of establishing regulatory clarity for online political ads was on display in 2016 when Russian-backed interests purchased political ads on Facebook.”).

210. Cf. Sara Morrison, *Why Are You Seeing This Digital Political Ad? No One Knows!*, *VOX* (Sept. 29, 2020, 8:50 AM), <https://www.vox.com/recode/2020/9/29/21439824/online-digital-political-ads-facebook-google> [<https://perma.cc/4S8Q-8LPA>] (explaining that, since there is no “ad archive requirement,” law enforcement cannot effectively pursue “potential law-breaking”).

and remains to this day, ineffective. Since the late 1990s, the number of MURs initiated each year has remained relatively constant, but the percentage of internally generated MURs has declined precipitously. As a result, contemporary third-party enforcement, shaped by robust federal disclosure law and technological advancements, plays an increasingly important role in deterring campaign finance violations. Fortunately, third-party enforcement is much more efficacious than portrayed in the literature. This Note proposes that the FEC improve its enforcement processes and strive for fairer elections by capitalizing on the benefits of third-party enforcement of campaign finance violations.