The Federal Election Commission

Government Astride the Political Process

John R. Bolton

THE FEDERAL ELECTION Commission (FEC) has been on the watch for "corruption or the appearance of corruption" in federal election campaigns for some three years now —long enough so that we can begin to assess its performance. This assessment is especially important for at least two reasons. First, the Federal Election Campaign Act Amendments of 1974 (under which the commission was established) are attacked as an "Incumbents' Protection Act" and, if the attack is justified, thus represent an interesting extreme case of regulation for the benefit of those being regulated.

Second, campaign speech comes under the free speech guarantees of the First Amendment, and a regulatory commission whose duties impinge upon First Amendment rights should be subjected to greater scrutiny than a regulatory commission whose duties involve (say) railroad rate-setting. The Supreme Court has consistently limited the discretionary authority of government agencies whenever that authority might "chill," or deter, citizens from exercising their First Amendment rights. By contrast, agencies concerned with economic regulation have been granted broad latitude. To see the reason for the difference we need only note that Mr. Justice Frankfurter, while staunchly denying the "preferred position" of First Amendment rights, found such rights to be "the indispensable conditions" of an open society and deserving of a "respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements" (*Kovacs* v. *Cooper*, 1949).[1] Because the FEC is concerned with more than the "shifting economic arrangements" handled by the ICC, its actions should be more carefully restrained.

The FEC, established in 1975, has the power (upon the request of certain persons and committees) to issue advisory opinions, to promulgate regulations, and to set federal policy for campaigns whose outcome is election (or nomination for election) to the presidency, the Senate, or the House of Representatives. In addition, it has the power (and responsibility) to investigate complaints filed with it and to conduct investigations in the absence of a complaint when it has reason to believe that the Federal Election Campaign Act has been violated. If the alleged offender does not disprove the charge or enter into a "conciliation agreement," the commission can institute civil suits and seek declaratory relief and civil fines.

This authority is conferred by the 1974 amendments to the Federal Election Campaign Act. The act's purposes, as deduced from the legislative record by the Supreme Court in *Buckley* v. *Valeo* (1976), are to prevent "corruption and the appearance of corruption" in the financing of candidacies for federal office. Yet, much of the act and much of what the FEC has done are unrelated to these purposes.

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[1] I assume, for purposes of this article, the "preferred position" of the First Amendment within the framework of constitutional jurisprudence. Whether it deserves such a position and, if it does not, whether there should be more regulation of the marketplace for ideas or less regulation of the marketplace for goods and services, are questions I leave for another day.

In discussing how the Federal Election Campaign Act has operated, it is sometimes difficult to distinguish between the deficiencies of the statute on the one hand and the FEC's excessive discretion on the other. Indeed, in many cases, the problems I wish to address are caused by a third factor—the impossibility of fair and equitable regulation of campaign financing under *any* statute as administered by *any* commission. In what follows I discuss each of these three factors, largely by reference to examples of commission action that, as a lawyer who practices before the FEC, I believe best illustrate the commission's problems. If the examples are among the more egregious that could be cited, they nonetheless seem to typify the commission's general approach to regulation. Moreover, they pertain to the areas of the law that should be of greatest concern if the protections of the First Amendment are to apply fully in partisan politics.

Problems with the Statute

The unfairness of the campaign finance law comes through in many ways. As I have argued elsewhere, its low contribution limits favor incumbents while discriminating against challengers, and its burdensome disclosure requirements needlessly complicate campaigns, a matter of more importance to the inexperienced challengers than the experienced incumbents (*Vanderbilt Law Review*, November 1976). But even more important than its favoring incumbents, the law treads dangerously near to favoring government in general at the expense of First Amendment rights.

The Legislative Veto. Fundamental to any analysis of the FEC is the provision in the statute that gives either house of the Congress the right to veto proposed FEC regulations. The Congress retains, in other words, the final decision over whether the agency can implement its proposals. Critics of the use of the legislative veto in the campaign finance law charge that it provides incumbents with a way to dominate the process by which the statute is administered and enforced. As the American Civil Liberties Union put it, the statute is "like a football game where the home team makes up all the rules. . . ."

As we shall see, Congress proved the correctness of this charge by using its veto to reject the first two sets of regulations proposed by the commission. Since then, the FEC has danced gingerly around any question involving incumbents. In a statute designed to enhance

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"Hit him again with the deodorant!"

the integrity of the electoral process, there is simply no place for the legislative veto—a provision that can only help the "ins" at the expense of the "outs."

Vagueness in the Statute. A second basic problem with the statute is that it is so poorly drafted that even if the FEC were reluctant to use its discretion (which it plainly is not), the statute would virtually compel unguided bureaucratic choices in important matters that should have been reserved for formal legislative judgment. Indeed, there is so much vagueness and uncertainty that agency responses to critical questions—left unanswered in the statute—can determine whether a candidate spends six years in the New Senate Office Building or one year in Lewisburg. It cannot be too heavily stressed that, because "First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity" (*NAACP* v. *Button,* 1963). If the Federal Election Campaign Act is narrowly specific, I for one would doubt that any act could be considered vague.

At the heart of the vagueness problem lie two terms central to almost every provision of the act—"contribution" and "expenditure." The FEC's varying treatment of these terms offers a classic example of the excessive discretion granted under the statute.[2]

Following the Supreme Court's decision in *Buckley* v. *Valeo* (which upheld the statute's ceilings on campaign contributions but found its limits on campaign expenditures unconstitutional), the question arose whether contributions to "independent expenditure committees" (committees making independent expenditures for or against candidates, which means expenditures not made in coordination with a candidate's campaign) were subject to contribution limits. Many believed that they were not. Their argument was that the Supreme Court had sustained the constitutionality of contribution limits only because of the supposed compelling governmental interest in preventing corruption and the appearance of corruption, and had struck down limits on independent expenditures on the grounds that these expenditures did not have the same potential for corrupting or appearing to do so. Insofar as the potential for corruption was concerned, therefore, contributions to independent groups were functionally the same as independent expenditures.

The commission did not see it that way. It first held that contributions to independent expenditure committees were subject to the same contribution limits that were applicable to any political committee—$5,000—regardless of its activities (draft response to Advisory Opinion Request [AOR] 1976-20). Later, however, the commission changed its mind. In the version of its opinion eventually adopted, it held that independent expenditure committees supporting only one candidate could not accept contributions in excess of $1,000. It further held that the amounts an individual had contributed directly to a candidate were chargeable against the $1,000 limit that individual might contribute to an independent committee also supporting that candidate. Thus, if someone gave $500 to a candidate, he could give no more than $500 to an independent committee whose only activity was to support this candidate. Not only is such a result illogical—the same person might contribute $1,000 directly to a candidate and then make *unlimited* independent expenditures—but it amply demonstrates what statutory vagueness can lead to. The commission completely reversed its position and severely limited the freedom of action of independent committees. The FEC's tergiversations would be entirely inexcusable were it not that it had no guidance whatsoever from the Congress in this area.

To give yet another example of statutory vagueness, the Federal Election Campaign Act treats any expenditure made in coordination with, or under the supervision of, a candidate and advocating that candidate's election (or his opponent's defeat) as a contribution to the candidate and therefore limited to $1,000 per individual. Should such an expenditure be made without the candidate's consent or without coordination with his campaign, it is an "independent expenditure" and can be made without any limit.

[2] The Supreme Court of Missouri recently declared unconstitutionally vague the definitions of "contribution" and "expenditure" contained in that state's election law (*Labor Educational and Political Club—Independent* v. *Danforth,* 1977). The Missouri statute used the same definition for both terms. Interestingly, the federal statute comes very close to doing the same thing—which suggests that a constitutional challenge on vagueness grounds might well be appropriate in its case also.

Now, during a campaign any well-informed person can know a great deal about a candidate, his strengths and weaknesses, and how he hopes to get elected—without ever coming anywhere near the candidate or his staff. No one has yet suggested that such a person is disqualified from making independent expenditures. The FEC, however, has said that

> individuals in attendance at [a party] where a representative of [a] campaign appears and communicates information about campaign plans, projects or needs may have been precluded from making independent expenditures on [that] candidate's behalf. . . . [Opinion Request (O/R) #786]

This rule apparently applies even though a person reading the same information in a newspaper the next morning would in no way be precluded from making independent expenditures. Perhaps even more disturbing, the FEC's opinion does not state that an individual must have actually heard the information being imparted—only that he must have been present. The prospects this raises—in the context of actual enforcement proceedings—for detailed probing into the private lives of citizens are sobering at best.

Problems with the Commission

Enforcement Priorities. The commission devotes large amounts of its resources to pursuing the most trivial kinds of violations. It gives considerable attention, for instance, to the so-called non-filers—federal candidates who have failed to register with the commission, failed to file the proper disclosure reports, or failed to establish principal campaign committees, as required by the statute. To date, the commission has instituted over 100 civil suits against non-filers.

These candidates are typically third-party or independent candidates, or candidates seeking the nomination of one of the two major parties. They include no incumbents. Only a tiny minority of them win more than a minuscule share of the vote, and their expenses are typically trivial. The FEC has, for instance, instituted civil suits against members of the Socialist Workers party, the Prohibition party, La Raza Unida, and the Communist party. As former Senator McCarthy remarked about such suits:

> If you are waiting for an FEC investigation of the link between campaign contributions and the cargo preference bill or a check of bank loans to the Carter campaign, remember that the Commission is burdened with more important work.

Defenders of the commission's policy argue that proceeding against non-filers encourages "voluntary compliance." Moreover, if the commission does not institute proceedings, they say, the statute will fall into disuse as did its predecessor, the Corrupt Practices Act. One wonders, however, what kind of example the commission is setting when it proceeds against the least powerful and least popular federal candidates—when, in effect, it is prosecuting the widows and orphans of the political process.

It might be asked why the commission concentrates *any* of its resources on such candidates. In *Buckley*, the Supreme Court held that the compelling governmental interest that justified contribution limits was the prevention of corruption and the appearance of corruption—that is, the statute was designed to prevent the securing of any political *quid pro quos*. If a candidate does not hold public office—indeed, never had a serious chance of reaching that office—harassment will do nothing to prevent corruption. Defeated candidates (no matter who owns them) cannot affect government policy. They have no *quos* to exchange for any *quid*. If the commission is to have any comprehensive strategy, it should be the repeated and careful scrutiny of incumbents.[3] But that, of course, would send the commission straight into history's wastebasket.

Some Candidates Are More Equal Than Others. One consistent theme in commission pronouncements is that whenever the statute offers the option, the commission rules in favor of incumbents. This pattern is based on unhappy experiences of the FEC's childhood, against which it has been guarding ever since. The very first set of regulations it proposed provided for close regulation of, and limitations

[3] The FEC gives considerably more attention to presidential candidates receiving public subsidies than to congressional candidates, in large measure because of statutory requirements.

on, congressional "office accounts." The Senate, making use of the legislative veto, promptly torpedoed those proposed regulations. As time passed, the commission made revision after revision to the regulations, in the course of which substantive limitations on the office accounts disappeared. Only disclosure now remains. In short, Congress got its way.

The FEC's files abound with similar results. For example, Congress provides funds (by legislative appropriation) for various partisan research groups whose output is available almost exclusively to incumbents. Challengers either have to rely on volunteer researchers or have to purchase such services. Nevertheless, the FEC found it permissible for incumbent members of Congress to use public funds in ways ultimately useful to their reelection efforts (Advisory Opinion [AO] 1976-34). If an employee of a corporation takes a leave of absence from his job to run for federal office and the corporation continues to pay his salary, the corporation has made an illegal contribution (AO 1976-70). Yet when a member of Congress runs for reelection, his salary is paid by the government and lawfully available to him to spend on his campaign. Thus, while incumbents have control over their own incomes, the FEC is busily restricting what challengers can do with theirs.

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Enforcement Procedures. Unfortunately, the adverse effects of commission activities are not felt only when the FEC brings civil litigation in federal court. Enforcement proceedings before the commission sometimes verge on the Kafkaesque. Although the campaign act, reflecting some sensitivity to First Amendment concerns, requires that respondents in these proceedings be given a "reasonable opportunity to demonstrate that no action should be taken" against them, in practice that requirement provides precious little protection. By its actions, the commission has effectively vitiated the intended procedure.

The person involved typically learns that an enforcement action has been commenced against him or her by receiving a letter signed by the commission's general counsel. If the investigation was triggered by a complaint, a copy of the complaint should be included with the notification (although this does not always happen). The notification letter states that the commission has found "reason to believe" that a violation of the statute has occurred. Ascertaining what the alleged violation is supposed to be, however, is not so easy as one might think. The supposed offense is described in the most cursory language, often merely tracking the words of the statute. In the course of an investigation, a respondent may try repeatedly to find out the exact nature of his or her alleged offense, all to no avail.

As respondents cope with interrogatories, notices of depositions, and requests for production of documents that pour out of the commission, they remain in the dark as to what information the commission has turned up from other sources, how much of it is true, half-true, or completely false, or what bearing it has on the compliance action. The discovery activity proceeds at an erratic pace, sometimes interrupted by months of silence, until the respondent is informed that the commission has found "reasonable cause to believe" that a violation has occurred. This finding moves the investigation into a new stage: either the commission and the respondent must enter into a "conciliation agreement" or the commission must decide whether to institute a civil suit seeking injunctive relief and possibly a civil fine.

The respondent's options at this stage are extremely limited. If he chooses to enter into a conciliation agreement, he must admit the alleged violation, probably pay a fine, and promise to comply with the statute. (Note that the commission has repeatedly refused to agree to the common "consent decree" approach, where the alleged violator neither admits nor denies the violation but promises not to engage in the prohibited activity in the future.) If he chooses instead to go to court, the question that has been pursued confidentially until this point

will be pursued in public proceedings. Many respondents would prefer to have their admission of a violation buried in the commission's file (even though that file is available for public inspection and even though the fact of a violation may return to haunt them in later campaigns), rather than risk the publicity of proceedings in open court. In such circumstances, it should come as no surprise that, once again, the respondent has little chance to present a case.

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Nowhere in these procedures can one find the required "reasonable opportunity to demonstrate that no action should be taken." Since the respondent usually cannot be certain what the alleged offense is, it is difficult to demonstrate that it did not occur. Even if fully aware of the supposed violation, the respondent cannot respond to evidence that is kept from him. Moreover, he risks making statements or revealing evidence that the commission can readily use against him. This risk is by no means trivial. Since the respondent does not know what facts the commission has or how it is interpreting them, the commission has considerable flexibility to shift its position in light of the arguments made by the subject of the investigation.

The commission's defenders are quick to point out that its procedures are not substantially different from those of other regulatory agencies. Even if that were true, it misses the critical point. The Federal Election Commission is—*must be*—different from other agencies, because it regulates political speech, not railroad rates. If the commission continues to operate in its present fashion for any substantial period, it must be assumed that the chilling effect of its actions on political speech will be more and more widely felt, though the most important adverse consequences of its actions will remain invisible: political activity that is stifled before it can take place will not be missed.

Inconsistency and Unreasoned Decisions. The FEC's advisory-opinion power appears, at first blush, to be a means of reducing the vagueness that permeates the statute. Unfortunately, exactly the opposite is true. The commission's advisory opinions have been almost a random walk through various possible outcomes.

Consider what happens when a candidate wants to tie his campaign to that of his party's candidate for President. Representative (now Mayor) Edward Koch of New York, running for reelection to Congress in 1976, had what would seem to be a relatively simple idea: why not manufacture some buttons that read "Carter-Mondale-Koch" and distribute them to his constituents? This was hardly a novel or potentially corrupt campaign tactic; nonetheless, the question whether to permit Representative Koch to distribute his buttons was a perplexing one for the FEC.

The problem arose because candidate Jimmy Carter had chosen to accept federal subsidies for his general election campaign. Accordingly, by the terms of the statute, private contributions to his campaign were not permitted. Were "Carter-Mondale-Koch" buttons forbidden contributions, or were they permissible "independent expenditures" by Representative Koch—that is, expenditures made by a person not under the control of or in coordination with the candidate supported or opposed? For weeks, the commission deliberated.

Finally the FEC decided that Representative Koch could use the buttons. But its opinion permitting the buttons to be used, a truly Delphic pronouncement, offered no explanation for the decision (Re: AOR 1976-78). The FEC later ruled similarly—without explanation—in a different case and permitted a congressional candidate to issue a brochure containing a picture of the presidential nominee of the candidate's party (Re: AOR 1976-82).

Next came the case of Representative Parren Mitchell of Maryland, also running for reelection to the House in 1976. He proposed to purchase a newspaper advertisement on behalf of his candidacy and to include in that advertisement pictures of the Democratic presidential and vice-presidential nominees and the Democratic Senate candidate in his state. Opined the FEC:

> It is clear that Mr. Mitchell's campaign cannot pay the entire cost for the described

> advertisements, since a portion of such a payment would be necessarily regarded as an in-kind contribution to the Carter/Mondale ticket.... [Re: AOR 1976-93]

In its letter to Representative Mitchell the FEC made no mention of its two earlier opinions on the same subject. It did not distinguish those earlier decisions from the later one, it did not overrule them, and it plainly did not follow them.

Consider next what happens if a "public interest" group wishes to provide a campaign platform for some, but not all, of the candidates for a federal office. When the League of Women Voters' Education Fund offered to sponsor a series of debates between President Ford and Governor Carter, the FEC issued a "policy statement" on August 30, 1976, explaining the constraints imposed on the debates by the statute. That statement provided that the Education Fund's expenses would be treated neither as contributions to candidates Ford and Carter, nor as expenditures (independent or otherwise) on their behalf; moreover, those expenses would not need to be publicly reported or disclosed. Such a result would seem to indicate that the debates were simply not regulated by the statute. However, the policy statement went on to forbid the Education Fund from accepting direct corporate or union contributions earmarked for the debates. At the same time, the statement permitted such contributions in unlimited amounts from other sources (including corporate and union political action committees). The FEC adopted the restriction on direct corporate and union contributions for the debates despite its earlier acquiescence in an opinion by its general counsel permitting them for the League of Women Voters' debates among candidates for the Democratic presidential nomination.[4]

The FEC never explained its shift on this point. Its policy statement did not address the question whether presidential candidates *not* invited to appear in the debates had been discriminated against. Instead, it offered only the following cryptic statement, unaccompanied by any explanation:

> Unlike sponsorship of an appearance by a single candidate, the unavoidable impact of which is to advance the chances of that candidate's election, the debate described in the League's proposal does not involve that kind of advocacy or assistance to a campaign to which the Act's contribution limits are directed.

But surely, if sponsoring *one* candidate's appearance advances the candidate's chances for election, it follows that sponsoring *two* candidates' appearances advances one or the other (or both) of their chances for election—and does so at the expense of candidates who do not receive an invitation to appear. Many political analysts now describe the debates as the central feature of the 1976 presidential election. Excluding any candidate thus necessarily diminished that candidate's chances. Surely, then, the League of Women Voters did make "contributions" to the Ford and Carter campaigns—"contributions" well in excess of the applicable limits. Nonetheless, with the FEC's approval, the debates proceeded.

One reason that a democratic society accepts decisions made by nonelected officials (judges, agency officials, and so on) is that these decision-makers can be expected to supply the reasons for their actions. This expectation provides legitimacy for what might otherwise be essentially unaccountable power. By failing to explain itself, the commission has circumvented a major barrier that citizens have erected against the arbitrary use of power. The flat contradictions among the commission's rulings have erected a different kind of barrier—one that will deter individuals from engaging in political speech. After all, if a candidate's supporters do not know what they are allowed to do—or, especially, to say publicly—they are likely to choose being safe to being sorry.

Ignoring Judicial Decisions Interpreting the Scope of Permissible Regulation. In several decisions, all of them unanimous, federal courts have held unconstitutional the application of campaign regulation to nonpartisan, issue-oriented speech by groups such as the American Civil Liberties Union (ACLU). In one case, a three-judge panel of the U.S. District Court for the District of Columbia narrowly construed the reporting and disclosure provisions of the 1971 Federal Election Campaign Act, holding them not applicable to ACLU dis-

[4]The FEC has recently reversed itself again by proposing a new regulation to permit corporate and union contributions, in certain circumstances, for debates.

cussions of the voting records and actions of public officials (*American Civil Liberties Union* v. *Jennings*, 1973, which the Supreme Court declined to review on grounds of mootness in *Staats* v. *ACLU*, 1975). Later, the U.S. Court of Appeals for the District of Columbia unanimously declared unconstitutional a provision of the 1974 campaign act amendments that would have forced reporting and disclosure by such groups as the ACLU and the League of Women Voters (*Buckley* v. *Valeo*, 1975). And finally, the Supreme Court in *Buckley* (1976) carefully limited the act's disclosure provision concerning independent expenditures so as to avoid deciding their constitutionality. The Court read the statute as requiring disclosure only when there was explicit advocacy of a candidate's election or defeat—as with the use of words such as "vote for" or "elect."

Undeterred by these decisions, the FEC is proceeding to regulate what the federal judiciary has ruled may not be regulated. In three separate rulings, one issued to the Sierra Club and its political committee and two issued to the United States Chamber of Commerce, the FEC has applied disclosure requirements to the following activities: the publication and distribution of voting records together with indications that the votes were "correct" or "incorrect"; the preparation, distribution, and publication of answers to questionnaires which are then made available to the general public; and the preparation of candidate "profiles" that evaluate a candidate's performance but do not explicitly advocate his election or defeat.

In addition, the commission has instituted an enforcement action against a group known as the Central Long Island Tax Reform Immediately Committee (TRIM). TRIM had published a brochure attacking the voting record of Representative Jerome A. Ambro on economic and tax legislation. Although it was highly critical of Representative Ambro's positions in Congress, the brochure contained not one word of electoral advocacy. On the contrary, it merely urged citizens to contact the member and his staff and to make their views on these matters known to him. Nonetheless, and consistent with its rulings in the Sierra Club and Chamber of Commerce cases, the commission held that there was "reason to believe" that TRIM had violated the statute. The total amount of money expended by TRIM in committing its alleged violation was $135. There is every indication that the commission takes this outbreak of free speech seriously. At last report, it had voted to institute litigation against TRIM and its chairman.

The commission is *not* required by statute to take so unremittingly hostile an attitude to independent free speech. It has done so by its own decision—and in the teeth of contrary judicial precedent. Whenever presented with a choice between more freedom of speech and less, the commission—as demonstrated by examples too numerous to catalogue in this article—consistently chooses less.

Problems with Regulating Politics

Much has been written about the unseen economic costs—passed on to consumers—generated by the need to comply with government regulations and to defend against enforcement proceedings. Where large corporations are involved, of course, the available "deep pocket" covers the costs without much visible protest, secure in the knowledge that those costs will ultimately be borne largely by others.

Politically active citizens, however, are not so likely to possess a pocket deep enough to cover the costs of litigation or agency enforcement proceedings. Typically, political activity is characterized by its spontaneity, with most of it not intended to extend beyond one election cycle. Even the national committees of the two major political parties have only recently equipped themselves to handle the numerous legal problems raised by the statute. They, and the House and Senate campaign committees of both parties, can assist their candidates and supporters in meeting the burdens of compliance only in a very limited way. The individual citizen, the third-party or independent candidate, or the primary challenger does not have even this minimum amount of potential help.

The respondent in a commission enforcement proceeding is therefore faced with a difficult choice. As we have noted, he can try to mitigate his problem by acquiescing in the commission's finding that a violation of the statute has occurred, or he can resist—in which case he involves himself in a proceeding that may be expensive and, depending on the media reaction, politically risky. Many political commit-

tees choose the first option. While the cost to individual candidates may be quite small, the cumulative effect on the political process of numerous surrenders to the commission's authority is likely to be immense.

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But costs are not the only problem. If they were, campaign regulation might be no more onerous than the regulation of small businesses. Several characteristics differentiate politics from other activities subject to federal regulation. First, and most important, political campaigns have definite endings. Although campaigning, particularly for the presidency, has become an increasingly lengthy process, it still ends on election day. Second, no matter how much preparation a candidate may make, it will not be until the campaign itself that most of the difficult legal questions concerning campaign financing will arise and need answering. The time-consuming style of regulation typical of other federal agencies is thus a luxury that the Federal Election Commission cannot afford, except *after* a particular campaign has concluded. Third, campaigns are not highly structured corporate bureaucracies. They often engender spontaneous activity well beyond the effective control of the candidate or his staff.

These characteristics render the administrative-agency model employed in other regulatory endeavors unsuitable for the regulation of politics. Both the political actors and the commission operate in an atmosphere that precludes the calm, reflective decision-making that we like to think is appropriate for quasi-judicial bodies. Some have tried to take short cuts, but these efforts raise problems of their own.

For instance, many people, hoping to avoid incurring extensive legal fees (and waiting inordinate lengths of time for responses) before engaging in what had previously been thought to be normal political activity, have simply called the FEC on the phone or met informally with its employees. Attorneys who deal with the FEC on a regular basis know well that an informal call to the agency will produce one answer one day and a contrary answer the next. And the risks of relying on these informal contacts have now been graphically demonstrated. The Gun Owners of America (GOA) believed it had obtained FEC approval for a plan involving financial arrangements with two affiliated committees. (The details of the arrangements are too complicated to detain us here.) Then, to its surprise, the FEC charged it with a violation of the statute and levied a record fine of $11,000. In reporting to the full commission on this case, FEC General Counsel William C. Oldaker stated, "Conversations held between Respondent's counsel and Commission staff would not limit Commission enforcement action. . . ." The imposition of a record fine in this case—despite the fact that GOA was clearly attempting to comply with the statute—says something about the way this FEC does business. But the problems inherent in relying on informal opinions, along with the inappropriate length of time needed for formal opinions, say something more important about applying the regulatory commission model to the political process. It should not be done.

Nor are there any grounds for believing that the situation will improve—though the commission's defenders have been quick to argue that many of its problems were caused by circumstances surrounding its first several years. (The FEC did not come into existence until several months after the effective date of the statutes it was designed to enforce; it was immediately embroiled in litigation challenging the constitutionality of those statutes and of the commission itself; finally, the Supreme Court declared unconstitutional major portions of the substantive law, as well as the very process by which the commission was appointed. Moreover, when the FEC was recreated, further changes were made in the substance of the law, and the 1976 primaries were then well underway.) With those difficulties behind it, according to the commission's defenders, it can turn to curing the vagueness of the Federal Election Campaign Act and to constructing a comprehensive regulatory framework.

There are at least two reasons why this will not happen. Most important, the defense assumes that politicians are essentially uncreative. The evidence we have, however, shows

them to be at least as creative as the business managers regulated by the traditional administrative agencies. Each pronouncement by the FEC will prompt some politician to devise a response, to which the commission will itself respond, and so on. The day may come when the FEC has solved all the questions that may arise, but that will be the day when politicians are no longer interested in holding elective office.

In addition, it is the purest whimsy to believe that Congress will refrain from further tinkering with the statute. In this sense, those who argue that the major problem in FEC regulation lies with Congress rather than the commission have a compelling point. Congress simply will not keep its hands off the statute. Major federal campaign-financing laws have been enacted in 1971, 1974, and 1976. In every other year since 1971 (including 1978), Congress has debated proposed changes in these laws. When the 1974 and 1976 amendments were passed, the prior amendments had not even gone through one complete election cycle so that their effect could be understood and evaluated. The election laws are obviously a matter of vital self-interest to every member of Congress. They also provide incumbents with a handy way to inflict hardship on their political opponents (while claiming to be advancing the cause of "integrity" in politics). In such circumstances, it is virtually inevitable that Congress will continue to pay extremely close attention to the Federal Election Campaign Act.

There are numerous other reasons why things will not change. The commission's own bureaucratic urge to extend the scope of its regulation comes to mind, as does the possibility that other portions of the statute will be invalidated in the courts. Politics is simply too complex and too changeable to permit the creation of a stable regulatory framework—much less one that is truly evenhanded or fair.

IN THE FACE OF the record, it is difficult to justify the commission's continuing to exist in its present form, or to deny that the wisest course would be to reexamine the underlying reason for its existence. Massive changes are needed. Without them, the FEC will become so well-established before long that it can never be seriously challenged—and another assault on free speech will have been enshrined in law. ■

Oil, Film, and Folklore

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defined "welfare." This means maximizing budgets—which is to say, maximizing costs.

Another criticism of the market as an institution is that, while it may be more efficient than government control, it lacks a sense of justice. This could be a valid criticism inasmuch as justice is not something uniquely determined by human reason. There are as many justices as there are theologies, and the market's sense of justice may not correspond to ours. This criticism, along with my research into government-controlled markets, has led me to the following definitions:

... the market is an institution that creates affluence and distributes it unevenly [while] ... the government is an institution that creates poverty and distributes it "fairly."

(1) the market is an institution that creates affluence and distributes it unevenly, and

(2) the government is an institution that creates poverty and distributes it "fairly." Obviously "fairly" must be in quotation marks, because "fair" means whatever the outcome of the political process implies. It means, for example, that I get cheap natural gas in southern Michigan while people in North Carolina, New Jersey, and Vermont go broke trying to pay their fuel bills.

To return to our analogous world of the entertainment industry, we may ask why it is fair that someone earn a fortune because he is born with flexible hips and durable vocal cords. This is the equivalent of asking why someone should earn a fortune (or anything else) because he discovers that his farm covers an oil field. To my knowledge, most people do not chastise entertainers for making a fortune rocking in the jailhouse in blue suede shoes. We accept that market outcome and fuss very little about its equity. Why is it that we place emphasis on political justice in petroleum but not in amusement? When we have answered that question, if we can, and when we have decided to allow petroleum companies and consumers the same rights we grant rock musicians and their audiences, I strongly suspect we will find the public better served. ■