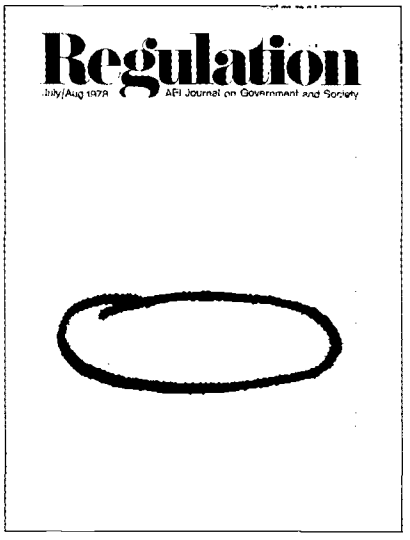
Letters

We welcome letters from readers, particularly commentaries that reflect upon or take issue with material we have published. The writer's name, affiliation, address, and telephone number should be included. Because of space limitations, letters are subject to abridgment.



More Railroad Lessons

TO THE EDITOR:

In "Midwest Railroads and Northeast Lessons" (*Regulation,* July/August 1978), John Barnum thoughtfully articulates some of the important considerations emanating from the reorganization of Penn Central et al. But clearly he has biased his argument in favor of the "controlled liquidation" theory—a reorganization technique which died on the vine in the Northeast and will, in my judgment, just as surely fail in the Midwest.

In the beginning of the Penn Central reorganization process, three different theories were vying for acceptance. The Department of Transportation, largely through the persuasive voice of Mr. Barnum, argued for "controlled liquidation" —the piecemeal absorption of the bankrupt system by surrounding solvent roads. Other forces, especially in New England, pushed hard for "nationalization" — a concept meaning different things to different people, but, at a minimum, consisting of federal government ownership of the roadbed. The United States Railway Association, the primary planning body, favored a "mixed" approach where a new "private enterprise" (but publicly funded) organization would take over operation and ownership.

Both the controlled liquidation and federalization theories collapsed of their own weight. The former collapsed because the solvent railroads—no fools when it came to discerning their own self-interest—respectfully declined the government's offer to take over thousands of miles of track for the sole privilege of losing money. The latter collapsed because it would cost too much and because it smacked of socialism.

The result was Conrail, a compromise solution and surely far from perfect. But at least it kept the trains moving; it allowed competing interests to partially satisfy most of their objectives; it permitted federal funds to be applied toward badly needed track rehabilitation; and it accomplished some rationalization of the rail structure. Conrail will almost certainly continue to be highly unprofitable in the near future. But this does not mean that the planning process which created it was unsuccessful or that a similar process would be inappropriate for the Midwest.

Mr. Barnum argues that the Midwest is "different." Controlled liquidation, he maintains, will work there because "there is enough local and bridge traffic . . . to make railroading *profitable for a system burdened by less duplication*" (emphasis mine).

Ah, there is the rub. Is it really plausible to believe that Congress, labor, shippers, and communities will stand idly by while solvent carriers pick and choose the routes and trackage that will most please their stockholders? Even assuming they would, is it plausible to believe that the solvent railroads could ever agree how to slice up the pie? Most railroads would rather undergo Chinese water torture than concede the slightest competitive advantage to another carrier. The Rock Island–Union Pacific merger was held up eleven years while competing railroads bickered before the ICC. . . .

Mr. Barnum suggests that this problem might be eliminated by providing government "incentives" (read "money") for private sector restructuring. But is it realistic to believe that Congress will throw federal funds at the private carriers without demanding a voice in the way lines will be rehabilitated, in the routes retained, and in the service provided to shippers. . . ? Mr. Barnum's paean to private sector restructuring comes within a whisker of being naive.

Collister Johnson, Jr.,
Peabody, Rivlin, Lambert & Meyers

TO THE EDITOR:

. . . . There can be no quarrel with the general premise of John Barnum's article—that the railroad situation in the Midwest is different from the situation which brought about Conrail. While predictions are risky, it does seem unlikely that any serious attempt for a Midwest Conrail will be forthcoming. As of today, the Midwest problem seems to be working itself out along more traditional lines of reorganization, consolidation and abandonment.

I can take no exception with Mr. Barnum's six lessons, but I would add an additional lesson that many of us are learning: Conrail may not be the solution to the rail problem even in the Northeast states. Income has been consistently lower than projected in the Final System Plan and expenses consistently higher. To the extent that Mr. Barnum and the Ford administration insisted on including a continuing reorganization concept in the 4-R Act (which permits supplemental sales of parts of Conrail), the requisite flexibility is available to change the size and character of Conrail radically in the years to come. If such a reshuffle in fact takes place, the primary lesson we may have learned from the Northeast is the necessity of keeping legislative structures flexible enough to adapt to marketplace realities.

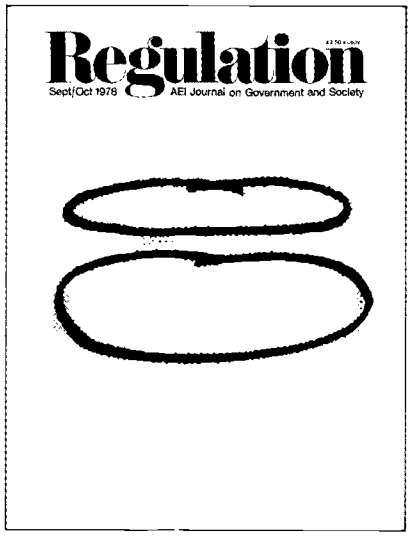
J. Paul Molloy,
House Committee on Interstate and Foreign Commerce

JOHN BARNUM responds:

Mr. Johnson is quite realistic in his assessment of the political implications of a "controlled liquidation" solution in the Midwest. I would also suggest, however, that as the price tag for government-designated reorganization in the Northeast rises and as taxpayers everywhere evidence their concern for ineffectual government spending, the low-cost/high-payoff solution in the Midwest will have added attraction—even to Congress.

I should also point out that I was not (as Mr. Johnson asserts) the advocate of "controlled liquidation" in the Northeast, but rather the proponent if not the progenitor of the concept of a collective reorganization. Certainly that was the thrust of the secretary of transportation's report to Congress and of the Regional Rail Reorganization Act of 1973. In the subsequent deliberations at the U.S. Railway Association, I was not advocating "controlled liquidation" but rather what some of the staff called "Barnum's Railroad," also described as "Conrail 1/4." Talk about my being naive! But I think Conrail 1/4 is only a matter of time; there just is not enough money for the present plant.

I accept Mr. Molloy's amendment.



Campaign Regulation

TO THE EDITOR:

John Murphy's article ("Federal Election Commission: A Rebuttal," September/October 1978), rather than being a rebuttal of John Bolton's attack on the FEC, serves to confirm Bolton's major points.

Bolton's major criticism of the Federal Election Campaign Act ("Government Astride the Political Process," July/August 1978) and the operation of the FEC is that both tend to limit freedom of speech, and—somewhat surprisingly for a rebuttal—Murphy agrees! For example, in commenting on the TRIM issue, Murphy wrote: "I am now all but convinced that the agency's current approach to the Sierra Club and TRIM questions will be rejected by the courts: The First Amendment value of protecting issue discussion (short of express advocacy) will simply prove too strong." Yet, according to Murphy, if the court does protect this free speech, "fortunes can be spent frankly and avowedly to influence the federal electoral process and the public will never learn the source or authorization of the first dime." Thus the law will either suppress free speech or be ineffective in achieving its primary purpose.

Murphy's comment on the FEC's decision regarding the funding of the presidential debates is also revealing: "it was unthinkable that the election laws could somehow get in the way of an event of such politically historic (even festive) proportions." And although Murphy characterized the case as "rare" and "difficult," he does not doubt its importance. Bolton questioned whether the FEC should make important and difficult arbitrary decisions which can have a major impact on politics.

The commission's handling of the Koch-Mitchell decisions is another key point in Bolton's view. Murphy acknowledges that the FEC did not explain its Koch-Mitchell decisions clearly, and yet he believes that anyone who paid even minuscule attention to FEC affairs should know "precisely where the difficulty lay." But I would ask, *why* should those who pay little attention to the day-to-day decisions of the FEC, especially on a matter that did not directly affect them at the time of its consideration, be able to understand what the FEC and its lawyers were unable to explain adequately to the parties in question?

Murphy's reference to those who seek to influence federal elections as "consumers of this difficult law" strongly suggests that he perceives a continuing relationship between the regulators and the regulated, whereas Bolton is concerned about political drop-outs or potential "consumers" for whom once is enough. The consumer analogy may represent the way an FEC lawyer sees things, but it is clearly not the view of the regulated.

Bolton's arguments are strong, even though he has not yet fully proven his case. On the other hand, while there may be justification for the FEC and even for the current law, Murphy's rebuttal is less than persuasive.

Richard G. Smolka,
Washington, D.C.

TO THE EDITOR:

Any act of government impinging on individual liberty warrants intensive scrutiny. . . . Mr. Bolton's conclusions follow a long acquaintance with the act and at least passing attention to the FEC's work. They are a hopeful start but a long way from a responsible treatment of the subject. . . .

For instance, Mr. Bolton in his original article says that nowhere in the enforcement procedures is there reasonable opportunity for a respondent to demonstrate that no action should be taken. In his rejoinder to Murphy's contrary evidence, that in the great majority of complaints the respondent was able to demonstrate that no action was warranted, Bolton says: "If, in fact, the vast bulk of enforcement actions are dismissed without fines or other sanctions, then it seems apparent that something is wrong with the way compliance actions are brought and handled."

This example illustrates deeper shortcomings in Mr. Bolton's approach. He seems unaware of the realities of politics and how the act and the commission are designed to deal with them. . . . The FEC has stressed the need to inform and educate political participants, not to drive them out of politics. The very fact that Congress in its 1976 amendments to the act changed most criminal provisions to civil penalties reflected an effort to give proper weight to minor kinds of violations. Mr. Murphy's article makes the point that the commission has met this responsibility well.

Another example is his comment about the role of business and labor in the political process. "Not only are business and labor not under new restrictions," he says, "but the statute has provided more opportunities than ever before for them to exercise political influence." Where has Mr. Bolton been all these years? Prior to 1976, prior to 1974, labor was active in the ways permitted in the statute and its powers have not

been increased, though some doubts about borderline illegalities have been resolved. Business always has had the powers it is now beginning to exercise—parallel to labor—but it entertained some uncertainties and regrettably chose to utilize other channels to put money into politics. In fact, the act places new restraints upon business and labor and all other special interests; for instance, in 1976 contributions to all political committees were limited for the first time. One of the great contributions to the political process, worked out with great care by Congress in 1976, is that special interests are now visible, are well-balanced, and are limited.

One final point about Mr. Bolton's comments. They are a lawyer's brief, listing the strong points of his complaint, the weak points of his opponent's. This is perfectly proper for a courtroom argument but not particularly useful in this kind of dialogue. He totally misses the mark when he reaches for his big conclusion: "the impossibility of fair and equitable regulation of campaign financing under *any* statute as administered by *any* commission" (his emphasis).

Can anyone decide what is fair and equitable regulation for campaign financing without comparing it with the prior practices and evils of politics?

Mr. Bolton says there is a workable solution: "Rather than attempt to limit, to proscribe, or to regulate politics, we should restrict the federal presence in the area to properly drawn disclosure statutes. . . . it would free the political process from the threat of haphazard enforcement and discretionary rule-making. . . ." Has he considered what this would entail? How in the diverse and changing political practices of the fifty states — where many permit corporate and labor union contributions, cash (anonymous) contributions, "loans," and contributions in kind — would he suggest that presidential elections be conducted and fully disclosed?... Is he unworried by escalating campaign costs . . . ? Finally, how does even a properly drawn statute get enforced?

Mr. Bolton, Mr. Murphy, and I agree that disclosure is the heart of an honest and credible political system. But disclosure is not enough. As the Supreme Court said in upholding contribution limits in *Buckley* v. *Valeo*, such measures enacted gradually by Congress over the years are justified and reasonable. I think Mr. Murphy's article helps to show that the Federal Election Commission's enforcement of this new law has been reasonable and moderate and will help, not hurt, the political process.

Neil Staebler,
Commissioner,
Federal Election Commission

JOHN BOLTON responds:

Commissioner Staebler's basic point is that the FEC's enforcement of the campaign finance laws "has been reasonable and moderate." The most persuasive rebuttal to that contention has already been made by the commission's own lawyers, in a brief filed on the commission's behalf in *Socialist Workers 1974 National Campaign Committee* v. *Jennings*, a case now pending in federal district court in the District of Columbia.

The commission's brief contrasts the status of the FEC with that of Article III courts, where judges have lifetime tenure and are removable only by impeachment: "By comparison, the Federal Election Commission does not possess the same insulation from political pressures, which can give rise to the appearance of politically influenced decisions." The brief goes on to say that the FEC is purely "an investigatory and enforcement body" and that "[t]his statutorily ordained role necessarily gives an administrative agency a narrow and restricted viewpoint."

In the most graphic passage of all, the commission's brief once again contrasts the FEC with the courts: "Courts, on the other hand, do not suffer from this purposely induced congenital myopia." It goes without saying that any agency that feels that way about itself is going to be hard pressed to provide "reasonable and moderate" enforcement of a statute.

Bakke

TO THE EDITOR:

Mr. Jesse Jackson's "Reparations Are Justified for Blacks" (September/October 1978) fairly reeks of the loose thinking that so permeates the issue of affirmative action.

First, he recurrently invokes concepts such as "justice," "equality," "parity," and "equity" without once specifying whether he means these terms to refer to groups or to individuals. It is of the utmost importance to be explicit about this choice, since the two approaches imply social reforms that have opposite effects on individuals. One approach focuses on equilibrating the group ratios and treats individuals so as to get the group ratios to come out "right," while the other seeks to be fair to individuals and lets the group ratios be the *outcome* of such individually fair treatment. . . . We may infer from Mr. Jackson's context that he intends these terms to pertain to groups, but this is a far-reaching alteration of their common usage, and such a crucial matter ought not go unargued. . . .

Second, he pretty much sails past the central question of "special admissions" for minorities—namely, can these admittees do the work? Merit criteria, after all, are not merely a rationale for passing out social favors but rather a means to identify those most able to achieve competency in their professions. It is of course legitimate to ask whether these criteria are at present giving false readings of the true academic and professional potential of minorities. If they are, then a good case could be made for exempting minorities from these criteria at this stage so as to allow concealed talent to be developed. But if, on the other hand, the criteria are accurately predicting future performance, then this exemption will just be the first of a limitless series, and it is not at all self-evident that a policy of perpetual favoritism can do much either to break down stereotypes or to foster social harmony. Unfortunately, much information is already in hand from the past decade of affirmative action showing that programs with a boundlessly elastic requirement for demonstrated academic aptitude but a rigid number of minority places to fill are distressingly prone to produce the latter result. . . . To start making such exceptions, it would seem, is to touch pitch.

Third, Mr. Jackson's serene faith that blacks are better protected by race-conscious than by race-neutral policies in a society that is overwhelmingly white is childlike. The true lesson to be drawn from the latter-day progress of blacks is *not* that the white majority has sincerely and irreversibly mended its ways, but that it can change its mind. So would it not be a wise precaution against a future change of mind to set in granite an absolute proscription *against* the government's making an official determination of a person's race and treating him differentially on this basis? . . .

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