REFLECTIONS ON THE ELECTION COMMISSION

An Interview with Neil O. Staebler

Conducted by Nathan J. Muller

Neil O. Staebler was one of the original six members of the Federal Election Commission (FEC). A former chairman of the Michigan State Democratic Central Committee (1950–61), member of Congress (1963–65), and unsuccessful gubernatorial candidate (1964), Staebler was named to the FEC in large part because of his service on President Kennedy's 1961 Commission on Campaign Financing and on the Twentieth Century Fund's 1970 Task Force on Financing Congressional Campaigns. While on the commission, he earned the disapproval of the labor movement for casting the deciding vote in favor of the Sun Oil Company's political action committee in a controversial FEC opinion, a vote that probably cost him any chance of being reappointed to a second term when his first expired in 1977. The naming of his successor, Democrat John W. McGarry, sparked a legal challenge by Staebler and Common Cause, but the challenge became moot when the Senate confirmed McGarry and Republican Max Friedersdorf on February 21, 1979.

Staebler discusses the appointment controversy, FEC regulation of election campaigns, and Congress's relation with the commission in the following edited transcript of an interview he gave to Nathan J. Muller, editor of the Washington newsletter, Political Action Report. *The interview raises a number of points that relate directly to an article by* Buckley *v.* Valeo *attorney John R. Bolton and a response by former FEC general counsel John G. Murphy, Jr., both carried in REGULATION last year (volume 2, numbers 4 and 5).*

The FEC and Congress

Q: From the start, the Federal Election Commission has been criticized for being a "captive province" of the Congress? Is it?

A: Inevitably members of Congress are closer to the election process than other candidates. They follow developments in election law more closely and they are here in Washington, so they tend to get better than average service from the commission. But the commission has been conscious of the problems of nonincumbents and has always tried to be evenhanded. I think it has succeeded. Nevertheless, there are many aspects of incumbency that affect the process, among them the fact that members of Congress set the commission's budget and have the opportunity to review its proposed regulations and veto them.

Q: Has not the FEC been reluctant to deal with matters affecting incumbents?

A: No. Just the reverse. The FEC consciously braces itself against the danger that it might seem to favor incumbents. The legislative veto plays a role in what the commission does in that the commissioners may not try to do things that have been vetoed before. Take, for instance, our efforts to get a simpler way of having committees and candidates file their reports. We were rebuffed in this, one time officially and several more times unoffi-

cially. So the candidates and committees for Senate races still file with the secretary of the Senate and those for House races with the clerk of the House; then the reports are transferred to the FEC. There are other instances where we had difficulty selling a program to Congress. But as for doing things for incumbents or against them or neglecting challengers, no.

Q: In your years on the commission, did you detect any urge on the part of Congress to protect itself?
A: Yes, especially through the legislative veto. There was a serious problem several years ago when Wayne Hays was chairman of the House Administration Committee, which has oversight over the FEC. We had a running battle with him for about a year. During that time he tried to influence the commission in a number of different ways. He was against the act to begin with, and then after it was passed he tried to influence us to the extent of actually trying to change specific regulations. We strenuously resisted. We told him that if Congress wanted to veto something we had done, it could, but that an individual committee or individual member did not have veto power. Apart from that, we never had a serious effort by a member of Congress to change any FEC decision. Most congressmen, an overwhelming number, took us as a necessary evil—or even a desirable influence—and did not attempt to tamper.

Q: Is this still a potential danger?
A: There's always a potential danger. Part of it arises from the fact that there's always a borderline or hazy area in regulations. If I were in Congress, I would be averse to giving a commission like the FEC carte blanche to do anything it wanted. The commission is a small body and its members cannot know everything: it could conceivably go off on a tangent. There needs to be a way of holding the whole process to some kind of accountability.

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Q: But should Congress be able to veto the regulations of the agency designed to safeguard the integrity of the federal election process?
A: There has to be some sort of control, some final accountability. I think the legislative veto, the way it is set up, is a pretty good method of providing that. The FEC would like, however, to shorten the present veto process. As things stand now, proposed regulations have to lay before each house of the Congress for thirty legislative days. That, in effect, is ninety calendar days, and, on occasion, we found that this delayed the adoption of regulations by nearly a year. The FEC is urging Congress to shorten the waiting period to fifteen legislative days, which ought to allow reasonable opportunity for review.

Q: Are incumbents and their campaign committees given priority in terms of auditing or investigating questionable campaign practices?
A: No. In fact, the random auditing program the commission uses, a program that is subject to considerable attack by Congress, covers all the campaigns for a given seat and all are handled together —incumbents, as well as major and minor party challengers. Results are announced simultaneously, unless some serious violation is encountered that holds one contest up for a longer period of time. There is a modest threshold for the number of dollars spent, so some of the tiny campaigns are exempt from auditing. But minor candidates that spend over the threshold are handled with the rest. Incumbents are not given any priority in either starting or delaying audits.

Legal Complexifier?

Q: Since its creation, the FEC has had nine different individuals as members. Five have been members of Congress, two (including one of those five) have had state party experience, one was associate general counsel to the AFL-CIO, and the two newest members, John McGarry and Max Friedersdorf, have strong ties to members of Congress and the political party hierarchies. Do you believe the cumulative result of those backgrounds is an agency prone to complicate an already complex law?
A: It is not the fact that many have been members of Congress that produces complication in the law. The complexities arise partly from the circumstances of politics and partly from the inclination of lawyers to make things neat. Politics is hellishly complicated. After thirty years in politics, I thought I had seen most of the kinds of situations that could arise. I could not have been more wrong. From the time I came on the commission, there wasn't a week when three or four new things I'd never even heard of before were not brought before us. Americans are an inventive people, living in a highly pluralistic society; and Congress, when it wrote the law, didn't envision the true de-

gree of their inventiveness. When the commission writes the regulations, it is in somewhat the same boat. Moreover, nobody—nobody, I repeat—knows enough about the political process to write flawless laws. Lawmaking is always a process of blundering in, trying to avoid major errors, but still getting only an approximate coverage of a particular situation, and having to find out what is wrong after the measure goes into effect. Over a period of years, one hopes to reduce initial error and learn to correct it more quickly. But still, because of our pluralism, politics is a very complicated field.

Now the other factor that enters in here is that lawyers are bound by their training to generalize and to produce something that is manifestly fair and defensible on legal grounds from every point of view. They consequently try to take into account all the possible exceptions and the deviations. This makes for a law that is very complicated when you try to apply it. The Federal Election Campaign Act *is* complicated, but it is to the credit of the first commission that the act is a whale of a lot less complicated than it would have been had that commission not forced the attorneys to realize that not everything can be regulated.

A good illustration of the problem is the battle that took place over the allocation of party expenses arising from operation of candidate and party headquarters. It seemed to the attorneys that campaign headquarters' expenses were contributions to candidates and therefore ought to have been charged to candidates, especially since the issue came up when we were in the period of candidate ceilings. The majority of the commission agreed, but at the same time believed it would have been impractical to require the allocation of those expenses. That would only have imposed a mountain of bookkeeping on parties and candidates. How, we asked, could the general principles of the act possibly be compromised if we ruled that joint campaign headquarters were an expenditure by the party and not attributable to candidates? After all, if one tries to apply the same principles to both parties in the same ways, one is not likely to play favorites or upset the balance. So we won that argument and got a much simpler arrangement—namely, expenses incurred by the party for benefit of all candidates are not contributions to any particular candidate.

Q: Some critics accuse the FEC of tampering unnecessarily with the regulations and attribute this to lawyers and others who have no concept of how their meddling affects campaigns. What role have attorneys and other staff members played in the decision-making process?

A: The tampering should not be attributed to attorneys, since it is the business of attorneys to be as literal as possible. The tampering is done by the commission when it tries to relax a point in the law. But that is what I consider to be the chief role of the commission—trying to be practical in applying the act. "Tampering" is how the commission can get the attorneys to back away from their hard and fast literal interpretations.

No one can write laws that cover every circumstance. So, in applying a law, there is always the need to decide about its intent—to look up the legislative history, other prior laws, and any illuminating judicial decisions and, after doing that, to make a judgment. Then, the question I've always asked is: "Can I stretch the provision in question far enough in the direction of practicality, or should it be rewritten as a new law?"

If the results are very bad, the commission will throw the ball over to Congress and recommend changes. Six commissioners are correctives against each other as to what the purpose of the act is, for none of them thinks alike.

Other Perspectives Needed?

Q: Would the commission benefit from the perspectives of minor party leaders, state and local election officials, professional auditors, or even educators?

A: The commission benefits from all the perspectives it can get. The question is the price to be paid for one of those perspectives. It would not be advisable to have a narrow perspective because the commission is so small that one uninformed vote hurts very much. The thing most lacking on the commission is party experience. Most congressmen do not in fact have much party experience and really do not know how the parties operate. The greatest potential hazard the FEC presents is the damage it might do to the political parties. Joan Aikens and I were the only commission members who have really had any party experience. We struggled hard and managed to avoid a lot of damage, but this area remains a hazardous one. Ignorance of party functions is characteristically present in those from an academic or a third-party background. It is important that future appointments take into consideration the breadth of an individual's experience.

Q: But wouldn't most candidates say they have no need for political parties—or, at least, isn't that how many of them act?

A: Congressmen have always felt a little separate from their parties and have not wanted to trust

any organization other than their own. Senators are more inclined to trust the party because it is so hard to set up an adequate statewide organization of one's own. I believe the congressman's mistrust for parties is one of our greatest political shortcomings in the recent past and one of the greatest hazards for the future. A political system without parties would be chaos. Parties serve the purpose of bringing people together, of working out compromises on those issues the people have the tendency to get all wrought up about, of educating voters to a broader appreciation of political problems. One can visualize greatly weakened parties with a national primary or with the primary system made universal not only for the presidency but in every state. There would then be very little candidate recruitment, candidate training, and the development of experience—only chaos.

Small Campaigns

Q: Critics of the FEC charge that the agency is more attuned to the sensitivities of Congress than to the financial and recordkeeping problems present in many campaigns. Is this true?
A: We had a study made by Peter Hart and Richard Wirthlin two years ago. They found that the campaigns most likely to have trouble with the forms were the very tiny ones—those of the minor-party or vanity candidates—where there was not much manpower available and where the candidate, the candidate's wife, and a few friends tried to do everything. The larger organizations, no—they did not find the necessary recordkeeping difficult. I think the task will become increasingly easy as candidates get more used to it. Also, the commission is recommending amendments to the campaign act that would cut down filing by more than 50 percent.

Q: Why does the commission bother to cajole the non-filing minor-party candidates or unsuccessful vanity candidates into compliance?
A: The reason is that once the FEC accepts noncompliance for those whose spending is above the threshold, the seriousness of compliance is eroded. Candidate noncompliance was above 20 percent for 1977, the latest year for which a compilation has been made, and this suggests that important candidates could fall into the habit of noncompliance. The commission starts at the early stage with non-filers. It notifies everybody, and does it at a time when voters are likely to be paying attention to the matter. After the election, it sorts out those who did not get many votes or spend much money, and does not go any further with them.

Is Regulation Stultifying?

Q: Has the stable regulatory framework created by the act restricted campaign activity to the extent of discouraging more qualified individuals from seeking office?
A: The Hart-Wirthlin study shed some light on that matter. They asked the question another way: "What were the factors that entered into your deciding to run or not to run?" Ability to raise money was first on the list, and regulatory problems came in fifth or sixth—only a fraction even mentioned them. No one said he or she was deterred from running by the fact of regulation.

I believe that, over time, the expectation that the process is honest will encourage people to run. Electoral politics used to be such a murky process. If the other guy was going to get away with all sorts of shenanigans, and if the candidate didn't want to indulge in them himself or thought he couldn't, there would be an inclination to say, "let's get out of this mess and let somebody else do it."

Q: Has the act reduced the spontaneity of the average citizen's participation in election activities?
A: Most citizens are not aware of the act, except perhaps for the knowledge that they cannot give more than $1,000 to a candidate in either the primary or the general election. Since not many people give $1,000, the limit is not much of an inhibition. I have found that those who used to give more than $1,000 are in a way glad, and I have not found any great "chilling effect" on individuals.

Labor Cases

Q: In recent cases involving the AFL-CIO, the Public Service Research Council, the National Right-to-Work Committee, and the National Education Association, the initial penalties were very different and yet the amounts involved in the infractions were pretty much the same. Why?
A: Let me explain by telling the story of the AFL-CIO case. Actually I didn't think there should have been any penalty at all in that case. It involved the AFL-CIO political action fund (COPE), which followed the practice of collecting money during the two-year period before the elections—when, of course, it had no use for the money. So the fund would loan the money to the AFL-CIO's education fund and when the election came around, the education fund would repay it at 6 percent interest. The commission followed the law's prohibition against commingling of funds (commingling frequently results in hanky-panky). I maintained that

this was not a case of commingling—or that it was a case only in the most semantically strained way. The education fund knew the money was borrowed, could have borrowed the money from a bank, but chose to borrow it from the political action fund. What the latter got back was not tainted money, but its own money. The commission, however, believed so strongly that commingling ought to be prevented and was so damn literal on the matter that even Commissioner Harris, the AFL-CIO's former attorney, thought the union was guilty.

The FEC's first conciliation proposal, which I voted against, was that the education fund forfeit the $300,000 it had borrowed and pay a $10,000 penalty. The AFL-CIO took us to court, refusing to settle. The judge said no on the $300,000 and yes on the $10,000 fine, whereupon the AFL-CIO appealed. The case is still in the courts.

Q: Can the AFL-CIO continue the practice in the future if the $10,000 fine is rescinded upon appeal?
A: No. It agreed in the conciliation agreement it would not do that in the future.

Another kind of commingling that the commission has to work hard against involves the funds of state party committees. It is, of course, illegal for *federal* candidates to take contributions from corporations but, in many states, it is not illegal for *state* candidates to take such contributions. So there is a problem if a party committee commingles corporate and noncorporate contributions and then makes a contribution to a federal candidate. We urge those committees to set up two funds, one for each kind of contribution.

Q: How do you explain the FEC's reluctance to rule on the reverse checkoff method of collecting contributions used by the National Education Association (NEA)?
A: There was no reluctance to rule—in fact we reached a decision very rapidly. But NEA put up so many defenses against it, and the question came back so many times during the early part of the conciliation process, that the commission wound up considering four or five different proposals. Another thing the NEA tried to do (and this was one more reason for the delay) was to get our ruling overturned in Congress by lobbying the House Administration Committee to attach an amendment to the FEC authorization bill to permit the reverse checkoff.

Q: How successful was this attempt?
A: It did not carry in the House Administration Committee. Finally, after all the legal maneuvers were exhausted, the case was settled in court, in the commission's favor. The FEC could not have moved any faster than it did.

Q: Did you detect any pro-union bias at all in your years with the commission?
A: Well, Tom Harris has been very careful, though I think I see some pro-union thinking he cannot well avoid. And I see it in myself, which is not surprising. Almost any Democrat, of course, has an inclination to regard unions as more beneficent than business. But I think I bring a fairly balanced approach to the commission because, though all my life in Michigan I worked with unions, I tried to keep the Democratic party from becoming a labor party—and did so with great success. Of course, even the top labor people recognized that it would not be desirable to let that happen.

I was accused of being anti-union in our decision on Sun Oil Company's Political Action Committee (SUN-PAC) in 1975. That decision, however, was not anti-union. I am a strong believer in everyone's being able to participate in the political process, and I think the law required the decision I reached. People accused me of stretching the law. I did not, but if I had had to stretch, I would have, because I think it would be very bad government, very bad politics, to permit one part of our society to do things forbidden to other parts.

Q: The people at the National Right-to-Work Committee (NRTW) have charged that the FEC is organized labor's newest weapon. They claim that when they asked for an advisory opinion on their plans for organizing a political action committee (PAC), Tom Harris deliberately stalled in answering—and then the staff's draft opinion approving operations of NRTW's PAC was suddenly withdrawn just before the commission was to rule on it. What has accounted for the long wait since NRTW's initial request in January 1976?
A: Certainly not Tom Harris or the withdrawal of the draft opinion. Two other things were involved. First, the request was ambiguous on the subject of membership and considerable time was consumed in getting NRTW to spell out what it meant by members. Second, while this was going on, there was a complaint (which automatically moved the matter to a different procedural track) on the subject of membership organizations whose members had no discernible authority or privileges of membership and whose only relationship to the organization was that of contributor.

As it turned out, National Right-to-Work was violating the important principle on which that

complaint was based—a principle that has arisen in a number of other cases. The law says membership organizations may form PACs and solicit their members. But NRTW is not a membership organization—in fact, article 7 of its by-laws even says it has no members. What it was doing was to use membership as a come-on. It was soliciting contributions for National Right-to-Work activities and calling the contributors "members." We told the officials at NRTW they ought to revise their by-laws so that membership provided some rights, gave members some control, however tenuous, over the organization. We told them to do it right, and eventually we filed suit.

Q: So it is only the membership question that caused the delay and the suit?
A: Yes. And, incidentally, the right-to-work people were not the only ones to have trouble with this membership question: other outfits were held up too. By the way, the case is in discovery now and is set for trial on July 9.

The Appointment Process

Q: When you wanted to be reappointed to a second term, didn't you ask Leonard Woodcock to intercede for you with the Carter administration?
A: Yes, I did. But Leonard did not want to get involved and referred me to Woody Ginsberg at the United Auto Workers. I could see that Ginsberg also didn't want to be involved so I let the matter drop. I wanted to give Woodcock a clear idea why I had acted as I did in the SUN-PAC decision. I thought he was prejudiced, and it was being said that there was a strong union objection to me. I wanted to serve, not a full term, but two years more—through the 1978 elections—in order to help correct some shortcomings we had uncovered in the act. But I found that getting union support was impossible.

Q: What do you think of the way President Carter handled the two recent FEC appointments?
A: His treatment certainly carried the implication that he was standing at something less than arms-length from the FEC. First he appointed—or, rather, tried to appoint—John McGarry for the Democratic seat and Richard Zagoria for the Republican seat. The Republicans objected to Zagoria, not because he was not a splendid person, but because he did not reflect a Republican viewpoint (they thought he was too liberal) and because he was first approached—to see if he would serve—by a Democratic member of the commission. That suggested to them that he would not be a wholly independent commissioner.

Q: Was it proper for a Democratic member of the commission to try to line up a candidate for a Republican seat, particularly in view of the understanding that the President would appoint from a list drawn up by the Republican congressional leadership?
A: It looked bad, but I don't think it was. Members are constantly trying to suggest good people.

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Q: Do you have anything to say about the way in which your successor, McGarry, was chosen?
A: The FEC Act provides that "a member of the commission may serve after the expiration of his term until his successor has taken office" and it provides that members take office after being appointed with the advice and consent of the Senate. Now McGarry was not confirmed by the Senate. Common Cause and I maintained—in a suit in the U.S. District Court of the District of Columbia—that there was no vacancy until my successor was confirmed, so McGarry could not receive an interim appointment to fill a vacancy. The President was treating this appointment like any other kind of administrative appointment—as though the act itself had no significance. We lost the case in district court, Common Cause appealed, but since McGarry has now been confirmed, the government will almost certainly move to dismiss the case as moot.

Between McGarry's appointment and the district court's decision, I did not vote on commission matters or draw a salary. And, of course, even if my case had been won, all the President would have had to do would have been to name somebody whom the Senate would confirm. And certainly the senators would have confirmed any one of dozens of people in my stead.

Q: Common Cause has called McGarry's interim appointment "shabby politics" and has implied that it smacked of a "political payoff" to House Speaker Tip O'Neill. Is Common Cause close to the mark?
A: I think the conclusion is inescapable that McGarry's appointment was in some way an attempt by O'Neill to keep a thumb on the FEC. ■