
The Federal Election Commission: A Rebuttal

John G. Murphy, Jr.

THE OVERWHELMING impression John Bolton seeks to create in his article in the last issue of *Regulation* is that the Federal Election Commission, the Federal Election Campaign Act, and the regulation of political campaigning represent a clear and present danger to the American Republic. This is a seriously distorted impression, in my view. But of course I was the commission's first general counsel, lived through most of the episodes about which Bolton complains so fiercely, and surely contributed to at least some of the results he finds so repelling. So it must be understood that I bring to this response a bias which the strongest urge to objectivity will not fully dismantle. I am nonetheless comfortable with the notion that I may introduce a little balance to the discussion.

I share Bolton's distrust of government, and I think his suspicion (or belief) that Congress is capable of writing self-serving laws is perfectly reasonable. Indeed, I think that is really what his article is all about—that it should be viewed as simply a further polemic in the war he has ably waged against the election laws beginning at least with *Buckley v. Valeo* (in which as plaintiff's counsel he argued that, except for the disclosure requirements, the Federal Election Campaign Act as amended belongs on the constitutional trash heap). The Federal Election Commission (FEC) is not his true target. The commission would appear to

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be little more than the messenger bearing bad news, whom Bolton would put to death in retaliation against his real enemies in the Senate and the House of Representatives. And I suggest that, in this surrogate combat, he has strained mightily to wring from the messenger in question bad news that really is not there.

Let us look at his complaints. I noted some five points: (1) the legislation is vague in key articles, leaving the commission with too much discretion, which it has abused; (2) in enforcement proceedings the commission is pursuing the “widows and orphans” of the political process, leaving important people alone, and in general does not treat respondents in compliance matters in a fair and responsive manner; (3) the commission issues inconsistent decisions that it does not trouble to explain and, in the process, occasionally ignores judicial directives dictating a different result; moreover it is guilty of giving informal staff advice one day and prosecuting those who follow it the next; (4) the commission humbles itself before Congress, out of fear of the legislative veto, and systematically issues pro-incumbent rulings; and (5) in any event, the political process is so complex that no stable regulatory system is achievable, particularly since Congress will endlessly tinker with the rules to suit itself.

My starting point in treating these issues is not that Bolton is entirely wrong: it is not the case that the commission has never erred. But I submit that the interpretive and procedural problems that the commission has encountered and the mistaken policy judgments arguably flowing therefrom are slight (and in

any event innocent and remediable) when measured against its total effort since April 1975, when the first commissioners were sworn. Moreover, even those decisions worth reexamining do not begin to justify either Bolton's apocalyptic vision of this regulatory system or his wish that the FEC be afforded an early burial. Let me consider his points in the order I have given them above.

Vagueness of the Statute

We are told that the statute is unconstitutionally vague because the critically important definitions of "contribution" and "expenditure" vest the commission with too much discretion. Bolton cites two FEC communications to illustrate the point but, unfortunately, neither has anything to do with the vagueness of these definitional concepts or their application. The first involved the question whether a contributor to a political committee making exclusively independent expenditures (independent of any candidate who might benefit from the expenditures) was subject to any contribution limits. In this case the issue was not whether the money so given was a contribution within the meaning of the law—all agreed it was—but rather how *much* could be given. The act clearly permits an individual to give \$5,000 to a political committee that is not the authorized committee of any candidate, engages only in independent expending, and makes no contributions; and the initial response drawn up by commission staff recommended this \$5,000 limit. The commission, however, accepted instead an argument focusing on the fact that the committee in question was spending for only one candidate and concluded that the appropriate contributions limit was \$1,000, not \$5,000. I thought and still think this conclusion wrong, given the inferences to be drawn from the *Buckley* decision, and believe the commission should reconsider it. But the point is that the commission debated and acted openly and upon statutory language and history, did not insidiously "reverse" itself, and by no means fashioned its conclusion from gossamer. In any event, that the commission in my judgment erred in this decision has nothing to do with the arguable vagueness of the contribution definition.

The same problem exists with Bolton's second illustration, an FEC communication as to whether attendance at a meeting addressed by a candidate's representative (where campaign plans, projects, and needs are discussed) compromises the ability of a member of the audience to make independent expenditures benefiting the candidate in question. The statute says that an expenditure can be independent only if made without the cooperation, consultation, request, or suggestion of the candidate or his agents. The commission said that attendance of the kind in question "may" destroy capacity for independent expenditure. Whether it would obviously must depend on what actually happened at the meeting. The commission did not say that independent expenditures would thereafter be impossible, but merely that the statutory language raised a warning flag. Again, Bolton is unhappy with the statute and only incidentally with the commission's communication (which faithfully tracked the statutory directive), but this does not bear on the uncertainty of the act's definitions of contribution and expenditure.

In short, while the statute is occasionally difficult to apply, as subsequent discussion will make clear, these two illustrations hardly demonstrate unconstitutional vagueness in the law.

Enforcement Priorities and Procedures

Bolton complains that the FEC has completely disordered its enforcement priorities by filing "over 100 civil suits" against persons failing to comply with the public filing requirements. These filing requirements are, of course, the heart of disclosure. Commencing with the 1971 act, Congress required that the American public be informed, through the submission of periodic financial reports, of the sources and uses of candidates' money. It is worth remembering that in the *Buckley* litigation, except for splinter political groups suffering a history of governmental harassment, no one argued that disclosure was wrong.

Against this background the commission became aware in late spring 1976 that a huge percentage of actual candidates in congressional primaries in some six or seven midwestern states either had not registered with the commission, or had not designated principal cam-

campaign committees (the critically important vehicle for centralizing reporting of a candidate's disparate financial activity), or were not filing reports as required. The commission accordingly created a special procedure for ensuring the submission of at least those reports that immediately precede an election (including a primary) and that are deemed to give especially important insight into a candidate's financial sources. Under this procedure, the failure to file the pre-election report on time (ten days before the election) produced a nearly instantaneous FEC communication to the non-filer, indicating that the commission had reason to believe that a violation of the act had occurred. To respond to another of Bolton's points, I should note that *every* non-filer was contacted and many of them were incumbents. If no report was then received within several days, the commission again got in touch with the candidate or committee, reasserting the proposition that the law was being violated. Once again *every* non-filer was on the list, including incumbents. On the Sunday before election Tuesday, the commission found probable cause for action against all remaining non-filers and their names were made public in time for newspaper coverage on the Monday preceding the election.

This process had the desired effect: timely filing increased in ensuing primaries. The commission then determined, I think sensibly, that before the general election those remaining candidates and committees who had still failed to file should be judicially enjoined to do so. This course was adopted not only to compel compliance by existing violators but also to serve notice in advance of the general election that the commission took the disclosure principle utterly seriously and was prepared to obtain judicial enforcement where necessary.

Contrary to Bolton's assertion that over a hundred suits against non-filers have been instituted so far, there were only thirty-eight as of July 1978—fourteen of them filed in 1976, twenty-three in 1977, and one in 1978. And as of mid-July 1978, the commission had filed only ten other law suits in its history, which hardly suggests it periodically goes on an enforcement rampage.

There is another misconception lurking in Bolton's attack on FEC enforcement of the disclosure laws against the "little people." He suggests that such defendants cannot affect public

policy because they have no chance of holding public office. But surely it is clear that they can affect an election, by drawing off votes one way or the other in a close race between major candidates. And surely Bolton has heard that this has happened from time to time and that on some of these occasions the splinter candidate entered the race for precisely this purpose and with the backing of forces favoring one of the major candidates. Is there no public interest in having the sources of this "little" candidate's money disclosed? I am not suggesting that any of the thirty-eight non-filers the FEC has sued thus far fall into this diversionary candidate status, but surely the point is worth considering in assessing the rationality of the commission's filing enforcement decisions.

Bolton further argues that the FEC's administrative enforcement procedures are unfair and unresponsive, and finally overbearing in the particular that the commission always insists on a confession of guilt in the conciliation agreement signed by the respondent. I agree with Bolton that the commission has an especially sensitive mission in regulating political and therefore First Amendment activity, and that it cannot casually and automatically rely on enforcement tactics enshrined in the traditions of other administrative agencies that deal with less delicate questions. I stressed the point while at the commission and have repeated it since. But I simply cannot agree that Bolton's complaint in this regard is very real. First, the commission does not always require a statement of guilt by the respondent in a conciliation agreement. Moreover, there are numerous cases where the conciliation agreement, while stipulating facts that show the respondent's violation, also contains a statement to the effect that the commission does not argue the violation was knowing or willful. Such a case was that involving the Gun Owners of America, to which Bolton so angrily (and mistakenly) refers at the close of his article.

Bolton's view of the commission's unresponsiveness is similarly baffling. While it is true that as an investigatory agency the commission does not reveal everything it knows about a case in dealing with a respondent, I have no doubt it is more forthcoming than most agencies in this regard—as, indeed, it should be. The statute does not provide for administrative hearings in connection with compliance and

the commission (rightly in my view) has not held any, since to introduce one or two tiers of formal administrative hearings would so encumber the present process as to exacerbate the slowness of which Bolton complains. And it is not as though the absence of a hearing procedure has allowed the commission secretly to coerce hosts of innocent respondents into signing conciliation agreements. The statistics show that in fact, without a hearing, the overwhelming majority of respondents have been given the required "reasonable opportunity to demonstrate that no action should be taken against them" and have used the opportunity successfully. As of mid-July 1978, the commission had opened a total of 646 formal compliance files, involving over a thousand persons. By the same date, 482 of these files had been closed. Of the 482, only 27 resulted in conciliation agreements, affecting 77 persons. Of these 77 persons, only 47 were required to pay civil penalties (23 of these in a single case). Of these, 33 paid less than \$1,000, including ten who paid as little as \$50.¹

If we add the 48 court suits filed (including the 38 against non-filers) to these 27 conciliation agreements, we find that the FEC took action against respondents in 75 out of 646 compliance actions—in less than 12 percent of the cases (and less than 16 percent of the cases closed). This means that somehow, miraculously, a huge percentage of respondents enjoyed findings favorable to them. If this be the mirror of a police state, I am naive.

Inconsistency and Unreasoned Decisions

Having as much fun as the FEC had agony over certain advisory decisions, Bolton makes several nice points about inconsistency—but these must be kept in context. Aggressive advocate that he is, he takes the most difficult conceptual issues faced by the commission and implies that the imperfection of their resolution marks *all* commission opinion-making. Such is hardly the fact.

Through mid-1978 the FEC (or the staff after commission review) had issued over 700 advisory communications of a legal nature, including 205 formal advisory opinions. In addition, thousands of informal communications went out through the commission's public af-

fairs sections and in discussion with commission lawyers and auditors. Notwithstanding the occasional gripe that informal staff answers to the same question changed from day to day,² I would submit that the consumers of this difficult law have largely agreed with the commission's and staff's views of what the law meant—or have at least understood that the commission's determination was rational and supportable—even when a different result was desired. It is also clear that the commission's groundbreaking willingness, after an uncertain start, to debate and decide in full public view, coupled with staff efforts to be as helpful as possible, has been widely admired. The FEC operated "in the sunshine" long before that openness in government was required by law.

Bolton's remarks on the decisions in the Koch-Mitchell cases and on corporate financing of presidential debates must be viewed against this background. Then-Congressman Koch had spent a few hundred dollars for traditional campaign buttons on which his name was juxtaposed with the names of his party's presidential and vice-presidential candidates. Congressman Mitchell was proposing to spend several thousand dollars for a similar juxtaposition, but in newspaper ads rather than on buttons (which explains the difference in cost). The dilemma in both cases lay with the benefit the buttons and the proposed newspaper ads would confer on Carter and Mondale; that benefit was rightly viewed as amounting to an in-kind contribution from the congressman to the presidential ticket, and thus forbidden under the law governing public financing of presidential campaigns. On the other hand, it

¹ Three persons have paid \$10,000 each, the highest penalty to date. Bolton is mistaken when he states that the record fine is \$11,000 paid by Gun Owners of America. Gun Owners paid only \$5,000. Two related organizations, which signed separate conciliation agreements paid \$5,000 and \$1,000 respectively.

² This is a favorite charge against regulatory agencies, but the Gun Owners of America case cited by Bolton is certainly not a good example. Bolton says that GOA "believed" it had FEC approval for certain financial arrangements between related committees. However, the facts show that in 1976 GOA's affiliates seriously overcompensated GOA for shared administrative expenses, that the affiliates thereby became federal committees in violation of registration and reporting requirements, that the overpayments in part included prohibited corporate funds, and that FEC communications, far from ratifying all this in advance, had clearly forewarned that such events would be deemed improper.

seemed evident to the FEC that Congress, in enacting the public financing provisions, had overlooked the ramifications of this prohibition for traditional "coat-tail" campaign activity (wherein the local congressman identifies himself with his party's national candidates). There was no clean way to resolve the dilemma: to say that no contribution was involved promised to destroy the limits imposed on spending for publicly financed presidential candidates; to say that an incumbent could make an independent expenditure for his own party's leader promised to erode the concept of a truly independent expenditure; but to say that Mr. Koch could not spend a few hundred dollars on buttons promised to turn the law into a joke.

So the commission opted for what was basically a *de minimis* rule: if the Koch-type of expenditure exceeded \$1,000, as Mitchell's would have, the commission said "no." Was the FEC very articulate about this rule? Did it explain itself clearly? In its letters to the gentlemen in question, no. On the other hand, it debated the problem openly over several public sessions, and anyone who paid even minimal attention to its affairs knew precisely where the difficulty lay. Moreover, in the same period of time the commission had openly debated another variation of the same problem: what to do about traditional local party committee spending for the national ticket (as, for example, for a billboard in Montgomery County, Maryland, featuring the faces of Ford, Dole, and the local Republican congressional candidate). This question arose in the course of public rulemaking sessions in summer 1976, and the commission finally decided, in the absence of any statutory guidance, to propose a regulation giving local party committees what was in effect a \$1,000 exemption from the relevant statutory prohibition. That proposal (which Congress embraced in accepting the commission's total regulatory package) supplied at least some coherent background for what was done shortly thereafter in the Koch and Mitchell cases. Subsequently, in early 1977 the commission forwarded to Congress a long list of recommended amendments to the law,³ prominent among which were proposals for curing the predicaments that public financing posed for local party candidates and committees—which suggests the FEC does not enjoy

legislating in a vacuum. Did the commission legislate anyway in the Koch case? Yes. Then is that a shroud I see descending over the lifeless body of American democracy? Well, not exactly.

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Bolton's indictment of the FEC's opinions on corporate and union financial participation in the underwriting of the presidential candidate debates sponsored by the League of Women Voters is, I believe, more on the mark. An Opinion of Counsel, which I issued after commission review, authorized the League of Women Voters' Education Fund to sponsor five regional "educational" forums in which presidential aspirants would debate national issues. Participants were to include not only Republicans and Democrats but also, in the language of the opinion, other "individuals of such national stature that their inclusion in the forms will maximize [the forums'] educational benefit to the public." At this point (late 1975), the commission's perception of permissible corporate and union financial activity "in connection with" federal elections was just beginning to evolve. It was believed that this prohibition against contributions made "in connection with" federal elections (the statutory wording applying to corporations and unions) encompassed a broader range of election-related phenomena than did the definition of contributions made by the ordinary citizen, who was deemed to have "contributed" only when he gave something of value "for the purpose of influencing the nomination for election, or election, of any person to Federal office . . ." (the

³ The fundamental thrust of these proposals was to reduce those burdens of the election law which the commission's experience in 1975-76 had shown to be probably unnecessary to a fair and understandable regulatory system, and thereby to facilitate enhanced popular participation in the electoral process. For example, the commission suggested changes in the reporting requirements, notably in nonelection years, that would have the effect of reducing the number of reports by 50 to 90 percent for many candidates and political committees.

statutory wording applying to individuals). No one was sure just how much broader the range was. The staff opted to allow corporate and union treasury contributions to underwrite the regional forums, given the league's nonpartisan tradition and the fact that a broad spectrum of candidates would participate. Such contributions were not, in these circumstances, deemed to be "in connection with" a federal election.

Thereafter in mid-1976 the league's Education Fund proposed to sponsor debates between Mr. Carter and Mr. Ford only. Bolton is right to suggest that the FEC's handling of this problem was less than conceptually satisfying. Basically the commission's policy statement, publicly debated at length before issuance, said that an individual's donation to the fund to defray debate costs would not be deemed to be "for the purpose of influencing the election of any person to federal office" and could therefore be unlimited, but that a similar donation to the fund by a corporation or union would be "in connection with" a federal election and was therefore prohibited. This is by no means a result clearly directed by the law (on this issue, there is no result directed by the law) and its conceptual rationale is thin, at least in allowing unlimited donations by an individual. But the practical reality of the times left the commission with little choice but to find some funding leeway; there was enormous public desire for the debates to go forward and to many it was unthinkable that the election laws could somehow get in the way of an event of such politically historic (even festive) proportions. I recall the *Washington Star* editorially advising the FEC to "call off its bureaucratic dogs" in this connection—which makes the point, I think, that if Mr. Bolton were not today damning the commission on this question it would be because a million other critics had damned it in the summer of 1976. It is regrettable that what I took to be a necessary result could not, in the circumstances, be accompanied by reassuring black-letter legal reasoning. But the case was as rare in its difficulty as any the FEC has faced, and I take it still as a relatively isolated incongruity. Certainly it is not typical of the commission's work in any but a handful of similarly anguishing cases, all of which either could be cured by a little thoughtful draftsmanship on Capitol Hill or

will be cured by more specific judicial delineation of what the Constitution commands in the areas affected.

This reference to the courts brings me to Bolton's point that the FEC disdains judicial directives. While he implies a malevolent intent that I know does not exist at the commission, I am ultimately moved to agree with him that, in two of the three cases he cites, the FEC (in one instance, with my help) has erred in construing *Buckley v. Valeo*. The core issue in these cases is whether an independent expenditure *not* expressly advocating the election or defeat of a clearly identified candidate (that is, an expenditure like the Sierra Club Committee on Political Education's issuance of an incumbent's voting record with adverse partisan comment short of advocacy of defeat) may nonetheless be an expenditure "for the purpose of influencing" an election, and thus count toward the \$1,000 spending threshold that triggers reporting by a "political committee." In the TRIM (Tax Reform Immediately) cases, a further issue is whether an organization's independent public communications regarding a candidate for re-election to federal office can be deemed "express advocacy of the . . . defeat" of that candidate where the inescapable inference is that the organization wants the candidate "defeated" but when it does not use that word or like phrases, spelled out by the Supreme Court in the *Buckley* case, such as "vote against."

In my view *Buckley* appears to answer both these questions in the negative. Among other things the Sierra Club wished to publish incumbent voting records with accompanying commentary indicating whether the incumbent's vote on various issues had been "correct" or "incorrect" from the club's point of view. The TRIM organizations issue brochures aggressively attacking clearly identified office holders for voting for bigger government and more taxes. Neither the Sierra Club nor TRIM tells the reader in so many words to vote against the individuals identified. It should be stressed that the commission's concern in these cases is not to stop the speech subsidized by the expenditures in question but merely to have the expenditures publicly reported *if they fit within the act*, and to ensure that the printed communications indicate, as required by law, whether they have been authorized by any can-

didate. One should not be misled by Bolton's red-herring ridicule of the commission's interest in the \$135 "outbreak of free speech" involved in the Central Long Island TRIM publication. The *New York Times* reported (February 19, 1978) that 275 local TRIM committees have been established across the country and quoted the TRIM national director, John Robbins, to the effect that 190 of these committees sent out voting record brochures in 1976. The *Times* further reported that national TRIM prepares the basic brochure at national headquarters, "with local chapters to insert names and votes of their district members of the House of Representatives." So the phenomenon the FEC is dealing with here is not an iso-

lated and pitifully small expenditure of a local group but an orchestrated national effort, involving several hundred organizations and potentially thousands of dollars, all of which clearly and directly bear on federal elections.

The commission's caution on these matters is thus understandable. If the expenditures in question are *not* reportable, then 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. Superabundant nondisclosable spending of the type described undermines the central concept of an open, visible campaign process. But while the commission has certainly acted in good faith to protect the

A Reply

John R. Bolton

ALTHOUGH I would enjoy making a point-by-point response to John Murphy, his article impels me to adopt a different approach. I will instead summarize some broader—more philosophical—differences, as well as note points on which we seem to agree.

First, as to the statute, I continue to believe (and here it seems that Professor Murphy may agree with me) that the legislative veto should be repealed. Scholars have noted that the presence of a legislative veto causes members of regulatory agency staffs to work closely with congressional committee staffs in formulating proposed regulations—obviously in an effort to head off a congressional veto before it occurs. Observers of the FEC can verify that such consultation has occurred in the drafting stages of election regulations. This covert influence upon the agency's work is even more troubling than a straightforward congressional veto after public debate. Only if the FEC is made truly independent of Congress can it have a chance of succeeding when it opposes incumbent interests.

Second, as to the vagueness in the statute, Murphy makes it clear that the FEC takes a "loophole-closing" view of its role. That is, it

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will attempt to extend the reach of the statute to preclude or limit campaign strategies or tactics that the congressional drafters did not contemplate. But rather than bolster a deficient statutory framework, the FEC should look to the First Amendment for guidance. And when it comes across activity about which the statute is silent or vague, it should permit that activity unless there is clear evidence of corruption or the appearance of corruption.

This approach would have several advantages. It would be consistent with the requirement that political debate be "uninhibited, robust, and wide-open" (*New York Times v. Sullivan*, 1964). Also, it might protect the statute from further constitutional attack. When courts or agencies adopt limiting constructions of statutes, reviewing courts are less likely to decide constitutional issues. Such a result would create greater stability in the statutory framework and therefore less disruption of the political process. Finally and most important, if Congress does not like the results of a First Amendment approach to campaign regulation, *it should change the rules*. Congress should have to address the free-speech issues squarely, putting itself on record for or against freer political advocacy. There is no reason why the FEC should engage in loophole closing when Congress is unwilling to do so.

Third, as to the enforcement process, Murphy's own statistics indicate that the process needs drastic reform. 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.

integrity of that process, on treacherously difficult terrain, 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.

The FEC Is a Congressional Lady-in-Waiting

Bolton's generalized charge here is that the FEC's performance has enhanced the proincumbent bias inhering in the statute itself by granting congressmen special electoral privileges unavailable to challengers. The fact

is that the FEC, endowed with what was at best equivocal statutory authority, has persistently infuriated officeholders (including a sitting President) with its efforts to bring incumbents and challengers into a relative parity of position in the campaign process.

The fiasco of the office account regulation is illustrative. The act gives the FEC authority to require disclosure of amounts contributed to (or used by) an incumbent to help defray "ordinary and necessary expenses incurred by him in connection with his duties as a holder of Federal Office." Since only an innocent would assume that none of this money would be used for re-election purposes, the commission unanimously concluded that the regula-

Yet the fact that actions are dismissed does not mean no harm has been done, and Murphy is highly misleading when he suggests that "a huge percentage of respondents enjoy findings favorable to them." Often, cases were dismissed or files closed only because the commission was deadlocked. Such results are hardly ringing vindications of the respondent's position.

Murphy relies on rhetoric here, proclaiming "if this be the mirror of a police state, I am naive." Of course, it is not. But as I said in my article, what the political process loses because of FEC enforcement is the activity that never occurs. A decline in the tempo of our electoral process may proceed for many years before anyone notices the change. The chilling effect of FEC enforcement is felt most directly by the respondent, and is felt whether the respondent is vindicated or not. For the chill to spread gradually through the body politic takes somewhat longer.

Fourth and finally, Murphy disagrees with me on how well the statute has functioned. He cites public opinion polls in the *Buckley* record to show that, before the 1974 statute was enacted, the citizens were disenchanted by their government. What that proves about this campaign finance law, I am not exactly sure. Murphy also complains that before the 1974 statute, 2 to 3 percent of the people contributed 95 percent of the financing for congressional elections, and he sees this as evidence of a "functional oligarchy." But for these 4 to 6 million contributors to constitute an "oligarchy" (and a very large oligarchy it would be), they would have to be aiming pretty much at a common political goal. Quite obviously, since

they include far left and far right and all the spectrum between, they would have no goal in common and would not be an oligarchy in any useful sense of the word.

Moreover, for all of his concern about functional oligarchy, Murphy is silent about the role in the political process of business and labor, the two most notable examples of "special interests." How has the statute limited them? The answer is simple: not only are they not under major new restrictions, but the statute has provided *more* opportunities than ever for them to exercise political influence.

New attempts to limit political activity by some groups and by individuals generally do not bring about "functional equality." They merely shift the balance of political power to those whose activity is not limited. Ultimately, unless the courts intervene to protect First Amendment freedoms, the campaign act will simply be a battleground for the financial gerrymandering of the electoral process.

There is a workable solution to these problems. Rather than attempt to limit, to proscribe, or to regulate politics, we should restrict the federal presence in this area to properly drawn disclosure statutes. That would avoid the inherent unfairness of the present statute, it would free the political process from the threat of haphazard enforcement and discretionary rulemaking, and most important, it would return the ultimate decision to the people. Instead of having Congress or the FEC determine what is the "proper" amount of permissible activity, the voters could make this choice at the polls. That is, presumably, the way a free political process should work. ■

tion in question should not only compel disclosure but should apply the relevant statutory limits on contributions and expenditures to those office account receipts and disbursements that could be deemed as made "for the purpose of influencing" the incumbent's reelection. The imposition of limits through the proposed regulation, over and above mere disclosure, was from the outset legally questionable; but we hoped the House and Senate would recognize and accept the curtailment on "slush funds" as consistent with the rest of the legislation. The House and Senate did not, and the regulation in force today merely tracks the statute, requiring disclosure only.

To say this is regrettable is to state the painfully obvious. But here as elsewhere the FEC's effort to control the use of funds (including legislatively appropriated funds) in campaign activity foundered on a lack of jurisdiction, not a lack of will. Note that the commission tried; it did not meekly submit to the legal fact of its own helplessness against the legislative veto. And there can be little doubt that the publicity surrounding its fight contributed to the subsequent reluctant willingness of both houses of Congress to modify political usage of funds in the twilight zone of office accounts.

Similarly, the FEC ruled in a series of opinions that an honorarium received by an incumbent for a personal appearance would be deemed a contribution, depending on whether the incumbent was a candidate and on whether his appearance had political overtones or was before an audience eligible to vote for him. None of this was directed by the statute, but all of it was inescapably consistent with the act's view of what constitutes a contribution. Congress did not like this at all, and flatly said in the 1976 amendments that an honorarium could never be a contribution under the act, no matter what the circumstances. (Unsurprisingly, those amendments said nothing about how honoraria paid to challengers were to be treated.)

The commission quarreled as well with the Republican National Committee (RNC), which argued that during the campaign it could move President Ford around the country at will, without incurring campaign expenditures, so long as his appearances thus subsidized were for "party building" as dis-

tinct from "political" purposes. The commission finally resolved this argument by ruling that all "party building" appearances in an election year are presumptively campaign related, and in a nonelection year must take place under carefully circumscribed conditions to avoid the same characterization. Consistent with this ruling, the Ford committee was obliged to pay for several appearances in 1975 that would otherwise have been covered by the RNC.

. . . the real and enduring danger of this regulatory system [is] the congressional urge to protect itself. . . .

In short, the commission, far from taking a dive at the first sign of officeholder displeasure, has persistently sought to read the law in a fashion that minimizes the inherent electoral edge enjoyed by incumbents over challengers seeking to replace them. But the illustrations also highlight what I take to be the real and enduring danger of this regulatory system: the congressional urge to protect itself, whether that protection involves using legislatively appropriated funds for political purposes, vetoing a reasonable regulation, or amending the law periodically to eliminate a threatening FEC decision or to confine or limit the minority's access to a relatively greater slice of the pie. This is a peril not to be lightly discounted, and we are well forewarned by critics such as Bolton.

Can We Regulate Campaign Activity?

This leads me to my final point. Bolton is wrong, I believe, when he concludes that the FEC (and presumably the law itself) should be thrown out because "politics is simply too complex and too changeable to permit the creation of a stable regulatory framework" and because Congress will inevitably tinker with the statute to increase its own leverage. This claims too much. Conceding that these first experimental years have not been unblemished by moments of confusion and error, one can nevertheless say that the system has worked well. Bolton's alarm that the process will drive people away

from politics and limit the "spontaneity" of the average citizen's participation in election activity is worth thinking about, but hardly seems supported by current data. For example, there is no evidence that the number of candidates for federal office has declined since the passage of the reform laws in 1972. And as of early July 1978 political committees filing with the commission had reported the receipt of \$47 million in contributions of more than \$100 in 1977 and 1978. Some of these contributions will end up funding campaigns for state and not federal office, but, even so, the \$47 million figure hardly reflects apathy among the giving public.

Moreover, one must ask whether the initiation of this regulatory system could conceivably have worse ramifications for John Q. Citizen's interest in political involvement than did the unregulated development of the political process in the decade prior to the 1974 amendments. In 1974, according to University of Michigan research included in the *Buckley* record, nearly 70 percent of the people polled thought government was run largely "by a few big interests looking out for themselves," while only 21 percent thought it was run "for the benefit of all." This result is hardly surprising: in 1974, according to the agreed findings in *Buckley*, just 1 percent of the contributors gave 90 percent of the money received by federal candidates, parties, and political committees, and 2 to 3 percent, "the wealthiest people in the country" (to quote the United States Court of Appeals opinion in *Buckley*) provides about 95 percent of the financing for congressional elections. Of course, prior to 1972 all of this had been largely secret, although that hardly alleviated the chilling effect experienced by the average citizen, who had to know that his few dollars or few hours of volunteer work did not amount to a damn in the larger picture of millions contributed by wealthy individuals and by business, labor, health, farm, and other interest groups. The inadequacies of the law and the FEC since 1974, and even the inhibitions on political participation arguably flowing therefrom, pale in comparison to the threat of functional oligarchy that faced the nation in the days before. Measuring that threat carefully, I am prepared to suffer the experiment of the election law and the commission for some substantial additional time. Bolton is good to remind us not to suffer in silence. ■

Regulation and Household Moving Costs

Denis A. Breen

SUPPOSE a family were to move its household goods from Baltimore or the Maryland suburbs of Washington, D.C., to a point some 125 miles away. How much would it cost?

It turns out there are two quite different answers, depending on whether the family moves to a point inside Maryland or beyond the state's borders. It also turns out that the reason for the difference appears to lie in the fact that rates for moving household goods inside Maryland are set by competition, whereas rates for moving the same goods from one state to another are arrived at collusively in rate bureaus and then approved by the anything but competition-minded Interstate Commerce Commission (ICC).

Setting Moving Rates: Maryland and Interstate

Geographically Maryland is the largest remaining unregulated market for household goods movers in the United States. Under a state law passed in 1932, the Public Service Commission of Maryland regulates certain classes of intrastate motor carriers (truckers operating with-

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