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Reflections on Voluntary Compliance Under the Federal Election Campaign Act

Thomas B. Curtis*

In this article, the author, a former Chairman of the Federal Election Commission, speaks from experience about the unique challenge of carrying out the Commission's mandate under the Federal Election Campaign Act: to keep the federal election process fair and to restore to it the confidence of the people. He reflects upon the need for the FEC, in carrying out its duties, to guard against the abuse of first amendment rights, especially the right of the citizenry to petition the government for redress of grievances, and to be alert to possible abuses of an incumbent's "reporting back" duty without stifling the legitimate use of that function. In exercising its authority over federal elections, the FEC must remain mindful of the Constitution's assignment to the states of the dominant role in overseeing presidential elections; the author suggests that, because of these constitutional limitations, the concept of voluntary compliance should and does prevail in accomplishing the Act's purposes. Finally, the author notes that the achievement of widespread voluntary compliance requires a Commission independent of the Congress and the presidency, and pinpoints modification of the FEC's role such that it acquires that independence as one of the most important areas for further work in the elections area.

INTRODUCTION

GOVERNMENTAL REGULATION of the election process is a narrow but vital area of jurisprudence. It is *sui generis* and only limited value may be derived from comparing it with other types of governmental regulation because elections are so different from all other regulated activities.¹ Instead, insight into the na-

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The views expressed here are Mr. Curtis' own and do not necessarily reflect the past or present views of the Federal Election Commission.

1. John R. Bolton, one of the counsel for James Buckley and Eugene McCarthy in *Buckley v. Valeo*, 424 U.S. 1 (1976), has enumerated some of the salient differentiating characteristics:

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

ture of federal regulation of elections must be gained through analysis of its historic and present function in the democratic process.

Elections are the prelude or antechamber of representative government itself and the epilogue or postmortem chamber of its performances. The Federal Election Commission (FEC) was created as an umpire to keep the process fair and to restore to it the confidence of the people. As the second presidential election of the Commission's career approaches, it seems appropriate to review election regulation's fundamental role in American politics and pinpoint the areas where further modification of the Commission's activities is needed to fulfill that role.

Ensuring the peaceful and fair transference of political power among individuals in society is one of the most difficult and sensitive functions of any government. It is here that representative democracy, "the worst form of government except all those other forms,"² most clearly proves itself preferable to "those other forms." The more that good sense and careful judgment are devoted to improving the election process, the better this "worst form of government" becomes.

This paper first considers some of the values to which a federal regulator of elections must remain sensitive. In the wake of *Buckley v. Valeo*,³ much has been said about the freedoms of political speech and association and the federal election laws. Other rights and traditions, however, have escaped the attention of the federal judiciary as it has entered the political thicket. Most important among them is the right of the citizenry to petition the government for redress of grievances.⁴ Another is the vital American political tradition that legislative representatives should report back to the people who elected them. In these areas the FEC confronts an unresolved tension: "petitioning" and "reporting back" are deeply at stake when the activities of incumbents are regulated, yet that is precisely where regulation is most needed.

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.

Bolton, *The Federal Election Commission: Government Astride the Political Process*, AMERICAN ENTERPRISE INSTITUTE JOURNAL ON GOVERNMENT AND SOCIETY, July 1978, at 46.

2. Speech by Winston Churchill, House of Commons (Nov. 11, 1947), 444 Parl. Deb., H.C. (5th ser.) 207.

3. 424 U.S. 1 (1976).

4. U.S. CONST. amend. I.

In considering the proper role of the FEC, it is important to review the Constitution's allocation of authority over federal elections. That the states are assigned the dominant role in presidential elections has serious implications for federal regulation in this area. This paper explores the constitutional limits of federal regulation of presidential elections and concludes that, at least in the area of federal financing for elections to the electoral college, these bounds have been overstepped.

Partly as a result of these historic and constitutional considerations, the Federal Election Campaign Act (FECA)⁵ depends heavily on voluntary compliance to effectuate its purposes. The sanctions of both the Presidential Election Campaign Fund Act⁶ and the Presidential Primary Matching Payment Account Act⁷ apply only to those who accept federal financial assistance for their campaigns. My thesis is that a true concept of voluntarism can prevail in this area of administrative law. At least with regard to the election laws, an approach based on voluntary compliance is viable and is working effectively.

Finally, I shall discuss the independence of the FEC—a concept essential to the full realization of voluntary compliance. In my view, the Commission is not yet sufficiently insulated from the political pressures that naturally emanate from the Congress and the executive branch.

I. THE FEC AND THE RIGHT TO PETITION THE GOVERNMENT

John R. Bolton has asserted that “the Federal Election Commission is—*must be*—different from other agencies because it regulates political speech, not railroad rates.”⁸ I disagree with Mr. Bolton's facile assumption that there can be no regulation of the election process without impeding constitutionally protected speech or assembly. To my mind, *Buckley v. Valeo* made it clear that the Federal Election Campaign Act neither requires nor allows regulation of protected political speech or activity.⁹ If Mr.

5. 2 U.S.C. §§ 431–55 (1976); I.R.C. §§ 9001–42 (1976), as amended by Federal Election Campaign Act Amendments of 1974, Pub. L. No. 94–443, § 208(a), 88 Stat. 1280, as amended by Federal Election Campaign Amendments of 1976, Pub. L. No. 94–283, §§ 101(a)–(d), 90 Stat. 475, 476, 481, as amended by Act of Dec. 20, 1977, Pub. L. No. 95–216, § 502(a), 91 Stat. 1565. [The sections of the Internal Revenue Code codified at Title 26 of the United States Code will hereinafter be cited to that Title.]

6. 26 U.S.C. §§ 9001–12 (1976).

7. 26 U.S.C. §§ 9031–42 (1976).

8. Bolton, *supra* note 1, at 51.

9. See 424 U.S. at 39–59.

Bolton had said, "*If not careful* the Federal Election Commission can easily get into regulating political speech," I would agree. Then the more relevant question would arise, "Has the Commission been careful?"

I believe the Commission has thus far exhibited scrupulous regard for first amendment freedoms. But the potential for infringement remains. The Supreme Court in *Buckley* struck the compulsory expenditure limitations from the original Act as unconstitutional "restrictions on . . . protected political expression."¹⁰ Yet, another first amendment concern is at stake in this regulatory program. If the Federal Election Commission is not careful in administering the Act, it can become involved in regulating the right of the people "to petition the Government for a redress of grievances."¹¹

In my view, this right is second in importance only to the right to vote itself. In a representative democracy the people must have free access to governmental officials. Although the first amendment explicitly protects the right to petition government, this right has thus far received little attention by the courts. Since the right to petition the government is crucial to a functioning republic, and since it could be endangered by an overly free-wheeling FEC, I believe it merits careful consideration.

In a broad sense, the entire election process is an omnibus petition for redress of a whole collection of grievances, and those engaged in electing are perforce engaged in petitioning. The techniques employed are similar and intermingled. More specifically, the right to petition is at stake when government seeks to regulate the citizenry's communications and activities with incumbents running for office. The problem is of considerable dimension for the FEC because it is constantly dealing with incumbents seeking reelection.¹²

Unfortunately, petitioning government is better known—and not without justification—by its pejorative names: "lobbying" when exercised in the legislative branch and "influence peddling" when exercised in the executive or "independent agency" branch.

10. *Id.* at 58-59.

11. U.S. CONST. amend. I.

12. In the Congress, incumbents have won over 85% of all congressional elections since 1954. TWENTIETH CENTURY FUND TASK FORCE ON FINANCING CONGRESSIONAL CAMPAIGNS, *ELECTING CONGRESS: THE FINANCIAL DILEMMA* 3 (1970) [hereinafter cited as *ELECTING CONGRESS*.] Rarely does a one-term President decline to run for a second term.

of government. These labels bespeak the ability of incumbents to convert the right of the people to petition government into a means of securing votes. In my view, Members of Congress overreach when they attempt to handle too many constituents' petitions on an individual basis. By acting selectively on particular grievances, a legislator can grant special favors with the expectation of receiving a returned favor, often financial, during the campaign for reelection. This is, of course, a corruption of the governmental process when it is not properly handled.

The biggest, most influential lobbyists in Washington are governmental officials in the executive and regulatory agencies. Accordingly, in pursuing their right to petition the Congress, the people have often found it efficacious to work indirectly through the executive branch. With the power of the President to command the attention of the people when he speaks—"the bully pulpit" as Theodore Roosevelt accurately described it¹³—the executive branch can be effective in both petitioning the Congress and influencing the reelection of its Members. Moreover, the way that the executive and the agencies use their broad, discretionary powers is of vital interest to Members of Congress acting in their representative capacities—and in their desires to be reelected. The executive branch can grant or withhold federal contracts or appointments. It can determine where to locate federal facilities and which laws to enforce vigorously and which to ignore. In promulgating regulations the agencies can determine how fully (or meagerly) to flesh out a statute. All these can be wielded by the executive branch and the agencies as redeemable political favors to influence the reelection of favored incumbents in Congress.

I believe that an incumbent Member of Congress should be reelected for work well done as a legislator, not on the basis of reciprocated favors. A distinction must be drawn between petitioning a Congressman legitimately in his representative capacity and improperly influencing a Congressman as an incumbent desiring reelection. A really thorough program of election regulation would prevent abuse of the right to petition the government.

Unfortunately, the existing laws are woefully ineffective. Section 1913 of the federal criminal code,¹⁴ for instance, makes it ille-

13. See Putnam, *Roosevelt: Historian and Statesman*, in T. ROOSEVELT, 9 WORKS OF THEODORE ROOSEVELT x (national ed. 1924).

14. 18 U.S.C. § 1913 (1976). This section provides that:

No part of the money appropriated by any enactment of Congress shall, in the absence of express authorization by Congress, be used directly or indirectly to pay

gal for federal funds to be used to subsidize lobbying. By ensuring an arm's length executive-congressional relationship, enforcement of section 1913 could prevent the use of the executive branch as a vehicle for incumbent Congressmen improperly seeking to please selected, influential, wealthy constituents. Yet, the Justice Department has ignored section 1913 since its enactment,¹⁵ and for years Presidents have openly established lobbying offices in the White House euphemistically called "Congressional Liaison."¹⁶ Such uses of federal funds by the executive are obvious violations of section 1913.

The recently-enacted limitations on outside compensation for Congressmen¹⁷ and controls on campaign financing are important first steps. But much more needs to be done to prevent incumbents, who happen also to be candidates, from acting on the citizens' petitions with a diligence related only to a particular constituent's ability to help secure the incumbent's reelection. I believe the petitioning process itself could be formalized without unduly impeding it. Codes of ethics have been established for Congress as a whole, but special codes should be established for the powerful congressional committees who ultimately act on the people's petitions when they are formulated as proposed legislation. Such codes should also prescribe ethical procedures to guide the actions of House-Senate conferences where differences be-

for any personal service, advertisement, telegram, telephone, letter, printed or written matter, or other device, intended or designed to influence in any manner a Member of Congress, to favor or oppose, by vote or otherwise, any legislation or appropriation by Congress, whether before or after the introduction of any bill or resolution proposing such legislation or appropriation: but this shall not prevent officers or employees of the United States or of its departments or agencies from communicating to Members of Congress on the request of any Member or to Congress, through the proper official channels, requests for legislation or appropriations which they deem necessary for the efficient conduct of the public business.

Whoever, being an officer or employee of the United States or of any department or agency thereof, violates or attempts to violate this section, shall be fined not more than \$500 or imprisoned not more than one year, or both; and after notice and hearing by the superior officer vested with the power of removing him, shall be removed from office or employment.

Id.

15. One of the few courts to confront this statute observed: "Unfortunately, in section 1913 plaintiffs have dusted off a statute which because of its obscurity may render impossible a precise judgment concerning the intent of Congress in passing the legislation. There appears to be no record of prosecutions under the statute." *National Ass'n for Community Dev. v. Hodgson*, 356 F. Supp. 1399, 1403 (D.D.C. 1973).

16. See generally L.B. JOHNSON, *Congress and the Presidency*, in *LEGISLATIVE POLITICS* U.S.A. (T. Lowi & R. Ripley ed. 1973).

17. 2 U.S.C. § 44li (1976), as amended by Act of December 20, 1977, Pub. L. No. 95-216, § 502(a), 91 Stat. 1565.

tween two versions of legislation on the same subject are reconciled. Much needs to be done to insure that these forums are fair. The adversary method of fact finding and decisionmaking should prevail, as it does in the courts, by forbidding *ex parte*, *in camera* presentations. Opening these committee forums to all persons would inhibit the improper trading of favors between self-interested incumbents and powerful lobbyists.

It is possible that such a broad scheme of election regulation could infringe upon the constitutionally protected right to petition the government by unduly impeding the people's access to elected officials. Nevertheless, the FEC remains subject to the discipline of the judiciary as a guardian of first amendment rights,¹⁸ and the Congress, in the exercise of its broad oversight powers over the FEC,¹⁹ provides an additional safeguard. And of course the people, acting through Congress, could modify the functions of the FEC by legislation if it should unduly restrict their right to petition their representatives.

II. THE REPORTING-BACK FUNCTION

A significant characteristic of representative democracy is the vital function of legislators to report back to the electorate about governmental developments. Effective democratic government requires an informed citizenry, and Members of Congress have at their disposal numerous means of communicating with constituents. The franking privilege, for instance, allows postage-free mailings,²⁰ and Congressmen have liberal stationery accounts. The Senate and House both have extensive television and radio recording facilities available to Members free of charge. There are also two well-staffed offices for each Member, one in Washington and the other at home.

Again, the preeminence of incumbent candidates in federal elections presents a dilemma for the FEC. All the perquisites of office do have legitimate functions and, if it is not careful, the Commission could get into unduly regulating what I shall call the "reporting-back-to-the-people" function of representatives. But at the same time, incumbents should not be afforded unlimited free play with the perquisites of office in seeking reelection. Since

18. See 2 U.S.C. § 437h (1976) (providing expedited judicial review and standing to "any individual eligible to vote in any election for the office of President" in cases involving the constitutionality of provisions of the FECA).

19. *Id.* § 437c(b)(2) (1976).

20. 39 U.S.C. § 3210 (1976).

much of a representative's reporting back involves activity that very closely resembles campaigning, the two are not always easy to distinguish. I used to refer to my own campaigns for reelection to the House simply as "concentrated periods of reporting back under heckling."

Difficult as it is to distinguish proper use of congressional perquisites for legitimate reporting-back purposes from misuse for campaign purposes, Congress has begun to draw the line. Detailed statutes limit the use of the frank to official, proper purposes.²¹ The Senate has sought to limit incumbents' use of the congressional radio and television studios during periods preceeding elections.²²

Yet, much work remains. Almost a decade ago the Twentieth Century Fund Task Force on Financing Congressional Campaigns recommended "that a federal election commission enforce rules that will prevent members of Congress from using their staff, office, and communications facilities to plan and run their reelection campaigns."²³ For the most part, this plea has fallen on deaf ears. The FEC has never been given specific authority to prevent abuse of the advantages afforded incumbents through their reporting-back duties. The election statutes require only that the monies and services in kind used to influence or elect be reported to the FEC.²⁴ If the FEC insists on full and timely reporting, the ensuing publicity might eliminate much of the abuse. The problem, however, is that the use of congressional perquisites to get re-elected—particularly the use of congressional staff—remains unreported.²⁵

The size of the personal staffs of House Members has increased from four in 1950 to eighteen in 1979. This is disturbing because no Member of Congress needs eighteen persons to carry out his reporting-back duties. There was considerable merit in arguing for larger staffs for the increasingly busy congressional committees where the bulk of the legislative research, drafting, and oversight work is done. But in the case of individual Members, the expanded staffs have concentrated on nonlegislative, nonrepresentative functions. A large personal staff provides valuable

21. *Id.*

22. See S. Res. 110, 95th Cong., 1st Sess., 123 CONG. REC. S 5397 (1977).

23. ELECTING CONGRESS, *supra* note 12, at 26.

24. See 2 U.S.C. § 434(b)(11) (1976).

25. For a discussion of misuse of congressional staff for campaign purposes, see ELECTING CONGRESS, *supra* note 12, at 25-26.

public relations services free of charge to the incumbent, which a challenger would have to pay for out of campaign funds. Congressional offices have sometimes served as campaign headquarters,²⁶ and, as the election date approaches, the efforts of the eighteen-person staff shift easily from the routine ombudsman work of acting on constituents' petitions and reporting back to the citizenry to full-fledged campaign work for the congressional employer. Clearly these people should leave the federal payroll while performing campaign duties and be paid by the campaign organization. And although this work constitutes service in kind rendered for a candidate, little of it is disclosed to the FEC.

Thus, while the FEC must respect the legitimate reporting-back functions of incumbents in Congress, currently there is considerable abuse of the perquisites provided to facilitate the performance of that function. The most the FEC can do is to insist on full disclosure of such activities. And this alone would actually further the purpose underlying the reporting-back function to ensure an informed citizenry.

Before considering controls on the reporting-back activities of the President, it is necessary to recall some important distinctions between the process of electing a federal executive and the process of electing federal legislators. Just as the Constitution prescribes different purposes for the executive and legislative branches, it prescribes entirely separate election procedures for the two types of office. These distinctions bear crucially on the proper extent of the President's reporting-back function and, indeed, on the extent to which the FEC can be empowered to regulate elections to the respective offices.

Because of the nature of his election and his office, the federal executive, unlike his congressional counterparts, does not have a responsibility to report directly back to the people.²⁷ There is considerable misunderstanding of this point. To a large degree the confusion is the result of the recent popularity of the doctrine now identified pejoratively as the "Imperial Presidency."²⁸ The presi-

26. See, e.g., *Election Unit to Extend Morton Investigation to Others*, N.Y. Times, Jan. 16, 1976, at 34, col. 5.

27. The President does, however, have a responsibility to report to the people's representatives in Congress. "He shall from time to time give to the Congress Information of the State of the Union and recommend to their Consideration such Measures as he shall judge necessary and expedient . . ." U.S. CONST. art. II, § 3.

28. I use the phrase "Imperial Presidency" to connote the notion that the President should formulate substantive policy instead of executing the laws enacted by Congress. See M. BURNS, *PRESIDENTIAL GOVERNMENT: THE CRUCIBLE OF LEADERSHIP* (1965).

dency also provides a "bully pulpit," as our first Imperial President, Theodore Roosevelt, described it,²⁹ to harangue the people, and in a message to Congress the President can really address the people over the heads of their true representatives in Congress. This is particularly true since the arrival of the national news wire services, radio, and television. Together, the doctrine of the Imperial Presidency and the "bully pulpit" create the mistaken impression that the President should report directly to the people.

The doctrine of the Imperial Presidency is based upon two fallacies. The first is that the federal executive is a "super-legislator" and the sole leader, not merely one of the leaders, of his political party. This myth encompasses the idea that it is the responsibility of the President personally to lead the people and the Congress in political action, as is truly the case with prime ministers of parliamentary governments such as those of Great Britain and Canada.

The second fallacy is that the President of the United States is elected directly by the people as congressional representatives are. Despite all of the public relations camouflage, this is not so. As a matter of fact, in some states the citizen does not even cast his vote for a presidential candidate; he votes for an elector pledged to one of the political parties.³⁰ Even where the citizen does vote directly for a presidential candidate, invariably all of the names on the ballot have already been selected by delegates to political conventions.³¹

Today's method of electing the President has evolved from the original constitutional plan, but the basic framework of 1789 remains strong. Any national scheme of election regulation must proceed within that framework. It is helpful in understanding this constitutional structure to view it as consisting of three tiers.

The first tier is the selection every fourth November by the people in each state of electors for the electoral college.³² Actually, the original system has evolved so that the national conventions at which each party's presidential and vice-presidential

The phrase gained currency, of course, in A. SCHLESINGER, *THE IMPERIAL PRESIDENCY* (1973).

29. See Putnam, *supra* note 13.

30. See W. SAYRE & J. PARRIS, *VOTING FOR PRESIDENT: THE ELECTORAL COLLEGE AND THE AMERICAN POLITICAL SYSTEM* 41 (1970).

31. *Id.*

32. The Constitution prescribes the first tier procedures as follows: "Each State shall appoint as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress. . . ." U.S. CONST. art. II, § 1, cl. 2.

candidates are chosen constitute, in practical effect, additional "electoral colleges." At the second tier, the groups of electors meet in their respective states and formally cast their votes for one of the political parties' presidential and vice-presidential candidates. The candidate with the most electoral votes in each state is given all of that state's electors—the "winner take all" system. Then, the official results of each state's electoral poll are transmitted to the President of the Senate (the incumbent Vice President) in Washington.³³ Only if no candidate gets a majority of the vote in the electoral college does the third tier procedure for choosing the President and Vice President go into operation. There, the power to choose among the three top candidates in the electoral college is vested in the Congress.³⁴

At most, the chosen President should have a responsibility to report back only to the constituencies that actually chose him, namely, to the delegates of the political party whose national convention nominated him and the electors of each state. Because the people are not the President's electoral base, he has no duty to report directly back to them. When he does engage in reporting-back activities, it is not in a genuinely representative capacity. Rather, it can only be a self-serving effort to convince the people of the efficacy of his policies or, in election years, to influence his reelection.

But, as I shall develop presently, it is questionable whether the federal government—Congress, the President, or the Supreme Court—has any constitutional authority over the first two tiers of

33. The twelfth amendment sets out the second tier procedures:

The Electors shall meet in their respective states and vote by ballot for President and Vice-President . . . ; they shall name in their ballots the person[s] voted for as President and . . . Vice-President, and they shall make distinct lists of all persons voted for as President and . . . Vice-President, and of the number of votes for each, which they shall sign and certify and transmit sealed to the seat of the government of the United States, directed to the President of the Senate . . .

U.S. CONST. amend. XII.

34. At the third tier:

The person having the greatest number of votes for President, shall be President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. . . . The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President.

Id.

the three-tier process for selecting the federal executive.³⁵ Thus, the FEC's powers to regulate or interfere with whatever reporting-back function the President assumes is negligible. Indeed, as a practical matter, because it enjoys first amendment protection, the news media—the critical link in all presidential communications with the people—has more effective power to regulate or select what gets through to the President's constituents than has any agency of the government.³⁶ The result is that the FEC is virtually powerless to control or regulate any reporting-back-to-the-people function that an incumbent President may assume, even when he does so solely to enhance his prospects for reelection.

An instance from the 1976 presidential election campaign illustrates the special problems the FEC has in dealing with an incumbent President. In January, 1976, President Ford publicly announced he was placing a former chairman of the Republican National Committee on his staff in the White House as "Counselor to the President."³⁷ This new aide, however, would also have responsibilities for working with President Ford's reelection committee.³⁸ As a Commissioner, I stated that this was treading on thin ice. Treating this aide as a White House advisor rather than as a campaign employee would enable the President to avoid charging the aide's salary against the expenditure ceiling.³⁹ The FEC's dilemma here was that it had no authority to prevent the President from putting people on the White House payroll and then assigning them to go out and organize his campaign for reelection. The most the Commission could do was to insist on full reporting of these campaign expenses and then charge them against the President's expenditure ceiling. Fortunately, the attendant publicity, at least in this instance, led to full compliance on the part of the candidate.⁴⁰

35. See text accompanying notes 49–64 *infra*.

36. At least with respect to the politically important broadcast media, however, Congress has assumed a substantial regulatory role because of the limited number of national airwave frequencies available. Thus, under the equal time provisions of the Federal Communications Act, Congress has sought to assure candidates fair access to broadcasting facilities. See 47 U.S.C. § 315 (1976).

37. *Post for Morton Draws Criticism*, N.Y. Times, Jan. 15, 1976, at 17, col. 1.

38. *Id.*; N.Y. Times, Jan. 16, 1976, at 34, col. 5.

39. See 26 U.S.C. § 9035(a) (1976).

40. See N.Y. Times, Jan. 16, 1976, at 34, col. 6.

Later, candidate Ford's incumbency presented further difficulties. When the Republican National Committee accepted federal funds to hold its national convention, it was bound to spend these funds impartially among candidates seeking the Republican nomination. See 26 U.S.C. §§ 9004(a), 9008(c). It could not show any preference for any single

In summary, then, the FEC must seek a balance in regulating incumbents' campaign activities. With regard to the Congress, the Commission must respect the traditional responsibility of legislators to report back to the people they represent. At the same time, however, the Commission should strive to prevent incumbent Congressmen from converting the perquisites of their reporting-back duties into campaign tools. The President has no real reporting-back function. Nevertheless, since the ascendancy of the notion of the Imperial Presidency, Presidents as a matter of course have delivered their messages directly to the people. Because, as I shall explain, the FEC's authority does not extend to the relationship between the President and his constituents, whatever reporting-back the President does is largely beyond the ambit of the FEC.

III. FEDERALISM AND THE FEC

In *Buckley v. Valeo*,⁴¹ the Supreme Court held that the mandatory expenditure ceilings of the original Act offended political and associational freedoms guaranteed by the first amendment.⁴² I believe that coercive federal controls over presidential elections would suffer another infirmity. They would violate the constitutional allocation of authority over the electoral college and national political conventions.

The Constitution vests the basic power over federal elections, both presidential and congressional, in the states, with certain preemptive rights in the Congress with respect only to congressional elections. Section 4 of article I provides that: "The Times, Places and Manner of Holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators."⁴³

Potentially, national authority over congressional elections is plenary, except for the states' choice of a place for senatorial elections. Thus, at least with respect to elections to the House of Rep-

contender over another. Time and again, the Republican National Committee demonstrated its misunderstanding of this principle. Repeatedly, the National Committee openly treated the President's supporters more favorably than his challengers. In seeking to justify its actions favoring the incumbent candidate, the National Committee's attitude was simply that things had always been done that way.

41. 424 U.S. 1 (1976).

42. *Id.* at 37-59.

43. U.S. CONST. art. I, § 4, cl. 1.

representatives, the federal government could conduct congressional elections separately from elections to state and local offices. Nevertheless, Congress has historically preferred to rely on the states to organize and operate the machinery of all political elections.⁴⁴ Federal candidates, in effect, ride piggyback on the ballot with those running for local office. Congress has never exercised its constitutional choice to preempt state authority "by law," except to set a common date for holding national elections.⁴⁵ Its actions under these clauses have been merely additive rather than preemptive.

Elsewhere in the Constitution, Congress is given considerable latitude concerning congressional elections. The Framers granted Congress the exclusive power to "judge" the results of elections of its Members: "Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members. . . ."⁴⁶ Congress has been vigorous over the years in exercising this power. There have been, I would estimate, about a score of election disputes filed with the House of Representatives and turned over to the House Administration Committee at the beginning of each new Congress for the last fifty years.⁴⁷

Federal authority over the election of the President and the Vice President, in contrast to that concerning congressional elections, is sharply limited. The power over the first tier of this complicated process⁴⁸ is vested exclusively in the states.

The Constitution provides that "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors"⁴⁹ Here, no preemptive rights are vested in Congress. This language makes it clear that Congress has power

44. See generally A. BICKEL, REFORM AND CONTINUITY: THE ELECTORAL COLLEGE, THE CONVENTION, AND THE PARTY SYSTEM 39-45 (1971); W. SAYRE & J. PARRIS, *supra* note 30, at 64.

45. See 3 U.S.C. § 1 (1976).

46. U.S. CONST. art. I, § 5, cl. 1.

47. One can only estimate the number of congressional election disputes because of the spotty records kept by the House Administration Committee, which has had jurisdiction over such matters since the nineteenth century. The *Congressional Record* mentions only those cases which reach a relatively high point of development, so it, too, is of little help. For numerous synopses of pre-1934 cases of disputed congressional elections, see C. CANNON, PRECEDENTS OF THE HOUSE OF REPRESENTATIVES (1934); A. HINDS, PRECEDENTS OF THE HOUSE OF REPRESENTATIVES (1907).

Of course *Powell v. McCormack*, 395 U.S. 486, 519-47 (1969) contains a lengthy discussion of Congress' power to judge the *qualifications* of its Members-elect.

48. See text accompanying notes 32-34 *supra*.

49. U.S. CONST. art. II, § 1, cl. 2.

neither to conduct nor to regulate the initial tier in the selection of the President and Vice President, that is, the elections to the federal electoral college. Authority over these elections is given entirely to each state as the legislature thereof may direct. Congress may determine the time of choosing the electors and the day on which they shall give their votes, "which Day shall be the same throughout the United States,"⁵⁰ but this is the extent of its power at this stage. Not until the second tier—the transmission to the Senate of the "lists of all persons voted for as President, and . . . as Vice-President"⁵¹ by each state's group of electors—does federal authority become involved. Thus, with the exception of matters relating to the right to vote, presidential elections have always been administered and regulated entirely under local authority.⁵²

Congressional treatment of the Constitution's silences concerning the procedure for presidential elections confirms the tradition of state control. Unlike the case with disputed congressional elections, there is no provision in the Constitution stating who should judge disputes about electoral votes after each state's electors send their "lists" to Washington at the second tier of the process.⁵³ When faced with the disputed Hayes-Tilden electoral returns in 1876, Congress created a special electoral Commission.⁵⁴ This Commission ultimately accepted the returns as certified by recognized state authority, declining to reexamine the state certification.⁵⁵ The result was codified,⁵⁶ and today Congress will regard any state law resolution of a controversy concerning the appointment of presidential electors as conclusive.⁵⁷

The Constitution was also silent on how a new President should be chosen in the event both the President and Vice President die in office. Congress often sought to cover this gap by statute.⁵⁸ Eventually, however, the twentieth and twenty-fifth amendments were ratified, giving Congress explicit power to legis-

50. *Id.* art. II, § 1, cl. 4.

51. *Id.* amend. XII.

52. See A. BICKEL, *supra* note 44, at 39-45; W. SAYRE & J. PARRIS, *supra* note 30, at 67, 87.

53. See note 33 *supra*.

54. Act of Jan. 19, 1877, ch. 37, § 2, 19 Stat. 227.

55. D. MALONE & B. RAUCH, *CRISIS OF THE UNION* 336-38 (1960).

56. Electoral Count Act of 1887, ch. 90, § 2, 24 Stat. 373 (codified at 3 U.S.C. § 5 (1976)).

57. 3 U.S.C. § 5 (1976).

58. *E.g.*, Act of Mar. 1, 1792, ch. 8, § 1, 1 Stat. 65; Act of Jan. 19, 1886, ch. 4, 24 Stat. 1; Act of July 18, 1947, ch. 264, 61 Stat. 380; Act of June 25, 1948, ch. 644, § 19, 62 Stat. 677.

late in the area.⁵⁹ That constitutional amendments ultimately were deemed appropriate suggests that the earlier statutory solutions stood on shaky ground and affirms the paucity of congressional authority over the means of selecting Presidents.

Furthermore, as every student of American history knows, political parties were not provided for in the Constitution. The political parties developed in the nongovernmental sector of society and they remain to this day essentially private organizations.⁶⁰ Any governmental regulation over political parties has historically been exercised at the state, not the federal, level.⁶¹ Indeed, the major parties are charged with much of the responsibility for conducting the elections.⁶² Private individuals and the states have always determined the procedures to be used for selecting delegates for national political conventions.⁶³

What these constitutional and historical considerations mean for the current election laws is plain. In my view, it is doubtful whether the federal government—which would be the Congress if any branch at all—has any power to interfere with or regulate the electoral college or national conventions. Thus, the constitutionality of the federal election laws which provide federal financing for the first tier of the presidential election process is highly questionable. To the extent that the federal election laws intrude coercively into this historical domain of the states, they offend the principles of federalism underlying the Constitution's allocation of authority over national elections.⁶⁴ It is for this reason that the FEC must rely so heavily on voluntary compliance, rather than governmental compulsion, to effectuate its purposes.

IV. VOLUNTARY COMPLIANCE

A spirit of voluntarism pervades both the title 2 reporting pro-

59. U.S. CONST. amend. XX, § 4, amend. XXV, § 4. See also 3 U.S.C. § 19 (1976); 3 U.S.C.A. § 19 (Supp. 1979).

60. For a discussion of the local, private nature of political parties, see *Ripon Soc'y v. National Republican Party*, 525 F.2d 567, 574-89 (D.C. Cir. 1975).

61. See P. ODEGARD & E. HELMS, *AMERICAN POLITICS: A STUDY IN POLITICAL DYNAMICS* 671-79 (1938); Start, *The Legal Status of American Parties*, 34 *AMERICAN POL. SCI. REV.* 439, 685-88 (1940).

62. See C. ROSSITER, *PARTIES AND POLITICS IN AMERICA* 40-42 (1960).

63. See *Ripon Soc'y v. National Republican Party*, 525 F.2d 567, 588 & n.63 (D.C. Cir. 1975).

64. In 1976, the FEC failed to mention this limitation of federal power in its annual report to Congress. I attempted to alert Congress to the constitutional question in a statement of dissent. Dissenting views of Commissioner Curtis to the FEC Report to the Congress on Selection of Delegates to the National Party Conventions (on file with the FEC).

visions and the title 26 funding provisions. Under the latter, it is optional for presidential candidates and political parties to accept federal financial assistance. The sanctions set out in the statutes depend entirely upon contractual relationships between recipients of funds and the United States. To receive assistance for presidential primary campaigns, candidates essentially enter into contracts in which they "certify" under the threat of perjury sanctions that they will abide by the expense and contribution limitations⁶⁵ and "agree" to furnish the FEC with their records and to submit to an FEC audit.⁶⁶ Similar stipulations accompany the receipt of funding for the campaigns preceding the November election.⁶⁷

In light of the constitutional considerations discussed earlier,⁶⁸ it is hard to see what the Congress can do other than rely upon voluntary, contractual agreements in seeking to regulate the first tier in the process of selecting a President and Vice President. I have some doubt whether Congress can indeed contract to achieve results over which it has not been given jurisdiction under the Constitution.

In any event, it seems rather clear that a candidate or political party disinclined to use federal funds is unaffected by the title 26 provisions. Submission to regulation under them, therefore, is voluntary.

The title 2 reporting requirements also reach those first tier electoral activities that are beyond the federal sphere. To the extent that they are coercive, their viability—again, in light of the Constitution's allocation of authority over elections—is open to question. Fortunately for the sake of constitutional principles of federalism, effectuation of the title 2 provisions rests, as a practical matter, almost entirely on voluntary compliance, rather than federal compulsion.

Although the title 2 provisions authorize the Commission to initiate civil actions to enforce the Act,⁶⁹ the FECA specifically directs the Commission "to encourage voluntary compliance."⁷⁰ Moreover, the Commission must "make every endeavor for a period of not less than 30 days to correct or prevent [any apparent]

65. 26 U.S.C. §§ 9033(b)(1), (4) (1976).

66. *Id.* §§ 9033(a)(2), (3) (1976).

67. *Id.* §§ 9003(a), (b)(1), (2) (1976). The expenses of political parties accepting federal funding for their national conventions "may not" exceed statutory limitations. *Id.* §§ 9008(d)(1), (2) (1976). Significantly, the language is permissive, not mandatory.

68. See text accompanying notes 48–64 *supra*.

69. 2 U.S.C. § 437d(a)(6) (1976).

70. *Id.* § 437d(a)(10) (1976).

violation by informal methods of conference, conciliation, and persuasion, and to enter into a conciliation agreement with the person involved. . . ."⁷¹ During the first year of its operation, the FEC established a policy of making every effort to eschew compulsion.⁷² In my opinion it is only this overriding spirit of voluntarism that can justify federal regulation of those historically local aspects of presidential elections.

In that light, it is necessary to deal with the contention of some commentators that there really is no such thing as voluntary compliance with an administrative agency's directives. An unfortunate attitude which might be described as neo-Machiavellian pervades the literature. Consider, for example, the views of Professor Kenneth Culp Davis. He takes such a cynical view of voluntary compliance in all its manifestations that he refers to it as "coerced consent."⁷³

It is important to set out Professor Davis' viewpoint rather fully because it illustrates a widely held, derisive attitude toward administrative law. There is no gainsaying that some of what Professor Davis has to say is regrettably accurate, but if his point of view is basically sound, then indeed there is no such thing as voluntary compliance.

The supervisory power is the power of an administrative agency to coerce a regulated party by methods other than adjudication or rule making. It is a concomitant of, an outgrowth from, and a substitute for the prosecuting power. In some of the most effective regulatory agencies, perhaps nine tenths or more of the desired results are produced through exertion of the supervisory power.

From the standpoint of the overall system, the supervisory power is much in need of attention. . . . The power to prosecute or to withhold prosecution is frequently the power to coerce substantive action. Agencies wield this power to coerce . . . often without procedural safeguards and usually without any opportunity for check through judicial review.

. . . .
The fact that stipulations and consent orders are based upon consent does not mean that parties are necessarily protected against exercise of arbitrary power. Oft-repeated charges that the [Federal Trade] Commission [, for example,] makes oppressive use of the stipulation procedure by inducing inno-

71. *Id.* § 437g(a)(5)(A) (1976).

72. The Commission resolved early in its career to use the civil enforcement action "only when absolutely necessary." [1975] FEC ANN. REP. 58. Throughout my tenure as a Commissioner, there was no occasion to resort to the civil enforcement action.

73. K. DAVIS, ADMINISTRATIVE LAW TEXT § 4.06 (1959).

cent respondents to admit illegality in order to avoid the expense and publicity of a formal proceeding apparently have never been systematically investigated. But the Commission's long-term refusal to accept stipulations in any case unless the respondent admits the facts the Commission alleges has long been adversely criticized.

. . . .

A dissenting Commissioner recently dubbed the resulting system "regulation by lifted eyebrow."

. . . .

Much administrative action rests upon the kind of consent which bars the regulated party from effective remedy. Yet that consent is often coerced. . . .

In all such cases the regulated party consents and therefore cannot complain. But to argue that consent should bar further protest is not the same as concluding that justice is necessarily done. On the contrary, the opportunity for arbitrary action is extraordinary, for the decisive determination leads to exertion of pressure through the threat of instituting formal proceedings, and that determination is largely unprotected by procedural safeguards.⁷⁴

I do not subscribe to Professor Davis' thesis that the viability of agency action rests solely upon agency threats to institute enforcement actions. On the contrary, administrative law—and not just the administrative law of the FEC—can be grounded upon a true concept of voluntarism.

The Commission believed that most participants in the political process were genuinely desirous of complying with the law.⁷⁵ That, perhaps, is where my viewpoint differs most from that of Professor Davis. As I see it, the relationship between a regulatory agency and the regulated parties, contrary to Professor Davis' assumption, need not be antagonistic. In creating the agencies, Congress often seeks to avoid the antagonistic approach to the maximum extent possible and to gain the compliance of the citizenry without compulsion. After all, every regulated producer (or candidate) is also a consumer (or voter); we are all indirect beneficiaries of sound regulatory programs. Even those subject to a regulatory scheme might benefit from it: witness the motorist who, forgetting traffic regulations, narrowly misses a pedestrian, then parks his car and is nearly struck as he crosses the street.

If we can accept administrative law as a fourth kind of legal

74. *Id.* § 4.01-.03, .06. Professor Davis set forth a similar observation in the latest edition of this work. See K. DAVIS, ADMINISTRATIVE LAW TEXT § 4.09 (1972).

75. See [1975] FEC ANN. REP. 30.

process—the judicial, executive, and legislative processes constituting the first three—then, I would submit, there is yet a fifth process. This is the noncompulsory or voluntary process. This fifth process, the voluntary process, has always been a part of every society. Religion and economics, for example, have long been strong motivating institutions in society, but their influence on behavior is not compulsory. Consider also “custom and usage”: voluntary, consensual relationships and practices may recur so frequently that over time they become the expected norm, the custom and usage of the field. At some stage customs and usages might assume a compulsory dimension; commercial law, for instance, is substantially founded on established custom and usage. But in the beginning the underlying practices and relationships are voluntary, and governmental compulsion is unnecessary to assure compliance with society’s expectations.

So it should be with administrative law. The federal election laws fit this model well. Title 2 is essentially a disclosure statute. Its theory is that opening political campaigns to public scrutiny will induce voluntary conformity with the societal expectations expressed in the substantive measures of the Act.

A review of the Commission’s activities suggests how thoroughly the voluntary compliance concept permeates its administration of the FECA. The goal of voluntary compliance determined the priorities and organization of the FEC from the outset. The idea was that candidates wanted to comply with the law and would comply if they were properly advised of their legal responsibilities. Accordingly, the Commission regarded the development of programs to educate and advise candidates as its key initial task.⁷⁶ Prior to the 1976 election, the Commission conducted seminars for political committees across the country.⁷⁷ Numerous publications were prepared to explain the law in layman’s terms.⁷⁸ The *FEC Record* was established to disseminate the Commission’s policy decisions. The Commission sent letters explaining the law to each candidate in the 1976 elections⁷⁹ and drafted a great number of advisory opinions. FEC field auditors and advisors met with committee staffs and candidates to explain reporting, accounting, and auditing procedures and to establish working, on-the-spot relationships with campaign managers and

76. *Id.*

77. *Id.* at 56.

78. *Id.*

79. *Id.* at 39.

staff.⁸⁰ A toll-free line was established for telephone inquiries.⁸¹ To effectuate the purpose of the reporting provisions of title 2, all campaign reports received were made readily available for public inspection at the FEC's "store-front" Public Records Office.⁸² It is this heightened public awareness of candidates' financial activities—and not merely the threat of an enforcement action—that encourages voluntary compliance with the contribution limitations and, for those accepting funding under title 26, the expenditure ceilings.

The topic of voluntary compliance arose frequently during the FEC's early years. In late 1975 and early 1976, just as the Commission was establishing itself, it conducted several audits of candidates and political parties during the New Hampshire special senatorial election. Later these activities were challenged by William Cramer, the general counsel of the Republican National Committee, who inquired under what authority the Commission sent its people to New Hampshire and interposed in the election." I responded that the Commission acted under no authority at all in the sense and tone the question was asked, but only to carry out the concept of voluntary compliance. There is no reason the participants cannot sit down with the umpire ahead of—and even during—the contest to agree upon fair and reasonable ground rules which the umpire will apply across the board.

On many occasions I expressed to the Commission and the staff my hope that the staff would not put on Uncle Sam suits, sit in Washington, and dare the people to violate the election laws as they might be interpreted in the dark recesses of the FEC offices. Nevertheless, the funding provisions could well press the Commission to draw some difficult lines. In May, 1975, Robert Strauss, the Chairman of the Democratic National Committee, challenged the Commission "not to tell us how many balloons we can order for our national convention." I responded with the hope that the Commission would not get into such matters. Yet I had to point out that a future Commission impressed that it was handing out taxpayers' dollars might well undertake a thorough determination of what constitutes "expenses incurred with respect to a presidential nominating convention."⁸³ This is because "payments [to candidates or parties] shall be used only" to defray such

80. *Id.* at 40-41.

81. *Id.* at 19.

82. *Id.* at 48.

83. *See* 26 U.S.C. § 9008(c)(1) (1976).

expenses.⁸⁴ If the public funds turned over to candidates or parties are used for any purpose other than to defray qualified campaign expenses, the Commission may seek reimbursement.⁸⁵

In all, I believe that the election laws' scheme of voluntary compliance is working. In my view, there are ultimately only two sanctions the FEC needs in order to bring about compliance with the election laws. Neither of them interferes with the voluntary compliance approach or robs it of its meaning by creating a situation of "coerced consent." These sanctions are criminal perjury for false statements⁸⁶ and criminal contempt for failing to file timely statements.⁸⁷ Both are relatively simple and well established statutory crimes. The FEC can refer these matters to the Justice Department for prosecution and be fairly confident that action will be taken. The Congress thoughtfully provided for the Attorney General to make periodic reports on his actions "until there is final disposition"⁸⁸ of such a charge.

V. THE INDEPENDENCE OF THE COMMISSION

The most serious impediment to the success of voluntary compliance is the Commission's lack of independence. The achievement of widespread voluntary compliance requires a Commission in whose motivations and decisions regulated parties can have faith. Credibility is crucial, and the key to a credible FEC is independence from even the appearance of political influence.

The most difficult problems facing the Commission revolve around its relations with the Congress and the President. Unless the Commission is sufficiently insulated against routine political pressures from those currently in office in either branch, the Federal Election Campaign Act can become, as many critics already have alleged, the "Incumbents' Protection Act."⁸⁹ Independence is thus imperative if the Commission is to act with integrity. Unfortunately, as things now stand, the Commission is bound too closely to the will of both the Congress and the executive.

The Commission's considerable dependence on congressional favor is practically assured by the requirement that all of its proposed regulations be submitted to Congress for the potential veto

84. *Id.*

85. *Id.* §§ 9007(b), 9008(h).

86. *See id.* §§ 9012(d)(1), 9042(c)(1) (1976).

87. *See* 2 U.S.C. § 437g(a)(12) (1976).

88. *Id.* § 437g(b) (1976).

89. *See, e.g.,* Bolton, *supra* note 1, at 46.

of either House.⁹⁰ Properly used, this formalization of Congress' oversight responsibilities would serve a valuable purpose in keeping the FEC within the limits of its statutory authority. I believe that Congress usually acts with justification when it seeks to stem the recent tendencies of agencies to go beyond the parameters of the statutes Congress has written. But, unfortunately, the scope of the veto over the FEC's proposed regulations is not limited to *ultra vires* provisions. Twice the Congress has misused the veto procedure as a subterfuge merely to express disagreement with the substance of an FEC policy. By vetoing the Commission's first two regulations both the Senate and the House made it clear that the veto would be exercised simply because one House or the other disagreed with the judgment of the FEC—even though it was rendered within the scope of its statutory powers.⁹¹ Then, in the 1976 amendments, the Congress underscored the general subservience of the FEC by adding new language to the Federal Election Act: "Nothing in this Act shall be construed to limit, restrict, or diminish any investigatory, informational, oversight, supervisory, or disciplinary authority or function of the Congress or any committee of the Congress with respect to elections for Federal office."⁹²

The Commission's dependence upon congressional favor is further illustrated by the fact that the FEC must continually come before the Congress for authorization legislation—as well as for annual appropriations.⁹³ It is significant that the 1974 statute gave the FEC existence of less than a year.⁹⁴ Its first reauthorization request was for a lifetime of only 18 months, yet it was never enacted. Currently, the FEC has a three-year appropriation but no authorization.⁹⁵ If it is to be independent of the immediate political pressures of the Congress the FEC must have a permanent authorization or, at the minimum, an authorization of five years. Happily, the appropriation process in the statutes does permit the FEC to present its budget requests directly to the Congress rather

90. 2 U.S.C. § 438(c) (1976).

91. See S. Res. 275, 94th Cong., 1st Sess., 121 CONG. REC. 32321 (1975); H.R. Res. 780, 94th Cong., 1st Sess., 121 CONG. REC. 33674 (1975).

92. Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, § 101, 90 Stat. 475 (codified at 2 U.S.C. § 437c(b)(2) (1976)).

93. 2 U.S.C. § 439c (1976).

94. Federal Election Campaign Act § 210, 88 Stat. 1289 (1974) (current version at 2 U.S.C. § 439c (1976)).

95. 2 U.S.C. § 439c (1976).

than the Office of Management and Budget.⁹⁶ Thus, the Commission is free from direct financial dependence on the pleasure of the executive branch.

Still there is ample opportunity for incumbents in Congress to snuff out FEC regulations which might have the effect of limiting incumbents' preelection activities. Both Houses are run through standing committees whose membership is selected under the unwritten, but rarely overlooked, seniority rule. Accordingly, the real power structure is in the hands of long-time incumbents who are continually running for reelection.⁹⁷ Thus the regulator must answer to the regulated.

In short, as experience shows, the Congress can and will undo anything the FEC does that the Congress does not like. This certainly is the very opposite of creating a Commission which is independent of routine political pressures. It seems to me that vigorous public hearings on the FEC's Annual Reports to the Congress and the President would ensure sufficiently close congressional oversight without threatening the Commission's independence.

As a Commissioner, I often urged that the FEC formalize its relations with the Congress so that it could retain as much independence as possible.⁹⁸ As early as May, 1975, I suggested that we channel all of our communications with the Congress through the Chairman's office both for the sake of efficiency and to be certain that our relations were proper. This met with indifferent response.

It still merits emphasis that section 1913 of title 28 broadly prohibits the use of federal money in communications with Members of Congress except with "express authorization by Congress" or "through the proper official channels."⁹⁹ Even if this section were not in the Code, it would be wise for the relationship between the Congress and the FEC to be as much at arm's length as possible. There is no reason for the FEC to deal with the Congress other than through the official channels set out in the FECA. Thus, communications should be strictly limited to appropriation requests,¹⁰⁰ the required reports containing recommendations for

96. *Id.* § 437d(d)(1) (1976).

97. This power is concentrated particularly in the House Administration Committee, and a Subcommittee of the House Appropriation Committee, the Senate Rules and Administration Committee, and a Subcommittee of the Senate Appropriation Committee.

98. *E.g.*, Memorandum from Commissioner Curtis to Commissioners (Nov. 3, 1976) (on file with *Case Western Reserve Law Review*).

99. For the text of 18 U.S.C. § 1913 (1976), see note 14 *supra*.

100. 2 U.S.C. § 437d(d)(1) (1976).

legislative or other action,¹⁰¹ advisory opinions written at the request of individuals holding federal office,¹⁰² and the procedure spelled out for sending proposed regulations to the Congress.¹⁰³ Of course, the Secretary of the Senate and the Clerk of the House, as nonvoting members of the Commission, provide routine, more casual channels. But maintaining a healthy, formal distance between the Commission and the Congress will surely promote the Commission's independence.

A most unfortunate development concerning the composition of the FEC as it bears on its independence is the Supreme Court's decision in *Buckley v. Valeo*.¹⁰⁴ Concentrating the power to appoint the Commissioners in the hands of the President is a serious step backward from the innovative concept in the original law, which provided for a tripartite appointing authority—two Commissioners by the Senate, two by the House, and two by the President. An important purpose of the law, as even the *Buckley* opinion perceived, was to restore the confidence of the people in the American political system.¹⁰⁵ Thus, it was crucial to split whatever influence, real or imagined, might be gained from the power of appointment. Now, as a result of the *Buckley* decision, the possibility of self-aggrandizement by incumbent Presidents looms larger. Very conceivably, an executive could pack the Commission with loyal favorites.

In addition, the six-year term of the Commissioners¹⁰⁶ is probably too short to allay the pressures that could be applied by incumbent Commissioners seeking reappointment. The FECA does permit the Commission to elect its Chairman.¹⁰⁷ This is a step toward independence; in some regulatory bodies the President chooses his own Chairman.¹⁰⁸ However, the current practice of rotating the FEC Chairmanship and limiting it to a one-year term¹⁰⁹ tends to weaken this advantage.

The Act keeps the criminal enforcement power in the hands of the Justice Department despite that Department's deplorable rec-

101. *Id.* §§ 437d(d)(2), 437e (1976).

102. *Id.* § 437f(a) (1976).

103. *Id.* § 438(c) (1976).

104. 424 U.S. 1 (1976).

105. *Id.* at 25-27.

106. 2 U.S.C. § 437c(a)(2)(A) (1976).

107. *Id.* § 437c(a)(5) (1976).

108. *See, e.g.*, 15 U.S.C. § 41 (1976) (Federal Trade Commission); 47 U.S.C. § 155 (1976) (Federal Communications Commission).

109. *See* 2 U.S.C. § 437c(a)(5) (1976).

ord in enforcing violations of the federal election laws going back to the Corrupt Practices Act of 1909.¹¹⁰ Too easily the President can apply pressure on the Justice Department for his own benefit or for the benefit of incumbent Congressmen in hopes of getting reciprocal favors. This underscores the danger of vesting the entire appointive power in the President, as is necessary after *Buckley*. Fortunately, the Justice Department is required to submit reports to the FEC about its progress on any matter the Commission refers to it.¹¹¹ This exposure should discourage foot-dragging in the executive branch.

VI. CONCLUSION

The FECA brings campaign activity into the light of public scrutiny. That alone should further the integrity of the American political process. The watchful eye of the people naturally encourages voluntary compliance. Since, as I believe, most participants in the political process really do want to follow the law, the concept of voluntary compliance is eminently suitable for election regulation.

The desirability—indeed the necessity—for voluntary compliance in the area of federal elections is rooted in the character of the American democratic process. The right of the citizenry to petition the government for redress of grievances (along with other first amendment freedoms), the traditional duty of congressional representatives to report back to the people, the constitutional limitations on the proper sphere of coercive federal elections activity, and the fundamental importance of voluntary compliance to the entire scheme of the Commission's existence require that every effort be made to see that voluntary compliance works. At the same time, these considerations raise important challenges for those who seek to further the goal of voluntary compliance: There must be a greater effort toward insuring that incumbents do not use the perquisites of their reporting-back function to get reelected, and toward insuring that the Commission becomes truly insulated from potential political influences of incumbents in the Congress and the presidency.

110. See Redish, *Campaign Spending Laws and the First Amendment*, 46 N.Y.U. L. Rev. 900, 905-06 (1971).

111. 2 U.S.C. § 437g(b) (1976).