CFL suit against the FEC draws line against regulatory overreach

by George Canning

Since its founding in the wake of the Nixon-Watergate crisis, the Federal Election Commission (FEC) has acted as the government watchdog over campaigns for federal office. The commission has over the years weathered charges of First Amendment violations, bias against non-liberal candidates and causes, and bureaucratic nitpicking. On July 17, however, a class-action suit was filed against the FEC in U.S. District Court for the Southern District of New York that is the most serious challenge yet mounted to the commission's power to regulate elections.

The suit, brought by Citizens for LaRouche (CFL—the principal 1980 presidential campaign committee of Democrat Lyndon H. LaRouche, Jr.), CFL's treasurer, Patricia Dolbeare, and seven CFL contributors and/or campaign volunteers "on behalf of themselves and all others similarly situated," seeks declaratory and injunctive relief against the FEC from the court. The suit, *Patricia Dolbeare, Treasurer of Citizens for LaRouche, Inc., et al.* v. *Federal Election Commisson,* charges the FEC with carrying out, under cover of its investigative and audit authority, an ongoing campaign of intimidation against the committee and its political supporters. The plaintiffs are asking the court for a declaratory judgment "that the FEC investigation of plaintiffs was motivated solely by bad faith, constituted in whole or in part an abuse of process, violated plaintiffs' constitutional rights and unconstitutionally applied provisions" of the Federal Election Campaign Act (FECA).

Furthermore, they have requested preliminary (followed by permanent) injunctions to force the commission to refrain from any further investigation until it demonstrates to the court "that it is proceeding with a lawful investigation within the scope of its investigative authority," and when and if it so demonstrates, that the commission be required to notify CFL and any individuals involved and "proceed expeditiously with any such investigation limiting its inquiry to facts relevant to the investigative order."

FEC animus

Central to the suit is the charge that the commission acted out of an animus against Mr. LaRouche and his associates, including the plaintiffs. This animus is traced not only to the conflict between LaRouche's 1976 presidential campaign committee, Committee to Elect LaRouche, and the FEC, but also more deeply, to powerful political forces using the FEC as an instrument to harass and disrupt political efforts by LaRouche's associates. The CFL complaint points out that:

> The regulatory scheme favors incumbents and discriminates against new candidates and third parties. There is a major interchange of FEC employees with the political campaigns of established Washington, D.C.-based politicians which facilitates the unequal application of the laws. These structural aspects of the Commission became especially critical in 1980 when the Democratic National Committee, controlled by an incumbent President, virulently opposed LaRouche's Democratic candidacy.

One result of the relationship between the FEC and the various established political machines was the use of the agency in tandem with press outlets for "dirty tricks," some of which helped to establish an atmosphere for the later FEC investigations.

Affidavits submitted in evidence with the complaint detail activity such as Federal Election Commission staffers misinforming inquiring reporters that LaRouche was a candidate for the U.S. Labor, rather than the Democratic, party nomination, as well as the statement by a staff member of the Democratic National Committee that LaRouche would be penalized with an FEC investigation were he to continue to claim designation as a Democrat.

As early as December 31, 1979, two weeks after CFL had qualified for federal matching funds, commission chairman Frank Reiche was cited in the *Philadelphia Bulletin* as being "wary about approving the subsidy for LaRouche."

The article revealed the assumptions under which Reiche was working: "Legally, he said, he could not refuse it unless he found irregularities suggesting possible fraud by LaRouche's campaign. 'Thus far, no such

irregularities apparently have been found,' he said."

This statement was made in the context of a press campaign in Washington, D.C. and elsewhere complaining that CFL's receipt of matching funds represented a "flaw in the law" in that it allowed LaRouche and his supporters access to the political process and legitimized his Democratic candidacy.

Launching of direct harassment

Early in February 1980, the FEC began audit and investigative proceedings that were and are, according to papers submitted in support of the preliminary injunction, "based on differing technical interpretations of a law which is constantly evolving in terms of the actual practices of political campaigns." The papers go on to point out, "The unconstitutionally intrusive proceedings were based in all instances on practices of the plaintiff committee which were fully disclosed to the FEC with specific guidance and affirmative recommendations on those practices supplied by FEC regulations, instructions of the commission's audit division, and past application of statute."

During and after the audits, which lasted a total of 16 weeks during the campaign, the FEC began to investigate what it deemed irregularities in the campaign's finances. To do so, it subpoenaed for deposition—without giving notice to CFL—contributors and/or campaign volunteers in numbers of cities across the United States. Depositions were taken in Baltimore, Chicago, and Portland, Oregon. The subjects of the investigations that allegedly persuaded the commission to send its attorneys to cities around the country were:

> In each and every case . . . contributions or expenditures in the area of $40 to $250 in a political campaign which raised $1,450,253. The total amount of contributions under scrutiny by the FEC to date has been $5,321.00. The investigation has confirmed that these individuals made their contributions to CFL although some contributors have not been able to remember the specifics of each and every contribution.

Action initiated by CFL in the U.S. District Court for the District of Columbia established CFL's right to be notified of any depositions or other investigative action being taken concerning the committee, but subsequently failed to halt the taking of the depositions that the court had initially enjoined.

Cutting candidate's financial base

A major object of the never-completed series of FEC investigations, the CFL suit charges, is the sowing of discord between the committee and its political and financial base. This is allegedly intended to prevent not only the repayment of campaign debts, but also future political activity by LaRouche and his associates. Affidavits submitted in evidence outline the *known* extent to which this object has been obtained.

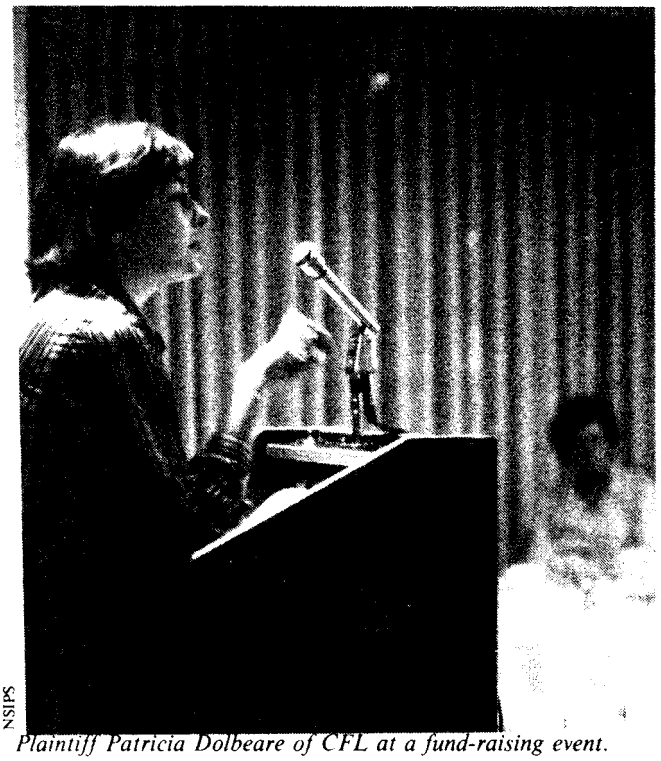
One plaintiff, a volunteer for CFL in Baltimore, describes in an affidavit the types of detailed and often irrelevant personal questions asked her in her deposition, and concludes:

> I seriously considered dropping out of the LaRouche campaign as the result of this investigation. This was not because of anything the campaign did or did not do. I just did not want the hassle when I was starting a new job of having marshals at my house, the FEC on the phone endlessly, and having to explain to my employer that I was being questioned by the federal government as a result of my political activities.

Another plaintiff, a leading campaign organizer and fundraiser for LaRouche in Baltimore, details in her affidavit a list of instances of supporters receiving letters or subpoenas from the FEC, becoming hysterical believing they'd been caught up in an activity the government considered illicit and breaking all relations with her and the campaign. One such contributor "stated that in some way I or the campaign committee had 'screwed up,' otherwise why would the Federal Election Commission be harassing him and demanding detailed responses from him in ten days." A woman who had been subpoenaed "was totally hysterical and threatened to sue me, stating that somehow the committee must have been at fault since she only acted legally in giving a campaign contribution." The plaintiff concludes:

> All of these incidents are, I believe, what the FEC intends by this entire illegal course of conduct against me and CFL. It is intended to create the smear of illegality in campaign fundraising where no substance can possibly exist in that accusation and in that way prevent CFL from raising further monies or garnering further support from its contributors. My reputation has been irreparably damaged as a fundraiser and a political organizer among the persons I worked long and hard to establish that relationship with. These persons will not, I believe, ever again give money to CFL or any cause associated with Lyndon LaRouche.

Yet another plaintiff, who had been a leading fundraiser for the LaRouche campaign in Portland, Oregon, details similar reactions among LaRouche supporters in that city, and concludes that "because of the effects of the FEC's investigation on my contacts, and because of the harassment the FEC seems bent on conducting against lawful contributors, I don't believe I could successfully fundraise from these persons again for Citizens for LaRouche, as I do not want to subject



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Plaintiff Patricia Dolbeare of CFL at a fund-raising event.

them or myself to any similar legal process."

An unloved bureaucracy

The conflict that has been brought to the courts in *Dolbeare et al.* v. *Federal Election Commission* is by no means unique in type, though it has been carried out with extraordinary intensity. No one, it seems has much good to say about the FEC.

Earlier this year, a joint letter was sent to the commission by the attorneys of several campaigns for federal offices. The letter asked for a moratorium on findings being made and published in audits of campaign finances. The reason for the requested moratorium was strikingly consonant with the experience of CFL (which was not one of the senders of the letter): the commission and its audit division continually picked at campaign practices on which they had earlier been asked for advice, only to later apply *ex post facto* law to the same details to "find" violations.

The Reagan campaign came under FEC scrutiny earlier this year, and was finally fined $1.6 million for alleged overexpenditure in various states. As is usually the case in the midst of an effort to reach the electorate and attain public office, the Reagan campaign paid part of the fine rather than divert its time and resources to contest the matter. Some observers have suggested that President Reagan's puzzling hesitancy to fulfill his campaign pledge to abolish the FEC stems from the agency's hoked-up investigation of his campaign, an investigation whose primary object at this point is the continued existence of the Federal Election Commission itself.

The commission has not been able to carry out its nitpicking and political harassment totally without penalty, however. A series of stinging setbacks has been given the FEC in the last month, setbacks that call into question its attempts to regulate elections the way government agencies such as the Securities and Exchange Commission or the Federal Trade Commission regulate business practices.

Writing the opinion in *Federal Election Commission* v. *CLITRIM,* the Chief Judge of the U.S. Court of Appeals for the Second Circuit (which is the circuit in which *Dolbeare* was filed) noted:

> This case has served to reinforce my view that we "must remain profoundly skeptical of government claims that state action affecting expression can survive constitutional objections. . . ." From this perspective, I continue to believe that campaign "reform" legislation of the sort before us is of doubtful constitutionality. . . . This danger is especially acute when an official agency of government has been created to scrutinize the content of political expression, for such bureaucracies feed upon speech and almost ineluctably come to view unrestrained expression as a potential "evil" to be tamed, muzzled, or sterilized.

More recently, the U.S. Court of Appeals for the District of Columbia made a strong differentiation between the FEC and other regulatory agencies with broad-ranging powers. In *Federal Election Commission* v. *Machinists Non-Partisan Political League,* the Court pointed out that

> . . . the activities which the FEC normally investigates differ in terms of their constitutional significance from those which are of concern to other federal administrative agencies whose authority relates to the regulation of corporate, commercial or labor activities. . . . The subject matter which the FEC oversees, in contrast, relates to the behavior of individuals and groups *only insofar as they act, speak and associate for political purposes.* . . .
>
> This information is of a fundamentally different constitutional character from the commercial or financial data which form the bread and butter of SEC and FTC investigations, since release of such information to the government carries with it a real potential for chilling the free exercise of political speech and association guarded by the First Amendment.

Several months before the *MNPL* decision, a decision in the U.S. District Court for the Southern District of New York struck down just such an intrusion by the FEC into political speech in *Reader's Digest* v. *FEC.*

The FEC carried out a long-term investigation on the theory that an article in the magazine about the Chappaquiddick incident and sales-promotional videotapes about the article were corporate contributions against Senator Kennedy's 1980 presidential campaign. The court in that case noted the statutory loophole that allows the FEC to prolong pre-enforcement investigations indefinitely, and also distinguished the FEC from other government agencies. Several months later, the FEC quietly announced it would probably find "no probable cause."

Criticism of the commission's overblown powers has begun to come from other quarters as well. Last year, the *Yale Law Journal* published a study that, while not considering the question of the FEC's being used for partisan political ends, concluded that the FEC's enforcement scheme in practice had consistently violated due process rights guaranteed under the U.S. Constitution. The source of these violations is the fact that respondents to FEC investigations have no opportunity to examine or challenge the alleged facts or the legal conclusions based on those "facts" until the agency brings the matter to court.

More recently, the *Wall Street Journal* on July 15 published a scathing editorial attack on the FEC after the commission had announced its withdrawal from the *Reader's Digest* fray. After defending press freedom, the editorial asked whether there will be free elections in America, pointing out:

> Although the FEC is supposed to be nonpartisan, it had its origins in a partisan struggle by liberal Democrats to weaken their conservative opponents, mainly by setting limits on cash campaign contributions. . . . It is not surprising, however, that a body with these origins might sound to some of us rather selective in the candidates it chooses to defend.

The *Journal* concluded its editorial with a call for Congress to dismantle "the ill-conceived agency."

Displaying a striking bureaucratic instinct for survival, the commission recently responded to the *Wall Street Journal*'s editorial charges of liberal bias by starting an "investigation" of Senator Edward Kennedy's 1980 presidential campaign. FEC documents on the campaign indicate that the commission is carrying out the same sort of picayune, bizarre investigation as previously initiated against the LaRouche campaign. More blatantly than the sword of unpaid civil fines held over President Reagan's head, this action appears to have been initiated solely to maintain the agency's existence by displaying a newly painted face of impartiality.

The Federal Election Commission has demonstrated a remarkable capacity for survival, owing primarily to its targets' preference for "copping a plea" rather than descending into the quagmire of legal nitpicking in which the FEC has few, if any, equals. Such a capacity has repeatedly enraged, yet kept at bay, political figures ranging from grass-roots congressional candidates to an elected President of the United States.

The LaRouche campaign's suit against the FEC, however, represents the opportunity to end the agency's abuses once and for all. Part of the case concerns a matter very similar to that in the *Reader's Digest* case: the commission sought to show that leaflets produced by CFL during the Wisconsin primary violated the FECA. The leaflets attacked Rep. Henry Reuss's economic policies as against the nation's interest and advocated his electoral removal from Congress. This action by the FEC may convince the Court that the FEC's intrusion upon First Amendment rights in the *Reader's Digest* case was not a momentary aberration, but a matter of bureaucratic habit. More importantly, however, the suit clearly documents a case of administrative process aimed not at preventing the buying and selling of politicians, but at destroying First Amendment-protected political associations built up during the process of the presidential campaign. In the atmosphere of the recent court decisions and commentary, the *Dolbeare* suit may catalyze the forces required to reestablish the primacy of the U.S. Constitution over the Federal Election Commission.