

Chapter Four

Presidential and Congressional Constraints

The creation of independent regulatory commissions does not "guarantee political independence."¹ This chapter briefly examines the role of presidential and congressional constraints, as well as politics, on the Federal Election Commission. First, it examines the manners in which Presidents can impact agencies through use of the appointment and re-appointment process, presidential leadership, and the role of the Office of Management and Budget in the budget process. Second, it examines congressional constraints on Federal Election Commission operations. These constraints include: the enactment of legislation, the budget process, oversight, the enactment of term limitations, and agency structural features.² In essence, this chapter examines some of the policy tools available to the President and Congress for constraining regulatory agencies.

Presidential Constraints:

The Appointment Process

The President controls the appointments to the regulatory Commission. The appointment process is fully political. The members to the Federal Election Commission are themselves

¹ Kenneth Meier, Politics and the Bureaucracy: Policymaking in the Fourth Branch of Government, (New York: Harcourt College Publishers, 2000), p. 77.

² In Politics and the Bureaucracy: Policymaking in the Fourth Branch of Government, (New York: Harcourt College Publishers, 2000), Kenneth Meier examines legislative and presidential controls on bureaucratic power. Among these controls are: legislation, budgeting, oversight, the appointment process, the role of the Office of Management and Budget, and several other factors. pp. 124-55.

political appointees nominated by the President and subject to congressional approval. The very process by which members are appointed to the Commission provides them with the opportunity to be "influenced" by the time they arrive at the Agency. As a result, the Commissioners may become more creatures of the Congress than creatures of the Agency. Only those who can navigate the political waters of the Congress and the White House need apply for appointment to the Federal Election Commission.

When one inquires of current and former Commissioners into the appointment process, however, very few indicated that the process was as political as it would seem. One current or former Commissioner described the appointment process as being a "very strange process." Another individual stated that the appointments and re-appointments are up to the President. Also, several individuals noted that several Commissioners had close ties to the Congress prior to their appointment. For instance, Commissioner Wold was described by one individual as having ties to Representative Bill Thomas (R-CA), now Chairman of the powerful House Ways and Means Committee. Commissioner Sandstrom came from the House committee overseeing the Federal Election Commission. And, Commissioner Mason came to the Commission from the Heritage Foundation. Prior to his service at the Heritage Foundation, Commissioner Mason had worked with Senate Majority Leader Trent Lott, and reportedly got along well with Senator Mitch McConnell (R-KY).

One current or former Commissioner indicated that the amount of consideration a Commissioner used to give to the re-appointment process was a matter of perspective. By this the individual meant that the degree to which a Commissioner considered their being re-appointed to the Commission varied by individual. As a result, the degree to which the individual may

have considered partisan ties may also have varied. Due to recently enacted term limitations, however, Commissioners may serve only a single term on the Commission.

Presidential Leadership

The President and his administration can also exert substantial policy influence upon regulatory agencies simply by virtue of his position as President. In "Control and Feedback in Economic Regulation: the Case of the NLRB," Terry Moe examines the National Labor Relations Board as an independent regulatory agency, similar to this dissertation's examination of the Federal Election Commission. In this article, Moe argues that, "the President can rely upon the OMB in monitoring... performance, shaping... budgets, and screening and modifying its legislative proposals... he can also rely upon an important intangible resource, Presidential leadership: precisely because he occupies the office of President, many executive employees throughout government believe he has a legitimate role to play in directing administrative behavior, and on many issues, has a right to expect their compliance."³

Meier notes that a president can, "set goals or an image for his administration."⁴ Meier views that these goals serve to guide the overall direction of the administration, while not becoming involved in all of the technical details of each policy area. Meier states, "[t]o control bureaucracy, the

³ Terry M. Moe. "Control and Feedback in Economic Regulation: the Case of the NLRB." American Political Science Review, Vol. 79, December 1985, p. 1101.

⁴ Kenneth Meier, Politics and the Bureaucracy: Policymaking in the Fourth Branch of Government, (New York: Harcourt College Publishers, 2000), p. 153.

president must set and communicate a consistent theme and then motivate bureaucrats to respond.”⁵

Budget Process

Since 1921, the President has sent annual budgets to the Congress. The Office of Management and Budget (OMB) receives and reviews agency budgetary requests and prepares the president’s budget that is sent to the Congress. By virtue of reviewing the Federal Election Commission’s budget request, the OMB and the President gain some modicum of leverage and influence over agency priorities and operations. This power may be utilized to enhance agency operations, diminish agency operations, or to send a signal to the agency about how the White House wishes the agency to operate. Meier states that, “[t]he budget process is a powerful tool because it creates an environment of expectations, if a bureau responds in certain sanctioned ways, it will be rewarded in the executive budget... The president is not the final step in the budget process; agencies can and do appeal successfully to Congress for more funds.”⁶

Congressional Constraints:

Legislation

The origins of regulatory agencies are found in legislation. As Chapter One illustrated, the Congress and the President established a policy “norm” in the area of campaign finance law, and amended it over subsequent years. The consideration and enactment of legislation serves to guide the actions of the Federal Election Commission. New grants of legislative authority or federal court rulings impact the

⁵ Ibid. p. 152.

⁶ Ibid., p. 150.

manner in which the Federal Election Commission interprets, implements, and enforces campaign finance law.

Legislation in the area of federal campaign finance restructured the Federal Election Commission following the Buckley court ruling. More recently, legislation placed term limitations on the terms of Commissioners at the FEC. Legislation that is proposed has also served to foster the debate over the role of money in our nation's political that was mentioned in Chapter One. Each change in the law serves to define for a time the role that money will legally play in our political system. The enactment of new legislation does not, however, serve to guarantee that a desired policy outcome will be achieved. Policy outcomes can not be dictated! Outcomes can not be ordained!

The Budget Process

Added to the agency's lack of a clear and consistent legislative mandate has been the role played by the budgetary process. First, Congress has sought to limit the size and amount of budgetary appropriations for the Federal Election Commission. Second, Congress has denied the Commission the use of a multi-year budgetary process, thereby requiring the agency to come before the Congress every year to document the Agency's accomplishments, goals, and needs. By restricting its budget, the Congress is able to limit the types of operations that the agency undertakes. For instance, budgetary restrictions can limit the number of attorneys that the Federal Election Commission is able to hire to investigate potential violations of federal election law. Further, budgetary constraints can restrict the ability of the Federal Election Commission to enforce the most severe violations of the law. And, budgetary restrictions can hinder the mandatory auditing of presidential

campaigns. As a result, and as will be seen in Chapter Six, the Federal Election Commission, similar to other regulatory agencies, has been forced to adopt a system of prioritization by which they undertake enforcement activities.

Over the past decade, the budget of the Federal Election Commission has nearly doubled. The agency budget has grown from \$17,147,230 in 1991 to approximately \$36,500,000 in 1999. During this time span, the only year in which the agency's budget appropriation decreased was in 1996 when the agency's appropriation was decreased from \$27,106,000 (1995 Congressional Appropriation) to \$26,521,000 (1996 Congressional Appropriation).

In each of the past ten years, the largest portion of the agency's budget has been allocated to the Office of the General Counsel.

Several aspects of the agency's recent budget appropriations are worth noting. For instance, in 1998 Congress increased the agency's overall budget, but at the same time dedicated \$750,000 for the conducting of an outside performance audit of the agency. This performance audit was the PriceWaterhouse Coopers "Technology and Performance Audit and management Review of the Federal Election Commission," cited earlier in this dissertation. Another \$4,500,000 of the agency's budget appropriation was dedicated to non-personnel uses. The result was what the agency termed an "operational budget"⁷ of \$26,800,000. This amounted to an overall decrease. Furthermore, the agency's 1999 congressional appropriation allocated \$4,500,000 for computer upgrades. Another \$1,000,000 was "fenced-off... to improve its [the agency's] enforcement

⁷ FEC Annual Report, FY 1997, p. 32.

program.”⁸ Included in the budget appropriation, however, was a prohibition on the hiring of more enforcement staff.⁹

In his address to the House Appropriation’s Subcommittee on Treasury, then FEC Vice Chairman Scott Thomas stated that, “the time has come to, in essence, put more cops on the beat.”¹⁰ Mr. Thomas continued, “[o]ur main message is simple: we need more staff to do a better job of ensuring compliance with existing laws.”¹¹ Further, Mr. Thomas reiterated, “[w]ithout adequate staff to enforce existing disclosure requirements and contribution requirements, reliable disclosure will fade, and contributions of any amount from any source may become the norm.”¹² The result of Mr. Thomas’s pleadings was that the congressional appropriation prohibited the hiring of additional enforcement staff. Clearly, a majority in the Congress did not wish to have the FEC hire additional staff attorneys and other staff necessary to achieve enhanced enforcement. At the same time, however, a majority in the Congress did see fit to increase the size of the agency’s budget appropriation. Congress wanted the perception that it was tough on campaign finance, while at the same time not strengthening overall enforcement.

Oversight

One of the primary means that the Congress has to influence and control regulatory agencies is through oversight. The basis of congressional oversight is that the area of

⁸ FEC Annual Report, FY, 1999, p. 4.

⁹ Ibid.

¹⁰ Ibid.

¹¹ Ibid.

¹² Ibid.

federal campaign finance law falls under the jurisdiction of a committee of the Congress. Meier states that, "[t]he oversight process is fairly simple; a congressional committee investigates a bureau or a policy by holding hearings, conducting staff evaluations, or requesting audits by the General Accounting Office."¹³ Oversight may range from as an annual review of the agency's operations at budget time to the holding of special hearings into federal campaign finance law and possible reforms. A recent example of congressional oversight can be seen in the Thompson Committee hearings that investigated campaign finance irregularities during the 1996 presidential election.

Term Limitations

Another means of constraining the Federal Election Commission that the Congress has at its control is the enactment of term limitations upon Commissioners and high-level agency staff. Only recently has the Congress enacted term limitations on agency Commissioners. And, the Congress also recently considered enacting term limitations on the Federal Election Commission's Staff Director and General Counsel. In talking with Commissioners and high level staff, it appears that the Congress was utilizing the possibility of more term limitations as a means of sending a message to the Commission and its General Counsel. That message: we do not like the manner in which you are pursuing court cases and undertaking other enforcement activities.

Structural Features

¹³ Kenneth Meier, Politics and the Bureaucracy: Policymaking in the Fourth Branch of Government, (New York: Harcourt College Publishers, 2000), p. 133.

Congress has also utilized the structural features of the Federal Election Commission, described in Chapter Three, to restrict and guide the actions of the agency. As was described in that Chapter, the Commission is required, for all intents and purposes, to be composed of three Republicans and three Democrats. Due to natural political inclinations, members of the Commission should have an incentive to protect the interests of members of their respective political party from undue political hardship. Further, the Commission is required to have four votes in order to act. The result is that bipartisan action is required for the Commission to take any action. In essence, the Commission has been politically structured by the Congress to restrict action to all but the most basic and obvious violations.

The creation of politically structured features also can impact the agency's operations. For instance, structural features can neutralize the impact of politics when the impact of influence of one political party is offset by the impact of another political party. Similarly, structural features can also provide one political party with a political advantage over another political party within a regulatory agency, if one political party controls the entire nomination and approval process.

Chapter Discussion and Conclusion

This chapter has examined the manner in which the President and the Congress can attempt to constrain regulatory agencies through the use of certain policy tools. While the President and Congress have a number of means for constraining the regulatory agency, they can not constrain the agency too much. The Congress and the President have the incentive to see that the perception of a fair and effective Federal Election

Commission exists. It is fair to require that a majority of the Commission vote in favor for action to take place, that anonymous complaints not be investigated, and that the agency attempt to reach conciliation agreements. At the same time, the Congress and the President generally have the incentive to see that fewer enforcement actions are undertaken than might otherwise take place, and that actions that are taken are bipartisan in nature. By requiring complaints to be notarized the Congress and President were able to reduce the number of possible enforcement actions. Further, by requiring a majority vote of a politically constituted Commission, the Congress and President effectively utilized structural features to reduce the amount of enforcement activity undertaken by the Commission. Lastly, by requiring that the Agency attempt to enter into negotiated conciliation agreements with respondents for Matters Under Review, the Agency was all but precluded from undertaking timely enforcement actions. In short, the Congress and President have political incentives to protect themselves as clients of the Federal Election Commission, while ensuring that public opinion is generally subdued by the perception of an agency assigned to carry out the law.

Reality demonstrates that the policy process is not one in which the Congress or President dictates and the agency follows. Policy outcomes can not be dictated by lawmakers. The level of policy "compliance" that the agency achieves may or may not be the same level of "compliance" that those in Congress and the President had in mind when an agency or an ideal policy "norm" was established. And, Congress's and the President's desire to constrain the Federal Election Commission must be balanced with their need to satisfy the public's desire for the regulation of campaign finance.

The next chapter moves beyond the policy tools available to lawmakers for constraining regulatory agencies, and argues that other factors work in the regulatory agency's favor, thereby leading to give and take on the part of lawmakers and agency officials. In essence, the next chapter will examine how agency decision-making is a rationally constrained process, rather than a hierarchic political-administrative relationship in which lawmakers dictate and agency regulators comply.