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Congress as a Court of Appeals

SCOTT E. THOMAS*
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I. INTRODUCTION

Over the past century, Congress has enacted numerous pieces of legislation designed to clean up our governmental system by lessening the role “big money” plays in buying influence with government leaders. In 1907, Congress passed the Tillman Act, which prohibited corporations from making “a money contribution in connection with any [federal] election.”¹ In 1925, Congress extended that prohibition to “anything of value”² and made it a crime for a candidate to accept corporate contributions.³ In 1947, Congress extended this prohibition to labor organizations and broadened it to cover “expenditures” as well as contributions.⁴ Later, Congress passed the Federal Election Campaign Act of 1971 (“FECA” or “Act”),⁵ which tightened existing disclosure rules but loosened the contribution restrictions. The FECA Amendments of 1974⁶—largely a response to the extensive abuses aired during the Watergate hearings—along with further amendments in 1976 and 1979,⁷ finally pieced together a comprehensive set of prohibitions, contribution limitations, and disclosure provisions. Through these provisions, Congress sought to “remedy any actual or perceived corruption of

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1. Act of Jan. 26, 1907 (Tillman Act), ch. 420, 34 Stat. 864, 864-65 (current version at 2 U.S.C. § 441b (2000)).

2. Federal Corrupt Practices Act of 1925, tit. III, § 302(d), 43 Stat. 1070, 1071, (incorporated into the Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 20 (1972)).

3. *See id.* tit. III, 43 Stat. 1070.

4. Labor Management Relations (Taft-Hartley) Act, Pub. L. No. 80-101, 61 Stat. 136, 159 (1947) (amending § 313 of the Federal Corrupt Practices Act of 1925).

5. Pub. L. No. 92-225, 86 Stat. 3 (1972) (current version at 2 U.S.C. §§ 431-455 (2000 & Supp. 2002)).

6. Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263, *partially invalidated* by *Buckley v. Valeo*, 424 U.S. 1 (1976).

7. Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96-187, 93 Stat. 1339 (1980); Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, 90 Stat. 475.

the political process.”⁸

Over the years though, decisions of the Federal Election Commission (“FEC” or “Commission”) have undercut significant portions of FECA. Fortunately, these Commission decisions were not the final word. In 2002, Congress reversed a number of these agency actions when it passed the McCain-Feingold legislation known more formally as the Bipartisan Campaign Reform Act of 2002 (“BCRA”).⁹ In the post-BCRA era, however, we already have seen steps by the FEC to clutter the legal landscape, and it appears that Congress may once again have to review Commission decisions.

This article considers the role of Congress as a “court of appeals”—reviewing and reversing decisions of the FEC. In particular, the article summarizes significant loopholes in the law created by the FEC and the BCRA response. The article then considers several of the post-BCRA complications caused by the FEC that may drive Congress to come to the rescue again. The article concludes that, for the campaign finance law to work, Congress will have to assume its role as a court of appeals on an as-needed basis.

II. LOOPHOLES CARVED BY THE FEC AND THEN CLOSED BY BCRA

Congress has “vest[ed] in [the FEC] primary and substantial responsibility for administering and enforcing the Act.”¹⁰ To this end, Congress provided the FEC with exclusive jurisdiction for civil enforcement of the Act,¹¹ including the authority to conduct investigations, authorize subpoenas, and initiate civil actions to enforce the statute.¹² The Commission is also empowered to “formulate policy with respect to” FECA,¹³ and “to make, amend, and repeal such rules . . . as are necessary to carry out the provisions of [the] Act”¹⁴ In addition, the Commission may issue advisory opinions concerning the application of the Act and FEC regulations to specific factual situations.¹⁵

Through the years, however, a number of Commission actions (either in enforcement matters or regulation) created serious loopholes in the Act. This section discusses three of those loopholes: the “issue ad”

8. *FEC v. Akins*, 524 U.S. 11, 14 (1998).

9. Pub. L. No. 107-155, 116 Stat. 81.

10. *Buckley v. Valeo*, 424 U.S. 1, 109 (1976). For a full description of the FEC, see Charles N. Steele & Jeffrey H. Bowman, *The Constitutionality of Independent Regulatory Agencies Under the Necessary and Proper Clause: The Case of the Federal Election Commission*, 4 YALE J. ON REG. 363 (1987).

11. 2 U.S.C. § 437d(e) (2000). Section 437d contains a full listing of FEC powers. *See id.*

12. *Id.* § 437d(a)(3), (6), (9).

13. *Id.* § 437c(b)(1).

14. *Id.* § 437d(a)(8); *see also id.* § 438(a)(8) (Supp. II 2002); *id.* § 438(d) (2000).

15. *See id.* §§ 437d(a)(7), 437f.

loophole, the “coordination” loophole, and the “soft-money” loophole. This section also discusses how, in 2002, Congress sought to reverse Commission decisions leading to these loopholes with the passage of BCRA.

A. *The Issue Ad Loophole*

In order to ensure that the FECA independent expenditure provisions¹⁶ applied only to “advocacy of a political result”¹⁷ and not pure “issue discussion,”¹⁸ the Supreme Court in *Buckley v. Valeo*¹⁹ construed these provisions “to reach only funds used for communications that *expressly advocate* the election or defeat of a clearly identified candidate.”²⁰ The *Buckley* Court explained the purpose of the express advocacy standard was to limit application of the pertinent reporting provision to “spending that is *unambiguously related* to the campaign of a particular federal candidate.”²¹ The Court, however, provided no definition of what constituted “spending that is unambiguously related to the campaign of a particular federal candidate”²² or “unambiguously campaign related.”²³ The *Buckley* Court only indicated, in a footnote, that express advocacy would include communications containing such obvious campaign-related words or phrases as “‘vote for,’ ‘elect,’ ‘support,’ ‘cast your ballot for,’ ‘Smith for Congress,’ ‘vote against,’ ‘defeat,’ or ‘reject.’”²⁴ After *Buckley*, Congress amended the Act to incorporate the express advocacy test in the disclaimer and independent expenditure reporting rules.²⁵

The significance of the express advocacy test became more apparent in *FEC v. Massachusetts Citizens for Life, Inc. (MFCL)*,²⁶ when the

16. An independent expenditure is defined as “an expenditure by a person (A) expressly advocating the election or defeat of a clearly identified candidate; and (B) that is not made in concert or cooperation with or at the request or suggestion of such candidate, the candidate’s authorized political committee, or their agents, or a political party committee or its agents.” *Id.* § 431(17) (2000).

17. *Buckley v. Valeo*, 424 U.S. 1, 79 (1976).

18. *Id.*

19. *Id.*

20. *Id.* at 80 (emphasis added).

21. *Id.* at 80 (emphasis added); *see also id.* at 81 (stating that under an express advocacy standard, the reporting requirements would “shed the light of publicity on spending that is *unambiguously campaign related*” (emphasis added)).

22. *Id.*

23. *Id.* at 81.

24. *Id.* at 44 n.52.

25. *See* Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, § 104(d), 90 Stat. 475 (current version at 2 U.S.C. § 434(c) (2000 & Supp. II 2002)); Bipartisan Campaign Reform (McCain-Feingold) Act of 2002, Pub. L. No. 107-155, §§ 211, 311, 116 Stat. 81 (codified as amended at 2 U.S.C. §§ 431(17), 441d (2000 & Supp. II 2002)).

26. 479 U.S. 238 (1986).

Court held that expenditures for corporate (or union) communications not coordinated with a candidate “must constitute ‘express advocacy’ in order to be subject to the prohibition of § 441b.”²⁷ The *MCFL* Court also affirmed *Buckley*’s understanding that “the ‘express advocacy’ requirement [is meant] to distinguish discussion of issues and candidates from more pointed exhortations to vote for particular persons.”²⁸ The Court explained that express advocacy could be “less direct” than the examples listed in *Buckley* so long as the “essential nature” of the communication “goes beyond issue discussion to express electoral advocacy.”²⁹

Obviously, what constituted “express advocacy” became an important issue for the FEC. A narrow reading of the term would carve a significant loophole in FECA and would allow participants in federal elections to escape the requirements of the law so long as they avoid the use of certain “magic words” or phrases such as those stated by the *Buckley* Court in footnote fifty-two. Under such a loophole, massive soft-money expenditures disguised as issue ads would render meaningless the statute’s limitations, prohibitions, and reporting requirements.

In 1995, the Commission approved a regulation that presents an alternative to the “magic words” test and recognizes that there is more to express advocacy than a mere list of words.³⁰ The regulation incorporates the decision of the Ninth Circuit in *FEC v. Furgatch*,³¹ which stated that for a communication “to be express advocacy under the Act . . . it must, when read as a whole with limited reference to external events, be susceptible of no other reasonable interpretation but as an exhortation to vote for or against a specific candidate.”³² The FEC regulation defines the term “expressly advocating” as including not only the *Buckley* buzzwords but also “any communication that . . . taken as a whole and with limited reference to external events, such as the proximity to the election, could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s)”³³

Unfortunately, both before and after passage of this regulation, half the Commissioners of the FEC have read express advocacy so narrowly

27. *Id.* at 249.

28. *Id.*

29. *Id.*

30. Expressly Advocating, 11 C.F.R. § 100.22 (2005).

31. 807 F.2d 857 (9th Cir. 1987).

32. *Id.* at 864. In the “Explanation and Justification” of the regulation, the Commission stated that subsection (b) of the regulation reflected the analysis of *Buckley*’s express advocacy requirement articulated in *Furgatch*. Express Advocacy; Independent Expenditures; Corporate Labor Organization Expenditures, 60 Fed. Reg. 35,292, 35,295 (July 6, 1995).

33. 11 C.F.R. § 100.22(b).

when confronted with specific facts that the express advocacy standard has become meaningless. Over the years, the Commission has repeatedly split 3-3 on whether to find express advocacy in a number of enforcement actions. In many of these cases, there was little doubt that the communication was intended to advocate the election or defeat of a particular candidate. For example, in Matter Under Review (“MUR”) 3162, the Commission split 3-3 over whether a 1990 flyer, comparing candidates in various federal races and rating some “very bad” and some “excellent,” was express advocacy.³⁴

Similarly, MUR 3376 involved a 1990 newspaper ad featuring a picture of the candidate speaking in a dynamic manner before a large attentive audience.³⁵ Appearing above the picture, in large prominent letters, was the candidate’s name.³⁶ Below the picture were the words “CARING-FIGHTING-WINNING.”³⁷ The ad was paid for by the candidate’s campaign committee.³⁸ Once again, the Commission split on whether this was issue discussion or express advocacy.³⁹

Likewise, at issue in MUR 4922 was an October 1998 communication distributed by the Suburban O’Hare Commission (“SOC”) that urged voters to vote on Election Day.⁴⁰ The communication argued that it was essential to have an official in Congress who supported the SOC position on airport expansion, and then identified that official as Congressman Henry Hyde.⁴¹ In this matter, the Commission also split on whether this constituted express advocacy.⁴²

Perhaps one of the most egregious examples of express advocacy was the communication at issue in MUR 4568.⁴³ The matter involved the following 1996 television ad made during a congressional campaign:

34. Citizens for Informed Voting in the Commonwealth, Federal Election Commission Matter Under Review 3162, First General Counsel’s Report at 2 n.1 (May 21, 1991), *microformed on* FEC Office of Public Records microfilm location 91-OGC-085-0040, 92-OGC-087-1682, 91-OGC-087-1682.

35. Studds for Congress Committee, Federal Election Commission Matter Under Review 3376, First General Counsel’s Report at 2-3 (Mar. 4, 1992), *microformed on* FEC Office of Public Records microfilm location 92-OGC-090-0930, 0-OGC-090-3034, 94-OGC-097-2015, 0-OGC-090-3065, 0-OGC-091-4518.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. Suburban O’Hare Comm’n, Federal Election Commission Matter Under Review 4922, Complaint at 1288 (Aug. 23, 1999), *available at* <http://eqs.sdrdc.com/eqsdocs/000024C3.pdf>.

41. *See id.* at 1289-91.

42. *Compare id.* at 1852 (Chairman Darryl R. Wold’s Statement of Reasons Dec. 8, 2000), *available at* <http://eqs.sdrdc.com/eqsdocs/000024CD.pdf>, *with id.* at 1855 (Comm’rs David M. Mason’s and Bradley A. Smith’s Statement of Reasons Dec. 8, 2000), *available at* <http://eqs.sdrdc.com/eqsdocs/000024CD.pdf>.

43. Rick Hill for Congress Committee, Federal Election Commission Matter Under Review

Who is Bill Yellowtail?

He preaches family values, but he takes a swing at his wife.

Yellowtail's explanation?

He only slapped her, but her nose was not broken.

He talks law and order, but is himself a convicted criminal.

And though he talks about protecting children, Yellowtail failed to make his own child support payments.

Then voted against child support enforcement.

Call Bill Yellowtail and tell him you don't approve of his wrongful behavior.⁴⁴

Once again, however, the Commission split on whether this constituted express advocacy.⁴⁵

More recently, the Commission considered ads run by Republicans for Clean Air in MUR 4982.⁴⁶ In early March 2000, less than one week before the 'Super Tuesday' primaries, advertisements began running in three of the most important primary states—California, New York, and Ohio. Opening with a picture of presidential candidate John McCain superimposed over smokestacks belching dirty air, the New York advertisement was described in a script as follows:

Visuals/On Screen Copy:

McCain photo over pollution

McCain Voted Against Clean Energy

Paid for by Republicans for Clean Air

Audio:

Last year, John McCain voted against solar and renewable energy.⁴⁷

That means more use of coal-burning plants that pollute our air.

Visuals/On Screen Copy:

New York skyline with Statue of Liberty

Bush name with sky: Bush

Audio:

New York Republicans care about clean air.

So does Governor Bush.

Visuals/On Screen Copy:

Smokestacks with clear dawn

Bush Clamped Down On Polluters

4568, Comm'rs Scott E. Thomas' and Danny Lee McDonald's Statement of Reasons (Oct. 3, 2002) (on file with FEC Press Office).

44. *Id.* at 2-3.

45. *Id.* at 4.

46. Bush for President, Inc., Federal Election Commission Matter Under Review 4982, First General Counsel's Report at 3599 (Dec. 20, 2001).

47. Vote #171, S.1186, June 16, 1999.

Audio:

He led one of the first states in America to clamp down on old, coal-burning electric power plants.⁴⁸

Visuals/On Screen Copy:

Bush photo over green field
Bush Signed Clean Air Laws

Audio:

Bush clean air laws will reduce air pollution more than a quarter million tons a year.⁴⁹

Visuals/On Screen Copy:

Young people with canoe

Audio:

That's like taking five million cars off the road.

Visuals/On Screen Copy:

Bush name with kids: Let Bush & McCain Know You Back Clean Energy

Audio:

Governor Bush. Leading . . . so each day dawns brighter⁵⁰

Despite the timing of the ad, its placement in only three crucial primary states, its one-sided comparison of the two leading candidates for the 2000 Republican Presidential nomination, and the fact that the ad was addressed only to “Republicans” who were about to vote in the three primary states, e.g., “New York Republicans care about clean air,” the FEC did not consider this to be “express advocacy.”⁵¹

In 2002, Congress came to the rescue and largely closed the issue

48. Texas Senate Bill 7, signed June 18, 1999; Texas Senate Bill 766, signed June 18, 1999.

49. State of Texas, Office of the Governor, www.governor.state.tx.us/environmental/emissions.html.

50. Rick Hill for Congress Committee, Federal Election Commission Matter Under Review 4568, Comm'rs Scott E. Thomas' and Danny Lee McDonald's Statement of Reasons (Apr. 24, 2002) (footnotes omitted), available at <http://eqs.sdrdc.com/eqsdocs/00000127.pdf>.

51. *Id.* at 3628 (Certification of Commission Secretary) (Jan. 23, 2002). There have been still other examples of FEC deadlocks over express advocacy. For example, in Nita Lowey for Congress, Federal Election Commission Matter Under Review 3616, Certification of Commission Secretary (Oct. 20, 1993), *microformed on* FEC Office of Public Records microfilm location 94-OGC-356-0990, 94-OGC-354-4610, 94-OGC-352-2667, 94-OGC-358-5116, the Commission failed to find express advocacy in an advertisement featuring the candidate's name, picture, and campaign slogan that was paid for by the candidate's campaign committee and published during the month before the election. See also Americans for Tax Reform, Federal Election Commission Matter Under Review 4204, Certification of Commission Secretary (Apr. 24, 1995), *microformed on* FEC Office of Public Records microfilm location 96-OGC-376-3058, 97-OGC-377-2938, 96-OGC-377-2594; Clyde Evans, Federal Election Commission Matter Under Review 3678, Certification of Commission Secretary (Jan. 28, 1994), *microformed on* FEC Office of Public Records microfilm location 94-OGC-097-2234, 94-OGC-097-4110, 94-OGC-097-3240; Christian Coalition, Federal Election Commission Matter Under Review 3167/3176, Certification of

ad loophole created by the Commission. Signed into law on March 27, 2002,⁵² BCRA sought to lessen reliance on the express advocacy test and, instead, require the use of federally permissible funds to pay for certain issue ads that run near the election of the candidates mentioned in the ads. Specifically, BCRA created a new term of art, "electioneering communication," which is defined as:

- [A]ny broadcast, cable, or satellite communication which—
- (I) refers to a clearly identified candidate for Federal office;
 - (II) is made within—
 - (aa) 60 days before a general, special, or runoff election for the office sought by the candidate; or
 - (bb) 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate; and
 - (III) in the case of a communication which refers to a candidate for an office other than President or Vice President, is targeted to the relevant electorate.⁵³

Electioneering communications by corporations, unions, and other entities covered by 2 U.S.C. § 441b are prohibited.⁵⁴ By treating such "issue ads" running within 30 days of a primary election or within 60 days of a general election as campaign ads, Congress invoked its power to prevent commercial aggregations of wealth from overwhelming the political marketplace and driving average citizens away.⁵⁵

In *McConnell v. FEC*,⁵⁶ the Supreme Court upheld the "election-

Commission Secretary (Mar. 29, 1992), *microformed on* FEC Office of Public Records microfilm location 92-OGC-090-0851, 92-OGC-090-0542.

Meanwhile, a few courts were not exactly helping to close the loophole either. Three separate circuit courts of appeals struck down the 11 C.F.R. § 100.22(b) approach, finding that something approximating magic words must be present to constitute express advocacy. *See* Va. Soc'y for Human Life v. FEC, 263 F.3d 379 (4th Cir. 2001); Me. Right to Life Comm., Inc. v. Williams, 98 F.3d 1 (1st Cir. 1996); Iowa Right to Life Comm., Inc. v. Williams, 187 F.3d 963 (8th Cir. 1999) (ruling on an identical state-level regulation).

52. Statement by President George W. Bush upon Signing H.R. 2356, 38 WEEKLY COMP. PRES. DOC. 517 (Mar. 27, 2002).

53. 2 U.S.C. § 434(f)(3)(A)(i) (Supp. II 2002). A communication is "targeted to the relevant electorate" if it "can be received by 50,000 or more persons" in the House district or State the House or Senate candidate seeks to represent. *Id.* § 434(f)(3)(C).

54. *Id.* § 441b(c) (2000). Under §441b, it is unlawful for a corporation or a union to make a "contribution or expenditure in connection with" a federal election. *Id.* §441b(a) (2000). The term "contribution or expenditure" now includes "any direct or indirect payment, distribution, loan, advance, deposit, or gift" for "any applicable electioneering communication." *Id.* § 441b(b)(2) (Supp. II 2002). The latter term includes not only those made by the entities covered by § 441b, but also those made "by any other person using funds donated by an entity [covered by § 11]." *Id.* § 441b(c)(1) (2000).

55. *See* FEC v. Mass. Citizens for Life, Inc., 479 U.S. 238, 256-59 (1986).

56. 540 U.S. 93 (2003).

earing communication” provisions of BCRA.⁵⁷ In so ruling, the Court forcefully pointed out the uselessness of the “magic words” test used by the Commission on so many prior occasions:

[T]he unmistakable lesson . . . is that [the] magic-words requirement is *functionally meaningless*. Not only can advertisers easily evade the line by eschewing the use of magic words, but they would seldom choose to use such words even if permitted. And although the resulting advertisements do not urge the viewer to vote for or against a candidate in so many words, they are no less clearly intended to influence the election.⁵⁸

Rejecting this approach, the Court stated: “[The] express advocacy line, in short, has not aided the legislative effort to combat real or apparent corruption, and Congress enacted BCRA to correct the flaws it found in the existing system.”⁵⁹

B. *The Coordination Loophole*

In *Buckley*, the Supreme Court upheld limits on contributions to federal candidates, but ruled that a similar limitation on independent expenditures by individuals or political action committees (PACs) was unconstitutional.⁶⁰ The Court found that the absence of prearrangement or coordination of an expenditure “alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate.”⁶¹ The Court recognized, however, the importance of the coordination concept. If a would-be spender could pay for a television advertisement requested by a candidate, for example, this “coordination” would convert what might have appeared to be an “independent” expenditure into nothing more than a disguised contribution. Indeed, the *Buckley* Court warned that the contribution limitations would become meaningless if they could be evaded “by the simple expedient of paying directly for media advertisements or for other portions of the candidate’s campaign activities.”⁶²

In order to “prevent attempts to circumvent the Act through prearranged or coordinated expenditures amounting to disguised contributions,” the *Buckley* Court treated “coordinated expenditures . . . as contributions rather than expenditures.”⁶³ Thus, the *Buckley* Court drew

57. *Id.*

58. *Id.* at 193-94 (emphasis added) (internal footnotes and citations omitted).

59. *Id.* at 194.

60. *Buckley v. Valeo*, 424 U.S. 1 (1976).

61. *Id.* at 47.

62. *Id.* at 46. For a full discussion of what constitutes “coordination,” see Scott E. Thomas & Jeffrey H. Bowman, *Coordinated Expenditure Limits: Can They Be Saved?*, 49 *CATH. U. L. REV.* 133 (1999).

63. *Buckley*, 424 U.S. at 46-47.

a specific distinction between expenditures made “*totally independently* of the candidate and his campaign” and “coordinated expenditures” which could be constitutionally regulated.⁶⁴ The Court defined “contribution” to “include not only contributions made directly or indirectly to a candidate, political party, or campaign committee . . . but also *all* expenditures placed in cooperation with or with the consent of a candidate, his agents, or an authorized committee of the candidate.”⁶⁵

Congress adopted the *Buckley* standard as part of the FECA Amendments of 1976.⁶⁶ Concerned that independent expenditures could be used to circumvent the contribution limitations, Congress preserved the distinction drawn by the Supreme Court between those expenditures that are “totally independent” of the candidate’s campaign and those that are not. The statute squarely states that an expenditure made “in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents, shall be considered to be a contribution to such candidate,” and thus subject to the contribution limitations.⁶⁷ Moreover, § 431(17) of the statute defines “independent expenditure” as:

[A]n expenditure by a person expressly advocating the election or defeat of a clearly identified candidate which is made *without cooperation or consultation* with any candidate, or any authorized committee or agent of such candidate, *and which is not made in concert with, or at the request or suggestion of,* any candidate, or any authorized committee or agent of such candidate.⁶⁸

The FEC adopted the *Buckley* standard in former § 109.1(b)(4)(i) of the Commission’s regulations.⁶⁹ This provision explained that an expenditure will not be considered independent if there is “[a]ny arrangement, coordination, or direction by the candidate or his . . . agent prior to the publication, distribution, display, or broadcast of the communication.”⁷⁰ The regulation further stated that an expenditure is presumed not to be independent if it was “[b]ased on information about the candidate’s plans, projects, or needs provided to the expending person by the candidate, or by the candidate’s agents, *with a view toward having an expenditure made.*”⁷¹

In December of 2000, however, the Commission passed new regu-

64. *Id.* at 47 (emphasis added).

65. *Id.* at 78 (emphasis added).

66. Pub. L. No. 94-283, § 320, 90 Stat. 475, 487-88 (current version at 2 U.S.C. § 441a(a)(7)(B)(i) (2000)).

67. 2 U.S.C. § 441a(a)(7)(B)(i).

68. *Id.* § 431(17) (2000) (emphasis added).

69. *See* 11 C.F.R. § 109.1(b)(4)(i) (2000).

70. *Id.*

71. *Id.* § 109.1(b)(4)(i)(A) (emphasis added).

lations undercutting the concept of coordination.⁷² The Commission based these regulations upon the decision of a single district court in *FEC v. Christian Coalition*,⁷³ which effectively created its own definition of coordination. The district court seemed to require either a request or suggestion from the candidate's operatives, exercise of control over the communication by the candidate's operatives, or "substantial discussion or negotiation between the campaign and the spender over[] a communication's: (1) contents; (2) timing; (3) location, mode, or intended audience . . . ; or (4) 'volume'"⁷⁴ Oddly, the Commission did not appeal the lower court's decision.⁷⁵ Rather, four members of the Commission embraced the decision and passed new coordination regulations based upon it.⁷⁶

These new regulations greatly narrowed the Act's definition of contribution and opened substantial loopholes diminishing its effect. By tapering the circumstances under which an expenditure is considered "coordinated" to only those instances in which the candidate or committee has "request[ed] or suggest[ed]," "exercised control or decision-making authority," or had "substantial discussion or negotiation" that resulted in "collaboration or agreement,"⁷⁷ the regulation excluded those situations in which a communication was "based on" information a campaign provided "with a view toward having an expenditure made."⁷⁸ Such a limited approach rendered the coordination standard—and thus, the contribution limits—largely ineffective. In the real world, would-be spenders find ways to inform and get implicit consent without "collaborating" or "agreeing" on the details.

Once again, Congress was forced to come to the rescue. Recognizing the loophole created by these regulations, section 214 of BCRA repealed the Commission's narrow definition of coordination and

72. General Public Political Communications Coordinated with Candidates and Party Committees; Independent Expenditures, 65 Fed. Reg. 76,138 (Dec. 6, 2000) (codified at 11 C.F.R. pts. 100, 109, and 110).

73. 52 F. Supp. 2d 45 (D.D.C. 1999).

74. *Id.* at 92.

75. The decision of a single district court certainly cannot and should not resolve such an important issue as coordination. Indeed, the decision of the district court in *Christian Coalition* is not binding precedent on any other federal court, even in the same district. See, e.g., *In re Korean Air Line Disaster*, 829 F.2d 1171, 1176 (D.C. Cir. 1987) ("Binding precedent for all [circuits is] set only by the Supreme Court, and for the district courts within a circuit, only by the court of appeals for that circuit.").

76. General Public Political Communications Coordinated with Candidates and Party Committees; Independent Expenditures, 65 Fed. Reg. at 76,138 ("The Commission is promulgating new rules at 11 CFR 100.23 that define the term coordinated general public political communication. They generally follow the standard articulated by the United States District Court for the District of Columbia in the *Christian Coalition* decision." (citation omitted)).

77. 11 C.F.R. § 100.23(c) (2001).

78. 11 C.F.R. § 109.1(b)(4)(i)(A) (2000).

instructed the Commission to “promulgate new regulations on coordinated communications paid for by persons other than candidates, authorized committees of candidates, and party committees.”⁷⁹ Section 214 specifically stated that any new coordination regulations “shall not require agreement on formal collaboration to establish coordination.”⁸⁰ As explained by Senator Feingold, the “collaboration or agreement” standard “would miss many cases of coordination that result from *de facto* understandings.”⁸¹ Rejecting the Commission’s narrow definition of coordination, Senator McCain similarly explained:

Informal understandings and *de facto* arrangements can result in actual coordination as effectively as explicit agreement or formal collaboration. In drafting new regulations to implement the existing statutory standard for coordination—an expenditure made “in cooperation, consultation or concert, with, or at the request or suggestion of” a candidate—we expect the FEC to cover “coordination” whenever it occurs, not simply when there has been an agreement or formal collaboration.⁸²

C. *The Soft-Money Loophole*

Early on, the FEC took a very hard line on the use of soft money⁸³ for registration and get-out-the-vote activity (GOTV). For example, in Advisory Opinion 1976-72, the FEC held that “even though the Illinois law apparently permits corporate contributions for State elections, corporate or union treasury funds may not be used to defray *any portion* of a registration or get-out-the-vote drive conducted by a political party.”⁸⁴ Thus, the Commission found that this type of activity had to be paid for entirely with hard dollars. The FEC reached a similar result later that year in Advisory Opinion 1976-83.⁸⁵

The party soft-money loophole began with a 1978 advisory opinion by the FEC that allowed a state party to fund a reasonable “non-federal” share of party building expenses, like voter registration or GOTV, with whatever funds state law allowed.⁸⁶ In so ruling in Advisory Opinion

79. Bipartisan Campaign Reform (McCain-Feingold) Act of 2002, Pub. L. No. 107-155, § 214, 116 Stat. 81, 94-95.

80. *Id.*

81. 148 CONG. REC. S2096, S2145 (daily ed. Mar. 20, 2002) (statement of Sen. Feingold).

82. *Id.* (statement of Sen. McCain).

83. The phrase “soft money” commonly refers to funds that cannot be contributed to a federal candidate or political committee under the Act. These funds include: contributions in excess of certain limits, 2 U.S.C. § 441a (2000 & Supp. II 2002); corporate and labor contributions, *id.* § 441b; and contributions by foreign nationals in federal, state, and local elections, *id.* § 441e.

84. CCH, FEDERAL ELECTION CAMPAIGN FINANCE GUIDE ¶ 6934 (1976) (emphasis added).

85. *Id.* at ¶ 6936.

86. *Id.* at ¶ 5340.

1978-10, the Commission overturned Advisory Opinion 1976-72 and Advisory Opinion 1976-83, and allowed corporate and union funds to be used for the portion of costs allocated to the party committee's non-federal account. In Advisory Opinion 1979-17, the FEC extended this allowance to national party committees so that they could also allocate a portion of their activity as "non-federal," and pay for that share with money raised in states with laws permitting the use of federally prohibited funds.⁸⁷ Underlying the allocation approach developed in these two advisory opinions was a recognition that the efforts of political parties—particularly the state and local parties—often involved generic party-building activity designed to help both federal and non-federal candidates.

Congress essentially ratified this "allocation" approach as part of the 1979 FECA Amendments. With regard to certain provisions allowing more flexibility for state and local parties, Congress indicated that "if State law allows the use of treasury funds of a corporation, that money could be used for the State portion, but not for any portion allocable to Federal candidates."⁸⁸ During the early years of allocation, parties made slight use of soft money. The FEC, however, only required that any formula used by a party committee be "reasonable."⁸⁹ It didn't take long for party committees to push the envelope by allocating their expenses in a way that allowed the vast majority to be paid with soft money.

Beginning with the 1992 election cycle, the FEC attempted to slow down this pattern of evasion with regulations that required party committees to use specific allocation formulas.⁹⁰ For example, the two national party committees were required to allocate sixty-five percent of their party-building costs as federal expenditures in presidential election years, leaving only thirty-five percent that could be paid with soft money.⁹¹ State and local parties, though, were allowed to work with a "ballot composition" formula whereby the number of federal candidates on the ballot was divided by the number of all candidates to achieve a federal percentage.⁹² In most states, the federal share ranged around

87. *Id.* at ¶ 5416.

88. H.R. REP. NO. 96-422, at 8 (1979).

89. In the 1977 regulations, the FEC required political committees active in federal and non-federal elections to allocate their administrative expenses between federal and non-federal accounts "in proportion to the amount of funds expended on federal and non-federal elections, or on another *reasonable basis*." 11 C.F.R. § 106.1(e) (1977) (emphasis added); *see also* 55 Fed. Reg. 26,058, 26,059 (June 26, 1990).

90. *See* Methods of Allocating Between Federal and Non-Federal Accounts; Payments; Reporting, 55 Fed. Reg. 26,058 (June 26, 1990) (codified at 11 C.F.R. pts. 102, 104, and 106).

91. *Id.* at 26,063.

92. *Id.* at 26,064.

twenty-five percent, thus leaving the rest of the expenditures payable with soft money.⁹³ These final rules were issued in 1990 and became effective on January 1, 1991.⁹⁴

The 1990 soft-money regulations, however, formalized a loophole massively exploited over succeeding years. As one court concluded: "From 1991 until BCRA went into effect . . . party committees routinely circumvented the spirit of campaign finance laws in order to use soft money to influence federal elections . . ." ⁹⁵ Indeed, reports filed with the FEC indicate a dramatic rise in soft-money spending by party committees. In the 1992 election cycle, national party committees reported spending \$79 million in soft money; in the 1996 election cycle, national party committees reported spending over \$271 million in soft money; and in the 2000 election cycle, national party committees reported spending \$497 million in soft money—more than a six-fold increase.⁹⁶

As the above numbers indicate, the use of soft money dramatically increased during the 1996 and 2000 election cycles. By 1996, party operatives had figured out that transferring available soft money to the state parties would allow for much more soft money to be spent for party-building activity. In the 2000 election cycle, huge amounts of soft money were raised by elected officials for the national parties and then transferred down to state parties for ads promoting or attacking particular federal candidates. The FEC tracked about \$150 million in soft money transferred by national committees of the Democratic Party to state or local party committees and about \$130 million transferred by the national committees of the Republican Party to state or local party committees.⁹⁷ These transfers represented large portions of the approximately \$250 million in soft money raised by each of the national party structures.⁹⁸ The spectacle of presidential and congressional candidates and officeholders openly soliciting huge soft-money donations, clearly targeted at federal races, left the FECA provisions in tatters.

In 1996, the Democratic National Committee and the Republican National Committee further stretched the law by using the allocation allowance to subsidize, with soft money, massive expenditures for ads in support of President Clinton and Bob Dole, respectively.⁹⁹ Both presi-

93. See, e.g., *Retroactive Application of Revised Ballot Composition Record*, FEC RECORD (FEC, Washington, D.C.), July 1992, at 3-4.

94. 55 Fed. Reg. 40,377 (Oct. 3, 1990).

95. *Emily's List v. FEC*, 362 F. Supp. 2d 43, 47 (D.D.C. 2005).

96. Press Release, FEC, FEC Reports Increase in Party Fundraising for 2000 (May 15, 2001) [hereinafter FEC Press Release], available at <http://www.fec.gov/press/press2001/051501partyfund/051501partyfund.html>.

97. *Id.*

98. *Id.*

99. See *Dole for President, Inc.*, Federal Election Commission Matter Under Review 4969,

dential campaigns recognized that their parties' issue advertisements played an important role in their campaigns.¹⁰⁰ Indeed, as Senator Dole candidly admitted:

"We had to spend a lot of money to win the nomination . . . [b]ut we can, through the Republican National Committee . . . run television ads and other advertising. It's called generic. It's not Bob Dole for President. In fact, there's an ad running now, hopefully in Orlando, a 60 second spot about the Bob Dole story: Who is Bob Dole? What's he all about?"¹⁰¹

Similarly, it appeared the Clinton campaign sought to use the Democratic National Committee to advance its campaign. For example, in notes regarding a campaign meeting, presidential advisor and consultant Dick Morris wrote: "Total Clinton Gore Money through May 28: \$2.5 million . . . *If Dole is nominated we need no additional CG [Clinton-Gore] money for media before May 28 since we can attack him with DNC money.*"¹⁰²

The FEC split on whether to pursue these 1996 advertising campaigns as 100% federal outlays.¹⁰³ Several Commissioners argued that the law was unsettled and that these ads were simply issue ads that could be treated like generic party-building activity.¹⁰⁴ As a result, several election cycles of profligate soft-money spending for hard-hitting, candidate-specific ads drifted by with no response from the FEC. In failing to pursue these matters, the FEC missed a clear opportunity to put the brakes on the massive amounts of soft money raised and spent for party

First General Counsel's Report at 27, n.28 (Jan. 12, 2000), available at <http://eqs.sdrdc.com/eqsdocs/00002664.pdf>.

100. *Id.*

101. *Id.* (emphasis added).

102. Clinton/Gore '96 Primary Committee, Federal Election Commission Matter Under Review 4713, First General Counsel's Report (Jan. 12, 2000), available at <http://eqs.sdrdc.com/eqsdocs//2004399.0611> at 39 (emphasis added).

103. The 1996 cases included Dole for President, Federal Election Commission Matter Under Review 4553 (Jan. 12, 2000), *microformed on* FEC Office of Public Records microfilm location 20-OGC-400-0002, 20-OGC-399-1622, 20-OGC-399-3101; Dole for President, Federal Election Commission Matter Under Review 4671 (Jan. 12, 2000), *microformed on* FEC Office of Public Records microfilm location 20-OGC-401-0002, 20-OGC-399-1641, 20-OGC-399-3129; Dole for President, Inc., Federal Election Commission Matter Under Review 4969 (Jan. 12, 2000), available at <http://eqs.sdrdc.com/eqsdocs/00002664.pdf>; Dole for President, Federal Election Commission Matter Under Review 4970 (Jan. 12, 2000), available at <http://eqs.sdrdc.com/eqsdocs/0000266D.pdf>; Clinton/Gore '96 Primary Committee, Federal Election Commission Matter Under Review 4407 (Jan. 12, 2000), *microformed on* FEC Office of Public Records microfilm location 20-OGC-398-0915, 20-OGC-399-3045, 20-OGC-399-1584. Because four affirmative votes are needed to make a determination, 2 U.S.C. § 437g(a)(2) (2000), no action was taken with regard to these matters.

104. See, e.g., Clinton/Gore '96 Primary Committee, Inc., Federal Election Commission Matter Under Review 4713, Comm'rs Statements of Reasons (Jan. 12, 2000), available at <http://eqs.sdrdc.com> (select "Case Type" MUR, and enter 4713 in "Case #" box).

ads clearly promoting a particular candidate. Had the Commission voted to treat those 1996 cycle ads as violations, there would not have been the flood of soft money for similar party “issue ads” in subsequent election cycles and, perhaps, no need for BCRA.

Congress rescued the FEC from the soft-money morass with BCRA, as it did with respect to the “issue ad” and “coordination” loopholes created by the FEC. In light of the history of the 1992 through 2000 election cycles, “Congress determined that the allocation system in fact enabled the circumvention of the law by authorizing the spending of soft money on activities that were intended to, and in fact did, influence federal campaigns.”¹⁰⁵ In order to remedy the party soft-money abuses sanctioned by the FEC regulatory scheme, BCRA prohibits national party committees from raising any funds other than those permissible for federal elections.¹⁰⁶ Specifically, it states that “[a] national committee of a political party . . . may not solicit, receive, or direct to another person a contribution, donation, or transfer of funds or any other thing of value, or spend any funds, that are not subject to the limitations, prohibitions, and reporting requirements of [FECA].”¹⁰⁷

To prevent the funneling of funds through state or local party committees, BCRA also requires state and local party committees to treat certain expenses as “[f]ederal election activity” and to use only federally permissible contributions, or an allocation of federally permissible contributions and donations of \$10,000 or less allowed under State law to pay such expenses.¹⁰⁸ To insulate federal candidates and officeholders from soft money, BCRA prevents them from soliciting in connection with elections any funds that would not be permissible under federal law.¹⁰⁹ Finally, anticipating possible loopholes in the party soft-money restrictions, BCRA extends the reach of several provisions to any “agent” of a party committee, federal candidate, or federal officeholder and to “any entity that is directly or indirectly established, financed, maintained, or controlled by” such party committee, federal candidate, or federal officeholder.¹¹⁰ BCRA also requires that “federal election activity” must be paid for with funds each committee raises itself, to prevent party committees, that can freely raise corporate or union funds or large donations under State law, from transferring such funds to other party committees.¹¹¹

105. *Emily’s List v. FEC*, 362 F. Supp. 2d 43, 47 (D.D.C. 2005).

106. 2 U.S.C. § 441i(a)(1) (2000 & Supp. II 2002).

107. *Id.*

108. *Id.* § 441i(b)(1), (2)(B)(iii).

109. *Id.* § 441i(e)(1).

110. *Id.* § 441i(a)(2), (b)(1), (e)(1).

111. *Id.* § 441i(b)(2)(B)(iv).

In *McConnell*, the Supreme Court upheld Congress's effort, through BCRA, to "plug the soft-money loophole."¹¹² The Supreme Court found that "there is substantial evidence . . . that large soft-money contributions . . . give rise to corruption and the appearance of corruption."¹¹³ The Court recognized that BCRA was enacted "to address Congress' concerns about the increasing use of soft money" to "influence federal elections."¹¹⁴ The Court stated that "[b]oth common sense and the ample record in these cases confirm Congress' belief that . . . large soft-money contributions to national party committees have a corrupting influence or give rise to the appearance of corruption."¹¹⁵ The Court found that "[b]ecause voter registration, voter identification, GOTV, and generic campaign activity all confer substantial benefits on federal candidates, the funding of such activities creates a significant risk of actual and apparent corruption."¹¹⁶

In upholding BCRA, the Supreme Court faulted the FEC for its administration of the law and laid the creation of the soft-money problem squarely on the FEC's doorstep. The Court pointed out that the FEC's pre-BCRA soft-money rules "permitted more than Congress, in enacting FECA, had ever intended," and that the rules "invited widespread circumvention" of the statute.¹¹⁷ In the Court's view:

[t]he main goal of [the BCRA soft-money prohibition] is modest. In large part, it simply effects a return to the scheme that was approved in *Buckley* and that was subverted by the creation of the FEC's allocation regime, which permitted the political parties to fund federal electioneering efforts with a combination of hard and soft money.¹¹⁸

Unfortunately, passage of BCRA did not put an end to the FEC's consistent failure to follow congressional intent.

III. THE FEC REGULATIONS "IMPLEMENTING" BCRA WEAKENED THE STATUTE AND MAY REQUIRE CONGRESSIONAL REVIEW AGAIN

Having passed BCRA, Congress expressly charged the FEC with the responsibility for promulgating new regulations to implement the statutory language. Specifically, section 402(c)(2) of BCRA required

112. *McConnell v. FEC*, 540 U.S. 93, 133 (2003).

113. *Id.* at 154.

114. *Id.* at 132.

115. *Id.* at 145.

116. *Id.* at 168.

117. *Id.* at 142, 145; *accord* Shays v. FEC, 414 F.3d 76, 80 (D.C. Cir. 2005) ("Charged with administering federal campaign finance laws, the Federal Election Commission . . . took a permissive view.").

118. *McConnell*, 540 U.S. at 142 (emphasis added).

the FEC to promulgate rules within 90 days of BCRA's enactment to carry out the provisions restricting the use of soft money by political party committees.¹¹⁹ Section 402(c)(1) of BCRA required the FEC to promulgate, within 270 days of its enactment, the remaining regulations required to carry out BCRA.¹²⁰ Although the FEC met the temporal requirements of BCRA,¹²¹ the regulations passed by the Commission failed to meet the spirit of the new law. As Senator Feingold put it: "The FEC met the deadlines, but not our expectations. Time after time, the FEC opened loopholes or potential loopholes rather than trying to faithfully discern the intent of the law. It acted as a super legislature, substituting its policy judgments for those of the Congress."¹²²

A. *Examples of FEC Regulations that Weakened BCRA*

In upholding virtually all of BCRA's provisions in *McConnell*, the Supreme Court observed that "BCRA's central provisions are designed to address Congress' concerns about the increasing use of soft money and issue advertising to influence federal elections."¹²³ Despite this clear congressional intent, the FEC passed a number of implementing regulations that, in the professed interest of "providing clarity," plainly undercut BCRA. In particular, it is useful to look at the way in which these regulations rolled back BCRA reforms in the areas of issue ads, coordination, and soft money.

With respect to issue ads, the new FEC regulations improperly narrowed the reach of the statute. For example, in defining an electioneering communication (targeted broadcast ads mentioning a candidate within 30/60 days of an election),¹²⁴ the Commission created a flat exemption for 501(c)(3) groups,¹²⁵ on the assumption that the IRS adequately would police this activity. This means incorporated 501(c) groups, or those that accept funds prohibited by FECA, do not have to worry about FEC oversight unless they trip over other rules, such as the coordinated communication or express advocacy restraints. Significantly, the only exemption authority granted to the FEC in BCRA is for activity that does not promote, support, attack, or oppose the named fed-

119. Bipartisan Campaign Reform (McCain-Feingold) Act of 2002, Pub. L. No. 107-155, § 402(c)(2), 116 Stat. 81, 113.

120. *Id.* § 402(c)(1).

121. See Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money, 67 Fed. Reg. 49,064 (July 29, 2002); Electioneering Communications, 67 Fed. Reg. 65,190 (Oct. 23, 2002); Coordinated and Independent Expenditures, 68 Fed. Reg. 421 (Jan. 3, 2003).

122. 149 CONG. REC. S9248 (daily ed. July 10, 2003) (statement of Sen. Feingold).

123. *McConnell*, 540 U.S. at 132.

124. See *supra* notes 53-55 and accompanying text.

125. 11 C.F.R. § 100.29(c)(6) (2005).

eral candidate.¹²⁶

For the coordination rules, the Commission adopted a complicated new “content” plus “conduct” standard whereby ads that do not meet a content test can be fully coordinated with a candidate without causing the ads to qualify as an in-kind contribution.¹²⁷ Even though Congress clearly directed the FEC to get tougher in this area, the new regulations broadly exempt from the limits, prohibitions, and contribution reporting provisions *fully coordinated* communications that run more than 120 days before the election as long as they avoid express advocacy or the direct re-publication of campaign materials issued by a candidate.¹²⁸ Essentially, unless there is express advocacy, ads that run more than 120 days from an election will not meet the “content” test. As a result, even ads that promote, support, attack, or oppose a candidate can be created and fully controlled by a candidate and yet be paid for without limit by a party committee, corporation, union, or even a foreign government. One can only imagine the attack ads paid for by such sources and orchestrated with a candidate in an early primary state between a March primary and early July, up until the beginning of the 120-day period before the general election. Consequently, candidate and party operatives find themselves indebted to the wealthy interest groups, individuals, or organizations that are willing to pay *without limit* for ads planned, created, and coordinated with candidates just outside the 120-day timeframe. Obviously, the potential for quid pro quo arrangements is great.¹²⁹ It is unlikely that this is what Congress had in mind when it overturned the FEC’s coordination regulations as too lenient.¹³⁰

126. 2 U.S.C. § 434(f)(3)(B)(iv) (Supp. II 2002).

127. See 11 C.F.R. § 109.21.(a)(1)-(3) (2005) (providing that a communication is coordinated with a candidate, an authorized committee, a political party committee, or an agent of any of the foregoing if the communication: (1) is paid for by a third party; (2) satisfies at least one of four “content” standards; and (3) satisfies at least one of six “conduct” standards).

128. See *id.* §§ 109.21(c)(4)(i)-(iii), 109.37(a)(2)(iii)(A)-(C).

129. *Cf. Buckley v. Valeo*, 424 U.S. 1, 47 (1976) (“The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate.”). By placing candidate approved communications running only a few months before the general election outside the limitations, prohibitions and reporting provisions of FECA, § 109.21 ignores this important teaching of *Buckley*.

130. Moreover, regardless of when made, a communication that avoids reference to a particular candidate or party can avoid treatment as an in-kind contribution. For example, a corporation could pay for an ad written by a candidate that says, “Do we need a liar, tax cheat, and wife-beater in Congress?”

The Commission had much better alternatives before it when considering the “coordinated communication” regulations. It could have kept the approach that worked fairly well for most of the FEC’s history: analyzing whether the coordinated message was an “expenditure”—or “for the purpose of influencing” or “in connection with” a federal election—under the law. See 2 U.S.C. §§ 431(9)(A)(i), 441a(a)(7)(B)(i), 441b(b)(2) (2000 & Supp. II 2000); see also FEC Advisory Op.

Additionally, the FEC completely exempted from the coordination rules communications using the Internet. It did this by using the term “public communications” in the “content” provisions, and exempting Internet communications from this term.¹³¹

For provisions preventing state party use of soft money for “Federal Election Activity,” the FEC found several ways to narrow the definition of Federal Election Activity. This freed state parties to use significantly more soft money to pay for allocable expenses. For example, with respect to Voter ID, GOTV, and generic campaign activity “in connection with an election in which a candidate for Federal office appears on the ballot,” the FEC narrowed the applicable time frame to the period beginning with the filing deadline in each state.¹³² Thus, in non-presidential years in late primary states, the restrictions do not take effect until July of the election year.¹³³ Particularly for Voter ID activity, which is ongoing throughout the election cycle, this allows significant party activity to be partly subsidized using whatever soft money state law allows.

Moreover, the Commission defined Voter ID to exclude altogether the costs of acquiring lists and updating contact information.¹³⁴ So, even within the time frame just noted, significant Voter ID expenses are excluded from the Federal Election Activity restraints. And, as with the coordination rules, the FEC exempted from the Federal Election Activity definition “public communications” using Internet formats.¹³⁵

In addition to rolling back BCRA reforms in the areas of issue ads, coordination, and soft money, the FEC created other loopholes. For provisions preventing federal candidates and officeholders from soliciting soft money, the FEC adopted a definition of solicitation that requires

No. 1982-56 (Oct. 29, 1982) (explaining that non-Federal candidate ad containing endorsement by Federal candidate not an “expenditure”), available at <http://ao.nictusa.com/ao/no/820056.html>; FEC Advisory Op. No.1996-11 (May 20, 1996) (explaining that candidate appearance at non-profit corporation event not an “expenditure”), available at <http://ao.nictusa.com/ao/no/960011.html>. In the alternative, the Commission could have adopted a “content standard” whereby only messages that promote or support or attack or oppose a named candidate would be covered by the coordination rules. Coordinated and Independent Expenditures, 67 Fed. Reg. 60,042, 60,049 (proposed Sept. 24, 2002). Either one of these approaches would have been far superior to the odd results flowing from the 120-days or reference-to-candidate rule.

131. See 11 C.F.R. § 109.21(c)(2)-(4).

132. *Id.* § 100.24(a)(1)(i) (2005).

133. For 2006, there are 13 states or territories with a July, August, or September filing deadline. See Federal Election Commission, 2006 U.S. Congressional Primary Dates and Candidate Filing Deadlines For Ballot Access (Nov. 3, 2005), <http://www.fec.gov/pubrec/fe2006/2006pdates.pdf>.

134. 11 C.F.R. § 100.24(a)(4).

135. *Id.* §§ 100.24(b)(3), 100.26.

one “to ask that another person make a contribution.”¹³⁶ Suggesting that a person make a soft-money contribution, however, is not a solicitation.¹³⁷ It is not difficult to imagine conversations such as, “it would be really nice if you could give the party \$1 million,” or “you’re the only person I’ve talked to today who hasn’t committed to giving the party \$250,000. How does that make you feel?” Effectively, the Commission may have created a “magic words” test for the BCRA solicitation restrictions.

For the soft-money-solicitation restrictions, which also apply to “agents” of national party committees, candidates, and officeholders, the FEC adopted a “two hat theory” whereby a person who is an agent of such a person for purposes of raising *hard* money may raise *soft* money as a separate individual.¹³⁸ Thus, the application of the soft-money restriction becomes a matter of proving that the agent was acting on behalf of the federal candidate when raising soft money. This will promote the use of paper “agency agreements” (e.g., “I only authorize Maurice Stans to raise ‘hard money’”), so that many of the same old faces tied to federal candidates can continue to raise soft money.¹³⁹

B. Shays v. FEC Challenges the Commission

On October 8, 2002, Representatives Shays and Meehan filed an action against the FEC challenging a number of the Commission’s regulations “implementing” BCRA.¹⁴⁰ Specifically, plaintiffs alleged that “the FEC’s new regulations, in multiple and interrelated ways, thwart and undermine the language and congressional purposes of Titles I and II of BCRA.”¹⁴¹ On September 18, 2004, the United States District Court for the District of Columbia effectively agreed when it ruled that fifteen of the nineteen challenged regulatory provisions promulgated by the Commission were invalid implementations of BCRA.

In a 157-page opinion, the district court had harsh words for the Commission’s regulations, stating, for example, that one regulation “would create an immense loophole that would facilitate the circumvention of the Act’s contribution limits,”¹⁴² another “severely undermines

136. *Id.* § 300.2(m) (2005).

137. Prohibited or Excessive Contributions: Non-Federal Funds or Soft Money, 67 Fed. Reg. 49,064, 49,064, 49,086 (July 29, 2002) (to be codified at 11 C.F.R. pt. 300).

138. *Id.* at 49,083.

139. Further, apparent authority is not an adequate basis for finding an agency relationship under the adopted regulations. *Id.* at 49,082. For example, if President Nixon had told his biggest donors, “Maurice Stans is my money guy,” such apparent authority would not create liability for Stans’ subsequent soft-money solicitations under the FEC regulations.

140. Shays v. FEC, 337 F. Supp. 2d 28 (D.D.C. 2004).

141. *Id.* at 35.

142. *Id.* at 65.

FECA's purposes" and "would permit rampant circumvention of the campaign finance laws and foster corruption or the appearance of corruption,"¹⁴³ while yet another regulation "would render the statute largely meaningless."¹⁴⁴ Applying the standard articulated in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,¹⁴⁵ the district court invalidated ten of the regulations on substantive grounds, and invalidated five of the other regulations on procedural grounds such as inadequate notice or explanation under the Administrative Procedure Act.¹⁴⁶ The court upheld only four of the challenged regulations.¹⁴⁷

In the aftermath of the district court's decision, the Commission decided to open rulemaking proceedings with regard to a number of those rules found deficient on procedural or substantive grounds. Notably, the FEC decided not to appeal the district court's holdings on substantive grounds regarding the Internet exceptions in the coordination and Federal Election Activity areas and the Voter ID definition. The Commission did, however, appeal the district court's decision¹⁴⁸ regarding plaintiffs' standing, as well as: (1) the district court's decision striking down the coordinated communications regulation at 11 C.F.R. § 109.21(c)(4)(i), (ii), and (iii); (2) the district court's decision striking down the definition of "solicit" at 11 C.F.R. § 300.2(m) and "direct" at 11 C.F.R. § 300.2(n); (3) the district court's decision striking down a regulation governing payment of state, district, or local party employee wages or salaries at 11 C.F.R. § 300.33(c)(2); (4) the district court's decision striking down the de minimis exception for Levin funds¹⁴⁹ at 11 C.F.R. § 300.32(c)(4); and (5) the district court's decision striking down the FEC's decision that electioneering communication rules cover only a

143. *Id.* at 70.

144. *Id.* at 79.

145. 467 U.S. 837 (1984). Under the two-step inquiry established in *Chevron*, a court first asks "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Shays*, 337 F. Supp. 2d at 51 (quoting *Chevron*, 467 U.S. at 842-43). However, if "the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 52 (quoting *Chevron*, 467 U.S. at 843).

146. *Shays* 337 F. Supp. 2d at 28.

147. *Id.*

148. The Commission voted to appeal these matters by a 4-2 vote with Commissioners Thomas and McDonald voting against an appeal.

149. Some Federal Election Activity can be paid for in part with so-called "Levin Funds," but such activity must not "refer to a clearly identified candidate for Federal office," and must not involve "costs of any broadcasting, cable or satellite communication, other than a communication which refers solely to a clearly identified candidate for State or local office." 2 U.S.C. § 441i(b)(2)(B)(i)-(ii) (2000 & Supp. II 2002); 11 C.F.R. §§ 300.2(i), 300.32(c)(1)-(2) (2005).

public distribution “for a fee” at 11 C.F.R. § 100.29(b)(3)(i).¹⁵⁰

On July 15, 2005, the United States Court of Appeals for the District of Columbia Circuit issued an opinion affirming the “exceptionally thorough”¹⁵¹ district court’s opinion “in all respects.”¹⁵² As a threshold matter, the court of appeals agreed with the district court that Representatives Shays and Meehan had standing to challenge the FEC’s flawed regulations. The court of appeals asked, “who suffers more directly [than the candidates themselves] when political rivals get elected using illegal financing?”¹⁵³ The court observed that:

[I]n a constitutional system based on the rule of law, it would be ironic, to say the least, if Article III [of the Constitution] barred the courthouse doors to citizens like Shays and Meehan who, because of unlawful government action [by the FEC] may protect their interest in election to Congress only by violating that lawmaking body’s own dictates.¹⁵⁴

The court concluded, “Shays and Meehan, as regular candidates for reelection, suffer injury to a statutorily protected interest if under FEC rules they must compete for office in contests tainted by BCRA-banned practices.”¹⁵⁵

Echoing the disapproving language of the district court, the court of appeals affirmed the district court’s invalidation of all five rules and added its own strong criticism of the rules and the Commission. With respect to the standards for “coordinated communications,” the court commented that “it seems hard to imagine that Representatives and Senators voting for BCRA would have expected regulations like these.”¹⁵⁶ The court held that “the 120-day window offers politicians and their supporters an *unreasonably generous safe harbor*” and illustrated their concern with an example:

Under the new rules, more than 120 days before an election or primary, a candidate may sit down with a well-heeled supporter and say, “Why don’t you run some ads about my record on tax cuts?” The two may even sign a formal written agreement providing for such ads. Yet so long as the supporter neither recycles campaign materials nor employs the “magic words” of express advocacy—“vote for,” “vote against,” “elect,” and so forth—the ads won’t qualify as contri-

150. See *Shays v. FEC*, 414 F.3d 76 (D.C. Cir. 2005), *reh’g en banc denied*, No. 04-5352 (Oct. 21, 2005).

151. *Id.* at 82.

152. *Id.* at 79.

153. *Id.* at 83.

154. *Id.* at 89.

155. *Id.* at 85.

156. *Id.* at 98-99.

butions subject to FECA.¹⁵⁷

The court found that “by employing a ‘functionally meaningless’ standard outside [the 120-day pre-election period], *the FEC has in effect allowed a coordinated communication free-for-all* for much of each election cycle.”¹⁵⁸

With respect to the definitions of the terms “solicit” and “direct,” the court held that the FEC’s narrow definition of those terms conflicted with the clear language of BCRA:

The FEC’s definitions fly in the face of [Congress’s] purpose because they reopen the very loophole the terms [solicit and direct] were designed to close. Under the Commission’s interpretation, candidates and parties may not spend or receive soft money, but apart from that restriction, they need only avoid explicit direct requests. Instead, they must rely on winks, nods, and circumlocutions to channel money in favored directions—anything that makes their intention clear without overtly “asking” for money. Simply stating these possibilities demonstrates *the absurdity of the FEC’s reading.* Whereas *BCRA aims to shut down the soft money system, the Commission’s rules allow parties and politicians to perpetuate it,* provided they avoid the most explicit forms of solicitation and direction.¹⁵⁹

As a result, the court affirmed the invalidation of the FEC definitions because “Congress has clearly spoken to this issue and enacted a prohibition broader than the one the FEC adopted.”¹⁶⁰

With respect to the interpretation of “electioneering communication,” the court found that “the FEC’s rule far exceeds any exemption BCRA would permit.”¹⁶¹ The court explained:

Attempting to concoct ambiguity, the FEC protests, “There is simply no mention of funding anywhere in the definition.” True, but so what? The already capacious U.S. Code would require even more volumes if Congress could be clear only by ruling out every possible limitation on statutory language. When Congress bans possession of a firearm or cocaine, we hardly scratch our heads and ask, “Gee, maybe they meant possession for a fee?” By the same token, when BCRA says “made,” we presume, absent compelling indication otherwise, that it means “made” and not “made for a fee.”¹⁶²

The court concluded that the FEC definition “contradicts BCRA’s plain text” and “runs roughshod over express limitations on the Commission’s

157. *Id.* at 98 (emphasis added).

158. *Id.* at 100 (emphasis added).

159. *Id.* at 106 (emphasis added).

160. *Id.* at 107.

161. *Id.* at 109.

162. *Id.* at 108 (emphasis added) (citation omitted).

power, thus again flunking *Chevron* one.”¹⁶³

The court of appeals was just as critical of the other FEC regulations at issue on appeal. The court found the FEC provision dealing with the allocation rules for state-party employees “particularly irrational” and “mak[ing] no sense.”¹⁶⁴ The court remanded the rule to the FEC for further review, but cautioned that “[s]hould the FEC wish to adhere to its current view in future rulemaking, it must summon more substantial support than the conclusory assertions presented to us.”¹⁶⁵ Similarly, the court affirmed the invalidation of a Commission rule allowing state and local parties a de minimis exemption from allocation rules for “Levin funds.” In rejecting this FEC-created exemption, the court of appeals bluntly stated that “the record here presents no coherent justification for the specific exemption the FEC chose.”¹⁶⁶

In conclusion, the court of appeals summarized its view of the Commission’s post-BCRA “implementing” regulations this way:

As the Supreme Court (rather fatalistically) observed in *McConnell*, “[m]oney, like water, will always find an outlet.” Offered there as a reason for “no illusion that BCRA will be the last congressional statement on [campaign finance],” this comment serves equally well here to illustrate *the importance of faithfully implementing the statute Congress has passed. For if regulatory safe harbors permit what BCRA bans, we have no doubt that savvy campaign operators will exploit them to the hilt, reopening the very soft money floodgates BCRA aimed to close.* Because the rules at issue in this appeal either fall short of Congress’s mandate or lack record support showing otherwise, we affirm their invalidation by the district court.¹⁶⁷

On October 21, 2005, the United States Court of Appeals for the District of Columbia Circuit denied the Federal Election Commission’s petition for rehearing *en banc* in *Shays v. FEC*.¹⁶⁸ The full court’s order thus let stand the judgment of the three-judge court of appeals.

Obviously, the Commission improperly created “regulatory safe harbors” when it failed to faithfully implement BCRA. Likewise, as we discuss next, the Commission effectively created a “regulatory safe harbor” when it failed to address the proliferation of so-called “527 committees” in 2004.

163. *Id.* at 109.

164. *Id.* at 112.

165. *Id.*

166. *Id.* at 115.

167. *Id.* (citation omitted) (emphasis added).

168. *Shays v. FEC, reh’g en banc denied*, No. 04-5352 (Oct. 21, 2005).

C. *The FEC Failed to Close the 527 Loophole, and Appeal to Congress May Be Required*

In 2004, so-called “527 organizations” appeared like never before on the election law scene. These organizations claimed their purpose was not to influence federal elections, but rather simply to discuss issues of the day. As a result, they argued that they should not have to register as a “political committee” under FECA,¹⁶⁹ which allowed them to escape the FECA limits and prohibitions regarding their receipts. At the same time, these groups represented to the IRS that their primary purpose was to influence elections which, subsequently, allowed these groups to claim special tax status under the Internal Revenue Code (IRC).

Having it both ways, these unregistered groups raised and spent tens of millions of dollars in 2004 on hard-hitting communications that attacked specific candidates but fell outside the requirements of FECA. Indeed, one poll attributed George Bush’s first lead in the campaign to the “Swift Boat” ads attacking John Kerry.¹⁷⁰ Moreover, a recent study by the Campaign Finance Institute found that a great deal of funds used by these 527s in 2004 were well in excess of the contribution limitations that would have applied if the 527s had not been so classified.¹⁷¹ As Senator John McCain recognized early in 2004, “so-called ‘527 groups’ . . . are raising and spending millions of dollars in the current presidential election. These groups readily admit that their intended purpose is to influence the outcome of Federal elections.”¹⁷²

In 2004, the Federal Election Commission had an opportunity to address this problem but failed. Instead of making clear that these groups must register as political committees under the Act and comply with the law’s contribution limitations and reporting provisions, the Commission passed half-measures that failed to address the core problem.¹⁷³ With the Commission unwilling to act, the activities of these 527 organizations will continue unabated into the 2006 election cycle and beyond. It seems clear that those wishing to address this activity must appeal to Congress.

169. 2 U.S.C. § 431(4) (2000).

170. Ronald Brownstein, *Bush Edges Ahead of Kerry for the First Time*, L.A. TIMES, Aug. 26, 2004, at A1.

171. Steve Weissman & Ruth Hassan, *BCRA and the 527 Groups*, in THE ELECTION AFTER REFORM: MONEY, POLITICS AND THE BIPARTISAN CAMPAIGN REFORM ACT (Michael J. Malbin ed., forthcoming), available at http://cfinst.org/studies/ElectionAfterreform/pdf/EAR_527Chapter.pdf.

172. 150 CONG. REC. S4471-72 (daily ed. Apr. 28, 2004) (statement of Sen. McCain)

173. See discussion *infra* pp. 31-32.

D. *Definition of “Political Committees” in FECA and “Political Organizations” Under the IRC*

FECA essentially defines a “political committee” as “any committee, club, association or other group of persons” that receives contributions “or makes expenditures aggregating in excess of \$1,000 during a calendar year.”¹⁷⁴ The terms “contribution” and “expenditure” are defined to reach funds given or paid “for the purpose of influencing any election for Federal office.”¹⁷⁵ On its face, this term “political committee” would even reach a law firm that makes a single \$2,000 contribution to a federal candidate.

Nonetheless, in construing the statutory definition of “political committee,” the Supreme Court has held that the term only includes an organization “under the control of a candidate or the major purpose of which is the nomination or election of a candidate.”¹⁷⁶ Later, in *MCFL*, the Court clarified:

[S]hould *MCFL*’s independent spending become so extensive that the organization’s major purpose may be regarded as *campaign activity*, the [organization] would be classified as a political committee. As such it would automatically be subject to the obligations and restrictions applicable to those groups whose primary objective is to *influence political campaigns*.¹⁷⁷

Thus, once an organization has received more than \$1,000 in contributions or made more than \$1,000 in expenditures,¹⁷⁸ *and* has met the major purpose test, it becomes a political committee pursuant to § 431.¹⁷⁹

FECA requires any political committee to satisfy certain organiza-

174. 2 U.S.C. § 431(4).

175. *Id.* §§ 431(8)(A)(i), (9)(A)(i). The term “contribution” is defined to include “any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office.” *Id.* § 431(8)(A)(i). The term “expenditure” is defined to include “any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office.” *Id.* § 431(9)(A)(i).

176. *Buckley v. Valeo*, 424 U.S. 1, 79 (1976).

177. *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 262 (1986) (citation omitted) (emphasis added).

178. For years, the FEC has allowed a group whose major purpose is campaign activity or influencing political campaigns, and that has crossed the \$1,000 threshold under the statute, to separate out and report only its federal activity to the FEC. 11 C.F.R. § 102.5 (2005). The exception has been where allocable expenses have to be reported in their entirety and the transfers in from non-federal accounts must be disclosed. *Id.* §§ 104.10, 104.17 (2005).

179. Based upon *Buckley* and *MCFL*, the Commission has stated that “[w]hen determining if an entity should be treated as a political committee, . . . the standard used is whether an organization’s major purpose is campaign activity; that is, making payments or donations to influence any election to public office.” FEC Advisory Op. No. 1996-13 (June 10, 1996) (emphasis added).

tional requirements¹⁸⁰ and register with the Federal Election Commission.¹⁸¹ Any organization that qualifies as a political committee must file periodic reports of its federal election receipts and disbursements for disclosure by the FEC to the public.¹⁸² Aside from disclosure responsibilities, the most significant aspect of political committee status is the need to operate within certain limitations in terms of contributions the organization receives,¹⁸³ as well as source prohibitions.¹⁸⁴

By comparison, the IRC provides tax-exempt treatment for certain income received by a “political organization,” which is defined as a “party, committee, association, fund, or other organization (whether or not incorporated) organized and operated primarily for the purpose of directly or indirectly accepting contributions or making expenditures, or both, for an exempt function.”¹⁸⁵ “Exempt function,” in turn, is defined as the “function of influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any Federal, State, or local public office or office in a political organization, or the election of Presidential or Vice-Presidential electors.”¹⁸⁶ As the Supreme Court observed in *McConnell*: “Section 527 ‘political organizations’ are, unlike § 501(c) groups, organized for the express purpose of engaging in partisan political activity.”¹⁸⁷ The Court further noted that 527 groups “by definition engage in partisan political activity.”¹⁸⁸

Section 527 provisions cover “political committees” that report to the FEC, committees that report to state or local election offices, as well as some groups that register and report with no election office. In the 2000 election cycle, several notable 527 groups, actively promoting or attacking candidates, claimed they did not have to operate under FECA “political committee” restraints (or even state or local election law restraints). In 2000¹⁸⁹ and 2002,¹⁹⁰ Congress added disclosure responsibilities for the larger 527s to the extent they were not already reporting to either the FEC or a state or local election office.

As noted, some 527 groups may claim they are “political organiza-

180. 2 U.S.C. § 432 (2000).

181. *Id.* § 433.

182. *Id.* §§ 433, 434.

183. *See id.* § 441a(a)(1)-(3).

184. *See, e.g., id.* §§ 441b(a).

185. 26 U.S.C. § 527(e)(1) (2000).

186. *Id.* § 527(e)(2).

187. *McConnell v. FEC*, 540 U.S. 93, 174 n.67 (2003).

188. *Id.* at 177.

189. Act of July 1, 2000, Pub. L. No. 106-230, § 2(a), 114 Stat. 477, 479-82 (codified as amended at 26 U.S.C. § 527).

190. Act of Nov. 2, 2002, Pub. L. No. 107-286, § 6(a)-(c), (e)-(g), 116 Stat. 1929, 1933-34 (codified at 26 U.S.C. § 527).

tions” for purposes of the IRC, but not “political committees” for purposes of FECA, in part to avoid the FECA limits on contributions to the group (such as the \$5,000 per year limit of § 441a(a)(1)(C) or (2)(C)). This is particularly crucial because the new electioneering communication rules in BCRA prevent the use of corporate or union funds for covered broadcast ads, but do not put limits on donations from individuals for such ads.¹⁹¹ Thus, for 527 groups that wish to focus on ads mentioning federal candidates, avoiding “political committee” status means retaining the ability to take in unlimited donations from individuals.

The primary argument raised by groups attempting to avoid “political committee” status is that the \$1,000 threshold for “contributions” received or “expenditures” made hinges on express advocacy. This is hard to square with *Buckley*, which clearly applied the express advocacy test only to groups whose major purpose is not to influence elections. The Court confined “political committee” status to those groups whose major purpose is influencing elections and noted that expenditures of such groups “are, by definition, campaign related.”¹⁹² Then the Court stated:

But when the maker of the expenditure is . . . a group other than a “political committee” . . . the relation of the information sought to the purposes of the Act may be too remote [W]e construe ‘expenditure’ for purposes of [the reporting provision applicable to persons other than a political committee] to reach only funds used for communications that expressly advocate . . . the election or defeat of a clearly identified candidate.¹⁹³

The financial activity of 527 groups in the 2004 elections was significant. According to a study by the Campaign Finance Institute (CFI), “Federal 527 groups” (defined by CFI as groups that were “primarily or very substantially involved in federal elections”) spent over \$398 million on the 2004 elections.¹⁹⁴ In addition, these 527 groups received \$405 million in net contributions for 2004, a dramatic increase of \$254 million over the \$151 million such groups raised in the 2002 cycle.¹⁹⁵ Of most significance, much of the funding for these groups came from individuals who gave far in excess of \$5,000 per year.¹⁹⁶ The CFI study found that “[t]he number of \$100,000 [plus] donors rose from 66 in ’02 to 265 in ’04. The top 24 \$2 million plus individual donors provided

191. See discussion *supra*, pp. 8-9.

192. *Buckley v. Valeo*, 424 U.S. 1, 79 (1976).

193. *Id.* at 79-80.

194. Weissman & Hassan, *supra* note 171, attachments at 4.

195. Press Release, The Campaign Finance Inst., New CFI Study of “527” Groups (Feb. 9, 2005), available at <http://www.cfinst.org/pr/020905.html>.

196. *Id.*

\$142 million or 56% of all individual contributions to 527s in '04."¹⁹⁷ The study concluded that "[i]f 527s become fully accepted and institutionalized, they could play an even larger financial role in the future, including the presidential election in 2008."¹⁹⁸

E. *The Thomas/Toner Proposal to Treat 527s as Political Committees Under FECA*

In early 2004, FEC Commissioners Thomas and Toner offered a regulation proposal to address the explosion of 527 activity avoiding FECA regulation.¹⁹⁹ Under the Thomas/Toner proposal, 527 organizations that crossed the \$1,000 federal threshold by running ads or engaging in voter mobilization activities that promote, support, attack, or oppose a federal candidate or party would be political committees under FECA, and therefore would have to register with the FEC and abide by the hard dollar fundraising restrictions for their federal activity.²⁰⁰ If this proposal had been promulgated by the Commission, it would have been in place for at least the post-nomination phase of the 2004 presidential election.

The first premise of the Thomas/Toner proposal was that 527s, by virtue of their chosen tax status, can be presumed to pass the "major purpose" test.²⁰¹ An exception was built in for 527s that are focused exclusively on non-federal elections, judicial selections, internal party races, or ballot questions.²⁰² The second premise was that for 527s, a "promote, support, attack, or oppose" test, rather than the discredited "express advocacy" test, would apply in defining "expenditure."²⁰³

The proposal also would have revised the Commission's allocation rules and required that all political committees pay for their allocable activities using at least 50% hard dollars.²⁰⁴ Communications that pro-

197. *Id.*

198. *Id.*

199. FEC Agenda Document No. 04-44 (Apr. 30, 2004) [hereinafter FEC Agenda Doc. No. 04-44], available at <http://www.fec.gov/agenda/2004/mtgdoc04-44.pdf>; FEC Agenda Document No. 04-75-A (Aug. 13, 2004) [hereinafter FEC Agenda Doc. No. 04-75-A], available at <http://www.fec.gov/agenda/2004/mtgdoc04-75a.pdf>.

200. FEC Agenda Doc. No. 04-44, *supra* note 199; FEC Agenda Doc. No. 04-75-A, *supra* note 199. The "promote, support, attack, or oppose" test was borrowed from BCRA. Public communications by state or local party committees that promote, support, attack, or oppose a federal candidate are treated as "Federal election activity." 2 U.S.C. § 431 (20)(A)(iii) (Supp. II 2002). Moreover, in the area of "electioneering communications," the FEC may only create exceptions that do not promote, support, attack, or oppose the referenced candidate. *See id.* § 434(f)(3)(B)(iv) (2000).

201. *See* FEC Agenda Doc. No. 04-44, *supra* note 199, at 2-3.

202. *Id.*

203. *Id.* at 4-5.

204. *Id.* at 9. Famously, one political committee that reportedly focused primarily on the

moted, supported, attacked, or opposed a federal candidate would have counted toward the long-standing “funds expended” allocation formula.²⁰⁵ In May²⁰⁶ and August²⁰⁷ of 2004 the Commission considered the Thomas/Toner proposal, but the proposal failed by a vote of 2-4 with only Commissioners Thomas and Toner voting in favor.

F. *New Commission Regulations Tinker with the Problem*

On August 19, 2004, four Members of the Commission passed new rules purportedly addressing the 527 problem, albeit in a very limited fashion. Importantly, the new rules do not rely on 527 status to determine a group’s responsibility for registering with the FEC and abiding with the contribution limits. Nor do they apply a “promote, support, attack or oppose” test to determine what types of public communications or voter mobilization efforts would count as “expenditures.”

Instead, the rules simply revise the allocation scheme with a flat 50% federal funds minimum for non-party political committees’ administrative expenses, generic voter drives, and public communications that refer to a political party without any reference to clearly identified candidates.²⁰⁸ While the new rules specify that a public communication or voter mobilization effort mentioning only federal candidates has to be treated as a 100% federal expenditure, they also allow such efforts that only mention non-federal candidates to be funded with 100% soft money.²⁰⁹ Finally, the new rules treat all money received in response to a solicitation as a “contribution” under FECA if the solicitation “indicates that any portion of the funds received will be used to support or oppose the election of a clearly identified Federal candidate.”²¹⁰

In addition to leaving a cloud of uncertainty over what types of communications will cause a 527 group to cross over the \$1,000 “expenditure” threshold,²¹¹ there are a number of other problems with the new

presidential race operated in 2004 with a 2% hard dollar, 98% soft dollar allocation split. Editorial, *Tools the FEC Already Has*, WASH. POST, May 13, 2004, at A28 (“The existing [allocation] formula is so visibly elastic that a major Democratic 527, America Coming Together (ACT), is funding its activities with 98 percent soft money (unlimited contributions from any source) and just 2 percent hard (contributions limited to \$5,000, and not from corporations or labor unions).”).

205. FEC Agenda Doc. No. 04-44, *supra* note 199, at 4.

206. FEC AGENDA DOCUMENT NO. 04-51, at 5 (May 13, 2004), available at <http://www.fec.gov/agenda/2004/mtgdoc04-51.pdf>.

207. FEC Agenda Document No. 04-77, at 9 (Aug. 19, 2004), available at <http://www.fec.gov/agenda/2004/mtgdoc04-77.pdf>.

208. 11 C.F.R. § 106.6(c) (2005).

209. *Id.* § 106.6(f)(2)(i).

210. *Id.* § 100.57(a) (2005).

211. For example, is the “functionally meaningless,” *McConnell* express advocacy test to be used?

Commission regulations. For example, the 50% allocation rule becomes effective only if the 527 group in question qualifies as a “political committee” under FECA. Obviously, this rule has little impact if a group can use an “express advocacy” test to avoid “political committee” status. A further problem is that for political committees that truly focus most of their message on federal candidates, a 50% federal allocation may be too low. Unfortunately, the Commission’s new regulations eliminated the “funds expended” allocation formula that would have covered this situation. Additionally, if the political committee is clever enough to avoid references to particular federal candidates, but includes a reference to a non-federal candidate, 100% of the communication or voter drive can be paid for with soft money. Finally, a 527 group should be able to avoid the new “contribution” test if its solicitations: (1) avoid clear signals that the funds sought will be used in the election process and (2) avoid references to particular federal candidates. In short, the Commission may be in the same predicament it now faces, where groups claim they are not raising “contributions” and are not making “expenditures.”²¹²

G. *Congress Reacts with Introduction of “The 527 Reform Act”*

On February 2, 2005, Senators McCain, Feingold, Lott, Lieberman, Schumer, Snowe, Collins, and Salazar introduced “The 527 Reform Act of 2005” designed to clarify that more 527 groups are required to comply with FECA.²¹³ The bill requires 527 groups to register as political committees with the FEC and comply with FECA unless they raise and spend money exclusively in connection with non-Federal candidate elections, state or local ballot initiatives, or the nomination or confirmation of individuals to non-elected offices such as judicial positions.²¹⁴ Under this requirement, 527 groups registered as political committees with the

212. There are also two lawsuits challenging the adequacy of the Commission’s new 527 regulations. On September 14, 2004, Representatives Shays and Meehan filed suit alleging that the Commission’s failure to issue new rules defining a “political committee” leaves in place “a legally inadequate rule that fails to properly implement the law, and under which multiple section 527 groups are currently spending tens of millions of dollars of soft money plainly for the purpose, and with the effect, of influencing the 2004 presidential and congressional elections.” See Complaint for Declaratory and Injunctive Relief, *Shays v. FEC*, No. 04-1597 (D.D.C. Sept. 14, 2004). Senator McCain later explained that this lawsuit hoped to overturn “the FEC’s failure to issue regulations to stop these illegal practices by 527 groups.” 151 CONG. REC. S905 (daily ed. Feb. 2, 2005).

Similarly, on September 17, 2004, the Bush-Cheney ’04 campaign filed suit, alleging that the FEC has failed to adopt any regulations setting forth clear standards for when entities organized under section 527 of the Internal Revenue Code are required to register as political committees. See *Bush-Cheney ’04 v. FEC*, No. 04:CV-0161 (D.D.C. Sept. 17, 2004).

213. S. 271, 109th Cong. (2005).

214. *Id.*

FEC can use only hard money to finance ads that promote or attack federal candidates, regardless of whether the ads expressly advocate the election or defeat of a candidate.

Regarding the allocation rules, the 527 Reform Act Bill further provides that when a 527 group, registered as a political committee, makes expenditures for voter mobilization activities or public communications that affect both federal and non-federal elections, at least 50% of the costs of such activities would have to be paid for with hard-money contributions.²¹⁵ Significantly, the Bill also provides that, with regard to the non-federal funds that can be used to finance a portion of voter mobilization activities and public communications affecting both federal and non-federal elections, such funds must come only from individuals, and must be in amounts of not more than \$25,000 per year, per individual donor.²¹⁶

Senators McCain, Feingold, Lott, Lieberman, Schumer, Snowe, Collins, and Salazar introduced the 527 Reform Act Bill because the FEC failed to write effective rules dealing with the 527 loophole. Commenting on 527 activity in 2004, Senator McCain stated:

These activities are illegal under existing laws, and yet once again, the Federal Election Commission, FEC, has failed to do its job and has refused to do anything to stop these illegal activities. Therefore, we must pursue all possible steps to overturn the FEC's misinterpretation of the campaign finance laws, which is improperly allowing 527 groups whose purpose is to influence Federal elections to spend soft money on these efforts.²¹⁷

Senator McCain further stated:

This legislation would not be necessary if it weren't for the abject failure of the FEC to enforce existing law The blame for this lack of enforcement does not lie with the Congress, nor with the Administration. The blame for this continuing illegal activity [of certain 527 groups] lies squarely with the FEC. This agency has a duty to issue regulations to properly implement and enforce the Nation's campaign laws—and the FEC has failed, and it has failed miserably to carry out that responsibility. The Supreme Court found that to be the case in its McConnell decision, and Judge Kollar-Kotelly found that to be the case in her decision overturning 15 regulations incorrectly adopted by the FEC to implement the Bipartisan Campaign Reform Act of 2002.²¹⁸

Senator Feingold similarly commented:

215. *Id.*

216. *Id.*

217. 151 CONG. REC. S887-01 (daily ed. Feb. 2, 2005).

218. *Id.*

Our purpose here is simple—to pass legislation that will do what the FEC could and should do under current law, but, once again, has failed to do. It sometimes seems like our mission in life is to clean up the mess that the FEC has made. We had to do that with BCRA, the Bipartisan Campaign Reform Act, which passed in 2002, closing the soft money loophole that the FEC created in the late '70s and expanded in the '90s. We are doing it again with the regulations that the FEC put in place after BCRA passed.²¹⁹

IV. CONCLUSION

In the quarter century following the passage of the 1979 Amendments to FECA, FEC decisions carved so many loopholes in the Act that the law was a shell of its former self and on the verge of collapse. Fortunately, Congress reasserted itself in 2002 and reversed many of those harmful rulings with the passage of BCRA.

In effect for the first time in the 2004 elections, the results of BCRA have been impressive. In *McConnell*, the Supreme Court observed: “Take away Congress’ authority to regulate the appearance of undue influence and ‘the cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance.’”²²⁰ After the passage of BCRA in 2002, voter turnout that had been on the decline during the soft-money-drenched elections of 1996 and 2000 dramatically increased in 2004.²²¹ According to a study of the 2004 election, “voter turnout [in 2004] reached its highest level since 1968.”²²² The study pointed out that, “[v]oter turnout increased by nearly 17 million votes and by 6.4 percentage points from the election of

219. Press Release, Senator Russ Feingold, Statement of U.S. Senator Russ Feingold on the 527 Reform Act (Feb. 2, 2005), available at <http://www.feingold.senate.gov/~feingold/releases/02/05/2005519810.html>.

220. *McConnell v. FEC*, 540 U.S. 93, 144 (2003) (quoting *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 390 (2000)). Legislative debate on BCRA specifically emphasized the need to get more voter involvement at the grassroots level. See, e.g., 148 CONG. REC. H339-02, 347 (Feb. 13, 2002) (statement of Rep. Pelosi) (“Today, we have an opportunity to achieve a great victory for the American people, to bring democracy back to them *We have an opportunity to create a new architecture of political fund-raising in our country which devolves to the grassroots, to the people from which power comes and where it belongs.*” (emphasis added)); *id.* at 351 (Feb. 13, 2002) (statement of Rep. Kind) (“Right now we stand on the brink of historic reform. Reform that will put the power of democracy back in the hands of ordinary Americans. Reform that will force politicians and political parties to get back to the grassroots level.”).

221. COMM. FOR THE STUDY OF THE AM. ELECTORATE, TURNOUT EXCEEDS OPTIMISTIC PREDICTIONS: MORE THAN 122 MILLION VOTE, at chart 1 (2005), http://election04.ssrc.org/research/csae_2004_final_report.pdf. Specifically, in 1992, the percentage of eligible citizens who voted for President was 58.1%. *Id.* In 1996, this figure plummeted to 51.5%. *Id.* In 2000, this figure remained at a relatively low 54.3%. *Id.* In 2004, the percentage jumped to 60.7%. *Id.*

222. *Id.* at 12.

2000, the largest percentage point increase since 1952.”²²³ While there were also other factors at work, it seems clear that BCRA played a significant role in increasing “the willingness of voters to take part in democratic governance”²²⁴ after a period of decline during the soft-money years of 1996 and 2000.

Moreover, contrary to predictions that political party fundraising would drop precipitously without being propped up artificially by soft money, Republican and Democratic Party fundraising flourished in 2004. In a summary of the party financial activity for the 2004 election cycle, the FEC found:

Republican national, state, and local committees who report to the FEC raised \$784.8 million during 2003-2004 in federally permissible “hard money.” Democratic committees raised \$683.8 million. Democratic party receipts were more than 89% higher than in the comparable period during the 2000 presidential campaign, while Republican party fundraising grew by 46% when compared with the same period. *Overall, these hard money totals for both parties’ national committees were greater than their combined hard and soft money raised in any prior campaign.*²²⁵

In addition, the FEC found that “all national committees substantially increased their contributions from individuals”²²⁶—undoubtedly a result of both parties’ increased efforts to expand their contributor base. As for state and local parties, the Center for Public Integrity reported that when federal and nonfederal receipts are combined, such committees raised over \$128 million more in the 2004 cycle than they raised in the 2000 cycle.²²⁷

Despite these successes, however, Congress will have to continue to serve as a court of appeals in reviewing the action and, in some cases, inaction, of the FEC. As the Supreme Court observed in *McConnell*, “the entire history of campaign finance regulation” teaches “the hard lesson of circumvention.”²²⁸ The Court explained that because “[m]oney, like water, will always find an outlet . . . [there should be] no illusion that BCRA will be the last congressional statement on [cam-

223. *Id.*

224. *McConnell*, 540 U.S. at 144.

225. Press Release, FEC, Party Financial Activity Summarized for the 2004 Election Cycle (Mar. 14, 2005) (emphasis added), available at <http://www.fec.gov/press/press2005/20050302party/Party2004final.html>.

226. *Id.*

227. Agustín Armendariz & Aron Pilhofer, *McCain-Feingold Changes State Party Spending: Fundraising Dips, Ad Buys Plummet in First Election After Campaign Reform* (May 26, 2005), <http://www.publicintegrity.org/partylines/report.aspx?aid=690>.

228. *McConnell*, 540 U.S. at 165.

paign finance].”²²⁹ For example, in view of the Commission’s failure to address the 527 issue in a meaningful way, legislation will be the only effective recourse to address this new vehicle for routing soft money into the federal election process. As the experience of soft money shows, loopholes will be exploited, albeit slowly at first, if left unchecked.²³⁰

There is, of course, no substitute for the FEC getting it right in the first place. But when the Commission gets it wrong, it is critical for Congress to step in and reverse those decisions. BCRA was an important step forward. To maintain the integrity of the statute, however, Congress will have to serve as a court of appeals, ready to act whenever needed.

229. *Id.* at 224.

230. As the *McConnell* Court pointed out, “[o]f the two major parties’ total spending, soft money accounted for 5% (\$21.6 million) in 1984, 11% (\$45 million) in 1988, 16% (\$80 million) in 1992, 30% (\$272 million) in 1996, and 42% (\$498 million) in 2000.” *Id.* at 124.