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Not Quite Shays' Rebellion: Putting McConnell v. Federal Election Commission in Perspective

There is a political power struggle taking place within the Beltway. The battle rages over neither the Presidency nor whether our troops should come home from Iraq, but it does have broad effects that dictate how citizens can support and interact with our government. Holding regular elections for our representatives is the primary way that American citizens display a vote of confidence in the democratic system. We depend on the integrity of the electoral system to ensure that our government is truly "of the people." The proponents of reform to the system argue that a three-decade old law designed to minimize the influence of money and corruption in campaigns has slowly broken down due to regulations that have minimized their effectiveness. Their opponents argue that further significant restrictions on campaign coordination and expenditures would hinder severely the First Amendment rights of Americans.

Although legislation to change the Federal Election Campaign Act of 1971 ("FECA")¹ developed for nearly a decade, the passage of the Bipartisan Campaign Reform Act of 2002 ("BCRA," or "McCain-Feingold," or "the Act")² started the current debate, which consists of political skirmishes on a number of fronts. The preliminary battleground for this debate has been the floor of Congress, where it took seven years³ for the Act's sponsors to push the bill through filibusters and disastrous amendment proposals. The Federal Election Commission ("FEC" or "Commission") was the next arena of contestation, as it disseminated regulations to implement the law that did not reflect the intentions of BCRA's sponsors.⁴ After the legislative and regulatory arenas, the fight moved to the judicial branch, the most recent battleground. Most significantly, the federal courts largely rejected Senator Mitch McConnell's challenges to the constitutionality of the McCain-Feingold legislation in

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

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

3. Sen. Russ Feingold, *On the Issues: Campaign Finance Reform*, http://feingold.senate.gov/issues_campaign_reform.html (last visited Aug. 18, 2005).

4. Press Release, Rep. Christopher Shays, Joint Statement by McCain, Feingold, Shays and Meehan on Challenges to FEC Soft Money Regulations (Oct. 8, 2002), *available at* <http://www.house.gov/shays/news/2002/october/joint.htm>.

McConnell v. FEC.⁵ The FEC regulations that followed the bill have also been challenged. The sponsors of BCRA in the House of Representatives claimed that the regulations were contrary to the spirit and the language of BCRA in *Shays v. FEC*.⁶ The lasting effect of *McConnell* will be determined by the final outcome of *Shays*, the amount of time it would take to enact new legislation, and the willingness of future courts to endorse *McConnell*'s holdings.

Apart from the result of *Shays*, this debate is significant because it is an exercise in democracy. Our government has methods of handling such issues that are fundamental to our society, and each arena of contestation is a step in the democratic process at work. Additionally, *McConnell* provides us with new judicial precedent, from which the final campaign finance regulations will be drawn. Such a landmark case has not been decided since *Buckley v. Valeo*,⁷ and it is unlikely that political currents will be strong enough to overturn it any time soon. As a result, the supporters of the McCain-Feingold legislation hope that in the long term these new laws and regulations will restore a sorely needed public confidence in the federal electoral campaign system, which has been marred extensively by skepticism and circumvention of its rules.

McConnell is the mid-point of a crucial round of debates that will likely have lasting effects on the confidence that Americans have in their democracy. Part I of this Comment explores the development of the political arenas of contestation in this debate, and especially the FEC regulations that have caused controversy over the interpretation of *McConnell* in *Shays*. Part II analyzes how the federal courts address the issues in *McConnell* and *Shays*. Part III highlights the battle at its most recent stage, including the ways in which the parties involved are framing the issues concerning the regulations that implement BCRA, as well as how the *Shays* circuit court opinion follows a similar line of reasoning to the one presented at, and accepted by, the district court. Part IV evaluates the importance of *McConnell* in the larger context of this debate and how the outcome of *Shays* will affect it.

I. POLITICAL ARENAS OF CONTESTATION

Throughout the twentieth century, political leaders in the United States have attempted to stem the flow of political money that has flooded each election cycle. The first federal civilian campaign finance legislation was the Pendleton Civil Service Reform Act, which prohib-

5. 540 U.S. 93 (2003).

6. 337 F. Supp. 2d 28 (D.D.C. 2004).

7. 424 U.S. 1 (1976).

ited party contributions from government employees and created a class of federal employment in which jobs were available only through competitive exams.⁸ Further advances, such as the Tillman Act, the Hatch Act, and the Taft-Hartley Act all limited contributions to campaigns in attempts to increase the legitimacy of elections.⁹ By 1970, the spending limits and disclosure requirements of the 1925 Federal Corrupt Practices Act were made ineffective by efforts to circumvent it, and Congressmen increasingly expressed concern about skyrocketing election costs and their "implication regarding the influence of money in the electoral process."¹⁰

The Federal Election Campaign Act of 1971 revolutionized campaign finance in two ways. Firstly, it limited the amount of money a candidate could give to his or her own campaign and placed limits on the amount a candidate could spend on television advertising.¹¹ Secondly, it revised the regulations for disclosing contributions and expenditures by requiring candidates, political action committees (PACs), and all party committees active in federal elections to file reports on a quarterly basis.¹² Over time, aggressive party fundraising practices and weak or non-existent responses to such practices by the FEC significantly undermined FECA's restrictions on campaign funding.¹³ The expanded use of soft money, unregulated monies by party committees, and issue ads that were unregulated by Congress in the 1980s and 1990s indicated to Congress that there was a significant need for reform.¹⁴ By the 2000 election cycle, national and congressional party committees had broken all previous records for soft-money fundraising.¹⁵ Between

8. CAMPAIGN LEGAL CENTER, CAMPAIGN FINANCE GUIDE, A BRIEF HISTORY OF MONEY AND POLITICS: THE NINETEENTH CENTURY: SPOILS AND ASSESSMENTS, <http://www.campaignfinanceguide.org/guide-30.html> (last visited Mar. 20, 2005).

9. CAMPAIGN LEGAL CENTER, CAMPAIGN FINANCE GUIDE, A BRIEF HISTORY OF MONEY AND POLITICS: THE EARLY 1900S: PROGRESSIVE ERA LEGISLATION, <http://www.campaignfinanceguide.org/guide-31.html> (last visited Mar. 20, 2005); CAMPAIGN LEGAL CENTER, CAMPAIGN FINANCE GUIDE, A BRIEF HISTORY OF MONEY AND POLITICS: THE NEW DEAL: EXPANDING THE LAW, <http://www.campaignfinanceguide.org/guide-32.html> (last visited Mar. 20, 2005).

10. CAMPAIGN LEGAL CENTER, CAMPAIGN FINANCE GUIDE, A BRIEF HISTORY OF MONEY AND POLITICS: THE 1950S AND 1960S: A CHANGING LANDSCAPE, <http://www.campaignfinanceguide.org/guide-33.html> (last visited Mar. 20, 2005).

11. CAMPAIGN LEGAL CENTER, CAMPAIGN FINANCE GUIDE, A BRIEF HISTORY OF MONEY AND POLITICS: THE FEDERAL ELECTION CAMPAIGN ACT: A NEW ERA OF REFORM, <http://www.campaignfinanceguide.org/guide-34.html> (last visited Mar. 20, 2005).

12. *Id.*

13. *McConnell v. FEC*, 540 U.S. 93, 124 n.7 (2003).

14. *Id.* at 142 n.44 ("The fact that the post-1990 explosion in soft-money spending on federal electioneering was accompanied by a series of efforts in Congress to clamp down on such uses of soft money . . . underscores the fact that the FEC regulations permitted more than Congress, in enacting FECA, had ever intended.").

15. Public Citizen, *Soft Money and Campaign Finance Reform*, http://www.citizen.org/congress/campaign/issues/soft_money/index.cfm (last visited Mar. 20, 2005) ("National

1986 and 2002, Congress debated campaign finance reform legislation almost annually, yet fervent partisan differences concerning the best way to rewrite the laws made agreement on new legislation impossible.¹⁶

A. BCRA

Congress continued to play its role as the most common venue for affecting change in campaign finance reform in 2002, when it became the first arena of contestation in the current debate by passing the Bipartisan Campaign Reform Act. The passage of BCRA was the result of a number of years of laborious effort put forth by its sponsors and supporters. Senators John McCain (R-AZ) and Russell Feingold (D-WI) sponsored the original version of BCRA in 1995 that, in addition to restricting the use of soft money, "called for voluntary spending ceilings on congressional races, free broadcast time and reduced rate mailing privileges to candidates who abided by the spending ceilings, and limits on self-financing of candidate campaigns."¹⁷ After the first draft of the McCain-Feingold legislation failed in the 104th Congress, the two original sponsors submitted to the Senate modified versions of the bill while the House of Representatives sponsors, Congressmen Christopher Shays (R-CT) and Martin Meehan (D-MA), submitted their versions to the lower house.¹⁸ All of their proposals were rejected by failing votes or filibusters in each of the following two Congresses.¹⁹ After surviving an assault of thirty-eight potentially crippling amendments, the McCain-Feingold bill passed in the 107th Congress.²⁰ The Senate approved a House version of the bill, eliminating the need for a conference committee and any reason to keep the bill from the desk of the President.²¹ George W. Bush signed BCRA into law on March 27, 2002 without the traditional public ceremony.²²

In order to increase candidates' accountability and decrease the amount of corruption (and the appearance thereof) in federal campaigns, BCRA made two major changes to FECA. It reinstituted limits on the

Republican party committees raised \$249.9 million in soft money and spent \$252.8 million in soft money, while national Democratic party committees raised \$245.2 million in soft money and spent \$244.8 million.").

16. CAMPAIGN LEGAL CENTER, CAMPAIGN FINANCE GUIDE, A BRIEF HISTORY OF MONEY AND POLITICS: THE BIPARTISAN CAMPAIGN REFORM ACT: RESTORING THE REFORMS, <http://www.campaignfinanceguide.org/guide-35.html> (last visited Mar. 20, 2005).

17. Public Citizen, *Bipartisan Campaign Reform Act of 2002*, <http://www.citizen.org/congress/campaign/legislation/bcralaw/index.cfm> (last visited Mar. 20, 2005).

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. CAMPAIGN LEGAL CENTER, *supra* note 16.

sources and size of political party contributions, and regulated how corporate and labor treasury funds could be used in political elections.²³ Specifically, as a contribution limit, BCRA prohibits federal candidates and their party committees from obtaining "soft money," or funds "that are not subject to the limitations, prohibitions, and reporting requirements" of the Act.²⁴ As a result, the national party committees can only use hard money raised in conformity with federal contribution limits to pay for their political pursuits.²⁵ To address the problem of candidate-specific issue advertising, BCRA set forth a new definition of "electioneering communication" to replace the narrowing construction of FECA's disclosure provisions, which were adopted by the Supreme Court in *Buckley*.²⁶ The new definition encompasses any broadcast, cable, or satellite communication that:

- (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 other than President or Vice President, is targeted to the relevant electorate.²⁷

This definition, which provides broader regulation of the monies used to pay for campaign advertising, essentially disregards the "magic words" threshold that was established in *Buckley* to differentiate between "express" and "issue" advocacy.²⁸

B. Federal Election Commission Regulations

The second major arena of contestation in the current campaign finance battle lay in the regulatory power of the Federal Election Commission. This power arises from the 1974 amendments to FECA, which established the Commission as an independent agency to enforce federal election law, facilitate disclosure of contributions, expenditures, and electioneering communications, and administer a public funding program.²⁹ When BCRA was passed, the 2002 election cycle was

23. *Id.*

24. 2 U.S.C. § 441i(a)(1) (2000 & Supp. II 2002).

25. CAMPAIGN LEGAL CENTER, *supra* note 16.

26. *McConnell v. FEC*, 540 U.S. 93, 189 (2003).

27. 2 U.S.C. § 434(f)(3)(a)(i) (Supp. II 2002).

28. *McConnell*, 540 U.S. at 189-91.

29. FEC, THE FEC AND THE FEDERAL CAMPAIGN FINANCE LAW (2004), available at http://www.fec.gov/pages/brochures/fec_feca_brochure.pdf.

approaching quickly and the proponents of the Act wanted the elections to be run pursuant to the BCRA provisions, so Congress created an expedited schedule for the FEC to draw up regulations in accordance with the new law.³⁰ Immediately after BCRA became law, interest groups and Members of Congress, led by Senator McConnell, sued the FEC in federal court to challenge the constitutionality of BCRA.³¹ Yet, according to the expedited schedule established by BCRA, the Commission was not only required to churn out regulations before the 2002 election cycle, but also before the Supreme Court could decide Senator McConnell's suit.

Some FEC Commissioners were sufficiently opposed to the passage of BCRA³² that they wrote a number of loopholes into the Commission's regulations. Some at the FEC were confident that BCRA itself would be declared unconstitutional by the Court in *McConnell* because they believed that the law's restrictions infringed upon the First Amendment rights of American citizens.³³ As a result, it is likely that it seemed unnecessary to write impenetrable FEC regulations in accord with BCRA.³⁴ When considering that the Chairman of the FEC, which was created to implement the laws as passed by Congress, was opposed to the passage of BCRA in the first place, it is not hard to imagine the reasons why the regulations that were developed under BCRA have been so contentious.

1. SOFT MONEY

A few of the Commission's regulations came under the most fire from proponents of the McCain-Feingold legislation. The first of the controversial regulations consisted of responses to BCRA provisions in

30. See Bipartisan Campaign Reform (McCain-Feingold) Act of 2002, Pub. L. No. 107-155, § 402(c), 116 Stat. 81, 113 (requiring the FEC to promulgate rules within 90 days of BCRA's enactment to carry out the provisions found in Title I, which added new limitations on party, candidate, and officeholder solicitations, and to promulgate within 270 days of its enactment the remaining regulations).

31. See *McConnell*, 540 U.S. 93.

32. See Bradley A. Smith, *McConnell v. Federal Election Commission: Ideology Trumps Reality, Pragmatism*, 3 ELECTION L.J. 345 (2004); see generally *The Federal Election Commission: Oversight Hearing Before the H. Comm. on H. Admin.*, 108th Cong. 5-6 (2004) [hereinafter *Oversight Hearing*] (statement of Ellen Weintraub, Vice Chair, FEC).

33. See, e.g., *Oversight Hearing*, *supra* note 32, at 13 (statement of Bradley A. Smith, FEC Chairman) ("I think most Americans have a right to be somewhat puzzled, nonetheless, to see a whole body of law that says your political speech receives less constitutional protection than your cross burning or your flag burning or your Internet pornography.").

34. See Smith, *supra* note 32, at 345 ("Historically, decisions that sharply curtail civil liberties, as does *McConnell*, have not stood well the test of time, and are looked upon as black moments in the Court's history.").

Title I, entitled "Reduction of Special Interest Influence,"³⁵ which were meant to eliminate soft money from the federal campaign finance regime by setting out prohibitions on various political actors' involvement with it.³⁶ Section 101 of BCRA provides 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 FECA as amended by BCRA.³⁷ Yet, in drafting the soft-money regulations, the Commission wrote rather narrow definitions for the terms "solicit" and "direct."³⁸ For both terms, the FEC requires that someone "ask" another person explicitly to contribute or make a donation to a campaign, albeit either directly or indirectly through a conduit or intermediary.³⁹

2. STATE PARTY FUNDRAISERS

The sponsors of BCRA were concerned that federal candidates would use state, district, or local party fundraisers as intermediaries to get soft money. As a result, BCRA restricts federal candidates from raising or receiving nonfederal money in connection with their campaigns.⁴⁰ Yet, in the interest of protecting the First Amendment rights of candidates, the law permits those candidates for federal office to "attend, speak, or be a featured guest at a fundraising event for a State, district, or local committee of a political party."⁴¹ However, the Commission, in writing regulations to implement that law, penciled in more wiggle room for federal candidates to participate in activities at nonfederal fundraising events than the sponsors had intended, by permitting them to "speak at such events without restriction or regulation."⁴² The BCRA proponents find this regulation objectionable because such a loophole would allow federal candidates to solicit and direct soft money so long as they do so within the nonfederal context permitted by the regulation.⁴³

3. FEDERAL ELECTION ACTIVITY

Congress also recognized that in trying to find ways to reduce special interest influence, it would be futile to implement an exclusion of soft-money assistance to national party committees alone.⁴⁴ Conse-

35. Bipartisan Campaign Reform Act §§ 101-103.

36. *Shays v. FEC*, 337 F. Supp. 2d 28, 72-73 (D.D.C. 2004).

37. Bipartisan Campaign Reform Act § 101(a) (emphasis added).

38. See 11 C.F.R. § 300.02(m)-(n) (2005).

39. *Id.*

40. See 2 U.S.C. § 441i(e), (b)(2)(C) (2000 & Supp. II 2002).

41. *Id.* § 441i(e)(3).

42. 11 C.F.R. § 300.64(b) (2005).

43. *Shays v. FEC*, 337 F. Supp. 2d 28, 88 (D.D.C. 2004).

44. See *The Constitution and Campaign Reform: Hearings on S. 522 Before the S. Comm. on*

quently, BCRA prohibits individuals from donating nonfederal funds to state and local party committees to help finance federal election activity.⁴⁵ In trying to prevent circumvention of this prohibition, Congress required that state and local parties spend federal funds to pay the salary of any employee who spends more than 25% of her compensated time on activities in connection with a federal election.⁴⁶ Pursuant to its duty to write regulations reflecting the spirit of the law, the Commission promulgated a regulation addressing wages for state and local party committee employees, but to some extent the regulation allows states to determine for themselves from which funds these employees may be paid:

Salaries and wages for employees who spend more than 25% of their compensated time in a given month on Federal election activity or activities in connection with a Federal election must not be allocated between or among Federal, non-Federal, and Levin accounts. Only Federal funds may be used. *Salaries and wages for employees who spend 25% or less of their compensated time in a given month on Federal election activity or activities in connection with a Federal election shall be paid from funds that comply with State law.*⁴⁷

4. DE MINIMIS EXEMPTION

In spite of Congress's great concern regarding the effect of soft money on federal election activity, the Levin Amendment to BCRA carves out an exception to the general rule.⁴⁸ It allows state and local party committees to pay for certain types of federal election activity with an allocated ratio of hard money and "Levin funds," which are funds raised within an annual limit of \$10,000 per person.⁴⁹ The rules that the Commission created for Levin funds do not address completely the rules that were originally set out by Congress in BCRA, in that the Commission proposes a reporting exemption for those who spend a minimal amount on federal election activities:

The disbursements for allocable Federal election activity that exceed in the aggregate \$5,000 in a calendar year may be paid for entirely with Federal funds or may be allocated between Federal funds and Levin funds Disbursements for Federal election

Rules and Admin., 106th Cong. 4-7 (2000) (statement of Bobby R. Burchfield, Partner, Covington & Burling).

45. 2 U.S.C. § 441i(b)(1).

46. *McConnell v. FEC*, 540 U.S. 93, 170-71 (2003) (explaining that otherwise a party might use soft money to pay for the equivalent of a full-time employee engaged in federal electioneering by dividing the federal workload among multiple employees).

47. 11 C.F.R. § 300.33(c)(2) (2005) (emphasis added).

48. *McConnell*, 540 U.S. at 162.

49. *Id.* at 162-63.

activity that may be allocated and that aggregate \$5,000 or less in a calendar year may be paid for entirely with Federal funds, entirely with Levin funds, or may be allocated between Federal funds and Levin funds⁵⁰

5. CONTENT STANDARDS FOR COORDINATED EXPENDITURES

The second group of controversial FEC regulations consisted of responses to BCRA provisions in Title II, entitled "Communications: Non-candidate Campaign Expenditures," which encompass both "coordinated" and "electioneering" communications.⁵¹ As early as *Buckley v. Valeo*, the Supreme Court acknowledged that "expenditures controlled by or coordinated with the candidate and his campaign might well have virtually the same value to the candidate as a contribution and would pose similar dangers of abuse," and should be treated as indirect contributions subject to FECA's source and amount limitations.⁵² Before BCRA was passed, the FEC regulation on coordinated communications placed substantial weight on whether a communication had resulted from a "substantial discussion or negotiation . . . the result of which is collaboration or agreement" between the candidate and an external contributor.⁵³ Upon the passing of BCRA, Congress instructed the FEC to repeal the existing regulations and promulgate new ones that require neither an agreement nor formal collaboration between the parties to establish coordination, so that true instances of coordination would not be overlooked.⁵⁴

As instructed, the Commission drafted new regulations, which define a coordinated communication as "[a] communication [that] is coordinated with a candidate, an authorized committee, a political party committee, or an agent of any of the foregoing when the communication [] is paid for by a person other than the candidate, authorized committee, [or] political party committee," and the communication satisfies one of the Commission's regulatory content standards and one of the conduct standards.⁵⁵ The content that satisfies the definition is:

- (1) A communication that is an electioneering communication under 11 CFR 100.29.
- (2) A public communication that disseminates, distributes, or republishes, in whole or in part, campaign materials prepared by a candi-

50. 11 C.F.R. § 300.32(c)(4) (2005).

51. Bipartisan Campaign Reform (McCain-Feingold) Act of 2002, Pub. L. No. 107-155, §§ 201-204, 211-214, 116 Stat. 81.

52. *Buckley v. Valeo*, 424 U.S. 1, 46 (1976).

53. 11 C.F.R. § 100.23(c)(2)(iii) (2001) (repealed 2002).

54. Bipartisan Campaign Reform Act § 241(b)-(c), 116 Stat. at 94-95.

55. 11 C.F.R. § 109.21(a) (2005).

date, the candidate's authorized committee, or an agent of any of the foregoing, unless the dissemination, distribution, or republication is excepted under 11 CFR 109.23(b). For a communication that satisfies this content standard, see paragraph (d)(6) of this section.

(3) A public communication that expressly advocates the election or defeat of a clearly identified candidate for Federal office.

(4) A communication that is a public communication, as defined in 11 CFR 100.26, and about which each of the following statements in paragraphs (c)(4)(i), (ii), and (iii) of this section are true.

(i) The communication refers to a political party or to a clearly identified candidate for Federal office;

(ii) The public communication is publicly distributed or otherwise publicly disseminated 120 days or fewer before a general, special, or runoff election, or 120 days or fewer before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate; and

(iii) The public communication is directed to voters in the jurisdiction of the clearly identified candidate or to voters in a jurisdiction in which one or more candidates of the political party appear on the ballot.⁵⁶

In explaining the reasoning for this regulation, the Commission described the content standard of paragraph (c)(4)(ii) as a "safe harbor" provision, in that "communications that are publicly disseminated or distributed more than 120 days before the primary or general election will not be deemed 'coordinated' under this particular content standard under any circumstances."⁵⁷

C. *Judiciary*

1. *MCCONNELL V. FEC*

Numerous provisions of the Bipartisan Campaign Reform Act of 2002 and regulations promulgated by the Commission have been, and are still being, disputed in the third arena of contestation: the federal courts of the United States. When Senator McConnell filed the first of eleven consolidated actions challenging BCRA as unconstitutional, the case was put before a special three-judge panel at the United States District Court for the District of Columbia (the "special panel" opinion in *McConnell*).⁵⁸ The challenge by Senator McConnell and the other opponents of the McCain-Feingold bill was largely unsuccessful, but produced a nearly eight hundred page opinion from the district court special panel. The per curiam opinion upheld most of Title II as constitu-

56. *Id.* § 109.21(c)(1)-(4).

57. Coordinated & Independent Expenditures, 68 Fed. Reg. 421, 430 n.2. (Jan. 3, 2003).

58. *McConnell v. FEC*, 251 F. Supp. 2d 176 (D.D.C. 2003).

tional,⁵⁹ and each of the judges wrote a separate opinion concerning the constitutionality of Title I, which addressed the BCRA restrictions on soft-money donations.⁶⁰ Most of the provisions of the law were upheld at the district court, so the regulations authored by the FEC to accommodate them were also left standing,⁶¹ at least until the Supreme Court could make a final decision on BCRA's constitutionality.

The proponents of BCRA also won the next round of the campaign finance reform debate, as refereed by the Supreme Court in *McConnell*. The Court considered each of the five titles of BCRA separately, and three of the more liberal Justices joined in an opinion concerning Titles I and II, as delivered by Justices Stevens and O'Connor (the majority opinion in *McConnell*).⁶² The majority significantly lowered the hurdles for the McCain-Feingold legislation in the race for legitimacy. By upholding more provisions of BCRA than the district court panel had,⁶³ the *McConnell* majority was able to bring to prominence its ardent support for BCRA and its disdain for the previously existing campaign finance situation that Senators McCain and Feingold fought to eliminate. At that point, most of BCRA remained intact, as did the corresponding FEC regulations.

2. SHAYS V. FEC

The regulations promulgated by the Commission set the stage for the most recent battleground in the final arena of contestation. Representatives Shays and Meehan, who had been the sponsors of BCRA in the House, challenged nineteen of the FEC's regulations on the grounds that they fail to abide by the language and congressional purposes of BCRA.⁶⁴ In response, District Court Judge Kollar-Kotelly, who participated in the per curiam opinion written by the original special panel in *McConnell*, heeded the call of the majority in Congress and struck down fifteen of the Commission's regulations, allowing BCRA to remain relatively unhindered.⁶⁵ The Federal Election Commission was left to redraft most of the stricken regulations and appeal the decision on five regulations that it thought were particularly meritorious.⁶⁶

The Commission did not fare any better at the United States Court

59. *Id.* at 184-86.

60. *See id.* at 184.

61. *See id.* at 187.

62. *See McConnell v. FEC*, 540 U.S. 93, 114 (2003).

63. *See, e.g., id.* at 199-202 (overruling the district court's rejection of a BCRA section that requires disclosure of executory contracts for electioneering communication).

64. *Shays v. FEC*, 337 F. Supp. 2d 28, 35 (D.D.C. 2004).

65. *Id.* at 130.

66. *See Shays v. FEC*, 414 F.3d 76 (D.C. Cir. 2005).

of Appeals for the District of Columbia Circuit, which did not believe that these five regulations had enough merit to reemerge at the circuit level.⁶⁷ Although some of the reasoning of the issues differed between the district and circuit courts, both followed similar themes in their decision-making. When the D.C. Circuit denied the Commission's petition for rehearing en banc,⁶⁸ the FEC retained the responsibility of drafting new regulations in accordance with BCRA.

II. ANALYSIS OF THE DYNAMIC AT THE DISTRICT COURT

A. Shays' *Broad Reading of McConnell*

To determine the validity of the FEC's regulations construing BCRA, it is of the utmost importance to understand BCRA's provisions and the purposes of each. Consequently, the debate over BCRA itself becomes naturally intertwined with the debate over the regulations that follow. Likely acknowledging this, Judge Kollar-Kotelly stayed the proceedings in *Shays* until the Supreme Court published its decision in *McConnell*,⁶⁹ and relied heavily on the majority decision. Moreover, in interpreting the Supreme Court's decision very broadly and conspicuously failing to question any of the majority's claims to any substantive extent, Judge Kollar-Kotelly essentially affirmed her own opinion from the special panel in *McConnell*. There are a number of examples in *Shays* that illustrate the court's unquestioned deference to the Supreme Court.

In its treatment of the FEC's regulations concerning the definitions of "solicit" and "direct" for the purpose of implementing the coordinated expenditure provisions of BCRA, the district court in *Shays* adopted the purported goal of the law, as put forth by the Supreme Court majority in *McConnell*.⁷⁰ Although Justice Kennedy found that the purpose of the section itself is misguided because it does not narrowly address the true problem of a "demonstrable *quid pro quo* danger,"⁷¹ Judge Kollar-Kotelly's view was more in line with the majority's view.⁷² The FEC's argument over the definitions of the words "solicit" and "direct" evi-

67. *Id.* at 79.

68. *Id.*

69. *Shays*, 337 F. Supp. 2d at 36.

70. *Id.* at 73 ("[T]he main goal of § 323(a) is . . . [to] 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." (quoting *McConnell v. FEC*, 540 U.S. 93, 142 (2003))).

71. *McConnell*, 540 U.S. at 298 (Kennedy, J., concurring in part and dissenting in part).

72. See *McConnell v. FEC*, 251 F. Supp. 2d 176, 652 (D.D.C. 2003) ("BCRA restores in large measure, the federal campaign finance structure that had functioned effectively prior to the rise of seductive 'soft money.'").

dences some concern for those who may violate the law unintentionally,⁷³ but Judge Kollar-Kotelly decided that “[g]iven [] the aim of the statutory provision . . . it is clear to the Court that Congress intended that the term ‘solicit’ would cover conduct beyond asking for [soft money] to be given to other entities.”⁷⁴

The *Shays* district court opinion also construed the Supreme Court decision in *McConnell* broadly in its consideration of the BCRA provision outlining that employees of state, district, or local committees of a political party who spend more than twenty-five percent of their time working on a federal election campaign are engaged in “Federal election activity.”⁷⁵ The corresponding FEC regulation not only addressed those situations, but also purportedly closed a gap in the law by addressing situations in which a qualifying employee spends twenty-five percent or less of her time working on a federal campaign.⁷⁶ The plaintiffs claimed that this extra regulation violated the *Orloski v. Federal Election Commission* standard,⁷⁷ in that it unduly compromised the purpose of the Act by strengthening the FECA restrictions.⁷⁸ Judge Kollar-Kotelly did not address the BCRA provision specifically at the special panel in *McConnell*, but found in *Shays* that the Supreme Court’s determination, that this provision is a prophylactic rule, was sufficient to determine that the FEC regulation compromises “the Act’s purposes of preventing circumvention of its national party committee nonfederal money ban and stemming the flow of nonfederal money into activities that impact federal elections.”⁷⁹

Even though the district court’s holdings in *Shays* mostly follow Judge Kollar-Kotelly’s special panel opinion, the broad interpretation that *Shays* has given to the Supreme Court majority’s decision in *McConnell* has not only served to benefit the proponents of BCRA. The law’s restriction regarding the governing of state party fundraisers makes an allowance for federal candidates to attend and speak at the fundraising events for a state or local political party.⁸⁰ Plaintiff *Shays* challenged the FEC regulation that authorizes federal candidates to speak at those events without restriction,⁸¹ but the district court found that the *McConnell* majority acknowledged that Congress provided for

73. *Shays*, 337 F. Supp. 2d at 74.

74. *Id.* at 78.

75. *Id.* at 113.

76. See 11 C.F.R. § 300.33(c)(2) (2005).

77. 795 F.2d 156, 164 (D.C. Cir. 1986).

78. *Shays*, 337 F. Supp. 2d at 113.

79. *Id.* at 114.

80. 2 U.S.C. § 441i(e)(3) (Supp. II 2002).

81. 11 C.F.R. § 300.64(b) (2003).

limited nonfederal fundraising for federal candidates and officeholders, even on behalf of state and local parties.⁸² Even though the district court used its broad reading to uphold the FEC regulation preliminarily, it struck down the regulation on a technicality in favor of the BCRA proponents.⁸³

The most striking instance of the district court in *Shays* reading *McConnell* broadly and, moreover, reaffirming Judge Kollar-Kotelly's decision at the special panel, was in its discussion of content standards for coordinated communications under Title II. In his challenge of the regulation, plaintiff Shays highlighted that unless the communication in question amounts to "express advocacy" or is a republication of a candidate's own materials, the regulation only restricts coordinated communication within 120 days of an election, primary, or convention.⁸⁴ Since *Buckley*, courts have interpreted the express advocacy test as a constitutional boundary on the government's power to regulate campaign-related communications.⁸⁵ In rejecting the Commission's regulation, the *Shays* district court opinion acknowledged Justices Stevens' and O'Connor's statement that: "the unmistakable lesson from the record in this litigation . . . is that *Buckley's* magic-words requirement is functionally meaningless."⁸⁶ The Supreme Court majority paraphrased this conclusion from the opinions of the special panel, including that of Judge Kollar-Kotelly.⁸⁷ The district court went further and noted that using express advocacy is an ineffective campaign strategy that would seldom be used even if campaigns were permitted to do so.⁸⁸

B. *The Continuation of McConnell in Shays*

The *Shays* district court read *McConnell* as broadly as it did not simply because Judge Kollar-Kotelly shares a similar perspective with the Supreme Court majority or because of her own opinion as a member of the *McConnell* special panel. The nature of this closely fought cam-

82. *Shays*, 337 F. Supp. 2d at 91 (acknowledging that § 441i(e)(1)(B) doubles the limits on how much individuals can contribute to, or at the behest of, federal candidates and officeholders, while restricting the use of the additional funds to activities not related to federal elections).

83. *Id.* at 92-93 (striking down the regulation based on an APA violation).

84. *Id.* at 57.

85. See *McConnell v. FEC*, 251 F. Supp. 2d 176, 600-03 (D.D.C. 2003) (discussing case law that construed express advocacy as a constitutional test).

86. *McConnell v. FEC*, 540 U.S. 93, 193 (2003).

87. *McConnell*, 251 F. Supp. 2d at 534 ("The uncontroverted testimony of political consultants confirm that there is no difference between campaign advertisements that contain words of express advocacy and candidate-centered issue advertisements that are designed to influence federal elections but that do not use the 'magic words' of *Buckley*.").

88. See *Shays*, 337 F. Supp. 2d at 58 (citing *McConnell*, 540 U.S. at 193); see also *McConnell*, 540 U.S. at 194 n.77.

paigned campaign finance reform debate created the need for *Shays* to look closely at *McConnell* because it is the most significant litigation on the subject since *Buckley*. That a small period of time passed between these two cases is evident: there have been neither more recent cases than *McConnell*, nor laws passed since BCRA to affect the body of precedent for the *Shays* court to construe. This is especially apparent in *McConnell* and *Shays* when the court makes reference to *Buckley*, a three-decade old case that serves as the previous landmark of jurisprudence on the subject. Since *Buckley*, there has been a tremendous amount of data collected, which has been used as evidence to promote the apparent need for BCRA and support it in Congress and in the federal courts.⁸⁹

Most of the legislative history testimony in *Shays* is pulled directly from the congressional debates over BCRA.⁹⁰ Congressmen and women are uniquely among the most knowledgeable people to speak about the issues that confront campaign finance reform, which creates an uncommon situation on Capitol Hill. Members of the House and Senate were able to predict how the situation would have played out if the major changes in FECA had not been affected by BCRA, because congressional campaigns had been evolving within the old system since FECA was first enacted.⁹¹ Therefore, it is appropriate for the courts to find inherent value in congressional testimony regarding candidates' past experiences in running for office, as well as officeholders' experiences in allowing various forms of access to people who provide donations to them or their parties. This is especially true in the context of this debate because much of the congressional testimony cited in both *McConnell* and *Shays* took place within the same temporal proximity.

The *Shays* district court must have found particular importance in the testimony submitted to the court by representatives before *McConnell* was decided at the special panel. In considering a suitable extent for the restriction on federal candidates in their actions at state, district, or local fundraisers, the *Shays* court recognized that the sponsors' intent was for the rule to be unambiguous.⁹² According to the court's broad

89. See generally *McConnell*, 251 F. Supp. 2d at 438-588.

90. See generally 147 CONG. REC. S2690, 2696 (daily ed. Mar. 22, 2002) (statement of Sen. Feingold); see also 148 CONG. REC. S2096, 2145 (daily ed. Mar. 22, 2002) (statement of Sen. Feingold).

91. See 147 CONG. REC. S2845, 2852-53 (daily ed. Mar. 26, 2001) (statement of Sen. Hollings) ("It amused me the other day when they said we finally had some debate going on in the Senate. The reason we have a debate is because this is the first subject we know anything about. All the rest of it is canned speeches that the staff gives you, and you come out and you talk about Kosovo, you talk about the defense budget, or you talk about the environment, and you read scientific statements and everything—but we know about money. Oh boy, do we know.").

92. See *Shays*, 337 F. Supp. 2d at 90 (citing 148 CONG. REC. S2096, 2139 (daily ed. Mar. 20, 2002) (statement of Sen. McCain) (opining that the FEC regulation should prohibit federal

reading of the *McConnell* majority, and in spite of its purported intent, Congress provided for limited nonfederal fundraising for federal candidates and officeholders.⁹³ However, this did not end the consideration of the regulation.

The district court in *Shays* asserted that it struck down the FEC regulation because the Commission failed to adequately support its rationale, which violated "the standards of reasoned decisionmaking."⁹⁴ However, it is likely that, just as the *Shays* district court found support for other points of law in looking back to the previous litigation of *McConnell*, the evidence presented to the special panel affected the *Shays* district court decision on this regulation as much as the Commission's failure to justify it sufficiently. After all, prior to BCRA, candidates and officeholders, including Senator McConnell, solicited donations to state parties, local parties, and tax-exempt organizations to help their campaigns and the electoral causes of their parties.⁹⁵

The testimony of people who put forth the effort to change the entire election law regime is more important than that of those who simply worked with the old regulations. The sponsors of the McCain-Feingold legislation are the only parties who have been intimately engaged in all of the arenas of contestation of the campaign finance battle. As a result, their experiences define the stages of the battle itself, from its nascent stages in the 104th Congress to the contentious litigation of the present. The federal courts acknowledge a due deference to the sponsors in describing the construction of the statute, which is particularly relevant when a court is trying to evaluate the validity of a regulation that is borne from it.⁹⁶ The district court in *Shays* observed this deference to the bill's sponsors, as their comments effectively eliminated the FEC regulation on coordinated communication content standards. The statements of Senators Feingold and McCain echoed the court's understanding that the Commission's BCRA regulations were meant to set a lower standard for determining coordination than what had existed previously, so that no cases of it would be overlooked.⁹⁷ The court took from the Senators' statements that the content and time of a broadcast are irrele-

candidates and officeholders from soliciting soft-money funds for any nonfederal party committee)).

93. See 2 U.S.C. § 441i(e)(1)(B) (2000 & Supp. II 2002).

94. *Shays*, 337 F. Supp. 2d at 92-93.

95. See *McConnell v. FEC*, 251 F. Supp. 2d 176, 480 (D.D.C. 2003).

96. See *Shays*, 337 F. Supp. 2d at 64 n.33 (quoting *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 526-27 (1982) (finding that the statements of the sponsor of a statute ultimately enacted are authoritative on the statute's construction)).

97. See 148 CONG. REC. S2096, 2145 (daily ed. Mar. 20, 2002) (statement of Sen. Feingold) (commenting that the FEC's narrowly defined standard of requiring collaboration or agreement sets too high a bar to the finding of "coordination"); *id.* (statement of Sen. McCain) (noting that

vant to whether coordinated communications expenditures should be treated as contributions.⁹⁸

C. *Common Sense in McConnell and Shays*

The Senators' statements before Congress and prior to the passage of BCRA were certainly important to the manner in which *Shays* interpreted the law and the FEC regulations. For the district court, the Senators' expertise and passion for campaign finance reform were likely less compelling than their use of "common sense" reasoning in justifying it. The theme of the superiority of "common sense" is highlighted by the sponsors' emphasis on the subtleties of the pre-BCRA campaign finance system. Justice Kennedy commented that campaign finance laws have a foundation in exposing quid pro quo arrangements, in which congressional or other legislative votes are purchased for the right price.⁹⁹ Justice Thomas believed, along a similar vein, that the nation's bribery laws would be best suited to address the inadequacies that were so glaring within the system.¹⁰⁰ In spite of this, Senator Feingold spoke of the "many cases of coordination that result from de facto understandings," in which the affect of money on politics is not obvious to the public eye.¹⁰¹ This is not a situation that BCRA supporters believe is appropriate for the "I know it when I see it" standard. Senator McCain brought to light the simplicity of a "wink and nod" in that "informal understandings and de facto arrangements can result in actual coordination as effectively as explicit agreement or formal collaboration."¹⁰²

The air of "common sense" that blankets the campaign finance reform debate also serves as a goal to be achieved by those who have been engaging in each of the arenas of contestation. Long before BCRA, a considerable amount of uncertainty surrounded a candidate's ability to finance her campaign, both in terms of the legality and morality of certain methods of campaigning, as well as the effectiveness of those methods. Survey and campaign reporting data collected between the passage of FECA and BCRA indicate how successful campaign finance techniques have evolved,¹⁰³ and to what extent individuals and other interests can garner access to the government's ear by making

the sponsors of BCRA expected the FEC to draw up regulations to cover "coordination" whenever it occurs, not simply when there has been an agreement or formal collaboration).

98. See *Shays*, 337 F. Supp. 2d at 64.

99. *McConnell v. FEC*, 540 U.S. 93, 291-307 (2003) (Kennedy, J., concurring in part and dissenting in part).

100. *Id.* at 267 (Thomas, J., concurring in part and dissenting in part).

101. 148 CONG. REC. S2096, 2145 (daily ed. Mar. 20, 2002) (statement of Sen. Feingold).

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

103. See *McConnell*, 540 U.S. at 124 (describing that as the permissible uses of soft money expanded, the amount of soft money raised and spent increased exponentially).

donations and coordinated expenditures.¹⁰⁴ The ever-growing mountain of evidence indicates that there has been an enduring “wink and nod” status quo, consisting of the willingness of people and business interests to pay people for access to the government and the willingness of our representatives to trade influence or access for money.¹⁰⁵

The deference that the Supreme Court majority paid to the proponents of BCRA relates to the idea that Congress simply recognized the number of problems riddling the election campaign finance law, and passed a bill to remedy them and restore order to the system. In recognizing the intent of the sponsors and the governmental interests underlying a number of the new provisions, the *McConnell* majority found that much of BCRA was necessarily tailored narrowly to the problems that existed.¹⁰⁶ Much of this was exemplified in the discussion over the BCRA provisions banning national parties’ involvement with soft money. The majority saw past the narrow scope of Justice Kennedy’s approach to defining improper influence,¹⁰⁷ and acknowledged that “[o]f ‘almost equal’ importance has been the Government’s interest in combating the appearance or perception of corruption engendered by large campaign contributions.”¹⁰⁸ The Court also noted that “[b]oth *common sense* and the ample record . . . confirm” that soft-money contributions to national party committees have a corrupting influence or create the appearance of corruption.¹⁰⁹

Just as Justice Kennedy found that BCRA’s definition of corruption is too broad, Senator McConnell claimed that the Act’s restriction on the solicitation and direction of soft money is too extensive, and that the alternative of soliciting hard money for state and local candidates is a nonexistent one.¹¹⁰ The majority rejected the argument because the “restriction on solicitation follows *sensibly* from the prohibition on national committees’ receiving soft money [in that a national committee is likely to be appreciative of a donation it requested,] regardless of whether the recipient is the committee itself or another entity.”¹¹¹ Moreover, the Court noted that “[t]his principle accords with *common sense*” and emerges in other federal laws.¹¹²

104. See generally *McConnell v. FEC*, 251 F. Supp. 2d 176, 439-522 (D.D.C. 2003).

105. See *McConnell*, 540 U.S. at 144-54.

106. See, e.g., *id.* at 167 (“As we explain . . . § 323(b) is narrowly focused on regulating contributions that pose the greatest risk of this kind of corruption.”).

107. See *McConnell*, 540 U.S. at 291-92 (Kennedy, J., concurring in part and dissenting in part).

108. *Id.* at 143.

109. *Id.* at 145 (emphasis added).

110. See *id.* at 157, n.52.

111. *Id.* at 157-58 (emphasis added).

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

The *McConnell* majority promoted its common sense more subtly to limit the breadth with which the “solicit” and “direct” provision of BCRA should be interpreted. Senator McConnell asserted that the section is unconstitutional because it interferes impermissibly with the ability of national committees to associate with nonfederal party committees.¹¹³ Nevertheless, the Court determined that McConnell’s claim—that the restriction on association prevents the Republican National Committee from executing a plan to act with state and local party committees to implement joint fundraising efforts—is an “unnaturally broad reading of the terms.”¹¹⁴ Nothing on the face of the statute prevents the national and local committees from working together and electioneering in this capacity, “[a]s long as the national party officer does not personally spend, receive, direct, or solicit soft money.”¹¹⁵

The debate over the soft-money regulations in Title I of BCRA continued in the discussion in *Shays*, as it brought to the forefront an inherent conflict between the certainty of the bright-line rules suggested in the FEC regulations and the catch-all nature that underlies the BCRA provision, seemingly propelled by the common sense of its authors. The Commission defended the narrow definitions for “solicit” and “direct” in its regulation¹¹⁶ by explaining its concern that these bright lines (or loopholes, depending upon one’s point of view) were written into the Commission’s regulations to protect the freedoms of speech and association of people who would otherwise be unsure about the limits of the law.¹¹⁷ Nevertheless, Shays supported his claim that the *plain meanings* of the two terms were far broader than the definitions promulgated by the Commission.¹¹⁸ The district court humored the Commission by looking at various dictionaries for definitions corresponding to the ones used by the FEC.¹¹⁹ In the end, however, the Court understood that the aim of the BCRA provision was to halt the national parties’ involvement with nonfederal money, and that Congress intended the terms to “cover conduct beyond ‘ask[ing]’ for nonfederal donations to be given to other entities.”¹²⁰

113. *See id.* at 159.

114. *Id.* at 160.

115. *Id.*

116. *See* 11 C.F.R. § 300.2(m)-(n) (2005).

117. *See Shays v. FEC*, 337 F. Supp. 2d 28, 74 (D.D.C. 2004).

118. *Id.* at 74.

119. *Id.* at 76 (“[T]he FEC’s definition of the term ‘direct’ as meaning ‘to ask’ is a definition foreign to every dictionary brought before this Court. It is difficult to deem a construction permissible when it does not comport with any definition of the statutory term.”).

120. *Id.* at 78.

III. FEC'S APPEAL OF *SHAYS*

After the district court decision in *Shays*, the battle moved to the next level. Both sides were armed and ready with dictionaries in hand.¹²¹ The FEC appealed the *Shays* district court decision on five of the regulations that it was commanded to rewrite to the United States Court of Appeals for the District of Columbia Circuit.¹²² The appellant relied partially on some of the same arguments that it had used unsuccessfully in the lower court, but supplemented its assertions with requests and justifications for deference to its decisions.¹²³ Most notably, the FEC maintained that "asking" is the best bright-line definition for both "soliciting" and "directing" funds to a candidate or party, and that the terms "serve distinct but complementary purposes."¹²⁴ In defense of providing a de minimis reporting exemption for those who are working under the Levin Amendment, the FEC claimed that it was well within the scope of its regulatory power to establish such an allowance because Congress failed to take a "rigid approach" in enacting the Amendment itself.¹²⁵ Similarly, in much of the rest of its argument, the FEC criticized Congress for a failure to act on the issues presented, and claimed that legislative inaction gave the Commission a right to step in and regulate where Congress could not.¹²⁶ This argument was most prominent in the FEC's appeal of the decision on content standards for coordinated expenditures, on which Congress, purportedly, was unable to agree on a definition.¹²⁷ The Commission also continued to use the justification of protecting First Amendment rights in establishing other bright-line regulations.¹²⁸

Even though the appellees clearly came out the victors at the district court, they urged strongly that all of the challenged regulations are facially invalid because they violate the language of FECA or BCRA, or both.¹²⁹ *Shays* and *Meehan* delved into dictionaries, grammatical construction, and past uses of "solicit" and "direct" by the Supreme Court to establish that the Commission's definitions of those words are com-

121. See Brief for the FEC at 22, *Shays v. FEC*, 414 F.3d 76 (D.C. Cir. 2005) (No. 04-5352); see also Brief for Christopher Shays and Martin Meehan at 29-30, *Shays v. FEC*, 414 F.3d 76 (D.C. Cir. 2005) (No. 04-5352).

122. See Brief for the FEC, *supra* note 121, at 2.

123. See *id.* at 23-28.

124. *Id.* at 26.

125. *Id.* at 37-38.

126. See *id.* at 29-34.

127. See *id.*

128. See *id.* at 23 (arguing that the FEC's regulatory definition of the terms 'solicit' and 'direct' would prevent the imputation of intent in a private conversation where a person had no intention of soliciting a contribution).

129. See Brief for Christopher Shays and Martin Meehan, *supra* note 121, at 20-21.

pletely nonsensical relative to the text of the statutes.¹³⁰ The appellees also claimed that the FEC's "safe harbor" regulation, which permits coordinated expenditures without the use of express advocacy, is facially contrary to FECA (and distinguished from permissible temporal provisions) because the law regulates coordinated expenditures year round.¹³¹ They emphasized that the major BCRA modifications were meant to strengthen the restrictions on candidates and parties, and that the FEC regulatory loopholes are counterproductive.¹³²

In keeping with recent judicial precedent, the circuit court kept the BCRA opponents from abating the progress of campaign finance reform. The circuit court's majority analysis was similar to that of the district court in that it broadly interpreted the *McConnell* Supreme Court majority, continued the ongoing campaign finance debate that began long before *McConnell*, and reasoned much of its opinion from the judges' own common sense.

The circuit court's broad interpretation of *McConnell* is limited in the number of times it cites the Supreme Court, but most of the references made by the majority closely follow the opinion of the district court. For example, with regard to the issue of soft money and the manner in which the FEC regulations should characterize "solicit" and "direct," both courts based their analyses¹³³ on *McConnell*'s view of "Congress' effort to plug the soft-money loophole."¹³⁴ Even though the FEC claimed the "need for clear definitions to avoid ambiguity, vagueness and confusion as to what . . . would constitute solicitations,"¹³⁵ the circuit court found that the "FEC's definitions fly in the face of this purpose because they reopen the very loophole the terms were designed to close."¹³⁶ In addition, the Supreme Court's classification of "Federal election activity" as a "prophylactic rule" affected the district court's interpretation,¹³⁷ and enabled the *Shays* circuit court majority to infer that "nothing in the [definition of Federal election activity] suggests congressional intent[] to deregulate *federal* activity."¹³⁸

In its treatment of Title II of BCRA, the district court degraded *Buckley*'s express advocacy magic-words requirement even more than *McConnell*'s "functionally meaningless" description, by labeling the

130. See *id.* at 29-34.

131. See *id.* at 22-25.

132. See *id.* at 36-37.

133. See *Shays v. FEC*, 414 F.3d 76 (D.C. Cir. 2005); *Shays v. FEC*, 337 F. Supp. 2d 28, 78 (D.D.C. 2004).

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

135. Contribution Limitations and Prohibitions, 67 Fed. Reg. 69,928, 69,942 (Nov. 19, 2002).

136. *Shays*, 414 F.3d at 106.

137. *Shays*, 337 F. Supp. 2d at 113.

138. *Shays*, 414 F.3d at 111.

words themselves as undesirable and ineffective.¹³⁹ The circuit court followed a slightly different path, because of the way it conducted its analysis under *Chevron U.S.A., Inc. v. National Resource Defense Council*.¹⁴⁰ The district court struck down the regulation under the second *Chevron* step, because to “exclude certain types of communications regardless of whether or not they are coordinated would create an immense loophole” and the potential for abuse.¹⁴¹ The circuit court, on the other hand, struck down the regulation because its “fatal defect is not that the FEC drew distinctions based on content, time, and place, but rather that, contrary to the APA, the Commission offered no persuasive justification for the . . . 120-day time-frame and the weak restraints applying outside of it.”¹⁴² It found that such a regulation “requires some cogent explanation” because it employs the standard that *McConnell* determined to be functionally meaningless, and that the FEC “allowed a coordinated communication free-for-all for much of each election cycle.”¹⁴³

The circuit court’s appeals for cogent arguments were limited neither to instances in which it interpreted *McConnell* broadly nor to the issue of soft money. In discussing payments to state and local party committee employees under BCRA, the circuit court recognized that in imposing additional constraints on federal election activities (FEA), Congress neither intended to deregulate non-FEA expenses nor support the exclusion of non-FEA salaries.¹⁴⁴ The court then declared the FEC regulation that allows state or local committee employees who spend less than twenty-five percent of their time on FEA activities to be paid from nonfederal funds,¹⁴⁵ to be:

particularly irrational given the FEC’s recognition that costs for . . . all matters, like salaries, that the FEA definition specifically addresses, may require allocation even when the activities “do not qualify” as FEA. In sum, the FEC has construed a BCRA provision sweeping *state* activities within FECA as an excuse to punt *federal* activities outside it. Because this “implication” from the statute makes no sense, and because the Commission gave no other justification for its rule, the regulation exempting 25%-or-less salaries from

139. *Shays*, 337 F. Supp. 2d at 58 n.28.

140. *See Shays*, 414 F.3d at 96 (referring to the two-step analysis set forth in *Chevron U.S.A., Inc. v. National Resources Defense Council*, 467 U.S. 837 (1984), which first asks whether Congress has directly spoken regarding the question in issue, and second, if the agency’s interpretation is reasonable when Congress has not spoken).

141. *Shays*, 337 F. Supp. 2d at 65.

142. *Shays*, 414 F.3d at 100.

143. *Id.*

144. *Id.* at 112.

145. 11 C.F.R. § 300.33(c)(2) (2005).

allocation is arbitrary and capricious.¹⁴⁶

The best illustrated example of the circuit court's longing for common sense appears in its review of the dispute over electioneering communications. BCRA had outlined the definition of an electioneering communication, including a definition that applies only to communications "made within" specified time periods.¹⁴⁷ In construing this phrase, the FEC's regulation defines "made" to mean "publicly distributed,"¹⁴⁸ and then defines "publicly distributed" to mean "aired, broadcast, cablecast or otherwise disseminated *for a fee* through the facilities of a television station, radio station, cable television system, or satellite system."¹⁴⁹ The appellees were concerned that free public service announcements would become the next type of campaign advertisement loophole if such a regulation were to remain.¹⁵⁰

A communication "is made" on the date of transmission, which is when the advertisement may influence the election.¹⁵¹ Accordingly, it makes no sense to say that the communication is "made" only if someone paid a fee, an event that likely occurred earlier.¹⁵² The FEC's argument was that the BCRA definition of electioneering communication did not mention funding.¹⁵³ The circuit court responded, "[t]rue, but so what? . . . 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 . . . that it means 'made' and not 'made for a fee.'"¹⁵⁴

Clearly, each side thought that this battle over definitions, deference, and distributions was one worth winning. As the FEC addresses its responsibility of redrafting the regulations to accord with the purpose and textual meaning of BCRA, two realizations become apparent: the DC Circuit's decision will go a long way in framing the issues and guidelines for the Commission and, for at least this round, the BCRA sponsors have won the campaign finance reform debate.

IV. WHAT HAVE WE LEARNED?

The campaign finance reform battle has developed such that it prevents *McConnell* from being understood in a legal vacuum. *McCon-*

146. *Shays*, 414 F.3d at 112.

147. 2 U.S.C. § 434(f)(3)(A)(i) (Supp. II 2002).

148. 11 C.F.R. § 100.29(a)(2) (2005).

149. *Id.* § 100.29(b)(3)(i) (emphasis added).

150. *Shays*, 414 F.3d at 108.

151. *Id.*

152. *Id.*

153. Brief for the FEC at 41-42, *Shays v. FEC*, 414 F.3d 76 (D.C. Cir. 2005) (No. 04-5352).

154. *Shays*, 414 F.3d at 108.

nell's importance lies subtly in its role as an arena of contestation in this ongoing debate, rather than plainly as a notable chapter in the history of federal election law jurisprudence. The Supreme Court's opinion can neither be read without the reasoning and examples used in the special panel decision, nor without the construction of it in *Shays*, which highlights *McConnell*'s lasting precedent. As a result, *Shays*, a separate lawsuit from *McConnell* with a de facto difference in parties, appears to be a continuation of *McConnell*. It needs to be so, to help illustrate our exercise in democracy.

Evaluating the importance of *McConnell* requires that one examine this debate in its entirety. *Shays* is so essential to deciphering *McConnell* because the FEC regulations implement BCRA and other election laws. The United States Court of Appeals for the District of Columbia Circuit denied the FEC's petition for rehearing en banc, so the extent to which *McConnell* and *Shays* will endure as significant jurisprudence is dependent upon the debate's return to the regulatory arena. If the Commission again takes wide latitude in interpreting BCRA and implementing its corresponding regulations, then the FEC can continue to modify or hinder the effectiveness of BCRA freely. In response, Congress can either restructure the agency so that it is more receptive to the will of Congress or eliminate the FEC altogether and find a new way to promulgate campaign finance regulations. The most palpable effects of this debate cannot be realized until the Commission takes the time it needs to promulgate new regulations before the 2006 elections. Even when the regulations are redrawn, it is foreseeable that they would encounter legal challenges not unlike the ones they recently underwent.

Regardless of the types of challenges that these or future laws and regulations may face, for the foreseeable future it seems that *McConnell* will continue to be interpreted as it has hitherto been construed in *Shays*. However, the foreseeable future in this case lasts only as long as the composition of the federal courts, especially the Supreme Court, remains similarly ideologically balanced. BCRA was hotly contested at the Supreme Court in *McConnell*, and three of the five titles of the Act were held unconstitutional.¹⁵⁵ Similarly, the per curiam special panel *McConnell* opinion could only be reached on Title II, and each judge wrote a separate opinion about the soft-money regulations in Title I.¹⁵⁶ The Supreme Court majority referred to Judge Kollar-Kottelly's opinion repeatedly, and it was natural that the district court in *Shays* gave considerable deference to that opinion as well. Anticipating whether *McConnell* will be interpreted in a similar manner at the Supreme Court

155. See *McConnell v. FEC*, 540 U.S. 93 (2003).

156. See *McConnell v. FEC*, 251 F. Supp. 2d 176 (D.D.C. 2003).

level matters: just as the federal courts have recently decided how to construe the definitions of certain words and the effects of certain regulations, future courts will look at the cases involved in this debate as precedent and decide whether today's courts had enough foresight to handle the situation correctly. Regardless of the makeup of the Court, sharp ideological divisions within Congress and a process featuring numerous arenas of contestation mean that another round of debate is to follow. However, the current debate grew from thirty years of experience since the last debate in *Buckley*. The debate to follow could be just as far removed.

The wave of new precedent established by *McConnell* and new political standards stemming from this round of the debate create ripples on a larger and more fundamental scale than an examination with a legal microscope can capture. All of the political jockeying and battling for supremacy are so important because they affect the basic constructs of our democratic government. Our government is supported necessarily by the confidence and trust of the governed. Thus, the ways and extent to which the governed participate in the functioning of our system is essential. The least informed citizens and the political pundits alike are skeptical about the motives and dealings of many of the politicians we elect; consequently, we question the sincerity of the system as a whole.

This understanding makes the appearance of corruption as important as it is to the Court and the legislators who are trying to affect change. The civic-minded among us spend so much time trying to get others to vote in our elections, and there may be a reason other than laziness to explain why people do not want to get involved in exercising their rights. Common sense tells us that skeptical people do not vote because they think voting is useless and does not effect change. Consequently, the campaign finance debate is a microcosm of the discourse concerning how our society should be run, and which values should dictate the functioning of our government.

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