

RECENT DEVELOPMENTS IN CAMPAIGN FINANCE LAW: IMPLEMENTING THE BIPARTISAN CAMPAIGN FINANCE REFORM ACT OF 2002

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“You have so tortured the law, it’s beyond silly.”¹

I.

INTRODUCTION

On November 6, 2002, after more than six years of legislative battling, the Bipartisan Campaign Finance Reform Act (BCRA), the first major campaign finance reform legislation since the Watergate reforms of the 1970s, went into effect.² Instead of rejoicing in their victory, however, two of BCRA’s principal sponsors, Representatives Christopher Shays (R-CT) and Martin Meehan (D-MA), sued the Federal Election Commission (FEC or Commission) under the Administrative Procedure Act (APA) to strike down the regulations adopted by the Commission to implement the new law.³ BCRA’s primary sponsors in the Senate, John McCain (R-AZ) and Russell Feingold (D-WI), are expected to file an amicus brief in the suit.⁴ Additionally, the Sen-

1. Press Release, Senator John McCain, FEC Undermines the New Campaign Finance Law in Direct Contravention of the Statute’s Language, Purpose and Legislative History (Nov. 5, 2002) (quoting FEC Commissioner Scott Thomas) (on file with the *New York University Journal of Legislation and Public Policy*). See also Scott Thomas, *Beyond Silly—What the Courts and the FEC Have Done to Congressional Reform Attempt* (Sept. 2002). This was a paper presented at Practicing Law Institute’s Corporate Political Activities 2002: Complying With Campaign Finance, Lobbying and Ethics Laws (on file with the *New York University Journal of Legislation and Public Policy*).

2. Pub. L. No. 107-155, 116 Stat. 81-116 (2002) (to be codified at 2 U.S.C. § 441i(e)(1) (2000)).

3. *Shays v. FEC*, Civ. No. 02-1984 (D.D.C. filed Oct. 8, 2002). See also Plaintiffs’ First Amended Complaint, *id.* (outlining reasons behind suit) [hereinafter Plaintiffs’ Complaint].

4. Press Release, Congressman Christopher Shays, Shays, Meehan Challenge FEC Regulations in Court (Oct. 8, 2002) (on file with the *New York University Journal of Legislation and Public Policy*).

ators introduced a “resolution of disapproval”⁵ in October of 2002 under the Congressional Review Act, which creates an expedited process for congressional review of agency rulemaking. No action was taken on the resolution in the 107th Congress, but the sponsors intend to introduce the measure again this session.⁶

At the same time BCRA’s sponsors are suing the FEC for attempting to undermine the purposes of the Act with weak regulations, they are also helping the Commission defend against challenges to the Act’s constitutionality. As soon as President George W. Bush signed BCRA into law, it was attacked with multiple lawsuits, eight of which are now consolidated as *McConnell v. FEC*.⁷ On a variety of grounds, including freedom of speech and federalism, more than eighty plaintiffs argue that the central provisions of BCRA are unconstitutional.⁸ As mandated by the Act itself, the case is being heard by a special three-judge panel made up of two district court judges and a member of the Court of Appeals for the District of Columbia.⁹ The parties were waiting for the panel’s decision before an inevitable appeal to the U.S. Supreme Court.¹⁰ The Supreme Court informed the panel that it required a decision by the end of January in order to hear the case this term. As of March 8, 2003, a decision was still pending.¹¹

While the constitutionality of much of BCRA remains to be decided, the Act itself is in force and has already begun to alter radically the field of campaign finance law.¹² Because *Shays-Meehan v. FEC*—the challenge to the FEC’s BCRA regulations—is expected to

5. S.J. Res. 48, 107th Cong. (2002). *See generally* Press Release, John McCain, Joint Statement by McCain, Feingold, Shays, and Meehan on Challenges to FEC Soft Money Regulations (Oct. 8, 2002) (explaining purpose of resolution) (on file with the *New York University Journal of Legislation and Public Policy*).

6. Press Release, Campaign and Media Legal Center, Campaign and Media Legal Center Weekly Report: Reform Act Sponsors Move to Void FEC Soft Money Rules (Oct. 15, 2002) (on file with the *New York University Journal of Legislation and Public Policy*).

7. *McConnell v. FEC*, (D.D.C. 2002) (Civ. No. 02-0582).

8. Consolidated Brief for Plaintiffs In Support of Motion for Summary Judgment, *McConnell v. FEC* (Redacted Version). Court documents for *McConnell v. FEC* are available from the Campaign Media and Legal Center at <http://www.camlc.org>.

9. Pub. L. No. 105-155, § 403, 116 Stat. 81, 113–14 (2002). *See also* Kenneth P. Doyle, *BCRA Litigation: Lawsuit Challenging FEC’s BCRA Rules Dormant as Constitutional Ruling Awaited*, BNA MONEY AND POL. REP. (Feb. 20, 2003) (on file with the *New York University Journal of Legislation and Public Policy*).

10. Richard L. Hasen, *Time Running Out For High Court to Hear McCain-Feingold*, ROLL CALL, Feb. 6, 2003, available at 2003 WL 7689715.

11. *See Stalled on Soft Money*, WASH. POST, Mar. 19, 2003, at A30.

12. *See* Adam Nagourney, *McCain-Feingold School Finds Many Bewildered*, N.Y. TIMES, Feb. 19, 2003, at A22.

remain dormant until a decision has been reached on the constitutionality of the Act, the challenged rules are in effect.¹³

In order to assess the extent to which BCRA will achieve its objectives under the current rules, it is helpful to examine the arguments of BCRA's sponsors. They argue that if allowed to stand, the current regulations implementing the Act will "in multiple and interrelated ways, thwart and undermine [its] language and congressional purpose."¹⁴ The sponsors essentially argue that the FEC's regulations render BCRA meaningless.¹⁵

II.

THE PURPOSES OF BCRA

According to BCRA's four primary sponsors, "the soft money ban is the central component" of the Act and "was the central feature of [a] seven year effort to reform the campaign finance system."¹⁶ Representatives Shays and Meehan contend that

[t]he passage of Title I of BCRA reflects Congress's determination that the explosive growth of soft money over two decades had caused corruption and the appearance of corruption in federal elections and in the federal political process, and had undermined the confidence of the American people in their government and their political system.¹⁷

Two purposes of the effort to ban soft money are "to ensure that campaign advertisements are subject to disclosure and to ban the use of corporate and union treasury money to fund campaign advertising . . . [and] to ensure that meaningful rules governing 'coordination' between an outside spender and an a candidate are in place to prevent evasion of the contribution limits, disclosure requirements and source prohibitions of federal law."¹⁸ BCRA's sponsors claim that the FEC's

13. Doyle, *supra* note 9. The case is expected to remain dormant because it has been assigned to Judge Colleen Kollar-Kotelly of the U.S. District Court for Washington, D.C., who is also a member of the panel hearing *McConnell v. FEC*. Judge Kollar-Kotelly is expected to wait until a decision has been reached on the constitutionality BCRA's basic provisions before addressing the legality of the FEC's implementing regulations. *Id.*

14. Plaintiffs' Complaint, *supra* note 3, at 3.

15. *See id.* While the sponsors do not explicitly state this in their complaint, it is implicit in their argument that the rules will undermine the three fundamental purposes of the Act. *See infra* Part III.B.

16. Letter from Sen. John S. McCain, Sen. Russell D. Feingold, Rep. Christopher Shays & Rep. Martin Meehan, to Rosemary C. Smith, Assistant General Counsel of the FEC (May 29, 2002) (on file with the *New York Journal of Legislation and Public Policy*) [hereinafter Letter from McCain et al.].

17. Plaintiffs' Complaint, *supra* note 3, at 1-2.

18. *Id.* at 2.

regulations undermine each of these purposes.¹⁹ Indeed, they argue that the FEC deliberately wrote loopholes into the rules to maintain the status quo.²⁰ Invoking the federal statutory standard of review for agency actions, the sponsors argue that the FEC's soft money rules should be invalidated because they are "arbitrary, capricious, an abuse of discretion, or otherwise . . . not in accordance with law . . . in excess of the FEC's statutory jurisdiction, authority or limitations," and "were adopted without observance of procedure required by law."²¹

Since the overarching goal of BCRA is to ban soft money from federal elections, and since the Act's sponsors claim that the FEC's rules "eviscerate"²² that ban, it is helpful to examine BCRA's soft money provisions and to compare the statutory language with the promulgated regulations to assess whether or not BCRA is likely to achieve its objectives.

III.

THE SOFT MONEY PROVISIONS

The term "soft money" refers to contributions made to the national political parties by individuals, corporations, interest groups, and labor unions that are not subject to federal contribution limits or source restrictions and would otherwise be illegal under the Federal Election Campaign Act (FECA).²³ Prior to enactment of BCRA, national political parties and their committees were free to accept any amount of money from any source—individuals, corporations, interest

19. *Id.* at 3.

20. See Press Release, Senator John McCain, FEC Undermines the New Campaign Finance Law in Direct Contravention of the Statute's Language, Purpose and Legislative History (Nov. 5, 2002) (on file with the *New York University Journal of Legislation and Public Policy*).

21. Plaintiffs' Complaint, *supra* note 3, at 3–4 (citing the Administrative Procedure Act, 5 U.S.C. §§ 706(2)(a), (c)–(d) (2002)).

22. Press Release, Campaign and Media Legal Center, McCain Declares Reform Crusade Continues (Nov. 14, 2002) (on file with the *New York University Journal of Legislation and Public Policy*) (quoting Sen. John McCain).

23. Federal Election Campaign Act of 1971 (codified as amended in scattered sections of 2 U.S.C.). See also Trevor Potter & Kirk L. Jowers, Recent Developments in Campaign Finance Reform: Summary Analysis of Bipartisan Campaign Finance Reform Act Passed by House and Senate and Sent to President, at <http://www.brookings.org/gs/cf/headlines/FinalApproval.htm> (last visited Mar. 8, 2003) (defining soft money) (on file with the *New York University Journal of Legislation and Public Policy*); MARK GREEN, SELLING OUT: HOW BIG CORPORATE MONEY BUYS ELECTIONS, RAMS THROUGH LEGISLATION, AND BETRAYS OUR DEMOCRACY 70–73 (2002) (outlining the history of soft money contributions).

groups, or labor unions.²⁴ The parties could use soft money for grassroots activities such as party-building and get-out-the-vote (GOTV) efforts.²⁵ In the late 1980s the parties began to use soft money donations from corporations, unions, and wealthy individuals to fund so-called “issue ads”—campaign-style advertisements focused on a particular voting issue but often used to support or oppose a candidate.²⁶ The proliferation of sham issue ads was largely responsible for the push to ban the use of soft money in federal elections.²⁷ As a result of the soft money loophole, millions of unregulated dollars were funneled into the campaign finance system throughout the late 1980s and 1990s.²⁸ Between 1992 and 2000, soft money spending by national parties went from \$80 million to \$500 million.²⁹

A. *The FEC's Soft Money Rules*

Under Title I of BCRA, national and state political parties, campaign committees, candidates, officials, and citizens are prohibited from soliciting, directing, receiving, or spending soft money.³⁰ The FEC published final rules implementing Title I in July of 2002.³¹ The Act's sponsors argue that “[t]he soft money regulations promulgated by the FEC fly in the face of the spirit of the new campaign finance law.”³² According to reform advocate Fred Wertheimer, who represents Shays and Meehan, the “FEC Commissioners have abused and

24. GREEN, *supra* note 23, at 70–73.

25. *Id.*

26. *Id.*

27. *Id.* at 70–71. The phrase “sham issue ad” refers to advertisements paid for with soft money that technically promote an issue but which operate as de facto candidate attacks or promotions. See generally CRAIG B. HOLMAN & LUKE P. McLOUGHLIN, BUYING TIME 2000: TELEVISION ADVERTISING IN THE 2000 FEDERAL ELECTIONS (2001) (describing and analyzing political advertising during the 2000 election cycle), available at <http://www.brennancenter.org/programs/buyingtime2000.html>.

28. GREEN, *supra* note 23, at 70–73.

29. *Id.*

30. Pub. L. No. 107-155, § 101, 116 Stat. 81, 82–86 (2002). See Press Release, Senator John McCain, FEC Undermines the New Campaign Finance Law in Direct Contravention of the Statute's Language, Purpose and Legislative History (Nov. 5, 2002) (on file with the *New York University Journal of Legislation and Public Policy*).

31. Prohibited or Excessive Contributions: Non-Federal Funds or Soft Money, 67 Fed. Reg. 49,064 (July 29, 2002) (to be codified at 11 C.F.R. pts. 100, 102, 104, 106, 108, 110, 114, 300, and 9034).

32. Press Release, Congressman Christopher Shays, Shays, Meehan Challenge FEC Regulations in Court (Oct. 8, 2002) (on file with the *New York University Journal of Legislation and Public Policy*) (quoting Rep. Christopher Shays).

exceeded their rule-making authority to undermine systematically the new ban on soft money, even before the law has taken effect.”³³

The soft money rulemaking process was steeped in political controversy from the beginning. In their comments on the draft regulations, all four of BCRA’s primary sponsors warned that the proposed rules created loopholes through which soft money would continue to flow.³⁴ The sponsors called on the FEC to revise the regulations with a view to what they argue is “the central component of BCRA.”³⁵ Urging the Commission to give “give great weight to our views in order to implement the law properly,” the sponsors implored the FEC to write rules that “reflect the will of the people, as expressed through their elected representatives, that soft money be banned.”³⁶

In contrast to the sponsors’ call for broad prohibitions, the national parties and several interest groups, many of which are the same organizations suing to have the soft money provisions struck down as unconstitutional, urged the Commission to interpret the rules narrowly and to provide bright lines.³⁷ According to Joseph Sandler, a lawyer for the Democratic National Committee, the party was seeking “reasonable, clear, and workable guidance in actually complying with and living with this law.”³⁸

Advocates for a strong ban on soft money accused the parties of deliberately trying to “drive huge loopholes” into BCRA.³⁹ Scott Harshbarger, president of the reform group Common Cause, wrote to the chairman of the Democratic National Committee, Terry McAuliffe, “[y]ou and other party leaders cannot take public credit for enacting important reforms supported by the American people on the

33. *Congressional Sponsors [sic] of Soft Money Ban File Lawsuit to Halt Implementation of FEC’s “Arbitrary and Capricious” Rules*, ON THE DOCKET (Democracy 21), Oct. 8, 2002, at <http://democracy21.org> (on file with the *New York University Journal of Legislation and Public Policy*).

34. Alison Mitchell, *Law’s Sponsors Fault Draft of Campaign Finance Rules*, N.Y. TIMES, May 31, 2002, at A16.

35. Letter from McCain et al., *supra* note 16, at 1.

36. *Id.* at 1–2.

37. Letter from Democratic National Committee, Democratic Senatorial Campaign Committee & Democratic Congressional Campaign Committee, to Rosemary C. Smith, Assistant General Counsel of the FEC (May 29, 2002) (on file with the *New York University Journal of Legislation and Public Policy*) [hereinafter DNC Letter]; Letter from Republican National Committee, to Rosemary C. Smith, Assistant General Counsel of the FEC (May 29, 2002) (on file with the *New York University Journal of Legislation and Public Policy*) [hereinafter RNC Letter].

38. Richard A. Oppel, Jr., *Sponsors Assert Soft Money Ban May Be Diluted*, N.Y. TIMES, June 14, 2002, at A1.

39. *Id.*

one hand, while sending your lawyers into court and into the F.E.C. to undermine the law, on the other.”⁴⁰

B. The Challenge to the Rules Governing Soft Money

Shays and Meehan allege that

[t]he regulations issued by the FEC undermine the soft money ban by contravening the language and purpose of BCRA in each of the three areas in which Congress legislated to address the problem: (a) the activities of the national parties; (b) the activities of the state parties; and (c) the activities of federal candidates and officeholders.⁴¹

The following example is illustrative of how the FEC’s rules undermine the ban.

One of the plaintiffs’ arguments is that the FEC’s rules create a loophole through which federal candidates and officeholders will be able to raise soft money at state and local party fundraisers.⁴² Under BCRA, federal officeholders and candidates are not allowed to “solicit, receive, direct, transfer or spend” soft money.⁴³ The Act further states “[n]otwithstanding paragraph (1) or subsection (b)(2)(C) [the ban on solicitations by federal officeholders and candidates], a candidate or an individual holding Federal office may attend, speak, or be a featured guest at a fundraising event for a State, district, or local committee of a political party.”⁴⁴ The FEC’s rule restates the statutory language, but also adds the following clause which is not found in the Act itself: “Candidates and individuals holding Federal office may speak at such events without restriction or regulation.”⁴⁵

Plaintiffs contend that “[t]his regulation is contrary to the language and purpose of BCRA, which prohibits federal officeholders and candidates from soliciting and directing soft money.”⁴⁶ They argue that the added clause “authorizes federal candidates and officeholders to make solicitations of soft money and to direct soft money, without restriction, at any event that is deemed to be a ‘state party fundraiser,’ in contravention of the statute.”⁴⁷ The sponsors of BCRA

40. *Id.*

41. Plaintiffs’ Complaint, *supra* note 3, at 10.

42. *Id.* at 17.

43. Pub. L. No. 107-155, § 101(a), 116 Stat. 81–116 (2002) (to be codified at 2 U.S.C. § 441i(e)(1) (2000)).

44. *Id.*

45. Prohibited or Excessive Contributions: Non-Federal Funds or Soft Money, 67 Fed. Reg. 49,064, 49,131 (July 29, 2002) (to be codified at 11 C.F.R. pt. 300.64).

46. Plaintiffs’ Complaint, *supra* note 3, at 17.

47. *Id.*

argue that they intended to allow federal officeholders and candidates to “attend, speak, or be a featured guest at a fundraising event” for a state or local party, but did not intend to create an exemption on the ban on soft money solicitation during an appearance.⁴⁸

Contrary to this intention, the FEC has interpreted the word “notwithstanding” to mean that the Act allows officeholders and candidates to solicit soft money when they attend, speak at, or are the featured guest at a “state party fundraiser.”⁴⁹ Indeed, FEC Commissioner Michael Toner, a former general counsel for the Republican Party and a supporter of the exemption, told *The Washington Post* that he considered the provision “a total carve out” from the ban on solicitation of soft money.⁵⁰

According to the FEC, the Commission “decided to construe the statutory exemption permitting Federal candidates and officeholders to attend, speak, and appear as a featured guest at State, district or local party committee fundraising events without regulation or restriction.”⁵¹

The Commission argues this conclusion

is compelled by the plain language of the section and the structure of the section within BCRA. The structure of the statute requires the Commission to construe the provision as a total exemption to the solicitation prohibition, applicable to Federal candidates and officeholders, when attending and speaking at party fundraising events, because the statutory section is styled as such.⁵² “To conclude otherwise,” it argues, “would require the Commission to read the restrictions itemized in the general prohibition into a statutory exemption that clearly and unambiguously excludes those restrictions by its own terms” and “would also require the Commission to regulate and potentially restrict what candidates and officeholders say at political events, which is contrary to the plain meaning of the statutory exemption and would raise serious constitutional concerns. Accordingly, candidates and officeholders are free under the rule to speak at such functions without regulation or restriction.”⁵³

FEC Commissioner Bradley Smith has given some insight into his rationale, writing, “what does one think that the ‘featured guest’ at

48. *Id.* at 16.

49. *See id.* at 17.

50. Thomas B. Edsall, *FEC to Allow “Soft Money” Exceptions; Campaign Finance Law’s Sponsors Criticize Panel*, WASH. POST, June 21, 2002, at A1.

51. Prohibited or Excessive Contributions: Non-Federal Funds or Soft Money, 67 Fed. Reg. 49,064, 49,108 (July 29, 2002) (to be codified at 11 C.F.R. pts. 100, 102, 104, 106, 108, 110, 114, 300, and 9034).

52. *Id.*

53. *Id.*

a ‘fundraiser’ is likely to speak about? The FEC is not a speech police reviewing transcripts of an officeholder’s remarks looking for signs of ‘solicitation.’”⁵⁴ It remains to be seen whether the court will view the FEC’s “total carve out” as a reasonable interpretation of the statute.

IV.

THE STANDARD OF REVIEW UNDER THE ADMINISTRATIVE PROCEDURE ACT

Shays and Meehan are asking the D.C. District Court to invalidate the FEC’s soft money rules under the APA on three grounds. First, they argue that the rules are “arbitrary and capricious, an abuse of discretion, and otherwise not in accordance with law” and “[a]s such, they are invalid pursuant to 5 U.S.C. § 706(2)(a).”⁵⁵ Second, the rules are contrary to the plain text of BCRA and the clear intent of Congress: “They are in excess of the FEC’s statutory jurisdiction, authority and right,” and “[a]s such, they are invalid pursuant to 5 U.S.C. § 706(2)(c).”⁵⁶ Third, Shays and Meehan argue that the rules were adopted without “adequate notice,” without an adequate rationale basis, and without an adequate explanation for their divergence from past agency action, the advice of the Commission’s General Counsel, and the comments of the public, and so are “invalid pursuant to 5 U.S.C. § 706(2)(d).”⁵⁷

Under *Chevron v. Natural Resources Defense Council*,⁵⁸ courts must use a two-part test to decide whether or not to uphold a regulatory agency’s interpretation of a statute. The first question is “whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear”⁵⁹ then the court “must give effect to the unambiguously expressed intent of Congress.”⁶⁰ But if “the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation.”⁶¹ If instead, “the statute is silent or ambiguous with re-

54. Bradley A. Smith, The Facts About the Federal Election Commission’s Rules on Soft Money Pursuant to the Bipartisan Campaign Reform Act of 2002, at http://www.fec.gov/members/smith/smithinfo_bcra.html (last visited Mar. 8, 2003) (on file with the *New York University Journal of Legislation and Public Policy*).

55. Plaintiffs’ Complaint, *supra* note 3, at 44.

56. *Id.* at 45.

57. *Id.*

58. 467 U.S. 837 (1984).

59. *Id.* at 842.

60. *Id.* at 843.

61. *Id.*

spect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."⁶² The *Chevron* Court emphasized, however, that

[t]he judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.⁶³

More often than not courts find themselves moving quickly to the second part of the *Chevron* test. As two commentators have explained, "*Chevron* effectively creates a presumption of statutory ambiguity—a presumption that is difficult to rebut. A case satisfies the first part of the *Chevron* test only if Congress's intent is 'unambiguously' clear Since few statutes are absolutely clear, courts will likely move to the second part of the *Chevron* test in most cases."⁶⁴ According to at least one judge on the D.C. Circuit, "more often than not we, as a court, cannot resolve a case at the first step of *Chevron*."⁶⁵

Under the second *Chevron* prong, a court must decide if an agency interpretation "is based on a permissible construction of the statute."⁶⁶ Where "Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation."⁶⁷ These gap-filling, legislative regulations are given controlling weight unless they are "arbitrary, capricious, or manifestly contrary to the statute."⁶⁸ Where delegation to the agency is implicit rather than explicit, "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency."⁶⁹

Since almost all of the plaintiffs' complaints involve the adoption of a regulatory definition for a term left undefined in the legislation, the arbitrary and capricious standard is the standard Shays and

62. *Id.*

63. *Id.* at 843 n.9.

64. Sidney A. Shapiro & Robert L. Glicksman, *Congress, the Supreme Court, and the Quiet Revolution in Administrative Law*, 1988 DUKE L.J. 819, 859 (1988).

65. The Hon. Lawrence H. Silberman, *Chevron—The Intersection of Law & Policy*, 58 GEO. WASH. L. REV. 821, 825 (1990).

66. *Chevron*, 467 U.S. at 843.

67. *Id.* at 843–844.

68. *Id.* at 844.

69. *Id.*

Meehan will have to meet to overturn any one of the FEC's soft money rules. This is the most narrow of the standards of review under the APA, and it grants courts "only the most limited scope of review."⁷⁰ When applying the standard, the court examines whether the agency has

relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, [or] offered an explanation of its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.⁷¹

Generally courts afford administrative agencies a great deal of deference in interpreting ambiguous statutory provisions.⁷² The Supreme Court has held that the FEC "is precisely the type of agency to which deference should presumptively be afforded."⁷³ The Court noted that "Congress has vested the Commission with 'primary and substantial responsibility for administering and enforcing the [FECA]', providing the agency with 'extensive rulemaking and adjudicative powers.'"⁷⁴ Moreover, the Court has held that the FEC's interpretation of a statutory term should be given deference if the term is undefined in the legislation.⁷⁵ Nonetheless, prior FEC regulations interpreting terms undefined by the statute have been struck down by the D.C. Circuit for being "arbitrary and capricious under the APA."⁷⁶ There is no formula for making this determination.⁷⁷ The scope of review is extremely narrow and the Commission will in all likelihood be given broad deference.⁷⁸ The outcome in *Shays-Meehan v. FEC* will turn on the outcome in *McConnell v. FEC*, and on the extent to which the court views the FEC's regulations and the justification provided for them as reasonable, consistent with the purpose of the Act, and within the discretion and authority of the Commission.⁷⁹

70. STEIN ET AL., 6 ADMINISTRATIVE LAW § 51.01 (2002).

71. *Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

72. *Chevron*, 467 U.S. at 866.

73. *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37 (1981).

74. *Id.*

75. *Id.*

76. *See, e.g., Chamber of Commerce v. FEC*, 69 F.3d 600, 606 (1995).

77. *See* STEIN ET AL., *supra* note 70.

78. *Id.* at § 51.03.

79. *See id.* at § 51.01.

V.
CONCLUSION

Regardless of whether the FEC's BCRA regulations are determined to be arbitrary and capricious or contrary to the purpose and intent of the Act, one thing is incontrovertible: The tradition of building loopholes into federal campaign finance law is alive and well.⁸⁰ Indeed, political parties, as well as federal candidates and officeholders, are already taking advantage of the new loopholes, and the soft money is flowing as thick as ever.⁸¹

Who is to blame for the loopholes in BCRA is not at all clear. It is impossible to ignore the irony that BCRA's four primary sponsors are suing to overturn regulations for a law that they themselves spent almost seven years working to enact. According to FEC Commissioner Scott Thomas, "[i]t is fair to say that in most instances when the FEC was confronted with the choice between an interpretation that would allow for greater restriction of soft money and an interpretation that would allow for less restriction of soft money, a majority of commissioners chose the latter."⁸² But according to Commissioner Bradley Smith, any loopholes are created by the legislation itself and not by the rules. He argues that BCRA's sponsors wanted the FEC to regulate what the Act fails to cover.⁸³

80. See generally GREEN, *supra* note 23, at 27–54, (discussing history of campaign finance).

81. Under another loophole challenged by Shays and Meehan the parties' entities will be able to raise and spend soft money after the effective date of BCRA, notwithstanding their establishment by, and affiliation with, the national party prior to that date. And just as the sponsors predicted they would, throughout the months leading up to BCRA's effective date, both the Republican and Democratic parties established, staffed, and positioned "shadow organizations designed to evade the intent of the law and continue the flow of unregulated 'soft money' into presidential and congressional campaigns." Thomas B. Edsall, *Campaign Money Finds New Conduits As Law Takes Effect*, WASH. POST, NOV. 5, 2002, at A2. For example, Progress for America is a new tax-exempt not-for-profit which uses soft money to fund pro-Republican issue ads and operates out of the offices of a company owned by Tony Feather, the political director of the Bush-Cheney 2000 campaign. Likewise, former Clinton aid and Democratic operative Harold Ickes is set to head a "presidential media" committee organized to raise and spend money from undisclosed sources and in undisclosed amounts on issue ads. If allowed to stand, the FEC's "safe harbor" provision will mean that these organizations will be allowed to continue to raise and spend unlimited amounts of soft money without disclosure. See, e.g., Thomas B. Edsall, *New Ways To Harness Soft Money In Works*, WASH. POST, Aug. 25, 2002, at A1.

82. Scott E. Thomas, *The 'Soft Money' and 'Issue Ad' Mess: How We Got Here, How Congress Responded, and What the FEC Is Doing*, at 12, at <http://www.fec.gov/members/thomas/thomasarticle06.pdf> (2002) (on file with the *New York University Journal of Legislation and Public Policy*).

83. Smith, *supra* note 54.

Whether the problem is with the implementation of BCRA or with the Act itself, it is clear that if the FEC's current regulations stay in force, millions of dollars in unlimited, unregulated, and undisclosed soft money will continue to influence federal elections. If this is indeed the future of campaign finance law under BCRA, then the Act will have failed to achieve its central purposes and much of the work of its sponsors will have been in vain.

