
ADMINISTRATIVE LAW — CAMPAIGN FINANCE REGULATION —
D.C. CIRCUIT AGAIN INVALIDATES FEC REGULATIONS IMPLE-
MENTING BIPARTISAN CAMPAIGN REFORM ACT. — *Shays v.*
FEC, 528 F.3d 914 (D.C. Cir. 2008).

In 2002, Congress passed the Bipartisan Campaign Reform Act of 2002¹ (BCRA), overhauling the campaign finance regulatory system. Following enactment, the Act was challenged on constitutional grounds,² and its implementation by the Federal Election Commission (FEC) was challenged by supporters and opponents of the Act, asserting that the implementing regulations were, respectively, too permissive and too restrictive.³ Recently, in *Shays v. FEC*,⁴ the D.C. Circuit adjudicated the latest challenge from BCRA's supporters. Facing regulations revised after initial versions were invalidated in an earlier suit,⁵ the court again struck them down. Although it criticized the FEC for not acting as BCRA required, the court could only invalidate the regulations, not replace them; it had to leave that affirmative task to the FEC. With the court's role limited to attempting to prompt action, ultimate resolution of the dispute depends on Congress's intent in passing BCRA and on the capacity of courts to influence agencies. In this case, the FEC's involvement and the limited nature of the remedy the court could provide make a lasting solution — the production of BCRA-compliant regulations — exceedingly unlikely.

BCRA was enacted in response to what had become a “‘meltdown’ of the campaign finance system.”⁶ Its aim, in the D.C. Circuit's words, was “to rid American politics of two perceived evils: the corrupting influence of large, unregulated donations called ‘soft money,’ and the use of ‘issue ads’ purportedly aimed at influencing people's policy views but actually directed at swaying their views of candidates.”⁷ Among its “dramatic changes” to the existing campaign finance system, it (1) “required the FEC to develop a new test for determining what advertisements count as ‘coordinated communications,’”⁸ (2) “barred state

¹ Pub. L. No. 107-155, 116 Stat. 81 (codified primarily in scattered sections of 2 and 47 U.S.C.).

² See *Davis v. FEC*, 128 S. Ct. 2759 (2008); *McConnell v. FEC*, 540 U.S. 93 (2003).

³ See *FEC v. Wis. Right to Life, Inc.*, 127 S. Ct. 2652 (2007) (too restrictive); *Shays v. FEC*, 414 F.3d 76, 79 (D.C. Cir. 2005) (too permissive).

⁴ 528 F.3d 914 (D.C. Cir. 2008).

⁵ See *Shays*, 414 F.3d at 79.

⁶ *Id.* at 918 (quoting *McConnell*, 540 U.S. at 129). This situation partly resulted from the decision in *Buckley v. Valeo*, 424 U.S. 1 (1976), which permitted funding of “issue ads” by organizations banned from making “expenditures” to federal candidates as long as the ads omitted “magic words” of explicit support. See *Shays*, 528 F.3d at 917 (quoting *McConnell*, 540 U.S. at 126).

⁷ *Shays*, 528 F.3d at 916.

⁸ *Id.* at 918 (quoting 2 U.S.C. § 441a note (2006)). Expenditures deemed “coordinated” are treated as contributions to a candidate or party. See *id.* at 920 (citing 2 U.S.C. § 441a(a)(7)(B)(i)).

parties from spending soft money on ‘federal election activity,’⁹ “including ‘get-out-the-vote activity’ and ‘voter registration activity,’”¹⁰ and (3) “prohibited federal candidates from soliciting soft money.”¹¹

Regulations implementing these changes were among those invalidated in the first round of litigation initiated against the FEC by BCRA’s House sponsors, after which the FEC revised its regulations in each area.¹² The most substantial changes were made to the test defining “coordinated communications.” First, in keeping with the invalidated rule, a new “content standard” limited the ads deemed “coordinated” because of their clear reference to a federal candidate to ads making such a reference that occur within a 120-day window of an election for presidential and vice-presidential candidates, but it shortened to ninety days the window for congressional candidates.¹³ Outside these windows, ads had to contain “magic words” expressly advocating a candidate’s election or defeat, or use official campaign materials, in order to be treated as “coordinated communications.”¹⁴ Second, the “conduct standard” governing vendors or former employees of a campaign or political party — which had originally treated ads created by such actors as “coordinated” unless the actors refrained from using or sharing “‘material’ information about ‘campaign plans, projects, activities, or needs’” in the ads’ creation for the entire election cycle — was revised to limit the ban to the 120-day period after a covered person stopped working for a campaign or party.¹⁵ A new “firewall safe harbor” provision also allowed an organization working for both a campaign or party and an outside group to avoid meeting the “conduct standard” by creating an appropriate firewall.¹⁶ In addition to the “coordinated communications” revisions, the FEC also repromulgated in essentially the same form “federal election activity” regulations initially rejected on procedural grounds.¹⁷ These regulations defined “get-out-the-vote activity” and “voter registration activity,” limiting them to actions in which parties use individualized means to assist people in registering or voting.¹⁸ Finally, the FEC adopted a

⁹ *Id.* (quoting 2 U.S.C. § 441i(b)(1)).

¹⁰ *Id.* (quoting 2 U.S.C. § 431(20)(A)).

¹¹ *Id.* (citing 2 U.S.C. § 441(e)).

¹² *Shays v. FEC*, 508 F. Supp. 2d 10, 18 (D.D.C. 2007).

¹³ *See Shays*, 528 F.3d at 921–22.

¹⁴ *See id.* The previous regulations had a 120-day window in both cases and were struck down due to a failure by the FEC to justify either the window lengths or the lax standard applied outside the windows. *Id.* at 921.

¹⁵ *See id.* at 928 (quoting 11 C.F.R. §§ 109.21(d)(4)–(5) (2003)).

¹⁶ *See id.* at 929. The firewall had to be a written policy designed to stop the flow of information between those working for each group, and there had to be no indication that material information had been conveyed between them. *See id.*

¹⁷ *See id.* at 931.

¹⁸ *Id.* at 931–32.

regulation that allowed federal candidates to solicit soft money at state party fundraisers.¹⁹

BCRA's House sponsors again brought suit, contending that each of these regulations was invalid as arbitrary and capricious action or as an unreasonable interpretation of the statute,²⁰ and that they together represented, on the FEC's part, a "continuing failure to promulgate lawful regulations."²¹ The district court struck down the "coordinated communications" rules and definitions of "get-out-the-vote activity" and "voter registration activity."²² Although the court noted some evidence justifying the "content standard" window lengths, it found the regulation invalid because the FEC had not justified the lax "express advocacy" standard used outside the windows.²³ The court found that the FEC had also failed to justify the change in the "conduct standard" to a 120-day limit,²⁴ and struck down the "safe harbor" rule for both its lack of guidance in creating a proper firewall and the FEC's failure to explain the shift from a previous rejection of a similar proposal.²⁵ It invalidated the "get-out-the-vote activity" and "voter registration activity" definitions because the FEC gave "no assurance" that the definitions covered all the activity that Congress could regulate constitutionally and that it intended to reach through BCRA.²⁶ Only the rule allowing federal candidates to solicit soft money at state party fundraisers survived, as, despite "continued suspicion" that the interpretation contravened Congress's intent, the district court held that the FEC had justified the rule.²⁷ Both parties appealed.²⁸

The D.C. Circuit affirmed in part and reversed in part. Writing for the panel, Judge Tatel²⁹ held all three regulations invalid, save for the "firewall safe harbor" provision of the "coordinated communications" regulations.³⁰ Beginning with the "coordinated communications" regulations, Judge Tatel recognized that Congress had provided the FEC with little direction in creating a new test, beyond that it could not require formal agreement.³¹ While "the vast majority of advertis-

¹⁹ See *id.* at 933.

²⁰ See *Shays v. FEC*, 508 F. Supp. 2d 10, 30–32 (D.D.C. 2007).

²¹ *Id.* at 18 (quoting Complaint at 2, *Shays*, 508 F. Supp. 2d 10 (D.D.C. 2007) (No. 06-CV-1247), available at <http://www.campaignlegalcenter.org/attachments/1752.pdf>).

²² See *id.* at 71.

²³ *Id.* at 46–47.

²⁴ *Id.* at 52.

²⁵ *Id.* at 54–56.

²⁶ *Id.* at 66, 68–69. The court also found that the FEC failed to address whether actions falling in a gray area may still "confer substantial benefits on federal candidates." *Id.* at 69.

²⁷ See *id.* at 61–62.

²⁸ See *Shays*, 528 F.3d at 917.

²⁹ Judge Tatel was joined by Judges Garland and Griffith.

³⁰ *Shays*, 528 F.3d at 917.

³¹ See *id.* at 920.

ing by candidates occurs in the 90/120-day windows,” justifying the FEC’s choice of window lengths, “a significant number of ads” run before the windows, and “very few ads contain magic words.”³² The express advocacy standard outside the windows “provide[d] a clear roadmap for” evading BCRA restrictions, producing “the exact perception and possibility of corruption Congress sought to stamp out.”³³ Since pre-window ads without “magic words” still clearly could be intended to influence elections, BCRA required a rational standard for determining which pre-window ads should be covered.³⁴

The court then considered the “conduct standard” revisions. It affirmed the invalidation of the new 120-day limitation on the coverage of common vendors or former campaign employees, because the FEC had provided no support for the line drawn and because some information these parties could share could remain material and permit coordination past this period.³⁵ The court did uphold the “firewall safe harbor” provision, deferring to the FEC’s contention that groups themselves should create their firewalls.³⁶ Judge Tatel argued that Congress had intended the FEC to have discretion on the specificity of its rules and that the FEC’s experience approving a firewall created by the EMILY’s List organization justified its shift in position.³⁷

The court next struck down the FEC’s definitions of “get-out-the-vote” and “voter registration activity,” holding that they created impermissible loopholes.³⁸ The definitions regulated only individualized assistance in registration or voting activity, leaving unregulated mere encouragement to register or vote and making an activity less likely to be covered the more people it affected.³⁹ The court stated that these sizeable loopholes might be invalid under *Chevron*⁴⁰ Step One⁴¹ and that, since they were “directly counter” to BCRA’s purpose, they were certainly an unreasonable interpretation of the Act.⁴²

The last FEC regulation permitted federal candidates to solicit soft money at state party fundraisers. While BCRA generally banned soft money solicitation, it allowed federal candidates to “attend, speak, or be a featured guest at a fundraising event for a State, district, or local

³² *Id.* at 924.

³³ *Id.* at 925.

³⁴ *Id.* at 926.

³⁵ *Id.* at 928–29 (citing a “candidate’s donor lists, mailing lists, and long-term strategic plan”).

³⁶ *See id.* at 930.

³⁷ *See id.*

³⁸ *Id.* at 930–31.

³⁹ *Id.* at 931–32.

⁴⁰ *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

⁴¹ The first step of the familiar *Chevron* test asks whether “Congress has directly spoken to the precise question at issue,” leaving no ambiguity in the statute for an agency to interpret. *Id.* at 842.

⁴² *Shays*, 528 F.3d at 932.

committee of a political party.”⁴³ The FEC argued that this clause created an ambiguity allowing it to issue a rule permitting soft money solicitation at these fundraisers.⁴⁴ The court invalidated the rule on *Chevron* Step One grounds, arguing that Congress knew how to create an explicit exception, as it had done elsewhere in the same section, and should not be thought to have created another exception implicitly.⁴⁵

In this latest iteration of *Shays v. FEC*, the D.C. Circuit delivered another harsh rebuke to the FEC, invalidating all but one of the challenged regulations. However, the result leaves an unsettled regulatory landscape rife with potential for circumvention of BCRA’s restrictions. Indeed, the failure of the court’s remedy to truly resolve the dispute in this case indicates that *Shays*, while a theoretically unproblematic review of agency action, poses challenges similar to a review of agency inaction, placing the *Shays* court in a position of attempting to nudge the agency into appropriate action. However, agency compliance following *Shays* is even less likely than in most agency inaction cases, given that the agency is the FEC and the available remedy is so limited. Without additional action from Congress, the courts may simply be unable to effectively oversee the allegedly shirking agency.

The fundamental issue in *Shays* is the FEC’s “continuing failure to promulgate lawful regulations,”⁴⁶ a failure far exceeding statutory deadlines for BCRA’s implementation.⁴⁷ Thus, *Shays*, though a review of rulemaking, in effect approximates a review of inaction, making the remedy of “setting aside” offending regulations insufficient to solve the core problem of “agency underreach.”⁴⁸ Two circuit court decisions later, the real effect of striking down the regulations seems not to be their replacement with rules consistent with the Act’s purpose, the true goal sought by the *Shays* plaintiffs, but rather unending alternation of notice-and-comment rulemaking and litigation.

This foot-dragging takes on even greater significance in view of the court’s expansive interpretation of BCRA and the nature of campaign finance regulation. First, the court viewed BCRA as instituting an extremely reformist regulatory regime, rather than taking incremental steps towards that goal. The opinion is grounded in an understanding

⁴³ 2 U.S.C. § 441i(e)(3) (2006).

⁴⁴ See *Shays*, 528 F.3d at 933.

⁴⁵ *Id.* at 933–34.

⁴⁶ *Shays v. FEC*, 508 F. Supp. 2d 10, 18 (D.D.C. 2007) (quoting Complaint, *supra* note 21, at 2).

⁴⁷ See 2 U.S.C. § 431 note (2006) (creating deadlines of ninety days for FEC implementation of BCRA’s soft money provisions and 270 days for all other provisions).

⁴⁸ For a discussion of Supreme Court cases involving agency underreach concerns, see Jody Freeman & Adrian Vermeule, *Massachusetts v. EPA: From Politics to Expertise*, 2007 SUP. CT. REV. 51, 77 (citing *Massachusetts v. EPA*, 127 S. Ct. 1438 (2007)); *id.* at 89 (citing *Motor Vehicles Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983)).

of BCRA's purpose as eliminating the "evils" of soft money and sham issue advertising.⁴⁹ This view requires the FEC not just to take some steps towards reform but to enforce a regulatory scheme "eliminating" — rather than, say, minimizing or reducing — these "evils." Second, the "hydraulic" nature of campaign finance regulation,⁵⁰ in which "[m]oney, like water, will always find an outlet,"⁵¹ means that, in order to be effective, regulation must be comprehensive.⁵² Any gaps or "outlets" in the regulatory scheme would cause BCRA not to forestall the flow of unregulated contributions but to redirect the flow into equally problematic channels, threatening the most basic goals of the Act.

An effective response, then, depends on a court not just striking down regulations but also nudging the agency into action, clearing away political pressures encouraging delay or shirking from full implementation of the statutory scheme.⁵³ The *Shays* court thus required that limits on the FEC's regulatory reach be based not simply on political concerns over, for example, avoiding "chilling" free speech, but also on data rationally separating ads meant to influence elections from those which are not so meant⁵⁴ or separating information still material to campaigns from that which is not.⁵⁵ By castigating the agency for failing to justify the loopholes it created, the court pressured the FEC to respond to empirically based considerations and not to its own reluctance to enforce the Act vigorously.

Unfortunately, the effectiveness of the attempt to nudge the agency depends on conditions that are not borne out in *Shays*. First, to be successful, this approach may require or be aided by an agency structure similar to that of the EPA, which is divided between political appointees and more technically minded career bureaucrats.⁵⁶ In that context, court intervention designed to clear away political pressures may have a better chance at spurring action consistent with a statute by a part of the agency thought to be ready to act if helped in this way.

⁴⁹ See *Shays*, 528 F.3d at 916. The interpretation is in line with that of the Supreme Court, see *McConnell v. FEC*, 540 U.S. 93, 132 (2003), as well as the words of the Act's sponsors, see, e.g., John McCain, *Reclaiming Our Democracy: The Way Forward*, 3 ELECTION L.J. 115, 115 (2004).

⁵⁰ See Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705, 1708, 1715–16 (1999).

⁵¹ *Shays*, 528 F.3d at 927 (alteration in original) (quoting *McConnell*, 540 U.S. at 224).

⁵² Congressional recognition of this need may explain the short deadlines for implementation included in the Act. See 2 U.S.C. § 431 note. Of course, even statutory deadlines are frequently missed by the implementing agency. See Jacob E. Gersen & Anne Joseph O'Connell, *Deadlines in Administrative Law*, 156 U. PA. L. REV. 923, 949 n.84 (2008).

⁵³ Cf. Freeman & Vermeule, *supra* note 48, at 52 (explaining the recent decision in *Massachusetts v. EPA*, 127 S. Ct. 1438 (2007), as "expertise-forcing," or "the attempt by courts to ensure that agencies exercise expert judgment free from outside political pressures").

⁵⁴ See *Shays*, 528 F.3d at 925–28.

⁵⁵ See *id.* at 928–29.

⁵⁶ See Freeman & Vermeule, *supra* note 48, at 55.

However, the FEC's structure — three commissioners from each party, a requirement of four votes to act, a selection system essentially run by each party's congressional leaders, and tight congressional control over the budget⁵⁷ — does not present the same opportunity. There is no internal split whose balance a court could shift through condemnation of FEC recalcitrance and thus no clear way to free the FEC from the domination of the politicians it is meant to regulate.

Furthermore, the *Shays* court based its opinion on a strong view of Congress's intent in passing BCRA, a view that, while consistent with its sponsors' espoused view, did not accord with Congress's choice of the FEC to administer the new regime. In constructing a new campaign finance regime, BCRA's enactors knew of the FEC's ineffectiveness,⁵⁸ and indeed, that ineffectiveness led some commentators to doubt the likelihood of success for the new regime soon after the Act's passing.⁵⁹ In fact, the choice by Congress to delegate certain decisions to the FEC was itself a part of the bargaining process in convincing members to support the Act.⁶⁰ The court's confident tone with respect to BCRA's purpose thus gives an impression of unified congressional intent belied by the fact that the seeds of regulatory underreach formed an integral part of Congress's initial choice of regulator.⁶¹

For the court, a truly effective remedy would have required a more dramatic reimagining of the problem and of the particular mix of agency action and inaction presented by the FEC in *Shays*. The plaintiffs initially proposed such an approach in the district court, asking the court to impose a thirty-day deadline for the FEC to commence new rulemaking procedures and to retain jurisdiction to ensure "timely

⁵⁷ See Donald J. Simon, *Current Regulation and Future Challenges for Campaign Financing in the United States*, 3 ELECTION L.J. 474, 485–86 (2004).

⁵⁸ See McCain, *supra* note 49, at 118 (claiming that the FEC was "a main agent of the campaign finance law's unraveling" in the first place, creating the need for BCRA). The FEC's ineffectiveness extends beyond these BCRA regulations to include a general paralysis, a product of its "apparent capture by incumbent politicians." Lloyd H. Mayer, *The Much Maligned 527 and Institutional Choice*, 87 B.U. L. REV. 625, 686 (2007). Indeed, at the time of the 2008 *Shays* decision, the FEC had only two members, well short of its required quorum of four. See Editorial, *The Campaign Monitor Goes Missing*, N.Y. TIMES, Mar. 26, 2008, at A22.

⁵⁹ See, e.g., Editorial, *The Dog that Never Barks*, WASH. POST, Nov. 26, 2002, at A28 ("[I]t is hard to have confidence that the FEC will respond aggressively to a naked effort to circumvent the core purpose of the reform law.").

⁶⁰ See 147 CONG. REC. 5140 (2001) (statement of Sen. Feingold) (responding to difficulties in crafting a new coordinated communications test by supporting an amendment that "gives some guidance to the FEC as to what issues it should address, without actually dictating the result").

⁶¹ That the root causes of the problem the court faces stem from the act of delegation itself suggests, as some BCRA supporters have recognized, that an ultimate solution will require congressional action fundamentally reforming the FEC. See, e.g., Posting of J. Gerald Hebert to Campaign Legal Center Blog, http://clcblog.org/blog_item-230.html (June 13, 2008).

and sufficient compliance.”⁶² The proposed remedies thus largely mirrored those potentially available in a case in which an agency has unreasonably failed to meet a statutory deadline.⁶³ The district court rejected this request, stating that it did not have the same remedial freedom in the agency action context.⁶⁴ Strangely, then, the agency action gave the court less freedom in ensuring a faithful implementation of the Act than the court would have had if the agency had taken no action at all, even though there seems to be no reason to grant the agency greater discretion in this context.⁶⁵ Without any “hammer provision” requiring imposition of a certain rule in the absence of agency action,⁶⁶ the D.C. Circuit could only remand to the agency once more, leaving the current rules in place in the interim.⁶⁷

The D.C. Circuit in *Shays v. FEC* thus confronted a pattern of agency underreach. In response, the court attempted to shape the contours of the agency’s subsequent decisionmaking to prompt compliance. Limitations on BCRA’s reach could be authorized only to the extent they rationally separated out covered activity from uncovered; circumvention of the Act out of policy-focused misgivings with campaign finance regulation would not be allowed. However, this approach seems unlikely to work when faced with an FEC that is strongly responsive to political pressures and a Congress that may not second the court’s vision of BCRA’s purpose. Absent the adoption of a decidedly more intrusive remedial role for courts in this setting of mixed agency action and inaction, an ultimate resolution of the issue may be out of reach.

⁶² Memorandum in Support of Plaintiffs’ Motion for Summary Judgment at 59 & n.43, *Shays v. FEC*, 508 F. Supp. 2d 10 (D.D.C. 2007) (No. 06-CV-1247), 2006 WL 4016179.

⁶³ See, e.g., M. Elizabeth Magill, *Congressional Control Over Agency Rulemaking: The Nutrition Labeling and Education Act’s Hammer Provisions*, 50 FOOD & DRUG L.J. 149, 157–58 (1995); see also Gersen & O’Connell, *supra* note 52, at 965–66.

⁶⁴ See *Shays*, 508 F. Supp. 2d at 70 (“[U]nder settled principles of administrative law, when a court reviewing agency action determines that an agency made an error of law, the court’s inquiry is at an end: the case must be remanded to the agency for further action consistent with the corrected legal standards.” (quoting *Shays v. FEC*, 337 F. Supp. 2d 28, 130 (D.D.C. 2004) (internal quotation marks omitted))).

⁶⁵ See Eric Biber, *Two Sides of the Same Coin: Judicial Review of Administrative Agency Action and Inaction*, 26 VA. ENVTL. L.J. 461, 468–69 (2008) (arguing for review of agency action balancing deference to agency resource allocation with a desire to uphold statutory supremacy, with statutory supremacy concerns greatest when Congress has set a deadline for action).

⁶⁶ See, e.g., Magill, *supra* note 63, at 154.

⁶⁷ The court followed the common practice in the D.C. Circuit of remanding without vacation. See, e.g., Ronald M. Levin, “Vacation” at Sea: *Judicial Remedies and Equitable Discretion in Administrative Law*, 53 DUKE L.J. 291, 295 (2003). While the court could have vacated the regulations that it had found invalid, the absence of any regulations in the three areas would have created even larger loopholes pending the promulgation of new regulations, without necessarily spurring the recalcitrant FEC to swifter action.