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Campaign Finance Reform - Legal Issues

Campaign Finance – Legal Issues

Paul J. Weinstein Jr. 07/31/97 11:18:41 AM

Record Type: Record

To: Rahm I. Emanuel/WHO/EOP, Michael Waldman/WHO/EOP, Peter G. Jacoby/WHO/EOP, William P. Marshall/WHO/EOP

cc: Michelle Crisci/WHO/EOP, Elena Kagan/OPD/EOP, Laura K. Capps/WHO/EOP
Subject: City of Cincinnati Resolution

Correspondence recently passed on to me a resolution from the City of Cincinnati. This resolution requests that the President and the Justice Department to join in support of their position in the *Kruse* case. We obviously need to respond. The question is, how aggressive can and should we be in light of Justice's concern about indentifying a case which will maximize our chance for sucess in overtuning *Buckley v. Valeo*? The complete transcript of the resolution is below:

Resolution no. 134-1997

URGING the President of the United States and the Attorney General of the United States to formally join with the City of Cincinnati and thirty three States, the Territory of Guam, and other interested groups, in support of the City's position on campaign finance reform and spending limits.

WHEREAS, recent news reports indicate that the President of the United States, the Attorney General are seeking a case through which to challenge the campaign spending limits, previously stricken down by the U.S. Supreme Court in the case of *Buckley v. Valeo*, in the interests of promoting meaningful campaign finance reform; and

WHEREAS, these reports indicate that the President and Attorney General are focusing on two Ohio cases, one of which is the case of *Kruse, et. al. v. The City of Cincinnati*, challenging Ordinance No. 240-1995 passed by Council to impose campaign spending limits on candidates for City Council, which case is currently pending in the United States Court of Appeals for the Sixth Circuit; and

WHEREAS, the *Kruse*case has drawn the interest of attorneys general and secretaries of state across the Country, many of whom have urged that the courts uphold spending limits as a way to reform the means of financing political campaigns; and

WHEREAS, Council of the City of Cincinnati feels that the participation of the Justice Department in these efforts would provide impressive support and lend additional credibility to these already widely supported efforts; no, therefore,

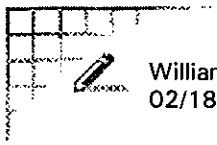
BE IT RESOLVED by Council of the City of Cincinnati, State of Ohio:

Section 1. That the President of the United States and the Attorney General of the United States are hereby strongly urged to formally join with the City of Cincinnati and thirty three States, the Territory of Guam, and other interested groups, in support of the City's position on campaign finance reform and spending limits as expressed in the case of Kruse, et. al. v. The City of Cincinnati.

Section 2. That this Resolution be spread upon the minutes of Council and that copies heof be sent

to the Office of the President of the United States and the Office of the Attorney General of the United States.

CFR - legal



William P. Marshall
02/18/97 02:01:30 PM

Record Type: Record

To: Paul J. Weinstein Jr./OPD/EOP

cc: Elena Kagan/OPD/EOP, Peter G. Jacoby/WHO/EOP
Subject: Campaign finance

Paul,

As I indicated to you, OLC is currently reviewing whether limits on soft money expenditures in federal campaigns can be enacted through FEC rulemaking. I have also asked them to take examine whether the FEC, through rulemaking, can restrict foreign contributions (unlikely) or streamline its own enforcement by eliminating reason to believe requirements and similar procedural hurdles to effective enforcement (also unlikely).

You should also be aware that Justice is in the early stages of determining whether to seek Supreme Court review on two cases addressing campaign reform issues. The first deals with the definition of 'express advocacy' under the statute and the second with the meaning of 'political committee.' Both cases could have significant implications for our reform efforts.

out these considerations in its second *Chicago Central* decision, the Commission noted that:

> (1) the traffic at issue ... involv[es] the movement of cars solely for the assembly or disassembly of trains; (2) the cars ... come to rest before and after movement to and from ConAgra's plant; and (3) the outgoing assembled trains ... or incoming trains to be disassembled ... [are] composed of cars serving other shippers and destinations as well as cars serving ConAgra's plant.

Chicago Central II at 3–4, 1995 WL 294224, at *3. These findings are supported by the text of the Union Pacific–Chicago Central agreement and by the affidavits in the record from Union Pacific employees.

The Union argues that Chicago Central's operation over Union Pacific's track, though called switching, is really part of through movement because it is necessary to get the cars from their starting point to their destination. In support of this argument, the Union relies on *Nicholson*, where we defined switching by contrasting it to through movement:

> [T]rack segments which are intended to be used to carry through trains between points of shipment and delivery, particularly those segments which extend a railroad's service into new territory, must be approved by the Commission pursuant to section 10901(a). On the other hand, track segments which are merely incidental, and not required for, a railroad's service between points of shipment and delivery are exempted from the requirements of section 10901(a) by section 10907(b)(1).

Nicholson, 711 F.2d at 368. *Nicholson* does not support the Union's argument. For one thing, because *Nicholson* concerned a side yard used only for assembling and disassembling trains, we had no occasion to address the type of switching operations involved in this case—switching used to move cars between their point of connection with long-haul trains and their ultimate place of loading or unloading. Moreover, Chicago Central does not use the tracks involved in this case to "carry through trains," *Id.* at 368; Chicago Central's through trains begin or terminate at Council Bluffs.

The Fifth Circuit's decision in *New Orleans Terminal*, also relied on by the Union, is equally distinguishable. There, the tracks at issue connected major freight lines on opposite sides of the city, and their predominant use was for the uninterrupted passage of long-haul trains. *New Orleans Terminal*, 366 F.2d at 165–66. That situation is quite different from this case. Chicago Central's long-haul trains begin or end their journeys in Council Bluffs; the operations at issue take place before or after those journeys.

[12] We thus find nothing in *Nicholson* or *New Orleans Terminal* inconsistent with the Commission's characterization of the operations at issue in *Chicago Central* as switching rather than through movement. Those operations involve the discrete movement of groups of cars for assembling with or disassembling from entire trains; the movements take place largely, if not exclusively, within a terminal area; and they occur before or after entire trains make their continuous long-haul journeys between terminal points. Moreover, the Commission's view accords with its own longstanding classification of switching movements. *See Sioux City Terminal Ry. Switching*, 241 I.C.C. 53, 90 (1940) (footnotes omitted) (defining switching, in relevant part, as "all movements of railway cars and locomotives in yards or at way stations, except movements in road trains running between stations"). Although Chicago Central's operation over Union Pacific's track is, in a literal sense, necessary to move the cars from their starting point to their destination, the operation is not part of a train's through movement, but instead is an operation taking place just before or just after the train's through passage. *Cf. Illinois Commerce Comm'n v. ICC*, 779 F.2d 1270, 1273 (7th Cir.1985) (making similar distinction under spur-track exception to Commission jurisdiction).

In *Iowa Interstate*, the Commission followed the same approach, characterizing the trackage-rights agreement as allowing only for switching operations:

> ... IAIS uses switch engines and crews to move traffic to and from UP's Omaha intermodal ramp for loading or unloading. IAIS's switching jobs are functionally separate and distinct from its road crew operations, and the flatcars come to rest at both the Council Bluffs yards and the Omaha intermodal ramp. For operational and tariff purposes, the movement is solely within the Omaha/Council Bluffs switching terminal.

Iowa Interstate at 3, 1995 WL 646763, at *3 (footnote omitted). The Commission's factual claims are amply supported by the record. As in *Chicago Central*, the essential element justifying the denial of jurisdiction is the Commission's finding that the transfer of intermodal cars between the Union Pacific ramp and Iowa Interstate's yard is not part of a continuous through movement. Rather, the transfer of cars, discrete from through movement, enables Iowa Interstate to assemble those cars for through shipment from Council Bluffs to Chicago or to disassemble those cars from trains after the trains have made the through movement from Chicago to Council Bluffs.

IV

Finding that the Unions failed to establish that any of their members was threatened with constitutionally sufficient injury in the *Richmond Belt* case, we dismiss that petition for lack of standing. Although the Locomotive Engineers' Union does have standing in the *Chicago Central* and *Iowa Interstate* cases, we deny those petitions on the merits.

So ordered.

James E. AKINS, et al., Appellants

v.

FEDERAL ELECTION COMMISSION, Appellee

No. 94–5088.

United States Court of Appeals, District of Columbia Circuit.

Argued May 8, 1996.

Decided Dec. 6, 1996.

As Amended Jan. 3, 1997.

Plaintiffs sought review of Federal Election Commission (FEC) decision dismissing their administrative complaint which alleged that particular organization was "political committee" under Federal Election Campaign Act (FECA) and thus should have been subject to registration and reporting requirements. The United States District Court for the District of Columbia, June L. Green, J., granted summary judgment for FEC, and plaintiffs appealed. After remanding for clarification, 1992 WL 183209, the Court of Appeals, Silberman, Circuit Judge, held, on rehearing that: (1) plaintiffs had standing as affected voters; (2) plaintiffs satisfied prudential standing concerns; (3) courts were not required to defer to agency interpretations of judicial opinions; and (4) organization could be deemed "political committee" even if its major purpose was not campaign related activity.

Reversed.

Sentelle, Circuit Judge, filed dissenting opinion in which Karen LeCraft Henderson, Circuit Judge, joined.

Opinion, 66 F.3d 348, vacated.

1. Elections ⇐317.5

Lobbyists had standing, as affected voters, to challenge Federal Election Commission (FEC) decision dismissing their administrative complaint which alleged that particular organization was a political committee under Federal Election Campaign Act (FECA) and thus should have been subject to registration and reporting requirements; voter deprived of useful infor-

mation at time he or she votes suffers particularized injury in some respects unique to that voter, FEC's decision had causal connection to alleged injury, and injury was sufficiently redressable. U.S.C.A. Const. Art. 3, § 1 et seq.; Federal Election Campaign Act of 1971, §§ 301–406, as amended, 2 U.S.C.A. §§ 431–455.

2. Federal Civil Procedure ⇐103.2

Under theory of "informational standing" party may be entitled to sue in federal court to force government to provide information to public, and thus to party, if government's failure to provide or cause others to provide that particular information specially affects that party, but such injury is narrowly defined, as failure must impinge on plaintiff's daily operations or make normal operations infeasible in order to create injury-in-fact.

See publication Words and Phrases for other judicial constructions and definitions.

3. Constitutional Law ⇐55
Federal Courts ⇐1.1

Although Congress may not "create" Article III injury that federal judiciary would not recognize, anymore than Congress could amend Constitution, Congress can create legal right, and, typically, cause of action to protect that right, the interference with which will create Article III injury, and such legal right can be given to all persons in country. U.S.C.A. Const. Art. 3, § 1 et seq.

4. Federal Civil Procedure ⇐103.2

Where Congress creates legal right, and cause of action to protect that right, the interference with which will create Article III injury, any person whose individual right has been frustrated or interfered with has standing to sue, even though all other persons have same right, without claim being regarded as generalized grievance. U.S.C.A. Const. Art. 3, § 1 et seq.

5. Elections ⇐317.4

Mere denial of attempt to gain information does not create cognizable injury under Federal Election Campaign Act (FECA), which subjects political committees to certain reporting requirements; individual must file complaint with Federal Election Commission (FEC), which is provided authority to enforce requirement that political committees report their activities, and only parties aggrieved by dismissal of complaint are entitled to challenge in court FEC's refusal to enforce. Federal Election Campaign Act of 1971, §§ 301–406, as amended, 2 U.S.C.A. §§ 431–455.

6. Health and Environment ⇐25.15(4.1)

To show standing under National Environmental Policy Act, which does not provide private right of action to enforce environmental impact statement (EIS) procedural requirements, litigant must allege that he will be harmed by underlying agency action contemplated, and that if forced to prepare and consider EIS, agency might act differently. National Environmental Policy Act of 1969, § 102, 42 U.S.C.A. § 4332.

7. Elections ⇐317.5

Lobbyists who challenged Federal Election Commission (FEC) decision dismissing their administrative complaint, which alleged that particular organization was a political committee under Federal Election Campaign Act (FECA) and thus should have been subject to registration and reporting requirements, were sufficiently aggrieved by FEC's decision to satisfy prudential standing requirements in accordance with FECA; lobbyists were registered voters who filed complaint that was dismissed, and voters were primary beneficiaries of FECA's requirements. Federal Election Campaign Act of 1971, § 309(a)(8)(A), as amended, 2 U.S.C.A. § 437g(a)(8)(A).

8. Federal Civil Procedure ⇐103.2

Where Congress has created right to seek judicial review, someone must be deemed to have prudential standing to seek such review, since it cannot be that Congress intended that right should extend to no one.

9. Administrative Law and Procedure ⇐783, 796

Courts, which are supposed experts in analyzing judicial decisions, are not required to defer to agency interpretations of Supreme Court's opinions, especially where Supreme Court precedent is based on constitutional concerns, which is area of presumed judicial competence.

10. Elections ⇐317.4

Organization which lobbied for military and economic aid to foreign country could be deemed "political committee" subject to registration and reporting requirements under Federal Election Campaign Act (FECA), where organization made campaign contributions or coordinated expenditures exceeding statutory limits under FECA, even if organization's major purpose was not campaign-related activity; Supreme Court precedent imposing "major purpose" requirement was applicable only where independent expenditures not connected to any candidate were involved, as it was purpose of organization's disbursements, not of organization itself, that was relevant. Federal Election Campaign Act of 1971, § 301(4)(A), as amended, 2 U.S.C.A. § 431(4)(A).

See publication Words and Phrases for other judicial constructions and definitions.

11. Elections ⇐317.5

When organization controlled by candidate or major purpose of which is election related makes disbursements, those disbursements will presumptively be "expenditures" within meaning of Federal Election Campaign Act (FECA) provisions subjecting organizations that make certain amount of expenditures to registration and reporting requirements. Federal Election Campaign Act of 1971, §§ 301(4)(A), 304(e), as amended, 2 U.S.C.A. §§ 431(4)(A), 434(e).

See publication Words and Phrases for other judicial constructions and definitions.

12. Elections ⇐317.5

Decisions of Federal Election Commission (FEC) on how and to what extent to investigate complaint, while reviewable, command substantial deference.

Appeal from the United States District Court for the District of Columbia (92cv1864).

Daniel M. Schember, Washington, DC, argued the cause and filed the brief for appellants.

Richard B. Bader, Associate General Counsel, Federal Election Commission, Washington, DC, argued the cause for appellee, with whom Lawrence P. Noble, General Counsel, and David B. Kolker, Attorney, were on the brief. Vivien Clair, Attorney, Washington, DC, entered an appearance.

Before: EDWARDS, Chief Judge, WALD, SILBERMAN, WILLIAMS, GINSBURG, SENTELLE, HENDERSON, RANDOLPH, ROGERS, and TATEL, Circuit Judges, and BUCKLEY,* Senior Circuit Judge.

Opinion for the Court filed by Circuit Judge SILBERMAN.

Dissenting opinion filed by Circuit Judge SENTELLE.

SILBERMAN, Circuit Judge:

Appellants challenge the district court's grant of summary judgment. The court affirmed the Federal Election Commission's dismissal of appellants' administrative complaint, which had alleged that the American Israel Public Affairs Committee (AIPAC) was a "political committee" subject to relevant reporting and disclosure requirements and contribution and expenditure limits of the Federal Election Campaign Act (FECA), 2 U.S.C. §§ 431–55 (1994 & Supp.1996). The court thought reasonable the Commission's definition of "political committee" as including only organizations that, in addition to meeting the statutory $1,000 expenditure threshold, have as their major purpose campaign related activity. We reverse.

I.

James E. Akins, Richard Curtiss, Paul Findley, Robert J. Hanks, Andrew Killgore, and Orin Parker (collectively appellants) are former ambassadors, congressmen, or government officials. They are registered vot-

* At the time of *en banc* argument, Judge Buckley was a circuit judge in active service. He assumed senior status on September 1, 1996.

ers and "politically active persons who ... oppose AIPAC views on U.S. foreign policy in the Middle East" and who "compete with AIPAC in seeking to influence the views and actions of members of Congress, executive policymakers, and the public." Paul Findley is a former congressman from Illinois "widely perceived to be friendly to the Arab cause"; AIPAC is alleged to have helped to defeat him in the 1982 congressional election. AIPAC is an incorporated, tax-exempt organization with approximately 50,000 supporters nationwide and a budget of about $10 million (as of 1989) that lobbies Congress and the executive branch for military and economic aid to Israel and generally encourages close relations with Israel.

Appellants filed a complaint with the FEC in 1989, alleging *inter alia* that AIPAC had made campaign contributions and expenditures in excess of $1,000 and was therefore a political committee. A political committee is defined as "any committee, club, association, or other group of persons which receives contributions aggregating in excess of $1,000 during a calendar year or which makes *expenditures* aggregating in excess of $1,000 during a calendar year." 2 U.S.C. § 431(4)(A) (emphasis added). "Expenditure" is defined in turn as "any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election." 2 U.S.C. § 431(9)(A)(i). Expenditures have been classified by caselaw and FEC interpretation to include three categories: independent expenditures not connected to any candidate, coordinated expenditures made in cooperation or consultation with a candidate, and direct contributions to a candidate. Once designated a political committee, an organization must file periodic reports disclosing all receipts and disbursements and identifying each individual to whom it gives or from whom it receives more than $200. *See* 2 U.S.C. § 434(b)(2)-(5). And it is prohibited from contributing more than $1,000 to any candidate. *See* 2 U.S.C. § 441a(a). Appellants claimed that AIPAC met the statutory definition of political committee because, for example, it used full-time staff to meet with nearly every candidate for federal office, systematically disseminated campaign literature including candidates' position papers, and conducted regular meetings and phone calls with AIPAC supporters encouraging them to provide aid to particular candidates. Since these activities cost more than $1,000, AIPAC's failure to register as a political committee and comply with the requirements was a violation of the Act. *See* 2 U.S.C. §§ 433; 434(a)(1), (b); 441a(1), (2).

The General Counsel investigated the allegations and issued a report in 1992, making recommendations that were subsequently adopted by the Commission. The Commission determined that AIPAC likely had made campaign contributions exceeding the $1,000 threshold, but concluded that there was not probable cause to believe AIPAC was a political committee because its campaign-related activities were only a small portion of its overall activities and not its major purpose. The campaign activities were only conducted in support of its lobbying activities. No precedent was cited or rationale given, in the General Counsel's brief, his report, or the Commission's order, to support this interpretation of the statutory definition of "political committee." The Commission did find probable cause to believe that AIPAC violated § 441b, which generally prohibits campaign expenditures and contributions by corporations, but voted to take no action because it thought it was a close question whether AIPAC's expenditures were made in the course of communicating with its members, an exception to § 441b's prohibition. It therefore dismissed the complaint and closed the case.

Appellants sued in the district court pursuant to § 437g(a)(8), an unusual statutory provision which permits a complainant to bring to federal court an agency's refusal to institute enforcement proceedings, *cf. Heckler v. Chaney*, 470 U.S. 821, 831, 105 S.Ct. 1649, 1655–56, 84 L.Ed.2d 714 (1985), challenging the Commission's interpretation of the term "political committee." [1] The Commission responded that the Supreme Court, concerned with the Act's burdens on political speech, had narrowed the term's statutory definition in *Buckley v. Valeo*, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976), and *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 107 S.Ct. 616, 93 L.Ed.2d 539 (1986) (*MCFL*). The Commission read these opinions—at least it so asserted in district court—as holding that an organization is a political committee only if its major purpose is the influencing of federal elections. Therefore, notwithstanding the plain language, the Commission claimed it interpreted the statute at least reasonably.

The district court agreed. Combining the Supreme Court's opinions (and our decision in *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380 (D.C.Cir.), *cert. denied*, 454 U.S. 897, 102 S.Ct. 397, 70 L.Ed.2d 213 (1981)), with *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984) deference, the court concluded that the Commission's construction was "reasonable." A divided panel of this court affirmed. The FEC had not originally challenged appellants' standing, but the panel *sua sponte* asked the parties to brief the issue. The panel majority concluded that appellants had suffered an "informational injury" as voters and members of the public; the lack of information on AIPAC's contributions and expenditures, caused by the FEC's action, limited the information available to them as voters and impaired their ability to influence and inform the public and policymakers. The dissent thought appellants' injury was based instead on their competitive lobbying position *vis-a-vis* AIPAC. We determined to rehear the case *en banc* and directed the parties to focus on standing as well as the merits.

II.

The Commission, as it did before the panel (after it was asked to address standing), challenges the court's jurisdiction. The Commission contends that neither the theories adopted by the panel judges nor appellants' somewhat different contentions satisfy Article III standing requirements. Appellants—whether as voters or political competitors (except for Findley whose standing as a candidate the Commission does not challenge [2])—not only lack injury-in-fact, their alleged injury was not caused by the Commission's actions and it is not redressable by this court's order. It is further argued that even if appellants make out Article III standing, they are not parties "aggrieved" under the statute and so lack prudential standing.

[1, 2] We take up first appellants' standing as voters. We have recognized in our "informational standing" cases that a party may be entitled to sue in federal court to force the government to provide information to the public (and thereby to it) if the government's failure to provide or cause others to provide that particular information specially affects that party. But this type of injury is narrowly defined; the failure must impinge on the plaintiff's daily operations or make normal operations infeasible in order to create injury-in-fact. *Compare Scientists' Inst. for Public Info., Inc. v. Atomic Energy Comm'n*, 481 F.2d 1079, 1086 n. 29 (D.C.Cir. 1973) (the Atomic Energy Commission's decision not to provide an Environmental Impact Statement (EIS) on a reactor program established Article III injury because the Institute's main function was to distribute such information to the public), *and Action Alliance of Senior Citizens v. Heckler*, 789 F.2d 931, 937–38 (D.C.Cir.1986) (Article III injury where new government regulations restricting the availability of information on services for the elderly impaired AASC's ability to provide information, counseling, and referral services for its senior citizen members), *vacated on other grounds*, 494 U.S. 1001, 110 S.Ct. 1329, 108 L.Ed.2d 469 (1990), *with Competitive Enter. Inst. v. National Highway Traffic Safety Admin.*, 901 F.2d 107, 122–23 (D.C.Cir.1990) (no informational injury where organization failed to show how the

1. Appellants also contest some of the Commission's factual conclusions. In particular, they question the Commission's determination that there was a lack of credible evidence concerning AIPAC's involvement in providing assistance to the opponent of Paul Findley—a complainant here—in a 1982 congressional election.

2. The Commission does not explain why, if Findley does have standing, the rest of its standing objections are nonetheless determinative, because we would still be obliged to reach the merits.

NHTSA's decision not to issue an EIS significantly diminished its ability to educate and inform the public about highway safety). Appellants' alleged injury as voters does not seem to fit within the limited contours of our informational standing cases. They do assert that their injury is based on the FEC's failure to provide appellants, as voters, with certain *information*, but their injury does not depend on the character of their organizational activity but rather on the proposition that the deprivation of that information impedes their ability to engage in a particular act guaranteed them in a democracy. They have been deprived of certain specific information that Congress thought voters needed to make an informed choice and therefore required "political committees," *inter alia*, to disclose.

[3, 4] Although Congress may not "create" an Article III injury that the federal judiciary would not recognize, anymore than Congress could amend the Constitution, *see United Transp. Union v. ICC*, 891 F.2d 908, 915–16 (D.C.Cir.1989), *cert. denied*, 497 U.S. 1024, 110 S.Ct. 3271, 111 L.Ed.2d 781 (1990); *Safir v. Dole*, 718 F.2d 475, 479 (D.C.Cir. 1983), *cert. denied*, 467 U.S. 1206, 104 S.Ct. 2389, 81 L.Ed.2d 347 (1984), Congress can create a legal right (and, typically, a cause of action to protect that right) the interference with which will create an Article III injury. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 578, 112 S.Ct. 2130, 2145–46, 119 L.Ed.2d 351 (1992) (quoting *Warth v. Seldin*, 422 U.S. 490, 500, 95 S.Ct. 2197, 2205–06, 45 L.Ed.2d 343 (1975)); *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373, 102 S.Ct. 1114, 1121, 71 L.Ed.2d 214 (1982). Such a legal right can be given to all persons in the country. In that event, any person whose individual right has been frustrated or interfered with has standing to sue, even though all other persons have the same right, without the claim being regarded as a generalized grievance. That is why anyone denied information under the Freedom of Information Act (FOIA), 5 U.S.C. § 552 *et seq.* (1994), has standing to sue regardless of his or her reasons for suing. *Public Citizen v. FTC*, 869 F.2d 1541, 1548 & n. 13 (D.C.Cir.1989).[3]

[5, 6] Appellants would analogize this case to a FOIA case; any and all voters, in their view, suffer injury-in-fact when the FEC fails to force a political committee to report its activities to the Commission, which then has an obligation under the statute to make such information available to the public. *See* 2 U.S.C. § 438(a)(4) (requiring Commission to make all information filed promptly available to the public). But Congress did not quite create a legal right in all individual voters to obtain that information either directly or indirectly. The mere denial of an attempt to gain information does not create a cognizable injury under the Act. An individual must file a complaint with the Commission, which is provided authority to enforce the requirement that political committees report their activities. Only parties aggrieved by the dismissal of a complaint are entitled to challenge in court the Commission's refusal to enforce. (Although under § 437g(a)(8)(C), if a court decision directing the Commission to act is ignored by the FEC, the complainant can actually sue the offending party directly.) This indicates that the statutory entitlement to information is not as categorical or direct as that of FOIA.[4]

While a voter's rights under the Act are not exactly analogous to FOIA, appellants do have a point, and it is a point that distinguishes this case somewhat from our informational standing cases. *Cf. Public Citizen v. Department of Justice*, 491 U.S. 440, 449–50, 109 S.Ct. 2558, 2564–65, 105 L.Ed.2d 377 (1989) (analogizing requests for access to information under the Federal Advisory Committee Act (FACA) to requests under FOIA). Congress clearly intended voters to have access to the information political committees were obliged to report. The whole theory of the statute is that voters are benefitted insofar as they can determine who is contributing what to whom. *See Buckley*, 424 U.S. at 66–67, 96 S.Ct. at 657 (disclosure "provides the electorate with information 'as to where political campaign money comes from and how it is spent by the candidate' in order to aid the voters in evaluating those who seek federal office," deters actual corruption and the appearance of corruption, and helps the public detect post-election *quid pro quos*). Although Congress cannot determine when someone has suffered Article III injury, we do not think it can be denied that this sort of information that Congress required disclosed aids voters, if and when they vote. If a party is denied information that will help it in making a transaction—and a vote can be thought of as a kind of transaction—that party is obviously injured in fact. We recognized as much in *Public Citizen*, 869 F.2d at 1546 & n. 7, where we determined that a group representing consumers had standing to challenge the FTC's regulations exempting from health warnings certain promotional items sold by manufacturers of smokeless tobacco. Those promotional items, a form of advertising, were designed to encourage the purchase of smokeless tobacco, and some of the plaintiffs' members and their families alleged that they used or may use those products without the statutorily required reminder of the dangers that consumption entails. We reasoned that such information would be of substantial value to the plaintiffs' members, and therefore they were injured because they were deprived of it at the time they purchased or used the product. *Id.*

Although admittedly registered voters—even the more limited subset of those who actually vote—is a very large group of Americans, we do not think it analytically sound to describe a lawsuit brought by *affected* registered voters as presenting only a generalized grievance. The term "generalized grievance" does not just refer to the number of persons who are allegedly injured; it refers to the diffuse and abstract nature of the injury. *See, e.g., Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 94 S.Ct. 2925, 41 L.Ed.2d 706 (1974) (citizen and taxpayer challenge to membership of members of Congress in Armed Forces Reserves during Vietnam War presents generalized grievance); *see also Lujan v. Defenders of Wildlife*, 504 U.S. at 573–74, 112 S.Ct. at 2143–44. The number of potential plaintiffs matters not so long as each can assert a distinct, individual injury. *See Sierra Club v. Morton*, 405 U.S. 727, 734, 92 S.Ct. 1361, 1365–66, 31 L.Ed.2d 636 (1972); *Michel v. Anderson*, 14 F.3d 623, 626 (D.C.Cir.1994). A voter deprived of useful information at the time he or she votes suffers a particularized injury in some respects unique to him or herself just as a government contractor, allegedly wrongfully deprived of information to be made available at the time bids are due, would suffer a particularized injury even if all other bidders also suffered an injury. As we understand our dissenting colleagues, they agree with the Commission that appellants are presenting a generalized grievance because it is *information* that they seek. Apparently if Congress provided that public or private employers were obliged to provide their employees free transportation to the polls, enforceable through an agency like the FEC, that would be a particularized right (except that according to Section B of their opinion it would not be redressable). We think the dissent is just incorrect in refusing to see information as a commodity of value.[5]

To be sure, it would not be enough for standing in this case for appellants to assert only that they were voters, for appellants would not be injured as voters if AIPAC's activities were unrelated to any election in which they voted. But appellants can hardly be expected to allege that AIPAC made contributions in the elections in which they vot-

3. The dissent's *logic* suggests that even such a claim is only a generalized grievance; otherwise, to use the dissent's phraseology, the dissent "ducks the consequences" of admitting that all Americans could sue. Dissent at 2.

4. By contrast to FOIA, the National Environmental Policy Act, 42 U.S.C. § 4332(2)(C) (1994), does not provide a private right of action to enforce the EIS procedural requirements. To show standing, the litigant therefore must allege that he will be harmed by the underlying agency action contemplated, and that if forced to prepare (and consider) an EIS, the agency might act differently. *See Douglas County v. Babbitt*, 48 F.3d 1495, 1501 n. 6 (9th Cir.1995), *cert. denied*, — U.S. —, 116 S.Ct. 698, 133 L.Ed.2d 655 (1996); *Foundation on Economic Trends v. Lyng*, 943 F.2d 79, 83 (D.C.Cir.1991). Thus, the lack of the information itself is *not* an injury. Here, the injury is closer to the FOIA model; the injury to the voter is the *lack of the information itself*, and the only underlying agency action is the failure to require disclosure.

5. Since the dissent concedes that *all* appellants would have standing if the information had been supplied to the FEC and then simply withheld, Dissent at 746–47, 745 n.2, it would appear that the dissent's only *real* objection to standing is redressability.

ed, for whether AIPAC made such contributions is precisely the information of which appellants claim they have been deprived. As the FEC found that AIPAC likely did contribute in excess of $1,000 in one year, and the FEC did not identify the elections to which these contributions were made, there is nothing to indicate that appellants did not vote in various federal elections in which AIPAC allegedly made contributions that qualified it as a political committee. Therefore we conclude that appellants have standing as *affected* voters. We thus need not resolve whether appellants also have standing as political competitors of AIPAC, or whether Mr. Findley—who was last a candidate in 1982, *see Golden v. Zwickler*, 394 U.S. 103, 109, 89 S.Ct. 956, 960, 22 L.Ed.2d 113 (1969) (no controversy where it was unlikely that congressman would again be a candidate for Congress)—has standing as a candidate.

The Commission also questions the causal connection between its decision and appellants' injury, as well as causation's corollary in standing analysis—redressability. As best we understand the FEC's rather confusing argument,[6] its causation objection is primarily directed to appellants' alleged lobbying injury rather than their injury as voters. That the Commission does not make the argument *vis-a-vis* appellants' standing as voters is understandable because such a theory would stretch causation to its breaking point; no one would have standing to challenge the Commission's determination, or for that matter, many other administrative agency actions. It is only necessary for a voter to allege that *his* vote and others' votes may have been affected by the disclosure of information that a contrary FEC determination would have made available.

The Commission's argument that appellants lack standing because we cannot issue an order that redresses their injury—with which the dissent agrees—strikes us as a breathtaking attack on the legitimacy of virtually all judicial review of agency action. The Commission points out that it has enforcement discretion, so that even if we were to determine that its statutory interpretation of "political committee" is erroneous, it does not follow that AIPAC would be required to disclose the information a political committee must: the FEC might settle with AIPAC on terms that did not require disclosure. Yet all regulatory agencies enjoy some measure of enforcement discretion. If that factor were to mean that an agency's *legal* determination was not reviewable, that would virtually end judicial review of agency action. We rarely know when we entertain a case, say, challenging an agency's interpretation of a statute, whether the agency's *ultimate* action will be favorable to the petitioner or appellant. *See Public Citizen*, 491 U.S. at 450, 109 S.Ct. at 2564–65 (that FACA documents may not be disclosed pursuant to statutory exceptions no bar to redressability); *Competitive Enter. Instit.*, 901 F.2d at 118 ("[a] remand that would leave the agency free to exercise its discretion in a proper manner, then, *could* lead to agency action that would redress petitioners' injury") (emphasis added); *Foundation on Economic Trends v. Lyng*, 943 F.2d at 83 & n. 2 (plaintiff typically not required to show that the agency was likely to take a particular substantive action in response to EIS). Our job is limited to correcting a legal error—if error is committed—in the agency decision. *See SEC v. Chenery Corp.*, 332 U.S. 194, 196–97, 67 S.Ct. 1575, 1577–78, 91 L.Ed. 1995 (1947). The error must, of course, be one upon which the agency decision rests, an analytical precondition to the agency action. If that is so, it has *always* been an acceptable feature of judicial review of agency action that a petitioner's "injury" is redressed by the reviewing court notwithstanding that the agency might well subsequently legitimately decide to reach the same result through different reasoning. *See id.*

Nor can it be relevant, as the dissent supposes, that AIPAC might not comply with the Commission's order. That too is always true when an agency's nonaction against a third party is challenged. In any event, under this very unusual statute appellants are not dependent on the Commission's compliance with our decision correcting the Commission's interpretation of the phrase "political committee." As we noted earlier, if the Commission fails to "conform" to our "declaration," the appellants, as the original complainant, may bring their own civil action to remedy the violation of law. 2 U.S.C. § 437g(a)(8)(C). It would appear under this provision that if the Commission gave only lip service to compliance with our order and settled with AIPAC without requiring disclosure, as the dissent suggests could occur, appellants would be able to seek disclosure directly. This unique statutory provision then completely undermines the Commission's and the dissent's redressability argument—even on the argument's own terms.[7]

[7, 8] Finally, the Commission challenges appellants' prudential standing, claiming they are not parties aggrieved within the meaning of the statute, which provides that "any party aggrieved by an order of the Commission dismissing a complaint filed by such party ... may file a petition with the United States District Court for the District of Columbia." 2 U.S.C. § 437g(a)(8)(A). The Supreme Court, interpreting similar language in the Administrative Procedure Act permitting judicial review generally if a party is "aggrieved," has held that term obliges federal courts to determine whether, under the substantive statute, the party seeking judicial review is within the zone of interests. Thus

> [i]n cases where the plaintiff is not itself the subject of the contested regulatory action, the test denies a right of review if the plaintiff's interests are *so marginally related* to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit. The test is not meant to be especially demanding; in particular, there need be no indication of congressional purpose to benefit the would-be plaintiff.

Clarke v. Securities Indus. Ass'n, 479 U.S. 388, 399–400, 107 S.Ct. 750, 757, 93 L.Ed.2d 757 (1987) (citations omitted) (emphasis added). Here, although the governing judicial review provision is included within the substantive statute, the same test logically should apply to determine whether a party challenging a Commission decision qualifies. But why would appellants not meet that test? The Commission's argument again is rather convoluted. It concedes, as it surely must, that the statute is designed primarily to aid voters, *Buckley*, 424 U.S. at 66–67, 96 S.Ct. at 657–58; therefore, it seems strange to even suggest that a voter would not have prudential standing. Yet the Commission asserts that "a pure voter's interest [is] too generalized to satisfy Article III *or the zone of interests test*" (emphasis added). We have already explained why we do not regard appellants' case as presenting a "generalized grievance." *See supra* pp. 737–38. And although the numbers of persons who might be eligible to sue might well bear on a determination as to whether Congress intended such a broad class of potential litigants, in this case it is apparent that Congress treated the broad class—voters—as the core beneficiaries of the statute. Therefore, we simply cannot glean any congressional intent to preclude members of that class from suing—so long as they filed a complaint with the FEC that was dismissed.[8]

6. Appellants did not, it should be noted, provide much help on the difficult standing issue in this case.

7. In an argument that seems to be based more on mootness than redressability, the Commission also contends that appellants' injury would not be redressed by a favorable decision of this court because AIPAC is barred from making *future* contributions to candidates by another section of the statute, § 441b, which prohibits corporate contributions. This is a *non sequitur*; appellants claim they are injured because AIPAC was permitted to avoid registering as a political committee and disclosing its *past* receipts and expenditures. That disclosure of past activities would presumably affect voters in the future. If such injury were not redressable, once an election ended virtually all electoral conduct would be beyond review. In this case, for example, it took well over two years for the Commission to make a probable cause determination.

8. It is not clear from the Commission's argument who would have prudential standing. Although the fact that no one would have standing to sue is not a reason to find Article III standing, *Schlesinger v. Reservists*, 418 U.S. at 227, 94 S.Ct. at 2935, the same cannot be said for prudential standing. Where Congress has created a right to seek judicial review, *see* 2 U.S.C. § 437g(a)(8), it cannot be the case that Congress intended that right to extend to no one.

The Commission contends that "aggrieved" must be read to require a more direct connection to or a greater stake in the conduct in question, call it "voter plus" status. But appellants are not merely voters; they are voters who have filed a complaint with the Commission that has been dismissed. In sum, appellants' interests as voters clearly are not "so marginally related to or inconsistent with the purposes implicit in the statute," *Clarke*, 479 U.S. at 399, 107 S.Ct. at 757, for it to be unreasonable to assume Congress intended to permit them to sue.

III.

Section 431(4)(A) defines "political committee" solely in terms of "expenditures" and "contributions": a political committee is "any committee, club, association, or other group of persons which receives contributions aggregating in excess of $1,000 during a calendar year or which makes expenditures aggregating in excess of $1,000 during a calendar year." The FEC concedes that this language sets unambiguous requirements for classification as a political committee. But it asserts that Supreme Court decisions have narrowed the reach of the statutory language in response to First Amendment concerns. The FEC relies on language in *Buckley*, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659, and *MCFL*, 479 U.S. 238, 107 S.Ct. 616, 93 L.Ed.2d 539, in claiming that an organization should only be classified as a political committee if, in addition to exceeding the $1,000 expenditure limit, the *organization's* major purpose is the nomination or election of a candidate or the organization is controlled by a political candidate.

At minimum, the Commission argues, these cases created an ambiguity in the statutory definition of "political committee" so that the Commission's subsequent interpretation of the term is owed deference—and passes muster—under *Chevron* Step II. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). When Congress is silent or ambiguous, the Commission reminds us, an agency's construction is owed deference if it is permissible. That the ambiguity here arose from Supreme Court interpretation does not, it is argued, affect this general rule of deference; the agency still has discretion to fill the interpretive "gap." According to the FEC, the gap to be addressed here is not *whether* the Court established a major purpose test as a generic definition of political committee (which the Commission assumes), but *how* such a test is to be implemented. Since the Court did not decide the types of organizations that are within its "definition" of political committee, whether contributions and expenditures are treated the same, and so on, the Commission has discretion to flesh out the concept, consistent with Supreme Court precedent.

[9] We think the FEC's plea for deference is doctrinally misconceived. It is undisputed that the statutory *language* is not in issue, but only the limitation—or really the extent of the limitation—put on this language by Supreme Court decisions. We are not obliged to defer to an agency's interpretation of Supreme Court precedent under *Chevron* or any other principle. The Commission's assertion that Congress and the Court are equivalent in this respect is inconsistent with *Chevron's* basic premise. *Chevron* recognized that Congress delegates policymaking functions to agencies, so deference by the courts to agencies' statutory interpretations of ambiguous language is appropriate. But the Supreme Court does not, of course, have a similar relationship to agencies, and agencies have no special qualifications of legitimacy in interpreting Court opinions. There is therefore no reason for courts—the supposed experts in analyzing judicial decisions—to defer to agency interpretations of the Court's opinions. This is especially true where, as here, the Supreme Court precedent is based on constitutional concerns, which is an area of presumed judicial competence. *See Public Citizen v. Burke*, 843 F.2d 1473, 1478 (D.C.Cir.1988).

[10] In sum, since it is not, and cannot be, contended that the statutory language itself is ambiguous, and the asserted "ambiguity" only arises because of the Supreme Court's narrowing opinions, we must decide *de novo* the precise impact of those opinions. In that regard, we think the Commission misstates the interpretation issue. As we noted, it casts the question as how the major purpose test applies, as if the test were set forth categorically. But as we see the key question, it is whether the Supreme Court's major purpose limitation imposed in certain circumstances for constitutional reasons applies in another circumstance—this case—in which the same constitutional concerns may not be implicated.

Turning to the Supreme Court's decisions, the Court did state in *Buckley* that the term political committee "need only encompass *organizations* that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate." 424 U.S. at 79, 96 S.Ct. at 663 (emphasis added). And this notion was repeated in *MCFL*: "an entity subject to regulation as a 'political committee' under the Act is one that is either 'under the control of a candidate or the major purpose of which is the nomination or election of a candidate.'" 479 U.S. at 252 n. 6, 107 S.Ct. at 625 n. 6 (quoting *Buckley*, 424 U.S. at 79, 96 S.Ct. at 663). Although MCFL apparently was not charged with violating the political committee provisions, the Court in *dicta* said that "should MCFL's independent spending become so extensive that the organization's major purpose may be regarded as campaign activity, the corporation would be classified as a political committee." *Id.* at 262, 107 S.Ct. at 630.

While the above language in *Buckley* and *MCFL* can literally be read to support the FEC's position, both cases focused on the constitutional concerns raised by *independent expenditures*, which are not coordinated with or made in consultation with any candidate, as distinguished from coordinated expenditures or direct contributions. *See Colorado Republican Fed. Campaign Comm. v. FEC*, — U.S. —, ——, 116 S.Ct. 2309, 2315–16, 135 L.Ed.2d 795 (1996). Independent expenditures are the most protected form of political speech because they are closest to pure issue discussion and therefore farthest removed from the valid goal of preventing election corruption. *Buckley*, 424 U.S. at 19–23, 78–81, 96 S.Ct. at 634–37, 663–64; *MCFL*, 479 U.S. at 259–60, 107 S.Ct. at 628–29. They raise more serious First Amendment concerns because it is difficult to determine when an expenditure is independent, and regulation therefore risks chilling protected speech. For that reason, in *Buckley* the Supreme Court determined that expenditure limits are more likely to violate the First Amendment because they place substantial and direct restrictions on the ability to engage in political speech. *See* 424 U.S. at 39–59, 96 S.Ct. at 644–54. Limitations on contributions or coordinated expenditures, on the other hand, were thought to raise fewer constitutional concerns because they serve the basic governmental interest of protecting the electoral process while only marginally restricting political debate and discussion. *See Colorado Republican Fed. Campaign Comm.*, — U.S. at —, 116 S.Ct. at 2315; *Buckley*, 424 U.S. at 28, 96 S.Ct. at 639 (such limits "focus[ ] precisely on the problem of large campaign contributions—the narrow aspect of political association where the actuality and potential for corruption have been identified"); *see also Buckley*, 424 U.S. at 28, 30, 36, 96 S.Ct. at 639, 640, 643.

[11] To support its interpretation, the FEC points to *Buckley's* discussion of § 434(e), which imposes disclosure requirements on "[e]very person (other than a political committee or candidate)" making contributions or expenditures exceeding $100.[9] "Contributions"—when defined as direct or indirect contributions to a candidate, political party, or campaign committee, or expenditures placed with the cooperation or consent of a candidate—were determined to "have a sufficiently close relationship to the goals of the Act," and therefore limits on them are constitutional. *Id.* at 78, 96 S.Ct. at 663. The Court noted that the meaning of "expenditure," however, posed line-drawing difficulties because it posed the danger of "encompassing both issue discussion and advocacy of a political result." *Id.* at 79, 96 S.Ct. at 663. Therefore, the reach of § 434(e) was limited by "construe[ing] 'expenditure' for purposes of

9. Section 434(e) has subsequently been amended: "Every person (other than a political committee) who makes independent expenditures in an aggregate amount or value in excess of $250 during a calendar year" shall be subject to certain reporting and disclosure requirements. 2 U.S.C. § 434(c)(1).

that section ... to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." *Id.* at 80, 96 S.Ct. at 663. In the midst of this analysis of the scope of "expenditures" under § 434(e), the Court noted in *dicta* that the meaning of political committee, because it was defined solely in terms of contributions and expenditures, posed the same line-drawing problem. The Court's language that apparently refers to the major purpose of an organization, given this context, does not really support the Commission's interpretation:

> To fulfill the purposes of [FECA, political committees] need only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate. *Expenditures* of candidates and of "political committees" *so construed* can be assumed to fall within the core area sought to be addressed by Congress. They are, by definition, campaign related.

Id. at 79, 96 S.Ct. at 663 (emphases added). We think the better interpretation of this language, as appellants suggest, is that when an *organization* controlled by a candidate or the major purpose of which is election-related makes disbursements, those disbursements will presumptively be *expenditures* within the statutory definition. The Court clearly distinguished *independent expenditures* and *contributions* as to their constitutional significance, and its references to a "major purpose" test seem to implicate only the former.

As we noted, certain language in *MCFL* can also be read to support the FEC's position, but the Court was again addressing First Amendment problems with the regulation of *independent expenditures*. The Court *held* that § 441b, which prohibits corporate contributions or expenditures "in connection with any election," was unconstitutional as applied to MCFL because the Act's reporting and disclosure requirements might discourage protected political speech of such advocacy groups. *See* 479 U.S. at 253–56, 107 S.Ct. at 625–27. Still, the Court's analysis clearly distinguished contributions and expenditures: "should MCFL's *independent spending* become so extensive that the organization's major purpose may be regarded as campaign activity, the corporation would be classified as a political committee." *Id.* at 262, 107 S.Ct. at 630 (citing *Buckley*, 424 U.S. at 79, 96 S.Ct. at 663) (emphasis added). As in *Buckley*, this language can be read as merely creating a presumption that certain organizations' expenditures are "made ... for the purpose of influencing any election"; an organization devoted almost entirely to campaign spending could not plead that the administrative burdens associated with such spending were unconstitutional as applied to it. As in *Buckley*, the underlying concern is that congressional regulation, in its effort to achieve full disclosure, may impermissibly discourage protected independent expenditures. In short, the Court's rationale in *MCFL* and *Buckley* is simply inapplicable to the present case. There is no constitutional problem with applying § 431(4)(A) to AIPAC or to other organizations making campaign *contributions* (or coordinated expenditures) exceeding the statutory limits.[10]

The FEC further contends, however, that we endorsed its "major purpose" test in *Machinists Non-Partisan Political League*, 655 F.2d at 392. In *Machinists*, we held that "draft groups" that promoted the acceptance of particular individuals prior to their actual nomination did not fall within the definition of "political committee" because the expenditures and contributions were not made to a "candidate." *Id.* at 396. Our decision was based in large part on Congress' intent to exclude draft groups from the definition of political committee. *See id.* at 394–96 (Congress failed to respond to the FEC's repeated requests to amend the Act to apply

10. The Commission makes no claim that AIPAC actually qualifies for the *MCFL* constitutional exemption, which requires that the organization be engaged in issue advocacy, that it not accept contributions from labor unions or corporations, and that it have no shareholders or other persons with a claim on its assets who would have a disincentive to withdraw if they disagreed with its political positions. 479 U.S. at 264, 107 S.Ct. at 631. Indeed, the General Counsel's brief advised that AIPAC did not qualify because it apparently receives certain contributions from corporations.

contribution limits to draft groups). And our analysis, contrary to the FEC's suggestion, supports appellants' interpretation of the major purpose test. We did quote *Buckley's* language—noted above to be equivocal—on an organization's major purpose. *Id.* at 392. But we concluded that *Buckley* had endorsed the "narrowing construction" of "political committee" developed in *United States v. National Comm. for Impeachment*, 469 F.2d 1135 (2d Cir.1972) (*NCFI*), and *American Civil Liberties Union, Inc. v. Jennings*, 366 F.Supp. 1041 (D.D.C.1973) (*ACLU*) (three-judge court), *vacated as moot sub nom. Staats v. ACLU*, 422 U.S. 1030, 95 S.Ct. 2646, 45 L.Ed.2d 686 (1975), and we noted that "[a]ll three of these decisions recognized the grave constitutional difficulties inherent in construing the term 'political committee' to include groups *whose activities* are not under the control of a 'candidate,' or directly related to promoting or defeating a clearly identified 'candidate' for federal office." *Id.* at 393 (emphasis added). Our use of the word "activities"—while admittedly not free from ambiguity—indicates that, as appellants contend, it is the purpose of the organization's disbursements, not of the organization itself, that is relevant.[11]

The FEC's interpretation of "political committee" would, as appellants point out, allow a large organization to contribute substantial sums to campaign activity, as long as the contributions are a small portion of the organization's overall budget, without being subject to the limitations and requirements imposed on political committees. Thus, an organization spending its entire $1 million budget on campaign activity would be a political committee, while another organization spending $1 million of its $100 million budget on campaign activity would not. This would wholly eviscerate the $1,000 limit in § 431(4)(A)'s definition of "political committee." That such an organization, as the Commission emphasizes, may be limited by other statutory provisions as well—*e.g.*, § 441b's prohibition on corporate expenditures and § 434(c)'s restrictions on persons (defined in § 431(11) to include corporations) making independent election expenditures—is irrelevant. There is no indication that Congress intended to limit one section in light of others or to make their application mutually exclusive. As the Commission concedes, various statutory provisions impose different, if overlapping, limits and requirements on organizations; these differences represent the sound exercise of congressional judgment as to the various degrees of risk to the election process posed by certain activities.

[12] The Commission seeks to minimize the implications of its interpretation by arguing that it has not yet resolved when an organization's spending becomes "a" major purpose that counts toward the "political committee" threshold.[12] But we think little

11. Appellants argue that the major purpose test is properly employed to determine whether an organization's independent disbursements constitute "expenditures" within the meaning of § 431(9)(A)(i), such that they count toward the $1,000 limit defining political committee status. *See NCFI*, 469 F.2d 1135; *ACLU*, 366 F.Supp. 1041. We do not for purposes of this appeal have to determine finally whether appellants' version of the test is the only possible one. But we reject the FEC's contention that appellants' interpretation of the major purpose test is redundant because the statute already requires that an expenditure be "made for the purpose of influencing an election." A "major purpose" test was developed at least partly in order to construe this definition narrowly so as to avoid constitutional concerns. *See NCFI*, 469 F.2d 1135; *ACLU*, 366 F.Supp. 1041; *cf. Buckley*, 424 U.S. at 76–78, 96 S.Ct. at 662–63. The FEC assumes that this statutory language already had a precise meaning—under the control of a candidate or made with the consent or authorization of a candidate—which in fact *NCFI*, 469 F.2d at 1141, and *Buckley*, 424 U.S. at 40–42, 79, 80, sought to impose. Appellants' major purpose test thus can be seen not as a tautology but as a necessary judicial gloss on the statutory definition of expenditure.

12. The Commission nevertheless claims that it has consistently implemented its interpretation of the statute post-*Buckley*. The FEC points to two of its recent decisions, post-dating this litigation, to show its adherence to the major purpose test. *See* AO 1995–11, 2 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 6148–49 (1995); AO 1994–25, 2 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 6125. But as appellants note, earlier FEC advisory opinions—in the nearly 20 years after *Buckley* and 10 after *MCFL*—did not articulate a major purpose test; they instead appear to examine whether particular expenditures exceeded the $1,000 limit, without regard to the percentage of spending that was campaign related or to the organization's

of this suggested safety valve; the inevitable logic of the Commission's test is that the two organizations described above, spending precisely the same amount to influence federal elections and therefore presenting precisely the same threat of election corruption, will be treated differently. And if the Commission is truly considering a variable major purpose standard as applied to contributions—now it applies and now it does not—such discretion in itself raises First Amendment concerns. *Cf. Forsyth County v. Nationalist Movement*, 505 U.S. 123, 130–33, 112 S.Ct. 2395, 2401–03, 120 L.Ed.2d 101 (1992) (First Amendment prohibits investing official in licensing scheme with discretion). Moreover, if it relied on such a standard, the Commission should have determined more precisely the level of AIPAC's campaign spending and should have explained why that funding was not "a" major purpose.[13]

There is no contention that AIPAC's disbursements were independent expenditures, so there is no constitutional barrier to application of § 431(4)(A)'s plain terms. The FEC found that AIPAC likely made campaign contributions in excess of $1,000. Its decision that no probable cause existed to believe AIPAC was a political committee, and its consequent dismissal of appellants' complaint, were therefore based on its mistaken interpretation of § 431(4)(A). This error requires that we reverse the dismissal of the complaint and remand to the FEC for further action not inconsistent with this opinion.

* * * *

The judgment of the district court is

Reversed.

major purpose. *See, e.g.*, AO 1979–41, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5426; AO 1988–22, 2 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5932. We by no means think the FEC's apparent change of position dispositive, but it does undermine the Commission's insistence that the Supreme Court clearly imposed this test, particularly given its failure to explain that view in its Order in this case.

13. The FEC's decisions on how and to what extent to investigate a complaint, while reviewable, command substantial deference. *See FEC v. Rose*, 806 F.2d 1081, 1091 (D.C.Cir.1986). However, the investigation here likely would have been insufficient to support a finding that AIPAC's contributions were not "a" major purpose. The Commission asserts in its brief, without citation to the record, that "the evidence *indicated* that AIPAC's campaign spending never even reached one percent of its annual budget," but that already approaches $100,000 (emphasis added). In any event, given our resolution of the case, the factual findings already made by the FEC indicate that AIPAC should be classified as a political committee.

SENTELLE, Circuit Judge, dissenting, with whom Circuit Judge HENDERSON joins:

The standing doctrine "requires that anyone who would invoke the aid of the courts in resolving a complaint must allege, at a minimum, an actual or imminent injury personal to the plaintiff that is fairly traceable to the defendant's conduct and that is likely to be redressed by requested relief." *Louisiana Env. Action Network v. Browner*, 87 F.3d 1379, 1382 (D.C.Cir.1996). For the reasons that follow, I would hold that appellants have not established these minimum requirements.

A. *Informational Standing*

When this matter was before the panel, I wrote for the majority finding standing based on "informational injuries." I concluded at the time, and believe now, that the panel was compelled by circuit precedent to reach that result. *See, e.g., Save Our Cumberland Mountains, Inc. v. Hodel*, 826 F.2d 43, 54 (D.C.Cir.1987) (R.B. Ginsburg, J., concurring) (law of the circuit " 'whether or not [it] is correct' ... binds us unless and until overturned by the court en banc or by Higher Authority."). Because circuit precedent dictated that an organization can establish standing by alleging that a governmental action restricted the flow of information disseminated by the organization in its regular activities, *Action Alliance of Senior Citizens v. Heckler*, 789 F.2d 931, 939 (D.C.Cir.1986), I thought the panel had no choice on the issue. Because the en banc court is not so restricted but is empowered to depart from circuit precedent, if I were writing for the majority today, I would take this occasion to modify circuit law on informational standing and would not find informational standing on the present record.

The majority, rightly, rejects informational standing for plaintiffs in this case. I applaud the majority's decision to treat the concept as a narrow one. I agree with the majority that a party cannot successfully claim informational standing where he cannot establish that "the government's failure to provide or cause others to provide" information "impinge[s] on the plaintiff's daily operations or make[s] normal operations infeasible...." Maj. Op. at 735 (citing *Scientists' Inst. for Public Info., Inc. v. Atomic Energy Comm'n*, 481 F.2d 1079, 1086 n. 29 (D.C.Cir.1973)). While the majority is not clear on why appellants' complaint differs from that of, for example, the organization for the elderly in *Action Alliance*, it at least seems to be attempting to narrow the concept of informational standing by holding that the "[a]ppellants' alleged injury as voters does not seem to fit within the limited contours of" informational standing precedent. Maj. Op. at 736. But the majority retains the fundamental error which has infected our informational standing jurisprudence when it affords standing to the plaintiffs/appellants as voters, on a rationale indistinguishable from informational standing. Indeed, it recites in informational terms that "[a] voter *deprived of useful information* at the time he or she votes suffers a particularized injury in some respects unique to him or herself just as a government contractor, allegedly wrongfully deprived of information to be made available at the time bids are due, would suffer a particularized injury even if all other bidders also suffered an injury." Maj. Op. at 737 (emphasis added). In setting forth this analysis, the majority admits that the class of "registered voters—even the more limited subset of those who actually vote—is a very large group of Americans...."[1] *Id.* at 737. But the majority ducks the consequences of this admission.

The Supreme Court expressly held in *Warth v. Seldin*, 422 U.S. 490, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975), that "when the asserted harm is a 'generalized grievance' shared in substantially equal measure by all or a large class of citizens, that harm alone normally does not warrant exercise of jurisdiction." *Id.* at 499, 95 S.Ct. at 2205 (citing, *e.g., Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 94 S.Ct. 2925, 41 L.Ed.2d 706 (1974)). The majority has not explained why the claimed lack of information for the entire class of voters (or potential voters) does not fall squarely within this precept. The attempted distinction that " 'generalized grievance' does not just refer to the number of persons who are allegedly injured [but] refers to the diffuse and abstract nature of the injury," Maj. Op. at 737, gets nowhere without an explanation as to why this is not a diffuse and abstract injury.[2] The comparison to the bidder deprived of information accomplishes even less. Chief Justice Burger in *Schlesinger v. Reservists* made that comparison for us. "It is one thing for a court to hear an individual's complaint that certain specific government action will cause that person private competitive injury ... but it is another matter to allow a citizen to call on the courts to resolve abstract questions." *Schlesinger*, 418 U.S. at 223, 94 S.Ct. at 2933 (footnote omitted). Cases in this second category, Chief Justice Burger noted, raise "only a matter of speculation whether the claimed violation has caused concrete injury to the particular complainant." *Id.* This is the flaw of the new form of standing—voter standing—that the majority creates today. It, like the broad definition of informational standing, relies on a diffuse rather than a particularized injury.

I would not only reject informational standing as a basis for this claim, but, be-

1. It is not at all clear why the injury is limited to the class of registered voters as opposed to all potential voters as the information, if useful, could be as likely to warrant registration and voting as voting in a particular direction.

2. Contrary to the majority's assertion, Maj. Op. at 736 n.3, our logic does not suggest that a claim for information under FOIA is only a generalized grievance. FOIA gives everyone a right to information. A FOIA injury, therefore, is not a " 'generalized grievance' shared in substantially equal measure by all or a large class of citizens." *Warth*, 422 U.S. at 499, 95 S.Ct. at 2205. It is a particularized injury personal to the disappointed requester, and *Warth's* holding is therefore not implicated. Similarly, if the FEC had the information appellants want and refused to provide it, they might have a cognizable injury affording them standing.

cause I see no basis for distinction between this case and, for example, *Action Alliance*, I would reexamine the entire concept of informational standing as it now exists in this circuit, and I would reject it. I do not find within the majority opinion any justification for our precedent on that subject. The majority's creation violates the principle that a plaintiff generally may not rely for a claimed injury on a mere ideological interest, *Competitive Enter. Inst. v. NHTSA*, 901 F.2d 107, 112 (D.C.Cir.1990), by perpetuating the notion that an organization has standing where the alleged injury is that the government's failure to provide information to the organization "impinge[s] on the plaintiff's daily operations or make[s] normal operations infeasible." Maj. Op. at 735 (citing *Scientists' Inst. for Public Info., Inc. v. Atomic Energy Comm'n*, 481 F.2d 1079, 1086 n. 29 (D.C.Cir.1973)). While the Supreme Court's standing jurisprudence may not always be pellucid, the Court has left no doubt that "a mere 'interest in a problem,' no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to render the organization 'adversely affected' or 'aggrieved' within the meaning of the APA." *Sierra Club v. Morton*, 405 U.S. 727, 739, 92 S.Ct. 1361, 1368, 31 L.Ed.2d 636 (1972).

As the Court noted, if a special interest in a subject were enough to provide the floor for standing to a long-interested organization, there would be no objective basis for barring the same theory of standing to any other organization no matter how small or new, or to an individual with an interest in the subject matter. That the organization has made the collection and dissemination of information on a particular subject its goal in life no more gives it an injury in fact each time it cannot obtain the information it wants than would be true of any one of its members. The organization's standing can, like water, rise no higher than its members' source. That the organization cannot carry on its ordinary affairs because it cannot get the information it desires from the government no more creates injury in fact than if it were seeking government funds to which it was not otherwise entitled because it could not operate its ordinary affairs without that funding. That could hardly be said to provide it with an injury in fact for standing purposes unless the government were under some duty to provide the funding. I see no reason why the same is not true with respect to information.

Informational standing, of course, has a legitimate origin in those areas of the law where Congress has created a right to information and an obligation on the government to furnish it, and a plaintiff, attempting to exercise that right, has been denied the same. As the majority rightly notes, "Congress may not 'create' an Article III injury that the federal judiciary would not recognize, [but] ... Congress can create a legal right ... the interference with which will create an Article III injury." Maj. Op. at 736 (citations omitted). Thus, under statutes such as FOIA, where Congress has expressly entitled citizens to certain information, the withholding of that information by the government violates that statutory right and causes the injury in fact which underlies standing. This is so despite the fact that all citizens hold the right equally and that generalized grievances do not provide the injury in fact necessary for Article III standing. *See Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 449–50, 109 S.Ct. 2558, 2564–65, 105 L.Ed.2d 377 (1989).

The logic of allowing that deprivation to constitute injury in fact despite the generalized nature of the right violated is, upon examination, inescapable. The right is generalized, but the injury is not. The injury has occurred specifically, individually, and palpably to the person who tried to exercise the right and was thwarted. If the generalized nature of a right were sufficient to make the injury suffered in the deprivation of that right nonjusticiable, then there would be no way to vindicate, for example, First Amendment rights. Thus, standing under FOIA, under FACA, *see Public Citizen, supra*, and perhaps under the FECA is not "informational" standing at all. It is standing in its most traditional form. A plaintiff brings suit to vindicate an injury to a statutorily created right. That right happens to be access to information. But that type of action is not before us here. Plaintiffs in the instant case

are not seeking to vindicate a statutorily created right.

The FEC is, as the majority makes clear, obligated under the Act to provide certain information to voters, indeed, to the population at large. If the plaintiffs had gone to the FEC seeking information that the Commission possessed and been denied it, and then jumped through the proper procedural hoops, the FEC could not credibly have argued that the plaintiffs did not have the injury in fact to make out standing. But that is not what happened. The plaintiffs did not seek access to information in the Commission's possession, but rather sought to have the Commission perform its alleged legal duty to regulate a third party—the American Israel Public Affairs Committee ("AIPAC")—in such a fashion as to cause the third party to give it the information to which the plaintiffs would then be entitled.

Although the Act contemplates citizen complaints initiating Commission investigation of violation of the Acts, 2 U.S.C. § 437g (1994), this is not to say that Congress has created a right to enforcement of the law, the violation of which constitutes an injury in fact for standing purposes. In *Heckler v. Chaney*, 470 U.S. 821, 831, 105 S.Ct. 1649, 1655, 84 L.Ed.2d 714 (1985), the Supreme Court reaffirmed "that an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion." That being the case, the Court recognized "the general unsuitability for judicial review of agency decisions to refuse enforcement." *Id.* For an injury to afford standing, it must be remediable in the action brought. As we cannot, under *Heckler*, afford a remedy for an injury consisting of no more than the generalized grievance that the Commission has failed to enforce the law, the Commission's failure to take the regulatory action of declaring AIPAC a political committee which would allegedly cause AIPAC to turn over the information to which appellants would then have access is not an injury which this court can remedy under *Heckler*.

Neither does the congressional provision affording a right to sue overcome the lack of standing. Granted, section 437g(a)(8)(A) permits any party aggrieved by the Commission's dismissal of a complaint or failure to act on such complaint to file a petition with the United States District Court for the District of Columbia. Such a statute creating a right to sue does not, however, create standing. At most, it invests a right to sue in those who otherwise have standing but would not necessarily have a clear claim to relief cognizable by a district court. The Supreme Court has clearly enunciated this concept in the analogous context of environmental litigation. In *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992), the Court of Appeals had held, *inter alia*, that the citizens suit provision in 16 U.S.C. § 1540(g) provided standing. *Lujan*, 504 U.S. at 572, 112 S.Ct. at 2142–43 (citing 901 F.2d at 121–22). In reversing that holding, the Supreme Court expressly rejected the view that "the injury-in-fact requirement had been satisfied by congressional conferral upon *all* persons of an abstract, self-contained, noninstrumental 'right' to have the Executive observe the procedures required by law." 504 U.S. at 573, 112 S.Ct. at 2143. The Court recognized without difficulty that such a view rejected the consistent holding of the Supreme Court "that a plaintiff raising only a generally available grievance about government ... does not state an Article III case or controversy." *Id.* at 573–74, 112 S.Ct. at 2143. The logic of *Lujan* is no less applicable here. These plaintiffs have no statutory right, through section 437g or any other provision, to force the FEC to collect and turn over this information. In the absence of such a right, no injury—informational or otherwise—is possible. I would discard the entire notion of informational standing to the extent that it is something separate from traditional standing doctrine. Under traditional standing doctrine it is clear that these plaintiffs have stated no claim.

B. *Redressability*

Although I have alluded above to the absence of redressability as defeating standing, I wish to make it quite express that even if the grievance of voters is not held to be too generalized to afford standing, that grievance lacks the redressability essential to an Article III injury. Both we and the Supreme

Court have repeatedly made it plain that where an injury to putative plaintiffs is "highly indirect" as to a governmental actor defendant, and "'results from the independent action of some third party not before the court,'" it is "'substantially more difficult to meet the minimum requirement of Art. III'" standing than in the case of a direct injury. *Allen v. Wright*, 468 U.S. 737, 757–58, 104 S.Ct. 3315, 3328, 82 L.Ed.2d 556 (1984) (quoting *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 42, 96 S.Ct. 1917, 1926, 48 L.Ed.2d 450 (1976), and *Warth v. Seldin*, 422 U.S. at 505, 95 S.Ct. at 2208).

The *Allen* Court pronounced that analysis in a discussion that began with the causation element of standing, finding the line of causation between a grant of tax exemption and the third party's offending conduct "attenuated at best." *Id.* at 757, 104 S.Ct. at 3327–28. The Court then reasoned from that attenuated causation to a conclusion that "it is entirely speculative ... whether withdrawal of a tax exemption from any particular school would lead the school to change its policies." *Id.* at 758, 104 S.Ct. at 3328. The *Simon* decision makes it even more clear that multilevel relief is not only problematic as to causation—that is to say that the independent act of a third party is rarely fairly traceable to the government's failure to regulate—but also as to redressability. In that case, the Court held that "Art. III still requires that a federal court act only to redress injury that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the Court." *Simon*, 426 U.S. at 41–42, 96 S.Ct. at 1926. In *Simon*, in *Allen v. Wright*, in *Fulani*, the high court and this one have repeatedly held that it is too speculative to meet the redressability requirement of Article III standing to assume that an independent third-party actor would so amend its conduct to redress the wrong allegedly being done to the plaintiffs because of a court decree against the government. In those cases, admittedly, the regulatory act involved taxation. But the rationale is no different here.

In this case, no more than those, to find a lack of standing where redressability would depend on the Commission's regulation of a third party and that third party's response to the regulation is no "breathtaking attack on the legitimacy of virtually all judicial review of agency action," as the majority suggests. Maj. Op. at 738. Rather, it is only a specific application of general principles of standing jurisprudence.

Appellants' claim of redressability depends on the linked chain that the Commission will enter an order against AIPAC requiring the information plaintiffs seek, that AIPAC will comply with that order, and that appellants will still be sufficiently interested in the information thus produced that they will renew their claim on FEC to present them with that information after they jump through the procedural hoops. This, I submit, is too attenuated to provide the sort of redressability necessary to meet Article III standing.

CONCLUSION

Because the injury plaintiffs allege is neither personal to the plaintiffs nor redressable in this action, they lack standing to bring the claim to an Article III court. I would therefore affirm the grant of summary judgment entered by the district court.

Gerry SCOTT, Appellee,

v.

DISTRICT OF COLUMBIA, et al., Appellants.

No. 95–7108.

United States Court of Appeals, District of Columbia Circuit.

Argued Oct. 16, 1996.

Decided Dec. 6, 1996.

Action was brought against the District of Columbia and individual police officers for

constitutional and common-law torts in connection with arrest of off-duty officer for DUI, which charge was ultimately dismissed. After jury returned verdict for plaintiff, the United States District Court for the District of Columbia, William B. Bryant, J., denied defense motion for judgment as a matter of law, or, in the alternative, for new trial or remittitur. Defendants appealed. The Court of Appeals, Rogers, Circuit Judge, held that: (1) under District of Columbia law, neither police officers nor District, based on conduct of officers, was liable for false arrest; (2) there was no abuse of process under District of Columbia law; (3) negligence liability could not be imposed under District of Columbia law premised either on method of transporting plaintiff or failure to obtain medical treatment for him; and (4) force used by officers in effecting arrest was not excessive.

Reversed and remanded with instructions.

1. Federal Courts ⇐776

District court's denial of a motion for judgment as a matter of law is reviewed de novo.

2. Federal Courts ⇐765, 801

Issue on appeal from district court's denial of defense motion for judgment as a matter of law was whether there was sufficient evidence upon which the jury could base a verdict in plaintiff's favor; in making such determination, evidence would be viewed in the light most favorable to plaintiff and all conflicts would be resolved in his favor.

3. Federal Courts ⇐765

On appeal from district court's denial of defense motion for judgment as a matter of law, although appellate court could not substitute its view for that of jury, and could assess neither the credibility nor weight of the evidence, jury's verdict could only stand if the evidence in support of it was significantly probative and more than merely colorable; in other words, jury's verdict would withstand challenge unless the evidence and all reasonable inferences that could be drawn therefrom were so one-sided that reasonable men and women could not disagree on the verdict.

4. Federal Civil Procedure ⇐675.1

While federal procedural rule authorized plaintiff to plead alternative theories of liability, regardless of whether such theories were consistent with one another, and to argue alternative claims to the jury, recovery of damages could not be based on inconsistent theories when one theory precluded the other or was mutually exclusive. Fed.Rules Civ. Proc.Rule 8(e)(2), 28 U.S.C.A.

5. Federal Courts ⇐714

For purposes of appellate review, plaintiff could not argue in support of verdict in his favor both that he was not under arrest for purposes of his excessive force claim and that he was under arrest for purposes of his other claims.

6. False Imprisonment ⇐7(1)

Elements of a constitutional claim for false arrest are substantially identical to the elements of a common-law false arrest claim; for either type of claim, focal point is whether arresting officer was justified in ordering the arrest of the plaintiff and, if so, officer's conduct is privileged and the action fails.

7. False Imprisonment ⇐7(3)

Under District of Columbia law, neither police officers nor District, based on conduct of officers, was liable for false arrest; as to officer who encountered plaintiff at scene of motor vehicle accident, plaintiff in fact asserted that he was not arrested at accident scene and testified that he never saw that officer after he was placed in police cruiser; as to two other officers, they were acting at direction of superior who ordered them to transport plaintiff, and officers had ample probable cause to believe that plaintiff was guilty of DUI in view of fact that he had crashed his car and was acting in a manner consistent with intoxication, and could not have known from their own observations that first officer did not observe plaintiff operating or attempting to operate his vehicle and thus that arrest for DUI was not authorized. D.C.CODE 1981, § 23–581(a)(1)(B).

MAINE RIGHT TO LIFE COMMITTEE, INC., et al., Plaintiffs–Appellees,

v.

FEDERAL ELECTION COMMISSION, et al., Defendant–Appellant.

No. 96–1532.

United States Court of Appeals, First Circuit.

Heard Oct. 8, 1996.

Decided Oct. 18, 1996.

Nonprofit membership corporation brought suit seeking declaratory judgment that Federal Election Commission's (FEC) definition of "express advocacy" as to which corporate financial support was prohibited under Federal Election Campaign Act (FECA) was too broad. The United States District Court for the District of Maine, D. Brock Hornby, J., 914 F.Supp. 8, held that regulation was invalid. FEC appealed. The Court of Appeals held that definition violated FECA, since it intruded on public discussion of issues.

Affirmed.

Elections ⇐317.2

Federal Election Commission (FEC) violated Federal Election Campaign Act (FECA) when it defined "express advocacy," as to which corporate financial support was prohibited, as including any communication that "When taken as a whole and with limited reference to external events, such as the proximity to the election, could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s) * * *"; regulation intruded upon public discussion of issues. Federal Election Campaign Act of 1971, § 316(a), as amended, 2 U.S.C.A. § 441b(a); 11 C.F.R. § 100.22(b).

David Kolker, Attorney, with whom Lawrence M. Noble, General Counsel, and Richard B. Bader, Associate General Counsel, Washington, DC, were on brief, for defendant-appellant Federal Election Commission.

Dennis M. Flannery, Ankur J. Goel, Wilmer, Cutler & Pickering and Donald J. Simon, on brief, Washington, DC, for Common Cause, amicus curiae.

James Bopp, Jr., with whom Paul R. Scholle, Bopp, Coleson & Bostrom, Daniel M. Snow and Pierce Atwood, were on brief, Terre Haute, IN, for plaintiffs-appellees.

Before TORRUELLA, Chief Judge, CYR and BOUDIN, Circuit Judges.

PER CURIAM.

Defendant-appellant, the Federal Election Commission ("FEC"), appeals the decision of the district court that "11 C.F.R. § 100.22(b) is contrary to the [Federal Election Campaign Act (FECA), 2 U.S.C. §§ 431–55,] as the Supreme Court and the First Circuit Court of Appeals have interpreted it and thus beyond the power of the FEC." *Maine Right to Life Committee, Inc. v. Federal Election Commission*, 914 F.Supp. 8, 13 (D.Me.1996). Appellant argues that the "express advocacy" regulation promulgated in § 100.22(b) is facially reasonable, advances compelling governmental interests, and is entitled to deference.

After a careful evaluation of the parties' briefs and the record on appeal, we affirm for substantially the reasons set forth in the district court opinion. *See Maine Right to Life Committee*, 914 F.Supp. 8; *see also Federal Election Commission v. Christian Action Network*, 894 F.Supp. 946 (W.D.Va. 1995), *aff'd per curiam*, 92 F.3d 1178 (table), No. 95–2600, (4th Cir. Aug. 2, 1996) (unpublished disposition) (granting defendants' motion to dismiss on the grounds that the complained-of actions did not constitute violations of FECA, and the FEC lacked jurisdiction to bring suit).

Costs to appellee.

Affirmed.

MAINE RIGHT TO LIFE COMMITTEE, INC., et al., Plaintiffs,

v.

FEDERAL ELECTION COMMISSION, et al., Defendants.

Civil No. 95-261-B-H.

United States District Court, D. Maine.

Feb. 13, 1996.

Order Denying Motion for Reconsideration March 8, 1996.

Nonprofit membership corporation and a reader of its publications brought suit seeking declaratory judgment that Federal Election Commission's (FEC) definition of "express advocacy" as to which corporate financial support was prohibited under Federal Election Campaign Act was too broad, beyond authority of FEC and unconstitutionally vague, and injunction against FEC and United States Attorney General to prevent enforcement of the provision. The District Court, Hornby, J., held that regulation was invalid as not authorized by Act.

Ordered accordingly.

1. Elections ⇐317.5

Nonprofit membership corporation was not required to seek advisory opinion from Federal Election Commission (FEC) on any communication it proposed to make under new regulation defining "express advocacy" as to which corporate financial support was prohibited under Federal Election Campaign Act, before court addressed merits of regulation. Federal Election Campaign Act of 1971, § 316(a), as amended, 2 U.S.C.A. § 441b(a); 11 C.F.R. § 100.22(b).

2. Elections ⇐317.2

Federal Election Commission's (FEC) definition of "express advocacy" as to which corporate financial support was prohibited under Federal Election Campaign Act was not authorized by Act; by defining express advocacy as including any communication that "When taken as a whole and with limited reference to external events, such as the proximity to the election, could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s) * * *" regulation intruded upon public discussion of issues. Federal Election Campaign Act of 1971, § 316(a), as amended, 2 U.S.C.A. § 441b(a); 11 C.F.R. § 100.22(b).

Daniel M. Snow, Pierce Atwood Scribner Smith Allen & Lancaster, Portland, ME, James Bopp, Jr., Paul R. Scholle, Bopp Coleson & Bostrom, Terre Haute, IN, for Plaintiffs.

Kenneth Kellner, Steven Hershkowitz, Federal Communications Commission, Washington, DC, for FEC.

David R. Collins, Evan Roth, Assistant United States Attorneys, Portland, ME, for AG.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

HORNBY, District Judge.

I held a hearing on this matter on February 7, 1996. With the parties' consent, I consolidated the plaintiffs' request for temporary restraining order, the motion for preliminary injunction and the request for final declaratory and injunctive relief. *See* Fed. R.Civ.P. 65(a)(2). There are no disputed facts. This document contains my findings of facts and conclusions of law. *See* Fed. R.Civ.P. 52.

The Federal Election Campaign Act of 1971 prohibits "any corporation whatever" from making "a contribution or expenditure in connection with any election at which presidential and vice presidential electors or a Senator or Representative ... are to be voted for, or in connection with any primary election ... held to select candidates for any of the foregoing offices...." 2 U.S.C. § 441b(a). On its face, this provision amounts to a very broad prohibition against an organization like the plaintiff Maine Right to Life Committee, Inc. ("MRLC") using corporate contributions in connection with an election. The United States Supreme Court, however, has explicitly limited the scope of this statutory prohibition—on First Amendment grounds—to "express advocacy" of the election or defeat of a clearly identified candidate or candidates. *Buckley v. Valeo*, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976); *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 107 S.Ct. 616, 93 L.Ed.2d 539 (1986). *See Faucher v. FEC*, 743 F.Supp. 64, 68 (D.Me.1990), *aff'd*, 928 F.2d 468 (1st Cir.), *cert. denied*, 502 U.S. 820, 112 S.Ct. 79, 116 L.Ed.2d 52 (1991). The issue in this case is whether the Federal Election Commission ("FEC") acted beyond its power in the definition it has provided for "express advocacy" as to which corporate financial support is prohibited. *See* 11 C.F.R. § 100.22. I conclude that part of the FEC's definition of "express advocacy" is beyond the FEC's power as limited by these cases.

Background

In *Faucher v. FEC*, I set forth the basis for my authority to review a challenge to the legality of FEC regulations under the Administrative Procedure Act. 743 F.Supp. at 67–68. There is no reason to repeat it here.

The material facts about the MRLC have not changed appreciably since my decision in *Faucher*. MRLC, one of the two plaintiffs, is a nonprofit membership corporation exempt from federal income tax under Internal Revenue Code § 501(c)(4). It has approximately 2,000 members. MRLC is not affiliated with any political party, candidate or campaign committee. It is an ideological organization whose purpose is to promote the sanctity of human life, born and unborn; educate the public on abortion; and restore protection of the right to life for unborn children. MRLC accepts contributions from business corporations into its general treasury. MRLC publishes a quarterly newsletter with funds from its general treasury; it surveys candidates before elections to determine their stance on prolife issues and publishes the results in these newsletters; and it makes statements in the news media through such devices as press conferences, guest columns and letters to the editor on a recurring basis.

The second plaintiff is an individual, Hugh T. Corbett, who is not a member of MRLC. He reads its publications, however, and would like to continue to do so.

The plaintiffs seek a declaratory judgment that the FEC's definition of "express advocacy" as to which corporate financial support is prohibited under the Federal Election Campaign Act of 1971 is too broad, beyond the authority of the FEC and unconstitutionally vague; and an injunction against the FEC and the United States Attorney General to prevent enforcement of this provision.[1]

Analysis

In the context of corporate contributions or expenditures, the FEC historically was unwilling to limit its enforcement activities to express advocacy of the election or defeat of a particular candidate or candidates. Even after *Massachusetts Citizens for Life* held that such express advocacy was the limit on prohibited activity, the FEC refused to revise its regulations to fit this standard until this court explicitly held them to be illegal, the First Circuit affirmed, and the U.S. Supreme Court denied certiorari. The FEC then promulgated draft rules on the subject in 1992, 57 Fed.Reg. 33548, but new language defining express advocacy did not become effective until October 5, 1995, 60 Fed.Reg. 52069, adding a new section 100.22 to Title 11 of the Code of Federal Regulations. This lawsuit is its first judicial review.

[1] The FEC argues that I should not address the merits of the new express advocacy regulation because the MRLC has failed to seek an advisory opinion from the FEC on any communication it proposes to make under the new regulation, and that I should permit the FEC to work out the proper scope of the new regulation on a case-by-case basis. I conclude that this is not an adequate ground for avoiding decision for the following reasons.

The statute does not expressly require that an interested party make use of the advisory opinion. Instead, by its language the advisory opinion is an optional or permissive device. 2 U.S.C. § 437f(a)(2). The U.S. Supreme Court held in *McCarthy v. Madigan* that without an express requirement of exhaustion by Congress, it is within the court's sound discretion whether to require prior resort to administrative remedies. 503 U.S. 140, 144, 112 S.Ct. 1081, 1086, 117 L.Ed.2d 291 (1992). It is true that in *Faucher v.*

1. In their Amended Complaint, the plaintiffs also attacked 11 C.F.R. § 114.4(c)(4), (5), promulgated in December of 1995, but at the hearing, the plaintiffs agreed that these proposed regulations are not yet ripe for review.

FEC, 708 F.Supp. 9 (D.Me.1989), Judge Cyr required the MRLC to seek an advisory opinion, but in that case there was a particular newsletter in question that could be submitted to the FEC and there was a substantial period of time until publication of the next issue. Here, the MRLC is seeking a ruling on its expressive activities generally, speech that may occur at any time in the form of interviews with reporters, letters to the editor, guest columns, etc. More important, the MRLC maintains that the FEC regulation is unconstitutional on its face. This is an attack that the FEC cannot dispose of in the advisory opinion process. (The FEC will rule only on whether a particular utterance complies with the statute or its regulations, 2 U.S.C. § 437f(a)(1), whereas the whole point of the plaintiffs' attack is that the very existence of the rule chills speech.) The plaintiff Corbett, moreover, as a listener or reader does not have the advisory opinion route open to him. Finally, time does not permit an advisory opinion in sufficient time before the presidential primary election occurs on March 5, 1996. For these reasons, I conclude that the plaintiffs are not required to seek an advisory ruling before I rule.

[2] I turn, therefore, to the merits of the lawsuit. Is the FEC's regulation defining prohibited "express advocacy" constitutional? First, I quote the language of the FEC regulation under attack:

> Expressly advocating means any communication that—
>
> (a) Uses phrases such as "vote for the President," "re-elect your Congressman," "support the Democratic nominee," "cast your ballot for the Republican challenger for U.S. Senate in Georgia," "Smith for Congress," "Bill McKay in '94," "vote Pro-Life" or "vote Pro-choice" accompanied by a listing of clearly identified candidates described as Pro-Life or Pro-Choice, "vote against Old Hickory," "defeat" accompanied by a picture of one or more candidate(s), "reject the incumbent," or communications of campaign slogan(s) or individual word(s), which in context can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidate(s), such as posters, bumper stickers, advertisements, etc. which say "Nixon's the One," "Carter '76," "Reagan/Bush" or "Mondale!"; or
>
> (b) When taken as a whole and with limited reference to external events, such as the proximity to the election, could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s) because—
>
> (1) The electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning; and
>
> (2) Reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action.

11 C.F.R. § 100.22.

The measuring standard, as I held in *Faucher*, is set by *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 107 S.Ct. 616. There the Court held that it would limit the reach of the federal election statute—in order to preserve its constitutionality as it concerns corporate contributions or expenditures—to a prohibition of express advocacy. *Id.* at 249, 107 S.Ct. at 623. *Massachusetts Citizens for Life* adopted *Buckley*'s definition of "express advocacy,"[2] namely, "communications that include explicit words of advocacy of election or defeat of a candidate," "communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office." 424 U.S. at 43–44, 96 S.Ct. at 646. According to *Buckley*, "[t]his construction would restrict the [statutory prohibition] to communications containing express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'" *Id.* at 44, n. 52, 96 S.Ct. at 647, n. 52. Subpart (a) of the new regulation closely tracks this language of *Buckley* and is therefore acceptable to the plaintiffs. They seek to invalidate subpart (b).

Subpart (b) originated as follows. After *Buckley* and before the FEC had adopted its current definition of express advocacy, it brought an enforcement action in connection with the 1980 election. *FEC v. Furgatch*, 807 F.2d 857 (9th Cir.), *cert. denied*, 484 U.S. 850, 108 S.Ct. 151, 98 L.Ed.2d 106 (1987) (The context was different in this respect: the corporate prohibition was not involved; instead, the asserted violation was an individual's failure to report to the FEC as required by another part of the statute. But the "express advocacy" standard was still at issue.). The political advocacy in question used none of *Buckley*'s prohibited words, but it was directed against President Carter and used the slogan "Don't let him do it." Because the timing was on the eve of the election, the FEC construed it as seeking the express defeat of President Carter. *Id.* The Ninth Circuit upheld the FEC's enforcement action. To do so, it enlarged ("interpret[ed] and refine[d]" or made "more comprehensive," according to the court, *id.* at 861, 862), *Buckley*'s definition of express advocacy to include speech that:

> must, when read as a whole, and with limited reference to external events, be susceptible of no other reasonable interpretation but as an exhortation to vote for or against a specific candidate. This standard can be broken into three main components. First, even if it is not presented in the clearest, most explicit language, speech is "express" for present purposes if its message is unmistakable and unambiguous, suggestive of only one plausible meaning. Second, speech may only be termed "advocacy" if it presents a clear plea for action, and thus speech that is merely informative is not covered by the Act. Finally, it must be clear what action is advocated. Speech cannot be "express advocacy of the election or defeat of a clearly identified candidate" when reasonable minds could differ as to whether it encourages a vote for or against a candidate or encourages the reader to take some other kind of action.

Id. at 864. It is obvious that subpart (b) of the FEC regulations comes directly from this appellate language. The plaintiffs complain that *Furgatch* and the resulting regulation go farther than *Buckley* and *Massachusetts Citizens for Life* permit.

If the Supreme Court had not decided *Buckley* and *Massachusetts Citizens for Life* and if the First Circuit had not decided *Faucher*, I might well uphold the FEC's subpart (b) definition of what should be covered. After all, the Federal Election Campaign Act is designed to avoid excessive corporate financial interference in elections and the FEC presumably has some expertise on the question what form that interference may take based on its history of complaints, investigations and enforcement actions. Federal courts are expected to defer to an administrative agency like the FEC that Congress has established to deal with a problem that demands expertise. *See FEC v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 37, 102 S.Ct. 38, 44–45, 70 L.Ed.2d 23 (1981). Language, moreover, is an elusive thing. The topic here is communication and it is a commonplace that the meaning of words is not fixed, but depends heavily on context as well as the shared assumptions of speaker and listener. (Consider the varying meanings of "hot," depending on whether the subject is the weather, spicy food, the currency of a particular topic, etc.) One does not need to use the explicit words "vote for" or their equivalent to communicate clearly the message that a particular candidate is to be elected. Subpart (b) appears to be a very reasonable attempt to deal with these vagaries of language and, indeed, is drawn quite narrowly to deal with only the "unmistakable" and "unambiguous," cases where "reasonable minds cannot differ" on the message. "Limited reference to external events" is hardly a radical idea. It is required even by the *Buckley* terminology. After all, how does one know that "support" or "defeat" means an election rather than an athletic contest or some other event without considering the external context of a federal election with specific candidates?

2. I reject the FEC's position (advanced at oral argument and in Advisory Opinion 1992-23, 1992 WL 215532 (F.E.C.)) that *Massachusetts Citizens for Life* loosened the *Buckley* requirement. The FEC attaches great significance to the fact that *Massachusetts Citizens for Life* allowed a prohibition of language that was "marginally less direct" than the words listed in *Buckley*. *Id.* The actual facts in *Massachusetts Citizens for Life* were that the publication "urge[d] voters to vote for 'pro-life' candidates," identified pro-life candidates and provided their photographs. That, the Court held, was "an explicit directive: vote for the (named) candidates." 479 U.S. at 249, 107 S.Ct. at 623. It was "marginally less direct" only in the sense that it did not say "Vote for Smith," but said "vote pro-life" and then listed the pro-life candidates. *Id.* It is unsurprising that *Massachusetts Citizens for Life* concluded that those words fit the *Buckley* language like a glove. *Massachusetts Citizens for Life* provides no support for the FEC's argument that the standard has thereby been loosened or "clarified."

But there is another policy at issue here and it is one that I believe the Supreme Court and the First Circuit have used to trump all the arguments suggested above. Specifically, the Supreme Court has been most concerned not to permit intrusion upon "issue" advocacy—discussion of the issues on the public's mind from time to time or of the candidate's positions on such issues—that the Supreme Court has considered a special concern of the First Amendment. As the Court said in *Massachusetts Citizens for Life:*

> The rationale for [*Buckley*'s] holding was: "[T]he distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions. Not only do candidates campaign on the basis of their positions on various issues, but campaigns themselves generate issues of public interest."
>
> . . . .
>
> *Buckley* adopted the "express advocacy" requirement to distinguish discussion of issues and candidates [protected under the First Amendment] from more pointed exhortations to vote for particular persons [properly regulated by the FEC].

479 U.S. at 249, 107 S.Ct. at 623. In other words, FEC restriction of election activities was not to be permitted to intrude in any way upon the public discussion of issues. What the Supreme Court did was draw a bright line that may err on the side of permitting things that affect the election process, but at all costs avoids restricting, in any way, discussion of public issues. The Court seems to have been quite serious in limiting FEC enforcement to *express* advocacy, with examples of words that directly fit that term. The advantage of this rigid approach, from a First Amendment point of view, is that it permits a speaker or writer to know from the outset exactly what is permitted and what is prohibited. In the stressful context of public discussions with deadlines, bright lights and cameras, the speaker need not pause to debate the shades of meaning in language. The result is not very satisfying from a realistic communications point of view and does not give much recognition to the policy of the election statute to keep corporate money from influencing elections in this way, but it does recognize the First Amendment interest as the Court has defined it. *Faucher*, 928 F.2d 468, confirms this reading. First, the First Circuit announced that the deference rule "no longer applies . . . once the Supreme Court has spoken on the issue. . . . It is not the role of the FEC to second-guess the wisdom of the Supreme Court." 928 F.2d at 471. Second, the First Circuit read *Buckley* as "adopting a bright-line test that expenditures must 'in express terms advocate the election or defeat of a candidate' in order to be subject to limitation." *Id.*

As the plaintiffs persuasively argued at the hearing, *Furgatch*, the source of subpart (b), is precisely the type of communication that *Buckley, Massachusetts Citizens for Life* and *Faucher* would permit and subpart (b) would prohibit. "Don't let him do it" can be a call for all sorts of actions—write the President or call the White House to change the policy; urge your Senator or Representative to use his or her influence; call a radio talk show host—all actions that are part of public issue advocacy; or it can be interpreted on the eve of the election as calling for nothing but the unseating of the President. Directly contrary to the First Circuit in *Faucher* (finding that the Supreme Court had created a "bright-line test," 928 F.2d at 471), the Ninth Circuit reasoned that the Supreme Court did *not* "draw a bright and unambiguous line." 807 F.2d at 861. As a result, *Furgatch* allowed the FEC to prohibit the speech (recognizing it as "a very close call," *id.* at 861); *Buckley, Massachusetts Citizens for Life* and *Faucher* call for letting it go forward in order to preserve the discussion of public issues even at the risk that it is used to elect or defeat a candidate.

The Explanation and Justification issued on July 6, 1995, reveals that the FEC does indeed intend subpart (b) to have just such breadth:

> Communications discussing or commenting on a candidate's character, qualifications, or accomplishments are considered express advocacy under new section 100.22(b) if, in context, they have no other reasonable meaning than to encourage actions to elect or defeat the candidate in question. The revised rules do not establish a time frame in which these communications are treated as express advocacy. Thus, the timing of the communication would be considered on a case-by-case basis.

60 Fed.Reg. at 35295. In other words, what is issue advocacy a year before the election may become express advocacy on the eve of the election and the speaker must continually re-evaluate his or her words as the election approaches.

That is sufficient evidence of First Amendment "chill" to entitle the plaintiffs to relief. *See, e.g., Buckley*, 424 U.S. at 76–77, 96 S.Ct. at 662 (I have also examined the various statements the MRLC has made in the past as attached to its Amended Complaint and some of them on election eve might well meet the subpart (b) definition. The MRLC engaged in such speech until the effective date of the new FEC definition, October 5, 1995, and then stopped. That too is sufficient evidence of chill.)

Conclusion

For these reasons I conclude that 11 C.F.R. § 100.22(b) is contrary to the statute as the United States Supreme Court and the First Circuit Court of Appeals have interpreted it and thus beyond the power of the FEC. I do not address the plaintiffs' argument that the subpart is also void for vagueness.

For the reasons I listed in *Faucher*, all other injunctive and declaratory relief is **Denied**. I **Grant** the Attorney General's motion to dismiss. The Attorney General takes action only upon a Federal Election Commission referral. No such action is threatened or even contemplated here.

Accordingly, the plaintiffs' request for declaratory judgment is **Granted** as follows: It is hereby **Adjudged** that the regulation found in 11 C.F.R. § 100.22(b) is invalid as not authorized by the Federal Election Campaign Act of 1971, 2 U.S.C. § 431 *et seq.*, as interpreted by the United States Supreme Court in *Massachusetts Citizens for Life*, 479 U.S. 238, 107 S.Ct. 616, and by the United States Court of Appeals for the First Circuit in *Faucher*, 928 F.2d 468, because it extends beyond express advocacy. The Clerk shall enter judgment accordingly.

So **Ordered**.

ORDER ON FEDERAL ELECTION COMMISSION'S MOTION FOR RECONSIDERATION OR RELIEF UNDER RULES 59(e) AND 60(b)

The motion for reconsideration or relief is **Denied**. I inquired specifically of the FEC's lawyer at the hearing what factual issues were in dispute so that I could assess whether consolidation of the hearing with the trial on the merits was appropriate under Fed. R.Civ.P. 65(a)(2). The plaintiffs had moved from the outset for such a consolidation and the FEC had filed no written objection, despite the requirements of Local Rule 19. The FEC's lawyer was unable to point to a single factual issue in dispute and it was therefore apparent that only legal issues remained to be resolved. As a result, there was absolutely no reason to delay matters for a trial on the merits.

The FEC had a full opportunity to argue the legality of its regulation and briefed the issue fully. It is specious to maintain that its legal argument should be materially different when the question is success on the merits rather than likelihood of success on the merits. The FEC has pointed me to no requirement that a certified administrative record of its rulemaking proceeding be available to the court before making a decision. In its briefing, the FEC cited extensive portions of the rulemaking history and my decision referred to this history. It is true that I did not have the thousands of pages that the FEC has now filed, but this was not an adjudicative proceeding where I was reviewing an administrative record. Instead, the issue before me was whether the FEC's rule as promulgated was consistent with the United States Supreme Court decisions in *Buckley v. Valeo*, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976) and *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 107 S.Ct. 616, 93 L.Ed.2d 539 (1986), and the First Circuit decision in *Faucher v. FEC*, 928 F.2d 468 (1st Cir.1990), *cert. denied*, 502 U.S. 820 (1991). My opinion candidly indicated that I believed the FEC had the better of the argument on its regulation so far as the logic of language is concerned, but that the statements by the U.S. Supreme Court and the First Circuit Court of Appeals in the relevant decisions foreclosed the option the FEC had elected. There is no suggestion in the FEC's motion papers how the rulemaking record would or should alter that conclusion, which

derives from the language of the court decisions, not the administrative record.

Finally, even now, the FEC declines to tell the court what new arguments it would make if it were afforded the opportunity to take another bite at the apple. Clearly, it was incumbent on the FEC to show me that granting this motion for reconsideration or relief has some point and is not a futile exercise. The absence of such a showing makes the motion appear to be a procedural ploy that would only engender delay in the inevitable outcome.

For all these reasons, the motion is DENIED.

So ORDERED.

Kenneth V. HACHIKIAN

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, in its Capacity as Receiver and Liquidating Agent for Bank Five for Savings and Olympic International Bank and Trust Company.

Civ. A. No. 94-11738-GAO.

United States District Court, D. Massachusetts.

Jan. 19, 1996.

Debtor who owed money to failed bank, for which Federal Deposit Insurance Corporation (FDIC) had taken over, filed action seeking to enforce alleged agreement to settle the debts. The District Court, O'Toole, J., held that: (1) debtor's letter to FDIC constituted sufficient claim for purposes of administrative claims process under Financial Institutions Recovery, Reform and Enforcement Act (FIRREA), and (2) enforcement of alleged oral agreement to settle debts was barred by Statute of Frauds.

Dismissed.

1. Administrative Law and Procedure ⇐662

Banks and Banking ⇐505

Failure to participate in administrative claims review process under Financial Institutions Reform, Recovery and Enforcement Act (FIRREA) is failure to exhaust administrative remedies, thus barring judicial review. Financial Institutions Reform, Recovery, and Enforcement Act of 1989, § 2(d)(13)(D)(i), 12 U.S.C.A. § 1821(d)(13)(D)(i).

2. Banks and Banking ⇐505

Debtor's letter to Federal Deposit Insurance Corporation (FDIC), which had taken over for failed financial institution, constituted sufficient proof of claim against FDIC, for purposes of administrative claims review procedures under Financial Institutions Reform, Recovery and Enforcement Act (FIRREA), even though debtor did not file formal proof of claim before commencing lawsuit against FDIC; even if letter could be read only as request for action, FDIC should have been alerted to existence of claim but failed to send claims notice to debtor within the required 30 days. Financial Institutions Reform, Recovery, and Enforcement Act of 1989, § 2(d)(5)(C)(ii), 12 U.S.C.A. § 1821(d)(5)(C)(ii).

3. Frauds, Statute of ⇐63(5)

Statute of Frauds barred enforcement of alleged oral agreement between debtor and Federal Deposit Insurance Corporation (FDIC), which had taken over for failed bank to which debtor owed money, where agreement called for release of third and four mortgages on debtor's home, which was interest in real property within meaning of Statute of Frauds, and there was no written promise, contract, agreement, memorandum or note created by FDIC setting forth the terms that debtor sought to enforce.

W. Paul Needham, Kevin M. Hensley, Needham & Warren, Boston, MA, for Plaintiff.

Thomas R. Paxman, Federal Deposit Insurance Corporation, Boston, MA, for Defendant.

MEMORANDUM OF DECISION

O'TOOLE, District Judge.

The plaintiff Kenneth V. Hachikian filed this action seeking to enforce an alleged agreement to settle certain debts he owed to the Federal Deposit Insurance Corporation ("the FDIC").[1] The FDIC argues first that this Court lacks subject matter jurisdiction because Hachikian did not comply with a requirement that he submit his claim to the administrative claims review process under the Financial Institutions Reform, Recovery and Enforcement Act ("FIRREA"), 12 U.S.C. § 1821. Alternatively, the FDIC contends that the settlement agreement is unenforceable under the Massachusetts Statute of Frauds. For the reasons stated below, the Court concludes that it has subject matter jurisdiction over the action, but that the Statute of Frauds bars enforcement of the agreement.

BACKGROUND

Hachikian had signed notes and personal guaranties with two banks, Bank Five for Savings ("Bank Five") and Olympic International Bank and Trust Company ("Olympic"). Hachikian's Olympic debt consisted of a $200,000 promissory note secured by a third mortgage on his residence; a personal guaranty of a $3 million loan; and a $115,000 promissory note. His Bank Five debt consisted of a personal guaranty of a $168,750 loan partially secured by a fourth mortgage on his home; a personal guaranty of a loan made to a realty trust; and a personal guaranty of a $100,000 loan to a real estate partnership. Both financial institutions subsequently failed. The FDIC was appointed receiver for Bank Five on September 20, 1991, and for Olympic on June 26, 1992.

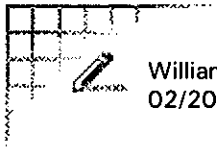
Hachikian thereafter entered into negotiations with the FDIC to try to settle his debts. He alleges that on June 3, 1993, a representative of the FDIC told his lawyer in a telephone conversation that the FDIC had accepted his offer for a settlement. Hachikian claims that the terms of the settlement were set forth in a letter his lawyer sent to the FDIC the next day. Under the supposed agreement, the FDIC would discharge all of Hachikian's obligations to the FDIC, as well as any claims it had against him as a maker or guarantor of any obligations currently held by it as receiver of Bank Five or Olympic, in exchange for an assignment of some stock and cash.

In October, 1993, Hachikian learned that the FDIC's position was that it had *not* agreed to a settlement. The FDIC told Hachikian that it had agreed to release the third and fourth mortgages on his residence, but only to facilitate its sale so that he could pay part of the proceeds to the FDIC. Specifically, the FDIC advised Hachikian that "the deficiency balance ... will remain open and payable in full." (Letter from Peter J. Frazier to Michael C. McLaughlin of December 21, 1993, Def's App. at 1.) Subsequently, Hachikian sold his property, and turned over approximately $103,755 to the FDIC.

By a letter dated January 19, 1994, Hachikian's lawyer urged the FDIC to reconsider its position and to discharge Hachikian's debt in its entirety as, he claimed, it had previously agreed to do. The FDIC took no action in response to the request. On August 29, 1994, Hachikian filed this action.

On December 14, 1994, Hachikian received two notices from the FDIC, each entitled "Notice to Discovered Creditor or Claimant Proof of Claim." The similarly-worded notices stated that the FDIC had discovered that Hachikian "may have a claim" against Bank Five and Olympic, respectively, and advised him to file a proof of claim. Hachikian has consistently maintained that his lawyer's January 19, 1994 letter to the FDIC constituted a proof of claim sufficient to satisfy the requirements of the administrative claims review process, and that that claim had been implicitly disallowed by the FDIC inaction as of July 20, 1994. (Under the statute, any claim not disposed of within 180 days is deemed to have been denied. 12 U.S.C. § 1821(d)(5)(A)(i).) Nonetheless, Hachikian responded to the December, 1994 claims notices by submitting proof of claim forms to the FDIC on January 5, 1995. The FDIC filed a motion to stay this suit for ninety days in order to consider Hachikian's claims in its administrative process, which was denied. Thereafter, the FDIC filed its motion for summary judgment.

1. The complaint contains two counts, one for declaratory judgment and the other for breach of contract. The latter prays both for specific performance and for money damages.



William P. Marshall
02/20/97 06:50:49 PM

Record Type: Record

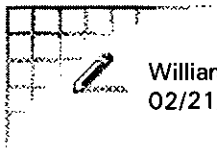
To: Paul J. Weinstein Jr./OPD/EOP, Elena Kagan/OPD/EOP, Peter G. Jacoby/WHO/EOP

cc:
Subject: Election reform

I do not have much in the way of good news. Justice has concluded that many of the options that we discussed regarding pursuing campaign reform through FEC rulemaking are not available under existing law. This includes limits on foreign contributions as well as changes in FEC enforcement procedure.

As we discussed, however, it appears that we can attempt to limit some soft money expenditures by FEC rule change. Specifically we could petition the FEC to change its rules regarding the allocation of hard and soft money in covering shared state and federal expenditures. Unfortunately, the governing law would not appear to allow the FEC to completely eliminate the use of soft money for shared state/federal expenditures but we can seek rule changes to limit the role of soft money as much as is legally possible. For example, we might suggest that upwards of 80% - 90% percent of shared expenditures be covered by federal dollars.

There is also, of course, no obstacle to our appointing persons to the FEC who are committed to reform and challenging the Republicans to submit the names of persons who are equally committed.



William P. Marshall
02/21/97 09:59:45 AM

Record Type: Record

To: Elena Kagan/OPD/EOP

cc:
Subject: Re: Election reform

They are clearly right on those. Congress went out of its way to make FEC enforcement as cumbersome and inefficient as possible. For example, the statute requires that even a simple decision to investigate a matter must be formally approved by the Commission. There is also no wiggle room under the statute on foreign contributions. Justice does have the ability to proceed independently in the case of criminal (not civil) violations but I am not sure what we want to do with that.

Although we obviously do not want to interfere with our current efforts on behalf of McCain-Feingold, we may want to consider, at some point, the advisability of offering legislation that addresses only FEC reform issues. This should including streamlining enforcement, requiring more frequent candidate disclosure filings, and breaking the partisan 3-3 logjam that is endemic to FEC decisionmaking.

Express Advocacy—January 16 Draft

Section 431(9)(A) is amended by adding at the end:

(iii) any payment for a communication that is made through any broadcast medium, newspaper, magazine, billboard, direct mail, or similar type of general public communication or political advertising by a national, state, district or local committee of a political party, including any congressional campaign committee of a party, that refers by name, description or likeness to a clearly identified candidate for federal office; and

for the purpose of influencing any election for federal office

(iv) any payment for a communication that contains express advocacy. Express advocacy means –

(1) any communication that conveys a message that advocates the election or defeat of a clearly identified candidate fo rfederal office by using expressions such as "vote for," "elect," "support," "vote against," "defeat," "reject," "vote pro-life," or "vote pro-choice," accompanied by a listing or picture of clearly identified candidates described as "pro-life" or "pro-choice," "reject the incumbent," or similar expressions, or

(2) any communication that is made through any broadcast medium, newspaper, magazine, billboard, direct mail, or similar type of general public communication or political advertising that refers to a clearly identified candidate for federal office, that a reasonable person would understand as advocating the election or defeat of such candidate, and that is made within 30 days prior to a primary election (and is targeted to the state in which the primary is occurring) or 60 days prior to a general election, or

(3) any communication that is made through any broadcast medium, newspaper, magazine, billboard, direct mail, or similar type of general public communication or political advertising that refers to a clearly identified candidate for federal office, that a reasonable person would understand as advocating the election or defeat of such candidate, that is made prior to the period covered in subparagraph (2), and that is made for the purpose of advocating the election or defeat of such candidate, as shown by one or more factors such as statements or actions by the person

? $10,000

primary ?

? $10,000

making the communication, or the targeting or placement of the communication, or the use by the person making the communication of polling, demographic or other similar data relating to the candidate's campaign or election.

(4) The term "express advocacy" does not include the publication or distribution of a communication that is limited solely to providing information about voting records of elected officials on legislative matters.

and that a reasonable person would not understand to be primarily advocating the election or defeat of a specific candidate.

1/15/97

1. Express Advocacy
   a. Paid advert -
   b. Voter guides
   c. a(2)(a) std

list: paid advert / direct mail / other stuff listed

then use →

Me - A reas person would understand
or is most reasonably understood

go back:
think alt def of commun/pub commun
reas person std

2. Coordinat -
   a. Payment → Expenditure
   b. Agent - language to make clearer

Reporting req - cand. can't be held to report for stuff it doesn't know.

Draft "express advocacy" language -- December 17

(A) Express Advocacy. The term "express advocacy" means:

(1) any communication that conveys a message that advocates the election or defeat of a clearly identified candidate for federal office by using expressions such as "vote for," "elect," "support," "vote against," "defeat," "reject," "vote pro-life" or "vote pro-choice" accompanied by a listing or picture of clearly identified candidates described as "pro-life" or "pro-choice", "reject the incumbent," or similar expressions, or

(2) any communication or series of communications that is made through any broadcasting station, newspaper, magazine, outdoor advertising facility or any other type of general public communication or political advertising, that involves an aggregate disbursement of $10,000 or more, that refers to a clearly identified candidate for federal office, and that can be reasonably understood as conveying a message which advocates the election or defeat of such candidate, provided such communication or series of communications:

(a) is made within 30 days prior to a primary election or 60 days prior to a general election; or

(b) is made for the purpose of advocating the election or defeat of such candidate, as shown by one or more [objective] factors such as statements or actions by the person making the communication, or the targeting or placement of the communication, or the use by the person making the communication of polling, demographic or other similar data relating to the candidate's campaign or election, or

(3) any communication that is made in coordination with a candidate, as defined in section 301(8)(A).

(B) Voting Records. The term "express advocacy" does not include the publication and distribution of a communication that is limited solely to providing information about votes by elected officials on legislative matters, that cannot be reasonably understood as conveying a message which advocates the election or defeat of a candidate, and that is not prepared or distributed in coordination with, or pursuant to any general or particular understanding with, a candidate as described in section 301(8)(A)(iii).

Party and coordination language – December 17 Draft

Section 301(9)(A)(2 U.S.C. 431(9)(A)) is amended by adding new paragraph (iii) as follows:

(9)(A) The term "expenditure" includes –

***

(iii) any communication that is made by a national, state, district or local committee of a political party, including any congressional campaign committee of a party, that refers to a clearly identified candidate for federal office.

Section 301(8)(A) (2 U.S.C. 431(8)(A)) is amended by adding new paragraphs (iii) and (iv) as follows:

(8)(A) The term "contribution" includes --

***

(iii) (aa) any [payment] made for a communication or anything of value that is made in coordination with a candidate. Payments made in coordination with a candidate include:

(1) payments made by any person in cooperation, consultation, or concert with, at the request or suggestion of, or pursuant to any [general or particular] understanding with a candidate, his authorized ~~political~~ committees, or their agents;

(2) the financing by any person of the dissemination, distribution, or republication, in whole or in part, of any broadcast or any written, graphic, or other form of campaign materials prepared by the candidate, his authorized ~~political~~ committees, or their agents; or

(3) payments made based on information about the candidate's plans, projects, or needs provided to the expending person by the candidate or the candidate's agents;

(4) payments made by any person if, in the same election cycle, the person making the payment is or has been --

(I) authorized to raise or expend funds on behalf of the candidate or the candidate's authorized committees; or

(II) serving as a member, employee, or agent of the candidate's authorized committees in an executive or policymaking position.

(5) payments made by any person if the person making the payments has advised or counseled the candidate or the candidate's agents at any time on the candidate's plans, projects, or needs relating to the candidate's pursuit of nomination for election, or election, to Federal office, in the same election cycle, including any advice relating to the candidate's decision to seek Federal office.

(6) payments made by a person if the person making the payments retains the professional services of any individual or other person who has provided or is providing services in the same election cycle to the candidate in connection with the candidate's pursuit of nomination for election, or election, to Federal office, including any services relating to the candidate's decision to seek Federal office. For purposes of this clause, the term 'professional services' shall include any services (other than legal and accounting services solely for purposes of ensuring compliance with any Federal law) in support of any candidate's or candidates' pursuit of nomination for election, or election, to Federal office.

(bb). For purposes of this subparagraph, the person making the payment shall include any officer, director, employee or agent of such person, or any other entity established, financed or maintained by such person.

(cc). For purposes of this subparagraph, any coordination between a person and a candidate during an election cycle shall constitute coordination for the entire election cycle.

Section 315(a)(7) [2 U.S.C. 441a(a)(7)] is amended by revising paragraph (B) as follows:

(B) Expenditures made in coordination with a candidate, as described in section 301(8)(A)(iii), shall be considered to be contributions to such candidate and, in the case of limitations on expenditures, shall be treated as expenditures for purposes of this section.

Section 301 [2 U.S.C. 431) is amended by striking paragraph (17) and inserting the following:

(17) (A) The term "independent expenditure" means an expenditure that --

(i) contains express advocacy; and

(ii) is made without the participation or cooperation of, or without consultation of, or without coordination with a candidate or a candidate's representative, as defined in section 301(8)(A)(iii).

(B) Any expenditure or payment made in coordination with a candidate as defined in section 301(8)(A)(iii) is not an independent expenditure under paragraph (17).

Section 441a(d) is amended by adding new paragraphs as follows:

(4) Before a party committee may make coordinated expenditures in connection with a general election campaign for federal office in excess of $5,000 pursuant to this subsection, it shall file with the Federal Election Commission a certification, signed by the treasurer, that it has not and will not make any independent expenditures in connection with that campaign for federal office. A party committee that determines to make coordinated expenditures pursuant to this subsection shall not make any transfers of funds in the same election cycle to, or receive any transfers of funds in the same election cycle from, any other party committee that determines to make independent expenditures in connection with the same campaign for federal office.

(5)(a) A political committee established and maintained by a national political party shall be considered to be in coordination with a candidate of that party if it has made any payment for a communication or anything of value in coordination with such candidate, as defined in section 301(8)(A)(iii), including but not limited to:

(i) it has made any coordinated expenditure pursuant to section 441a(d) on behalf of such candidate; or

(ii) it has made a contribution to, or made any transfer of funds to, such candidate; or

(iii) it has participated in joint fundraising with such candidate, or in any way has solicited or received contributions on behalf of such candidate; or

(iv) it has provided in-kind services, polling data or anything of value to such candidate, or has communicated with such candidate or his agents, including pollsters, media consultants, vendors or other advisors, about advertising, message, allocation of resources, fundraising or other campaign related matters including campaign operations, staffing, tactics or strategy.

(b) For purposes of this subsection, all political committees established and maintained by a political party, including all national, state, district and local committees of that political party, and all congressional campaign committees, shall be considered to be a single political committee.

(c) For purposes of this subsection, any coordination during an election cycle between a political committee established and maintained by a political party and a candidate of that party shall constitute coordination during the entire election cycle.

PRELIMINARY CONCERNS AND PROPOSED REDRAFT EXPRESS ADVOCACY -- DEC. 17, 1996 DRAFT

(A) Express Advocacy. The term "express advocacy" means:

(1) any communication that conveys a message that advocates the election or defeat of a clearly identified candidate for federal office by using expressions such as "vote for," "elect," "support," "vote against," "defeat," "reject," "vote pro-life" or "vote pro-choice" accompanied by a listing or picture of clearly identified candidates described as "pro-life" or "pro-choice", "reject the incumbent," or similar expressions, or

(2) any paid advertisement ~~communication or series of communications~~ that is made through any broadcasting station, newspaper, magazine, or outdoor advertising facility ~~or any other type of general public communication or political advertising~~, that involves an aggregate disbursement of $10,000 or more, and that refers to a clearly identified candidate for federal office, ~~and that can be reasonably understood as conveying a message which advocates the election or defeat of such candidate,~~ provided such advertisement ~~communication or series of communications~~:

> (a) is made within 30 days prior to a primary election or 60 days prior to a general election [the following is optional] and is susceptible of no other reasonable interpretation but as an exhortation to vote for or against a specific candidate; or
>
> (b) is made for the purpose of advocating the election or defeat of such candidate, as shown by one or more [objective] factors such as statements or actions by the person making the communication, or the targeting or placement of the communication, or the use by the person making the communication of polling, demographic or other similar data relating to the candidate's campaign or election, or

(3) any communication that is made in coordination with a candidate, as defined in section 301(8)(A).

~~(B) Voting Records. The term "express advocacy" does not include the publication and distribution of a communication that is limited solely to providing information about votes by elected officials on legislative matters, that cannot be reasonably understood as conveying a message which advocates the election or defeat of a candidate, and that is not prepared or distributed in coordination with, or pursuant to~~

~~any general or particular understanding with, a candidate described in section 301(8)(A)(iii).~~

EXPLANATION OF PROPOSED REDRAFT
EXPRESS ADVOCACY -- DEC. 17, 1996 DRAFT

I. Section (A)(1)

Section (A)(1) passes constitutional muster because its terms essentially track the examples of express advocacy provided by the Court in Buckley v. Valeo, 424 U.S. 1 (1976), and FEC v. MCFL, 479 U.S. 238 (1986).

II. Section (A)(3)

Section (A)(3) complies with the Constitution to the extent that the terms of section 301(8)(A) also pass constitutional muster under Buckley and its progeny. We have constitutional concerns about the December 17, 1996 draft of section 301(8)(A) to be discussed elsewhere.

III. Section (A)(2)

Section (A)(2), as written, raises constitutional vagueness issues. Eliminating the language that gives rise to the vagueness problems, however, creates overbreadth and other vagueness concerns.

A. The section (A)(2) phrase "can be reasonably understood as conveying a message which advocates the election or defeat of such candidate" raises vagueness concerns. These concerns are exacerbated by the fact that criminal penalties can be imposed for violations of the FECA.

B. Eliminating the "can be reasonably understood" language would make section (A)(2) vulnerable to further vagueness and overbreadth challenges, which we will discuss below.

C. Subsection (A)(2)(a)

Eliminating the phrase "can reasonably be understood as conveying a message which advocates the election or defeat of such candidate" would create an overbreadth issue with respect to subsection (A)(2)(a). This problem can be avoided by, at a minimum, limiting the kinds of communications covered by subsection (A)(2)(a) to advertising through the media specifically listed in section (A)(2). This approach would also eliminate the potential for vagueness and overbreadth challenges to the term "general public communication," the meaning of which is unclear. An approach that would provide even more protection against an overbreadth challenge would be to include the Ninth Circuit's "susceptible of no other reasonable interpretation but as an exhortation to vote" standard, which was crafted in FEC v. Furgatch, 807 F.2d 857 (9th Cir.), cert. denied, 484 U.S. 850 (1987). If the Furgatch standard is used, there would be no need

to limit the types of communications captured by subsection (A)(2)(a) to advertising through the media specifically listed, though we would still recommend clarifying what is meant by the term "general public communication."

D. Subsection (A)(2)(b)

Our comfort with subsection (A)(2)(b) stems from our understanding that its purpose element requires actual purpose. Changes in the language might be necessary to make this clear. It might also be helpful to clarify that factors other than those listed may be used to demonstrate purpose. Moreover, because subsection (A)(2)(b) contains a purpose element, there is no need to limit the types of communications covered thereby to only advertising through the media specifically listed in section (A)(2).

IV. Section (B)

Section (B) raises vagueness concerns. It is also vulnerable to the charge that it effects a content-based classification of speech, as it appears to favor one form of speech -- voting records-- over others based on its content. Limiting the types of communications covered in section (A)(2)(a) to advertising through the media specifically listed would just as effectively exempt nonpartisan voting records, without raising these issues.

alien residents ineligible to vote, Kind, felons

Preliminary Concerns to Discuss With Drafters Regarding Section 301(8)(A) "Party and Coordination Language - December 17 Draft"

In Buckley v. Valeo, the Supreme Court distinguished between political "contributions," which Congress may constitutionally subject to monetary caps, and "independent expenditures," which Congress may regulate to some degree (e.g., disclosure requirements) but may not subject to monetary caps. Expenditures that are "coordinated" with a candidate or his authorized committees are deemed to be "contributions" because they are not made independently. The party and coordination language contained in § 301(8)(A) seeks to establish constitutionally permissible conclusive presumptions that certain disbursements are sufficiently "coordinated" to constitute "contributions."

Don Simon

In Colorado Republicans, a 1996 decision, the Supreme Court for the first time considered when an expenditure may be deemed to be sufficiently coordinated for constitutional purposes to constitute a "contribution" that may then be subject to a monetary cap. The case concerned the constitutionality of restricting the Colorado Republican Party's expenditure of funds for an ad that attacked a Democratic candidate for Senate. Although seven of the justices agreed that restricting the party's expenditure violated the First Amendment, no single opinion attracted the support of a majority of the Court.

Writing for a three-justice plurality, Justice Breyer, joined by Justice Souter and Justice O'Connor, held that neither Congress nor the FEC had established any basis in the record for establishing a conclusive presumption that all expenditures by political parties may be deemed to be sufficiently coordinated to constitute contributions. The plurality further concluded that there was no evidence in the record to support the more limited conclusion that the Colorado Republican Party's actual expenditure was "in fact" coordinated. As a result, the plurality held that it would be unconstitutional to treat the particular expenditure under review as if it were a "contribution" rather than an "independent expenditure." The plurality opinion did not resolve whether Congress may impose conclusive presumptions of coordination in some circumstances, or whether instead all determinations of coordination must be made on a case-by-case basis.

In a separate opinion, Justice Kennedy agreed that political party expenditures on behalf of party candidates were "contributions," but he concluded that the constitution prohibited Congress from placing monetary caps on such contributions. In an opinion joined by Chief Justice Rehnquist and Justice Scalia, Justice Thomas concluded that Buckley erred in permitting Congress to place monetary caps on any contributions, whether made by political parties, individuals, or other groups. Justice Stevens, in an opinion joined by Justice Ginsburg, dissented on the ground that the constitution permitted Congress to place limitations on

political party expenditures generally without showing that particular expenditures had been "coordinated" with the candidate.

The upshot of these opinions is that it is simply impossible to determine whether this Court will sustain revisions to the campaign finance laws that have the effect of presuming certain payments to be coordinated with a candidate, without proof of coordination in fact. Our comments on the constitutionality of the presumptions set forth in § 301((8)(A) must be understood in light of the underlying legal uncertainty that persists after the divided decision in Colorado Republicans. At the same time, it is also clear that the Court's decision does not foreclose an argument that Congress may constitutionally establish some conclusive presumptions of coordination provided that it establishes a sufficient legislative record to support those presumptions in light of its compelling interests in combatting corruption and the appearance of corruption in the political process. Congress may also have somewhat broader authority to establish rebuttable presumptions -- i.e., those presumptions that place the burden of proof upon the regulated individual but permit that individual to disprove coordination in a particular case -- although even these less determinative presumptions would have to be supported by appropriate legislative findings. The degree to which sufficient findings could be produced to support presumptions that cover certain types of disbursements, or even to support the use of a conclusive, rather than a rebuttable presumption, will generally depend on answers to empirical questions about the current campaign finance system.

Presumptions that are not supported by sufficient legislative findings are overbroad in the sense that, under Buckley, they impose limits on protected expression without sufficient governmental justification. To the extent that some of the presumptions set forth in § 301(8)(A) are overbroad, there may be reason to draft a separate provision identifying particular evidentiary factors that may be relied upon to demonstrate coordination in particular cases, even though such factors could not themselves provide the basis for a constitutionally permissible presumption of coordination.

The use of presumptions of coordination also raises a question whether persons deemed to be "recipients" of such presumed "contributions" can be held responsible for them. To the extent presumptions of coordination render some disbursements "contributions" even though the supposed recipient plays no role in effecting them, it would be constitutionally problematic to impose legal obligations or consequences on such "recipients" with respect to such "contributions."

The following comments on the specific provisions set forth in the December 17 draft of § 301(8)(A) are provided with these general observations in mind. The comments do not include a

redlined version of the proposed language on coordinated expenditures because the constitutional problems identified below may be addressed through a variety of means. The means used to address these problems will largely depend upon the specific policy goals of the drafters, rather than any particular legal requirements. It is therefore difficult at this stage to make specific drafting suggestions.

The Use of the Term "Payment" in § 301(8)(A)

It appears that any "payment" by a person who meets the criteria set forth in subsection (iii)(aa) is a "contribution." That renders the term "contribution" potentially overbroad given the ordinary meaning of the words "payment." Without a particular definition of "payment," the term could be construed to include even disbursements that are unrelated to an election campaign as well as a host of other disbursements that are currently exempted from the definition of "expenditure" in § 431(9)(a). At least some disbursements that are made in relation to an election campaign -- for example, those that are made to facilitate the printing of an independent newspaper story -- would have to be excluded from the definition of "payment" -- just as they are exempted from the current definition of "expenditure" -- in order to avoid rendering the term "contribution" overbroad. Moreover, the term "payment" may have to include some additional exemptions not currently included in the statutory definition of "expenditure" because § 301(8)(A) broadens the definition of "contribution" beyond the scope of that term in the current statute. In addition to overbreadth concerns, we note that any definition of "payment" will be subject to the requirement that it not be vague.

Payment

?

Section 301(8)(A)(iii)(aa)(1)

The section is not problematic as applied to understandings with "a candidate," or "authorized political committees," because it may fairly be presumed that such payments have been authorized by the candidate. There appears to be an overbreadth problem, however, with the inclusion of the phrase "or their agents" to the extent that this term may be read to apply to "payments" made in consultation with low-level agents who are not acting on behalf of the candidate or the "authorized political committee." We note also that there are overbreadth problems unless the term "payment" is narrowed in the manner discussed above. Finally, the use of the term "authorized political committee" is potentially confusing. The present statute defines "authorized committees" to include certain "political committees" -- a term that the present statute also specifically defines -- but does not define the term "authorized political committee." It may therefore be useful to delete the word "political." (The same holds true for subsection (2)'s use of the phrase "authorized political committee.")

Agents

agents acting on behalf of candidate or authorized political committee

Section 301(8)(A)(iii)(aa)(2)

The section poses severe overbreadth concerns. The phrase "financing" the "dissemination, distribution, or republication" would appear to apply to a seemingly limitless array of actions, many of which would not even be related to an electoral campaign and others of which -- such as the publication of a story in an independent newspaper -- could not plausibly be understood to pose a risk of corruption or to create the appearance of corruption. The phrase should be limited in a manner that would restrict its application to those disbursements that are akin to those discussed in the section suggesting that the definition of "payment" needs to be narrowed.

Even if subsection (2) were limited in this manner, it would remain overbroad. The provision does not require a showing that the person making the disbursement in fact coordinated with anyone connected with the candidate, while subsection (1) at least requires that there be some indication of cooperation between an individual and persons sharing a direct tie to the candidate. Furthermore, the candidate may have no control over the uses to which his materials are put, and it may therefore be unreasonable in some circumstances to presume that the use of those materials demonstrates the candidate's involvement. For example, the use of a candidate's campaign poster in an ad may show no more than that someone took a picture of the publicly displayed poster. In addition, subsection (2) would appear to cover even instances in which materials are used in communications that could not conceivably be understood to be intended to further the election of the candidate whose materials are reproduced -- e.g., quoting from a candidate's briefing book in an ad that attacks him. The presumption therefore seems to cover disbursements unrelated to the government's interest in combatting either corruption or the appearance of corruption.

It may be that a narrow, rebuttable presumption could be drawn regarding the use of certain "campaign materials," although there would be significant difficulties in drafting a provision that was neither vague, nor overbroad, yet was useful as an enforcement tool. We note in this regard that a provision that set forth general evidentiary considerations for a finding of coordination could certainly identify the use of campaign materials as a particular kind of relevant evidence.

Section 301(8)(A)(iii)(aa)(3)

The section poses severe overbreadth problems unless the term "payment" is limited in the manner discussed above. In addition, the phrase "based on information" appears to aggravate the overbreadth. For example, the provision would apply to disbursements based on public information that was neither disseminated nor received, nor could reasonably be understood to

have been disseminated or received, as part of a coordinated effort to bring about the disbursement. Even payments made as a consequence of information provided by a candidate during an interview on a general news broadcast would seem to be covered. In light of vagueness concerns, it would be very difficult to write a provision that would sufficiently narrow the general phrase "based on information" yet remain a viable enforcement tool. Again, however, a general evidentiary provision could list information regarding the "candidate's plans, projects or needs" as among the kinds of evidence that could be used to support a specific finding of coordination.

Section 301(8)(A)(iii)(aa)(4)(I) & (II)

Subsection (I) is highly problematic because the term "authorized" would appear to apply to virtually every person who could engage in fundraising. Many of these people could not plausibly be understood to be acting in concert of purpose with the candidate. The mere act of fundraising, let alone the status of being "authorized" to engage in fundraising, seems to provide an insufficient basis for a presumption of coordination, rebuttable or not. Moreover, a definition of "authorized" in subsection (I) that was sufficiently narrow to avoid overbreadth concerns would appear to merely track the language already set forth in subsection (II), which applies only to persons who exercise an executive or policymaking role in the campaign.

The presumption effected in subsection (II) is probably permissible because it is limited to persons who perform executive or policymaking functions in the campaign. At the very least, the appearance of corruption is at its zenith with respect to such persons. To ensure that important fundraisers are not omitted from the provision's reach, we recommend that the word "fundraiser" be added after the word "employee" in subsection (II), and that subsection (I) be deleted.

Section 301(8)(A)(iii)(aa)(5) & (6)

Subsection (5) is overbroad. It sweeps in far too many people to be constitutionally supportable. To the extent that it could be narrowed to conform to constitutional requirements, it would probably merely cover persons already covered by subsection (6). We therefore recommend its deletion. Moreover, we note that subsection (6) is itself, at present, overbroad. The term "services" presumably applies even to volunteers working at phone banks. A person who retains someone to provide media services for an ad campaign in support of a candidate, for example, could not plausibly be deemed to be acting in a coordinated fashion with the candidate merely because the person who had been retained previously volunteered at a phone bank for that same candidate. It would be better to define "services" for the candidate more narrowly -- i.e., polling, media coordination, preparation of

sensitive campaign documents, etc. Also, the term "any services relating to the candidate's decision to seek Federal office" may be overbroad because, for example, in the days before announcing one's candidacy, one may consult with a broad range of people not all of whom one expects to be supporters in the end. Finally, there may be cause for concern because subsection (6) appears to make the decision to retain one person's services sufficient to taint all payments by the employer, regardless of the actual role played by the employee. (As a matter of language, the phrase "any individual or other person" is an odd one, unless "person" is defined elsewhere in the Act.)

Section 301(8)(A)(iii)(bb)

The provision gives rise to severe overbreadth problems. A person should not be deemed to be "making a payment" merely because a person is an "agent" of a person who actually makes a payment. To the extent that the provision would make anyone who works for the person making a payment legally responsible for that payment, therefore, it would seem to impose legal liability on persons unfairly. To ensure that persons otherwise covered by § 301(8)(A) may not avoid its reach by delegating the act of making payments to persons acting on their behalf, the provision could state that actions of persons acting on behalf of persons covered by §301(8)(A) shall be attributed to those persons on whose behalf they are acting.

Section 301(8)(A)(iii)(cc)

The provision is overbroad. It mandates that once an individual engages in any coordinated activity, all of his future activity will be deemed to be coordinated. That general presumption of coordination is problematic because it does not require any showing that the conduct that supposedly justified the initial finding of "coordination" was connected to the content of those subsequent payments the provision deems "coordinated." For example, if an individual makes one payment for an ad on the basis of information supplied to him by a candidate, it is not clear that all subsequent payments for ads by that individual will be similarly made with the assistance or approval of the candidate. Nevertheless, the provision appears to presume that those subsequent payments are made with such assistance or approval. It is doubtful that such a presumption may be constitutionally supported. The overbreadth problem is even more severe when one considers that the term "payment" is undefined, and that some instances of coordination, as defined in § 301(8)(A), are themselves overbroad. (We note also that the provision is somewhat confusing as it uses the term "coordination," even though §301(8)(A) does not itself define that term. The definition is apparently located in a later provision.)

FOREIGN CONTRIBUTIONS BAN

___. Section 319(b) of FECA (2 USC § 441e(b)) is amended to read as follows:

"(b) As used in this section, the term 'foreign national' means--

(1) any individual who is not a citizen of the United States;

(2) any person other than an individual which is a foreign principal as such term is defined by section 611(b) of title 22;

(3) any corporation which is a foreign subsidiary;

(4) any partnership of which the rights to governance, or in which the majority of the ultimate beneficial ownership or interests, are held or controlled, directly or indirectly, by individuals who are not citizens of the United States; and

(5) any person other than an individual, a corporation or a partnership, whose activities are directly or indirectly supervised, directed, controlled, financed or subsidized in whole or major part by a foreign principal as such term is defined by

section 611(b) of title 22.

For purposes of this subsection (b), the term 'foreign subsidiary' shall mean any corporation (i) the ultimate beneficial ownership of which is held or controlled, directly or indirectly, by individuals who are not citizens of the United States or (ii) a majority of the total combined voting power of all classes of stock of which is ultimately held or controlled, directly or indirectly, by individuals who are not citizens of the United States."