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Did a D.C. Federal Court Fail the "Major Purpose Test"?

One Judge's Retroactive Decision Regarding an Advocacy Group's Ads Broadcast in 2010 Threatens Vital Constitutional Rights and Could Reverse Decades of Settled Practice

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Introduction

A recent opinion[2] by Judge Christopher R. Cooper of the federal District Court in Washington, D.C. poses new risks for advocacy groups and their supporters. The ruling erodes a constitutional limitation on the power of the government to compel Americans speaking about policy issues to register themselves as political committees (PACs) with the Federal Election Commission (FEC).

The consequences of being regulated as a PAC are substantial. As the Supreme Court noted in *Federal Election Commission v. Massachusetts Citizens for Life*, being a PAC subjects an organization to "stringent restrictions" that "create a disincentive for such organizations to engage in political speech" and "impose administrative costs that many small entities may be unable to bear." 479 U.S. 238, 254-55 (1986). In addition, such groups must publicly disclose detailed information about all but the most de minimis of their contributions and expenditures, and the names, addresses, employment, and other information on all but the most de minimis of their donors.

Judge Cooper's decision would create a strong presumption that broadcast issue ads run shortly before an election, so-called "electioneering communications," are evidence the group's major purpose is to elect candidates, and therefore that it *must be* regulated as a PAC. This presumption would include communications merely urging citizens to contact their representatives about matters then pending in Congress.

This requirement is conspicuously absent from the relevant statute, and constitutes a reversal of decades of FEC policy. As applied to one group's ads broadcast in 2010, it thus raises troubling First Amendment, Due Process, and Separation of Powers concerns. After the FEC could not agree on whether to appeal the decision or conform to it by a required four votes,[3] the complainant filed a federal lawsuit asking to assume the role of the FEC and enforce this new policy itself.

At the heart of the case are people facing unforeseeable punishment and other infringements for associating and engaging in political speech eight years ago. Especially when the regulation of our political speech is involved, Americans share a right to know the law in advance. As the Supreme Court has explained, "laws . . . must give fair notice of conduct that is forbidden or required. . . . [T]wo connected but discrete due process concerns [are]: first, that regulated parties should know what is required of them so they may act accordingly; second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way. When speech is involved, rigorous adherence to those requirements is necessary to ensure that ambiguity does not chill protected speech."[4]

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2 *Citizens for Responsibility and Ethics in Washington v. Fed. Election Comm'n*, Case No. 16-2255, ECF No. 48 (D.D.C. Mar. 20, 2018). Available at: https://transition.fec.gov/law/litigation/crew_162255_dc_opinion.pdf.

3 *See* Caroline C. Hunter and Matthew S. Petersen, "Statement on *CREW v. FEC*, No. 16-CV-02255," Federal Election Commission. Retrieved on May 9, 2018. Available at: https://assets.documentcloud.org/documents/4448253/CREWvFECStatement.pdf (April 26, 2018) and Ellen L. Weintraub, "Statement of Vice Chair Ellen L. Weintraub Regarding *CREW v. FEC & American Action Network*," Federal Election Commission. Retrieved on May 9, 2018. Available at: https://www.fec.gov/resources/cms-content/documents/2018-04-19-ELW-statement.pdf (April 19, 2018).

4 *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012) (internal cites omitted).

American Action Network's Electioneering Communications

The American Action Network (AAN) is an advocacy organization that paid to broadcast ads shortly before the 2010 election. Some of its ads expressly advocated the election or defeat of candidates, but most of its ads did not. However, under the Bipartisan Campaign Reform Act (BCRA), any broadcast, cable, or satellite communication that merely *refers* to a person who is a federal candidate (for example, "Call Congressman Smith, and tell him to support HR 1. . . ") and that is publicly distributed to the relevant voters within 30 days of a primary or 60 days of a general election is nonetheless regulated as an "electioneering communication" (EC).[5] Whether an ad that meets these objective criteria is supportive or critical of a candidate, or if it in fact has no election-influencing purpose, is irrelevant. To address concerns such an ad might be designed to affect an election, BCRA requires a disclaimer to be included in the ad identifying the entity that paid for it and also requires that entity to promptly file reports with the FEC identifying any donors who contributed $1,000 or more to fund the ad.[6]

AAN's 2010 ECs included these required disclaimers, and it filed the required EC reports with the FEC. Nevertheless, an advocacy group supporting more speech regulation, Citizens for Responsibility and Ethics in Washington (CREW), filed a complaint with the FEC alleging that AAN also should have registered and filed reports as a PAC.

There was no indication in 2010 that sponsoring the EC ads at issue would require AAN to register as a PAC and follow the myriad, costly, and complex rules applicable to such committees. It is remarkable that, eight years later, AAN must face the choice of continuing its costly fight to vindicate its rights or capitulate. On May 4, 2018, AAN filed a notice indicating it will continue to fight and appeal Judge Cooper's decision.[7]

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The Political Committee Status Test

According to the Federal Election Campaign Act (Act), a group becomes subject to regulation as a "political committee" when it receives $1,000 in "contributions" or makes more than $1,000 in "expenditures." Among numerous other organizational and disclosure requirements, political committees must file reports divulging the name, address, occupation, and employer of any person who contributes more than $200 to the group. These reports are quickly published online and maintained in perpetuity in an easily searchable online database.

In 1976, the Supreme Court in *Buckley v. Valeo*, 424 U.S. 1 (1976), declared certain provisions of the Act unconstitutional, but it tried to save other aspects of the Act by interpreting the legislative language narrowly. It bears emphasis that the Court would not have had any power to effectively alter the terms of an act of Congress unless the law was unconstitutional as originally enacted. Specifically, to save groups engaged in the discussion of issues, the Supreme Court limited the definition of an "expenditure" to payments for communications that expressly advocate for the election or defeat of candidates. It also limited the definition of a "political committee" to those groups whose major purpose is the election or defeat of candidates. Because the Act defines a political committee to include any group making over $1,000 in expenditures, these two saving limitations work together to prevent the Act from violating Americans' core First Amendment rights to associate and speak on the political issues of the day. Without these limitations, virtually every group of two or more people who make even modest purchases of ads or expenditures for signs, pamphlets, and the like that discuss issues while referring to candidates (many of whom are incumbent officeholders) would have to organize, register, and report as a PAC.

Since *Buckley*, the FEC and citizen advocacy groups have known that if a group makes more than $1,000 in "expenditures" (payments for ads expressly advocating the election or defeat of a candidate) and those payments were a majority of its spending, it could be punished as an unregistered political committee, fined, forced to register as a PAC, and compelled to publicly disclose its donors. Conversely, the public and the FEC have relied heavily on the corollary understanding that spending on communications like ECs, which by definition do not contain express advocacy, are not expenditures that trigger PAC status. Instead, Congress created a separate, less burdensome EC reporting regime in BCRA to address concerns that the sponsors of ECs could be using these communications to influence elections.

5 52 U.S.C. § 30104(f)(3)(A).

6 52 U.S.C. § 30104(f); 52 U.S.C. § 30120(a).

7 Notice of Appeal, *Citizens for Responsibility and Ethics in Washington v. Fed. Election Comm'n*, Case No. 16-225, ECF No. 49 (D.D.C. May 4, 2018).

In 2004, after the enactment of BCRA, the Commission considered enacting new rules to determine when a group is a political committee. After considering over 100,000 comments, including from 150 members of Congress, the FEC decided to maintain its case-by-case method because the new rules:

> might have affected hundreds or thousands of groups engaged in non-profit activity in ways that were both far-reaching and difficult to predict, and would have entailed a degree of regulation that Congress did not elect to undertake itself when it increased the [IRS-based] reporting obligations of 527 groups in 2000 and 2002 and when it substantially transformed campaign finance laws through BCRA. Furthermore, no change through regulation of the definition of 'political committee' is mandated by BCRA or the Supreme Court's decision in *McConnell*.[8]

The FEC's approach to analyzing political committee status has been challenged and upheld.[9]

Judge Cooper's First Decision

CREW's novel theory was that AAN's spending on ECs should be added to its spending on independent expenditures to reach a determination that a majority of AAN's spending, and therefore its major purpose, was to influence elections. Under that view, AAN violated the law by failing to register as a PAC. Because a majority of commissioners did not agree with CREW, the Commission dismissed the case and CREW filed suit. The commissioners who found that AAN did not violate the law grounded their decision on the Act, BCRA, and First Amendment concerns addressed in the Supreme Court's *Buckley* decision and later cases. It bears repeating here that all of AAN's spending on ECs was publicly disclosed, and each message identified AAN as its sponsor, according to the terms of the statute.

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Nevertheless, in late 2016, Judge Cooper ruled in his first decision[10] that the FEC erred when it dismissed the AAN complaint because it categorically excluded all ECs from its major purpose test analysis.[11] At that time, Judge Cooper also rejected CREW's argument that all ECs should count toward a group's major purpose.

Normally, a decision that turned upon the FEC's interpretations of ambiguous statutory language, like the definitions of "expenditure" and "political committee," would warrant substantial deference from a court. Judge Cooper instead recast the issue as one of interpreting judicial precedent, stating that he would "not afford deference to the FEC's interpretation of judicial precedent defining the protections of the First Amendment and the related contours of *Buckley*'s major purpose test." Nonetheless, Judge Cooper stated that he would give deference to the FEC as to "*how* Buckley (and the test it created) should be implemented. . . . Such implementation choices, which call on the FEC's special regulatory expertise, were the types of judgements that Congress committed to the sound discretion of the agency."

As if the difference between what *Buckley* means and how it should be implemented were not opaque enough, Judge Cooper acknowledged that "[t]he statute that the FEC was charged to implement has since been construe[d] by the Supreme Court to incorporate the 'major purpose' limitation on political committee status." And he acknowledged that the District Court had previously "deferred to the FEC when the agency decided to adjudicate political committee status – and the major purpose test – rather than promulgate a rule defining it." There is a contradiction between the notion that the FEC has the power to implement the major purpose test – and warrants judicial deference as to how it does so – but is due no deference as to its method of adjudicating AAN's political committee status in this case.

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8 Political Committee Status, Definition of Contribution, and Allocation for Separate Segregated Funds and Nonconnected Committee, 69 Fed. Reg. 68056, 68064-68065 (Nov. 23, 2004); Political Committee Status, 72 Fed. Reg. 5595, 5596 (Feb. 7, 2007).

9 *Shays v. FEC*, 511 F. Supp. 2d 19 (D.D.C. 2006).

10 *Citizens for Responsibility and Ethics in Washington v. Fed. Election Comm'n*, 209 F. Supp. 3d 77 (D.D.C. 2016). Available at: http://s3.amazonaws.com/storage.citizensforethics.org/wp-content/uploads/2016/09/19161556/Document-52-9-19-16-Court-Mem-Op-on-MSJ.pdf.

11 In a footnote to its 2016 decision, the court dismissed the FEC's claim that it, in fact, did no such thing, but rather had, in fact, considered the text of each of AAN's ECs to identify any that may have contained the "functional equivalent of express advocacy" – yet another category of political speech created by the courts that can alter the reach of political speech financing regulations.

Judge Cooper's dismissiveness toward the FEC's authority to implement the law using a First Amendment-sensitive approach conflicts with decisions of the U.S. Court of Appeals for the District of Columbia Circuit. The Court of Appeals has held that:

> "[t]he FEC is unique among federal administrative agencies, having as its sole purpose the regulation of core constitutionally protected activity – the behavior of individuals and groups only insofar as they act, speak, and associate for political purposes . . . every action the FEC takes implicates fundamental rights. By tailoring [BCRA's EC] disclosure requirements to satisfy constitutional interests in privacy, the FEC fulfilled its unique mandate."[12]

In fact, the D.C. Circuit further held that "the FEC exercised its unique prerogative to safeguard the *First Amendment* when implementing its congressional directives. Its tailoring [of BCRA's provisions] was an able attempt to balance the competing values that lie at the heart of campaign finance law."[13]

It is extraordinary, to say the least, for a single district judge to disregard the reasoning of multiple courts of appeals.

Judge Cooper critiqued the significant body of case law contradicting his opinion and supporting the FEC's dismissal of the complaint against AAN. The court deemed the Seventh Circuit Court of Appeals' opinion in *Wisconsin Right to Life, Inc. v. Barland*, 751 F.3d 804 (7th Cir. 2014), an "outlier." It stated that the Tenth Circuit Court of Appeals' opinion in *New Mexico Youth Organized v. Herrera*, 611 F.3d 669 (10th Cir. 2010), was unpersuasive because that Court did not likely understand the meaning of *Citizens United*. Judge Cooper held that the Fourth Circuit Court of Appeals' decision in *North Carolina Right to Life, Inc. v. Leake*, 525 F.3d 274 (4th Cir. 2008) and a fellow D.C. District Court judge's decision in *FEC v. Malenick*, 310 F. Supp. 2d (D.D.C. 2004) should be disregarded because they were decided before *Citizens United*. (Although Judge Cooper emphasized the significance of *Citizens United*, that case did not address the question of PAC status at all.) It is extraordinary, to say the least, for a single district judge to disregard the reasoning of multiple courts of appeals.

Judge Cooper concluded that the reasoning of the FEC's controlling commissioners was contrary to law for excluding ECs in its adjudication of the major purpose test. The court therefore compelled the FEC to undertake an ad-by-ad analysis to differentiate which of AAN's ECs should be counted towards a major purpose determination. In deference to the FEC's judicially approved case-by-case approach to adjudicating political committee status and implementing the law, Judge Cooper's decision did not impose a rule for the FEC to apply. But he left no mystery as to how he would decide the case if he were the FEC: "*[M]any* or even *most* electioneering communications indicate a campaign-related purpose. Indeed, it blinks reality to conclude that many of the ads . . . in this case were not designed to influence the election or defeat of a particular candidate in an ongoing race."

The Court's Second Opinion

To comply with the court's order in the first ruling, the FEC had to develop a method to determine whether an organization's purpose was to elect candidates based on the implied messages of the ECs. The commissioners analyzed the disputed ECs again and categorized several as counting toward PAC status. However, when the costs for these newly categorized ads were added to the independent expenditure ads, the commissioners again could not find that AAN's spending on campaign ads constituted a majority of its spending. So the FEC dismissed the case, again. And CREW filed suit, again.

The controlling FEC opinion under review listed several factors to count certain ECs toward PAC status. Such factors would at least provide the public with notice of the speech which would trigger PAC status. The factors included:

- the extent to which an ad's text focused on elections, voting, and political parties;
- whether the ad focused on issues important to the group or merely the candidates referenced in the ad;
- whether the ad had a call to action relating to a policy issue or the election/defeat of candidates; and
- a limited consideration of the context of the ad.

Using these factors to evaluate each ad, the controlling FEC opinion found more of AAN's ads should count towards a major purpose. But because AAN's amount of spending on independent expenditures and qualifying ECs under this method was

12 *Van Hollen v. FEC*, 811 F. 3d 486, 499 (2016) (internal citation omitted).
13 *Id.* at 501 (internal citation omitted).

only 22% of its total spending in the two-year time frame reviewed, the controlling FEC opinion concluded the ads did not indicate AAN had a major purpose of electing candidates.

In his second opinion,[14] Judge Cooper conceded that if a "statute is silent or ambiguous on an issue," the court must approve an agency's resolution of the issue if it is "a reasonable policy choice for the agency," which is a "highly deferential" review. Further, his opinion concedes that "BCRA did not touch the text of the [Act's] definition of a 'political committee.'" And yet, Judge Cooper found the Act and "BCRA make clear that Congress intended to foreclose the Commission from applying a major-purpose framework that does not, at a minimum, presumptively consider spending on [ECs] as indicating an [organization's] election-related purpose."

Judge Cooper reasoned that the 1974 Act revealed this Congressional directive because of its broad definition of a political committee which, if he "could disregard *Buckley*'s constitutional concerns," he would use to conclude that AAN is a political committee. He also explained that, in BCRA, "Congress saw electioneering communications as generally aimed at swaying voters," and "Congress's intent regarding these ads is manifest in its very choice of labelling them 'electioneering communications.'" As for the Supreme Court's recognition in *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003) and *Federal Election Commission v. Wisconsin Right to Life*, 551 U.S. 449 (2007) that congressionally-defined ECs can include ads without an electioneering purpose, he deduced that Congress, in BCRA, "seems to have left open a small interpretive gap . . . that allows the Commission, using its case-by-case approach, to deem an extraordinary [EC] as lacking an election-related purpose." Thus, the absence of any provision altering the definition of "political committee" or including ECs in the calculation of the well-known "major purpose" test in BCRA's new disclosure regime was interpreted as an "unambiguous directive of Congress" that "electioneering communications *presumptively* have an election-related purpose." Therefore, the FEC "must presumptively treat spending on [ECs] as indicating a [organization's] major purpose [is] nominating or electing a candidate." Accordingly, Judge Cooper concluded the implementation method in the controlling opinion was "inconsistent with the governing statutes."

The court's confidence in the clarity of BCRA, despite BCRA's silence on political committee status, and the court's reliance on BCRA's general purpose of disclosure for the newly regulated ECs are in tension with the explicit holdings of the Court of Appeals for the D.C. Circuit. That Court has held BCRA's text is in fact ambiguous.[15] Moreover, statutory silence on an issue is considered an implicit delegation of authority to an agency to fill in the statutory gaps.[16] The Court of Appeals also admonished against judicial overreliance on perceptions of statutory purpose: "What judges believe Congress 'meant' (apart from the text) has a disturbing but entirely unsurprising tendency to be whatever judges think Congress *must* have meant, i.e., *should* have meant."[17] In fact, the D.C. Circuit squarely rejected the same use of BCRA's purpose that Judge Cooper adopted: "Just because one of BCRA's purposes (even chief purposes) was broader disclosure does not mean that anything less than maximal disclosure is subversive. . . . That BCRA seeks more robust disclosure does not mean Congress wasn't also concerned with, say, the conflicting privacy interests that hang in the balance."[18] And the Court of Appeals approved the FEC modifying its implementation of BCRA's disclosure regime in response to evolving jurisprudence, like *WRTL II*: "Constitutional decisions of this magnitude [*i.e.*, *WRTL II*], unquestionably justify an agency in updating its existing regulations [implementing BCRA's disclosure requirements] to appropriately compensate for changed circumstances."[19]

[T]he plain text of the FECA and its BCRA amendments unambiguously indicate Congress did *not* intend for ECs to satisfy the major purpose test.

Indeed, the plain text of the FECA and its BCRA amendments unambiguously indicate Congress did *not* intend for ECs to satisfy the major purpose test. Congress defined a payment for express advocacy of the election or defeat of a candidate as an

14 *Citizens for Responsibility and Ethics in Washington v. Fed. Election Comm'n*, Case No. 16-2255, ECF No. 48 (D.D.C. Mar. 20, 2018). Available at: https://transition.fec.gov/law/litigation/crew_162255_dc_opinion.pdf.

15 *See Van Hollen*, 811 F.3d at 492 ("In this case, BCRA is ambiguous, and the FEC's construction of it is reasonable. We defer accordingly."); *Center for Individual Freedom v. Van Hollen*, 694 F.3d 108 (D.C. Cir. 2012) (BCRA "is anything but clear, especially when viewed in light of the Supreme Court decisions in" *Citizens United* and *FEC v. Wisconsin Right to Life*, 551 U.S. 449 (2007) ("*WRTL II*").

16 *Van Hollen*, 811 F.3d at 493 ("Congress is presumed to have left to reasonable agency discretion questions that it has not directly resolved."); *id.* at 495 ("Congressional silence of this sort is . . . 'an implicit delegation from Congress to the agency to fill in the statutory gaps.'").

17 *Van Hollen*, 811 F.3d at 495.

18 *Id.* at 494.

19 *Id.* at 496.

"expenditure."[20] It defined a political committee as a group making over $1,000 in such "expenditures."[21] And in a provision of BCRA, Congress expressly defined ECs to not be "expenditures."[22] Accordingly, it cannot be said that Congress clearly and unambiguously mandated that payments for ECs should presumptively count toward satisfying the definition of a political committee, as they would if they were expenditures. Indeed, BCRA would make little sense if it means, as Judge Cooper's decision indicates, that a group primarily making ECs could be subjected to the entire regulatory regime reserved for political committees – thus rendering the EC disclosure regime that BCRA created superfluous.

Conclusion

Regardless of whether one thinks the policy Judge Cooper announced is wise or superior to the longstanding implementation of the law on which the FEC and the public have relied, there remain troubling questions about the court's path to its decision, including whether the rule announced was for this court to write in contravention of Legislative and Executive Branch prerogatives.

This decision thus intrudes on the rights of speech, association, privacy, and due process that empower all Americans to participate in our vibrant democracy, and it should be reversed.

Judge Cooper's decision also disregards a large body of case law in an area of profound constitutional sensitivity. In operation, Judge Cooper's prescription would undermine the law's lynchpin distinction between organizations that have a major purpose of influencing elections and those that do not – a distinction created by the Supreme Court to save the Act from its unconstitutionality. More troubling, however, are the potential consequences an advocacy organization may face for its speech based on an unprecedented rule announced by one judge almost eight years after that speech was communicated. This decision thus intrudes on the rights of speech, association, privacy, and due process that empower all Americans to participate in our vibrant democracy, and it should be reversed.

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20 52 U.S.C. 30101(9)A)(i), (17).
21 52 U.S.C. 30101(4)(A).
22 52 U.S.C. 30104(f)(3)(B)(ii).