

MoveOn.org Voter Fund Operated In Full Compliance With the Law

MoveOn.org Voter Fund (“MOVf”) functioned, during the 2003-04 election cycle, as a political organization that was exempt from tax under section 527 of the Internal Revenue Code, but that did not constitute a “political committee” under federal campaign finance rules. Although the role and status of such so-called “section 527” organizations became controversial during the 2003-04 cycle, the law in effect at the time was clear. And MOVf complied at all times and in all respects with that law.

Indeed, the FEC initially based its case against MOVf on a theory that had nothing to do with the legality of section 527 groups. The FEC then rejected that theory in favor of yet another one. At the end of the day, the FEC based its finding against MOVf on a legal theory about how MOVf’s funds were solicited--a theory that attempts to apply a regulation that did not even exist when MOVf was in operation.

To avoid the expense and distraction of litigation, MOVf decided to settle with the FEC without admitting or denying any wrongdoing. Had MOVf challenged the FEC’s finding, however, there is little doubt that MOVf would have prevailed and that court would have found MOVf operated, in good faith and in full compliance with the law.

I. Legal Framework in Effect in 2004

Section 527 is actually the section of the Internal Revenue Code that allows all partisan political organizations to take contribution income without paying taxes on it, to the extent they use that income for political purposes. Technically, *every* political committee at any level—from a presidential campaign down to Jones for Dogcatcher—is a “section 527 organization.”

The term “section 527 organization,” however, has come to mean something else in the past few years. In the current vernacular, it refers to groups that are political organizations for federal *tax* purposes but not under *campaign finance laws*, particularly the federal campaign finance laws. And if such an organization is not a political committee for purposes of federal campaign finance laws, there is basically no legal limitation on the source or amount of contributions to the organization.

How can it be that an organization *has* a political function for tax purposes—thus qualifying as a Section 527 organization—but is *not* a political committee for purposes of federal campaign finance law? The reason is that the legal tests are different.

With respect to the tax law test, the IRS issued a series of rulings in the late 1990's that essentially liberalized what a 527 group can do with tax-exempt money. The rulings held that such activities as voter guides and issue advocacy advertisements, which are *explicitly targeted and designed* to influence elections, are “exempt function” activities for a section 527 organization. That means they are activities that are legally permissible under the tax laws for such a group.

The campaign finance law test, on the other hand, hinges on interpretations of the Federal Election Campaign Act of 1971, as amended (“FECA”). At what point, under this law, will a political group's spending become subject to the federal campaign finance restrictions that apply to federal political committees like federal PACs?

The applicable law—the FECA—provides that an organization is a federal political committee only if it spends more than \$1,000 in a year “for the purpose of influencing a federal election.” 2 U.S.C. §431(9)(A). For more than 25 years, it has been the law that this definition of “expenditure” is confined to communications that “in express terms advocate the election or defeat of a clearly identified federal candidate.” *Buckley v. Valeo*, 424 U.S. 1, 42-44 (1976). In addition, the Supreme Court has held that the federal campaign finance laws do not apply to an organization unless, in addition to meeting this “expenditure” test, the organization is under the control of a candidate or its “major purpose” is nomination or election of a candidate. *Buckley*, 424 U.S. at 79; *accord*, *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 252, 262 (1986).

Nothing in the Bipartisan Campaign Reform Act of 2002 (BCRA, also known as “McCain-Feingold”) changed these tests. To the contrary, in undertaking a wholesale revision of FECA, Congress left absolutely untouched the definitions of “political committee” and, in all pertinent respects, the definition of “expenditure.” *See* FEC, *Notice of Proposed Rulemaking on Political Committee Status*, 69 Fed. Reg. 11736, 11737 (March 11, 2004). Indeed, in a later rulemaking proceeding, the FEC found that, “no change through regulation of the definition of ‘political committee’ is mandated by BCRA or the Supreme Court’s decision in *McConnell*.” *FEC, Political Committee Status, Final Rules*, 69 Fed. Reg. 68056, 68064 (Nov. 23, 2004). When Congress revises a statute, its decision to leave certain sections unchanged indicates acceptance of the preexisting construction and application of the unchanged terms. *Cottage Savings Ass’n v. Commissioner*, 499 U.S. 554, 562 (1991).

With respect to the unchanged definition of “expenditure,” the U.S. Supreme Court, in its decision upholding most of BCRA, *McConnell v. FEC*, 540 U.S.93 (2003), explicitly affirmed the *Buckley* “express advocacy” test. The *McConnell* Court characterized its earlier opinion in *Federal Election Commission v. Massachusetts Citizens for Life*, 479 U.S. 238, 248 (1986) as reaffirming this construction of “expenditure”. The *McConnell* Court indeed confirmed that, “Since our decision in *Buckley*, Congress’ power to prohibit corporations and unions from using funds in their treasuries to finance advertisements expressly advocating the election or defeat of candidates has been firmly embedded in our law.” 540 U.S. at 203.

In 2000, Congress did impose additional reporting obligations on section 527 groups, requiring them publicly to disclose their contributions and disbursements.

Thus, under the law in effect during 2004, a section 527 group was not a political committee unless it made expenditures of at least \$1,000 expressly advocating the election or defeat of a federal candidate. The only other requirements were that a section 527 group was required by the 2000 law to file reports with the IRS publicly disclosing its contributions and disbursements; and, under BCRA, to file “electioneering communications” reports if it spent funds on broadcast advertising within certain time windows. 2 U.S.C. § 434(f). MOVF filed several such reports with the FEC, disclosing all of its issue advertising within the relevant windows and all of its donors who contributed in excess of \$1,000 to MOVF. These electioneering reports were filed with the FEC within 24 hours of disseminating those issue advertisements as required by the BCRA.

II. MOVF Complied With the Law at All Times

. There is no question that MOVF never disbursed any funds for any communication expressly advocating the election or defeat of any federal candidate. The FEC *never* found that MOVF had made any such disbursement.

Nor was there any question about the legality of MOVF’s fundraising. MOVF accepted funds solely from individuals who are U.S. citizens or permanent resident aliens. It did not accept any donations from any corporation, labor union or any other type of organization.

Further, it is undisputed that MOVF complied with all applicable reporting requirements. It timely filed all public disclosure reports it was required to file under section 527 of the Internal Revenue Code. MOVF also timely filed with the FEC all “electioneering reports” it was required to file with respect to spending on certain broadcast advertising under BCRA. The FEC *never* found otherwise.

Thus, MOVF complied at all times, and in all respects, with the applicable law in effect at the time.

A. FEC’s Initial Legal Theory

The case against MOVF was triggered by a complaint filed with the FEC by the Republican National Committee. That complaint charged that the purpose and motivation of MOVF’s communications were to defeat George Bush; that MOVF had unlawfully coordinated its activity with the Kerry Campaign or the Democratic Party; and that MOVF effectively operated as the non-federal account of a federal PAC, the MoveOn PAC.

After examining the initial responses of MOVF and MoveOn PAC, the FEC dropped two of these charges—the ones relating to the purpose of expenditures and

coordination—and decided to investigate only the third, that MOVF operated as the non-federal account of a federal PAC, MoveOn PAC. Had MOVF functioned as the non-federal account of MoveOn’s federal PAC, the combined entities would have been required, under an FEC ruling (Advisory Opinion 2003-37) to pay solely from its federal PAC for communications referencing federal candidates, i.e., all of the advertising opposing President Bush.

MOVF and the PAC argued, however, that they functioned as separate entities, so that this ruling was inapplicable. The FEC’s Office of General Counsel then conducted an extensive investigation in which the two groups answered written questions under oath, made officials available for interviews and a deposition and provided numerous documents. After that investigation, the Commission voted to drop the “non-federal account” theory entirely and to pursue the case based on a new and entirely different theory, as explained below. (FEC General Counsel, Factual and Legal Analysis, Aug. 9, 2006).

B. Basis for FEC Finding Against MOVF

The FEC’s finding against MOVF was based on the theory that some of the contributions raised by MOVF had resulted from solicitations indicating that the funds would be used to oppose the election of a clearly identified federal candidate, namely, George Bush. The FEC argued that such solicitations turned the funds received into contributions subject to the FECA. And receiving more than \$1,000 in such regulated contributions requires a group to register and function as a federal political committee. According to the FEC, because MOVF did not comply with the laws applicable to a federal political committee, i.e., a federal PAC—which would have limited contributions to the group to \$5,000 and required registration and filing of reports with the FEC—MOVF violated the law.

Where did the FEC come up with this theory? In reality, it derives from a regulation that was not even in effect while MOVF was operating in 2003-04.

In response to the 527 controversy, the FEC conducted an extensive rulemaking proceeding, during 2004, to determine whether 527’s should be subject to greater regulation and whether, under certain circumstances, they should be treated as federal political committees. Ultimately, the FEC actually decided *against* issuing any new regulations as to whether 527’s should be regulated as “political committees.” The FEC found that that such 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 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*.

FEC, *Political Committee Status, Final Rules*, 69 *Fed. Reg.* 68056, 68064 (Nov. 23, 2004).

The FEC did, however, issue a new regulation providing that any funds received by a 527 group would be treated as “contributions” subject to FECA if such funds resulted from a solicitation indicating that “any portion of the funds received will be used to support or oppose the election of clearly identified Federal candidate.” *Id.* at 68066, adding new 11 C.F.R. §100.57(a). It is this regulation which the FEC sought to apply to MOVF’s solicitation of contributions during 2003 and 2004.

But that new regulation was not even effective until January 1, 2005. So how could the FEC apply it retroactively?

The answer is that the FEC, in making its finding against MOVF, pretended that the rule created by the new regulation had been in effect all along based on a court ruling, *FEC v. Survival Education Fund, Inc.*, 65 F.3d 285 (2d Cir. 1995). In that case, the court simply ruled that when a solicitation of contributions by a 501(c)(4) organization indicated that contributions would be used for communications expressly advocating the election or defeat of a federal candidate, the solicitation itself needed to carry a disclaimer—*i.e.*, a line indicating who paid for the solicitation. “[D]isclosure is only required under [FECA’s disclaimer provision] for solicitations of contributions that are earmarked for activities or ‘communications that expressly advocate the election or defeat of a clearly identified candidate for federal office.’” *Id.* at 29 (emphasis added). Furthermore, in that case, the funds received were *in fact* used for communications expressly advocating the defeat of Ronald Reagan.

This case is completely inapplicable to MOVF’s situation. None of MOVF’s solicitations indicated that the funds received would be used to expressly advocate the defeat of any candidate, and none of the funds were in fact so used. In any event, nothing in the *Survival Education Fund* case suggested that FECA regulated contributions received in response to a solicitation “opposing” a federal candidate such that the organization became a federal political committee. The case in no way supports the FEC’s pretense that its new, 2005 regulation was somehow already the governing law ten years ago.

MOVF’s solicitations complied with the law in effect at the time they were made and funds received in response to those solicitations did not constitute “contributions” under that law. Accordingly, nothing MOVF did transformed the organization into a federal political committee required to register and report to the FEC.