ADMINISTRATIVE LAW — JUDICIAL REVIEW — DISTRICT COURT FOR THE DISTRICT OF COLUMBIA INVALIDATES REGULATIONS IMPLEMENTING BIPARTISAN CAMPAIGN REFORM ACT. — *Shays v. FEC*, 337 F. Supp. 2d 28 (D.D.C. 2004).

Between 1977 and 2002, Federal Election Commission (FEC) regulations allowed unregulated and unrestricted contributions to political parties — soft money — to influence federal elections.[1] Concerned about the corrupting influence of soft money, Congress passed the Bipartisan Campaign Reform Act of 2002[2] (BCRA or the Act), often referred to as McCain-Feingold. Recently, in *Shays v. FEC*,[3] the United States District Court for the District of Columbia invalidated fifteen FEC regulations implementing BCRA.[4] Among the regulations invalidated was the FEC's interpretation of a BCRA provision that allowed federal candidates and officeholders, notwithstanding the Act's other restrictions, to "attend, speak, or be a featured guest at" certain fundraising events.[5] The FEC interpreted this language to permit politicians to solicit soft money while at such events — conduct otherwise prohibited.[6] Although the court struck down this regulation because of flaws in the rulemaking process,[7] it should have invalidated the agency interpretation at Step One of the *Chevron* analysis.[8] Properly interpreted, the statute's meaning is clear: it merely guarantees that politicians can attend, speak, or be featured guests at such fundraisers without per se violating BCRA.

In 2002, after seven years of legislative battles,[9] a ride on the Straight Talk Express,[10] and a winter of corporate scandals,[11] BCRA's sponsors[12] persuaded Congress to "plug the soft-money loophole"[13]

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[1] *See* McConnell v. FEC, 124 S. Ct. 619, 648–50 (2003) (recounting the origination and growth of soft money through regulatory loopholes).

[2] Pub. L. No. 107-155, 116 Stat. 81 (codified primarily in scattered sections of 2 and 47 U.S.C.A. (West 2005)).

[3] 337 F. Supp. 2d 28 (D.D.C. 2004).

[4] *See id.* at 130–31.

[5] 2 U.S.C.A. § 441i(e)(3) (West 2005).

[6] 11 C.F.R. § 300.64(b) (2005).

[7] *See Shays*, 337 F. Supp. 2d at 92–93.

[8] *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).

[9] *See* Editorial, *Election Law Coup d'État*, N.Y. TIMES, June 24, 2002, at A18.

[10] *See generally* JOHN MCCAIN WITH MARK SALTER, WORTH THE FIGHTING FOR 367–89 (2002) (recounting Senator McCain's presidential campaign).

[11] *See* Robert O'Brien, *Tyco Sinks 20%, WorldCom Falls as Market Supplies Lots of Drama*, WALL ST. J., Jan. 30, 2002, at C2; Rebecca Smith, *Enron Files for Chapter 11 Bankruptcy, Sues Dynegy*, WALL ST. J., Dec. 3, 2001, at A3.

[12] Senators McCain and Russell Feingold sponsored the Senate version of the bill; Congressmen Christopher Shays and Martin Meehan sponsored the House version.

[13] McConnell v. FEC, 124 S. Ct. 619, 654 (2003) (describing the purpose of Title I of BCRA).

with the Act. Under the Federal Election Campaign Act of 1971[14] (FECA), soft money contributions were exempt from donation limits and could be used to influence federal elections.[15] A bipartisan 1998 Senate investigation found that soft money had undermined campaign finance laws;[16] both parties exchanged access for contributions.[17] Public outrage at such practices sparked a grassroots movement[18] that led to BCRA.

The FEC promulgated the challenged regulations soon after BCRA's passage.[19] Congressmen Christopher Shays and Martin Meehan, cosponsors of the House bill, filed suit in the United States District Court for the District of Columbia, challenging the FEC's implementation of BCRA's provisions on soft money, coordinated communications, and electioneering communications.[20]

On cross-motions for summary judgment, Judge Kollar-Kotelly reviewed nineteen provisions of the FEC regulations.[21] The court upheld four.[22] The court invalidated four regulations at Step One of *Chevron* because Congress had "directly spoken to the precise question at issue"[23] and the FEC had not listened.[24] The court invalidated five rules at Step Two of *Chevron*, finding that they were impermissible in-

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14 Pub. L. No. 92-225, 86 Stat. 3 (1972) (codified as amended at scattered sections of 2, 18, and 47 U.S.C.).

15 *See McConnell*, 124 S. Ct. at 648–50 (summarizing the history and use of soft money).

16 S. REP. NO. 105-167, pt. 4, at 7515 (1998).

17 *Id.* pt. 1, at 41–42, 195–200; *id.* pt. 5, at 7968–71.

18 *See, e.g.*, Frank Bruni, *89, and 2000 Miles To Go for 'Democracy'*, N.Y. TIMES, Apr. 27, 1999, at A16 (interviewing then eighty-nine-year-old Doris Haddock, a.k.a. "Granny D," while she promoted campaign finance reform by walking across the country).

19 *See Shays*, 337 F. Supp. 2d at 37–38.

20 *See id.* at 36–38, 55, 72, 124. The suit initially was stayed pending the outcome of *McConnell v. FEC*, 124 S. Ct. 619, which upheld most of the Act against constitutional challenges. *See generally The Supreme Court, 2003 Term—Leading Cases*, 118 HARV. L. REV. 248, 364–71 (2004) (providing a detailed report of the Court's decision in *McConnell* and concluding that the Court "largely approved" BCRA).

21 Judge Kollar-Kotelly first dispatched challenges to standing and ripeness. *See Shays*, 337 F. Supp. 2d at 38–50.

22 *See id.* at 93–97 (upholding 11 C.F.R. § 300.2(c)(3) (2005), which excludes actions taken prior to November 6, 2002, from assessment of whether an entity is established or controlled by another entity); *id.* at 117–20 (upholding 11 C.F.R. § 300.32(a)(4), which allows the use of Levin funds to raise more Levin funds); *id.* at 120–21 (upholding 11 C.F.R. § 300.30(c)(3), which sets accounting standards for state, district, and local parties taking part in federal election activities); *id.* at 121–24 (upholding 11 C.F.R. § 100.14, which includes "state committee," "district committee," and "local committee" within "the official party structure").

23 Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842 (1984).

24 *See Shays*, 337 F. Supp. 2d at 65–71 (invalidating 11 C.F.R. § 109.21(c)(4), which excludes the Internet from coordinated communication regulation); *id.* at 107–08 (invalidating 11 C.F.R. § 100.24(a)(4), which defines "voter identification" in election activity regulations); *id.* at 114–17 (invalidating 11 C.F.R. § 300.32(c)(4), which creates a de minimis exception for Levin funds); *id.* at 128–29 (invalidating 11 C.F.R. § 100.29(b)(3)(i), which requires that communications be funded to qualify as electioneering communications).

terpretations of ambiguous statutory language,[25] in part because some "unduly compromise[d] the Act's purposes."[26] The court found that the six remaining regulations survived *Chevron* review but failed to comport with the requirements of the Administrative Procedure Act[27] (APA): four were "arbitrary and capricious" under the APA and *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*,[28] and two were invalid because their notice of proposed rulemaking was inadequate under the APA.[29] The court remanded the fifteen invalidated regulations to the FEC for action consistent with the opinion.[30]

Among the regulations the court found permissible under *Chevron* but unacceptable under *State Farm* was 11 C.F.R. § 300.64(b).[31] The court began its consideration of this regulation by examining the relevant statutory language: "Notwithstanding [the Act's restrictions on solicitation and other activity], a candidate or an individual holding Federal office may attend, speak, or be featured guests at a fundraising event for a State, district, or local committee of a political party."[32] The FEC regulation interpreted this provision to mean that "[c]andidates and individuals holding Federal office may speak at such events without restriction or regulation,"[33] and that "speaking" includes a range of activities, including solicitation of soft money, otherwise forbidden by the Act.[34]

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[25] *See id.* at 56–65 (invalidating 11 C.F.R. § 109.21(c), which creates content requirements for communication to be considered coordinated with a political candidate or party); *id.* at 73–75, 78–80 (invalidating 11 C.F.R. § 300.2(m), which defines "solicit"); *id.* at 73–77 (invalidating 11 C.F.R. § 300.2(n), which defines "direct"); *id.* at 108–12 (invalidating 11 C.F.R. § 100.25, which defines "generic campaign activity"); *id.* at 113–14 (invalidating 11 C.F.R. § 300.33(c)(2), which allows employees of state, local, and district committees of political parties who spend less than twenty-five percent of their time on federal election activity to be paid with soft money).

[26] *See, e.g.*, *id.* at 62 (quoting *Orloski v. FEC*, 795 F.2d 156, 164 (D.C. Cir. 1986)).

[27] 5 U.S.C. §§ 551–559, 701–706 (2000 & Supp. II 2002).

[28] 463 U.S. 29 (1983); *see Shays*, 337 F. Supp. 2d at 71–72 (invalidating 11 C.F.R. § 109.3, which defines "agent" for purposes of the Act's regulation of coordinated communications); *id.* at 80–88 (invalidating 11 C.F.R. § 300.2(b), which defines "agent" for purposes of the Act's soft money provisions); *id.* at 88–93 (invalidating 11 C.F.R. § 300.64(b), which allows federal candidates and officeholders to speak without restriction at fundraisers for state, district, and local committees of political parties); *id.* at 124–28 (invalidating 11 C.F.R. § 100.29(c)(6), which exempts 501(c)(3) organizations from electioneering communications regulations).

[29] *See Shays*, 337 F. Supp. 2d at 98–101 (invalidating 11 C.F.R. § 100.24(a)(2), which defines "voter registration activity"); *id.* at 101–07 (invalidating 11 C.F.R. § 100.24(a)(3), which defines "get-out-the-vote activity").

[30] *Id.* at 130.

[31] *See id.* at 88–93. The court invalidated the regulation as "arbitrary and capricious" because the explanation and justification for the rule failed *State Farm*'s reasoned analysis requirement. *See id.* at 92–93.

[32] 2 U.S.C.A. § 441i(e)(3) (West 2005); *see Shays*, 337 F. Supp. 2d at 88.

[33] 11 C.F.R. § 300.64(b).

[34] *See* Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money, 67 Fed. Reg. 49,064, 49,108 (July 29, 2002), *cited in Shays*, 337 F. Supp. 2d at 88.

At Step One of *Chevron*, the court found the statute ambiguous, susceptible to interpretation either as "a carve-out for unabashed solicitation by federal candidates and officeholders at . . . fundraising events, or [as a simple clarification] that merely attending, speaking, or being the featured guest at such an event is not to be construed as constituting solicitation *per se*."[35] The FEC argued that the plain language and structure of BCRA favored its interpretation, and that an interpretation that called for monitoring of speech at fundraising events would be constitutionally problematic.[36] The plaintiffs' analysis focused on the fact that Congress had not used the term "solicit" in § 441i(e)(3), arguing that Congress's use of the word in neighboring subsections that explicitly create exemptions suggests that Congress did not intend to do the same here.[37] The parties also differed on how the "notwithstanding" proviso operated.[38] Ultimately, the court agreed with the FEC that Congress's use of the term "solicit" to create other exemptions for solicitation did not clearly conflict with the agency's interpretation and held that § 441i(e)(3) is ambiguous.[39]

At Step Two, the court was unwilling to hold the FEC's interpretation unreasonable, though it recognized that it "likely contravenes what Congress intended when it enacted the provision, as well as what the Court views to be the more natural reading of the statute."[40] The plaintiffs had argued that the regulation flew in the face of congressional intent, as articulated by Senator John McCain on the Senate floor, that "[f]ederal candidates and officeholders cannot solicit soft money funds . . . for any party committee — national, State or local."[41] But the court found that BCRA provisions allowing solicitation in limited circumstances undermined the persuasiveness of Senator McCain's statement, and that the legislative record was otherwise "bare."[42] Although the court acknowledged the possibility of manipulation, it nonetheless held that the record was insufficient to support a finding that the regulation created "the potential for gross abuse,"[43] concluding that the interpretation was permissible at Step Two.[44]

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[35] *Shays*, 337 F. Supp. 2d at 89–90.

[36] *See id.* at 88.

[37] *See id.* at 89.

[38] *See id.*

[39] *Id.* at 90. The Court was also unwilling to apply at Step One a canon that provisos should be narrowly construed when their breadth is uncertain; this refusal was motivated by the belief that the canon requires ambiguity for its application and finding ambiguity at Step One would have required the court to move to Step Two. *See id.* at 90 n.57 (citing 2A NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 47:08 (6th ed. 2000)).

[40] *Id.* at 91 (footnote omitted).

[41] *Id.* at 90 (quoting 148 CONG. REC. S2139 (daily ed. Mar. 20, 2002)).

[42] *See id.* at 91.

[43] *Id.* (quoting *Orloski v. FEC*, 795 F.2d 156, 165 (D.C. Cir. 1986)).

[44] *Id.* at 92.

The *Shays* court erred in holding that § 441i(e)(3) is ambiguous and that the FEC's regulation was a permissible interpretation of the Act. The section reads:

> Notwithstanding paragraph (1) or subsection (b)(2)(C) of this section, a candidate or an individual holding Federal office may attend, speak, or be a featured guest at a fundraising event for a State, district, or local committee of a political party.[45]

The section's meaning is clear: notwithstanding the restrictions on fundraising by federal candidates and officeholders, those individuals can attend, speak, or be featured guests at certain fundraising events without per se violating the Act's rules. The FEC's interpretation errs on two fronts. First, it interprets "speak" in § 441i(e)(3) to cover not only speeches to attendees, but also whispered requests to individuals. Second, it treats § 441i(e)(3) as a "total carve out"[46] from the Act's coverage, allowing candidates to engage in express solicitation and other prohibited conduct while speaking. By holding this errant interpretation reasonable, the court allowed the FEC to twist the statute's language and open a loophole Congress never intended.

The FEC's first mistake was reading "speak" in the Act's text to include any oral communication, grouping intimate conversations with addresses to the attendees.[47] Although the FEC's reading conforms to one definition of "speak,"[48] the proper interpretation is that Congress here used "speak" to mean "to express one's views before a group: make a talk or address."[49] Because ambiguity is not created by mere "definitional possibilities,"[50] courts look to context, which demands this

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[45] 2 U.S.C.A. § 441i(e)(3) (West 2005).

[46] Editorial, *supra* note 9 (quoting FEC Commissioner Michael Toner); *see also* Candidate Solicitation at State, District, and Local Party Fundraising Events, 70 Fed. Reg. 9013, 9015–16 (proposed Feb. 24, 2005) (to be codified at 11 C.F.R. § 300.64(a)) (contrasting the regulation's "complete exemption" with an alternative that would assure candidates that attending or speaking would not be per se solicitation).

[47] *See* Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money, 67 Fed. Reg. 49,064, 49,108 (July 29, 2002) ("[T]he Commission . . . construe[s] the provision as a total exemption to the solicitation prohibition, applicable to Federal candidates and officeholders, when attending and speaking at party fundraising events . . . ."); Federal Election Commission's Response in Support of Its Motion and in Opposition to Plaintiff's Motion for Summary Judgment at 42 n.63, *Shays* (No. 02-CV-1984) ("BCRA clearly provides that Federal candidates and officeholders may do more than simply give a speech at a fundraiser.").

[48] *See, e.g.*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2185 (1981) ("[T]o give oral expression to thoughts, opinions, or feelings: engage in talk or conversation . . . .").

[49] *Id.*

[50] Brown v. Gardner, 513 U.S. 115, 118 (1994); *see also* MCI Telecomms. Corp. v. AT&T Co., 512 U.S. 218, 225–27 (1994); NLRB v. Federbush Co., 121 F.2d 954, 957 (2d Cir. 1941) (L. Hand, J.) ("Words are not pebbles in alien juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate the other, but all in their aggregate take their purport from the setting in which they are used . . . ."). *But see* Nat'l R.R. Passenger Corp. v. Boston & Me. Corp., 503 U.S. 407, 417–19 (1992) (finding ambiguity on the basis of multiple definitions).

reading. "Attending" and "being a featured guest at" a fundraiser are familiar and specific ways politicians give their imprimatur to an event. Giving remarks at an event, "speaking," is also a familiar and specific way politicians give their imprimatur to a fundraiser. Common sense and the canon of *noscitur a sociis* require that "speak" receive this specific meaning in order to remain coherent with the surrounding text.[51] The provision assures politicians that none of these familiar and specific acts will be considered "solicitation by [them] . . . or in [their] name."[52]

Reading the statute from the perspective of federal candidates and officeholders is necessary because they are the provision's audience.[53] When a statute addresses an audience more narrow than the general population, courts should read it as that interpretive community would.[54] Politicians would understand "speak" in "attend, speak, or be a featured guest at a fundraising event" as allowing them to give a speech without violating the Act.

The FEC also erred in reading § 441i(e)(3) as a "total carve out" from the Act's coverage, rather than as an assurance that certain activities would not be per se violations. Under the FEC's reading, the same solicitation that would violate the Act if contained in a fundraising letter would be acceptable if made at a fundraising event.[55] This interpretation violates the clear meaning of § 441i(e)(3), which assures politicians that they can attend, speak, or be featured guests at fundraisers without per se violating the Act.

The FEC's interpretation might be plausible if § 441i(e)(3) were read in isolation, but when placed within the context of the whole Act, it becomes clear that the FEC is mistaken. First, when BCRA exempts certain activities from its coverage, it uses the same term — "so-

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[51] *Cf.* Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687, 719–21 (1995) (Scalia, J., dissenting) (reading "harm" in the phrase "[t]he term 'take' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect" as only covering intentional harm).

[52] 2 U.S.C.A. § 441i(b)(2)(C) (West 2005).

[53] *See id.* § 441i(e) (regulating the behavior of federal officeholders and candidates).

[54] *See* Cont'l Can Co. v. Chi. Truck Drivers, 916 F.2d 1154, 1157 (7th Cir. 1990) (Easterbrook, J.) ("Words do not have meanings given by natural law. . . . [S]uccessful communication depends on meanings shared by interpretive communities."); *see also In re* Erickson, 815 F.2d 1090, 1092–94 (7th Cir. 1987) (Easterbrook, J.) (discussing and illustrating the importance of audience in statutory interpretation); John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2457 (2003) (explaining that textualists "believe that statutes convey meaning only because members of a relevant linguistic community apply shared background conventions for understanding how particular words are used in particular contexts").

[55] Uncertainty regarding how the FEC will define "solicit" on remand, *see Shays*, 337 F. Supp. 2d at 73–75, 78–80 (invalidating 11 C.F.R. § 300.2(m), which defines "solicit"), complicates the question of when candidate speech (whether at a fundraiser, in a letter, or over the phone) will qualify as solicitation. This is surely an uncomfortable inquiry from a First Amendment perspective. Nevertheless, it is the inquiry BCRA demands and *McConnell* upheld.

licit" — that it uses when prohibiting the conduct.[56] Courts, presuming that variations in statutory language are meaningful,[57] should regard § 441i(e)(3)'s use of other terms as a deliberate choice not to exempt politicians at fundraisers from the Act's coverage.[58] Further, a cursory look at § 441i shows that § 441i(e)(4) is titled "Permitting certain solicitations."[59] Congress's choice to enumerate contexts in which solicitation is permitted, and not to place "attending, speaking, and being a featured guest" at fundraisers within that enumeration, suggests that § 441i(e)(3) should not be read to permit solicitation.[60]

Consideration of BCRA's statutory purpose and legislative history, whether at Step One or Two of *Chevron*,[61] further supports invalidation of the FEC regulation. The Act's purpose is to "plug the soft-money loophole."[62] As the *McConnell* Court noted, many BCRA provisions do not directly regulate soft money; rather, they are "anticircumvention measures" that close potential channels through which the newly banned funds could flow.[63] When Congress created exemptions that could conflict with this purpose, it did so in precise, detailed, and cabined language.[64] In the absence of such clear instruction from Congress, BCRA provisions should not be interpreted to open up new loopholes for soft money.

Legislative history further undercuts the FEC's reading of § 441i(e)(3). When Senate cosponsor Russell Feingold debated the bill on the floor, he introduced into the record a section-by-section explanation of the Act. The portion describing the segment of the bill that

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[56] *See* 2 U.S.C.A. § 441i(e)(2) ("Paragraph (1) [the general prohibition on solicitation] does not apply to the solicitation, receipt, or spending of funds by [a federal candidate or officeholder] who is or was also a candidate for a State or local office solely in connection with such election . . . ."); *id.* § 441i(e)(4)(A) ("Notwithstanding any other provision of this subsection, a [federal candidate or officeholder] may make a general solicitation of funds on behalf of [certain tax exempt organizations] where such solicitation does not specify how the funds will or should be spent."); *id.* § 441i(e)(4)(B) ("In addition to the general solicitations permitted under subparagraph (A), [a federal candidate or officeholder] may make a solicitation explicitly to obtain funds for carrying out the activities described . . . .").

[57] *See* P. ST. J. LANGAN, MAXWELL ON THE INTERPRETATION OF STATUTES 282 (12th ed. 1969), *cited in* WILLIAM N. ESKRIDGE, JR. ET AL., CASES AND MATERIALS ON LEGISLATION 834 (3d ed. 2001).

[58] *Cf.* United States v. Fisher, 6 U.S. (2 Cranch) 358, 388–97 (1805) (finding that a "change of language strongly implies an intent to change the object of legislation").

[59] 2 U.S.C.A. § 441i(e)(4).

[60] *Cf.* Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687, 724 (1995) (Scalia, J., dissenting) (reasoning that Congress's careful prohibition of an action in one part of a statute bars courts from inferring the prohibition when similar language is omitted from another).

[61] The debate over when (and if) statutory purpose and legislative history should be consulted during *Chevron* review is live. *See* ESKRIDGE ET AL., *supra* note 57, at 1076–78.

[62] McConnell v. FEC, 124 S. Ct. 619, 654 (2003).

[63] *See, e.g.*, *id.* at 676 (noting that "the restrictions on the use, transfer, and raising of Levin funds are justifiable anticircumvention measures").

[64] *See, e.g.*, 2 U.S.C.A. § 441i(b)(2) (allowing Levin funds).

was to become § 441i(e) discussed permitted solicitations but did not include § 441i(e)(3). Rather, his presentation stated that the "restrictions [do] not prevent" politicians from attending, speaking, or being featured guests at state or local fundraisers.[65] In other words, politicians could engage in these activities without per se violating the Act.

Further, the "dog didn't bark" canon[66] suggests that silence in legislative history can be probative.[67] Here, nothing in the legislative history suggests that § 441i(e)(3) might be interpreted as the FEC proposes. Although it may be true that dogs have failed to bark at danger on rare occasions,[68] they most often do.[69] That Common Cause, Senator McCain, and a pack of other self-styled watchdogs failed to bark about § 441i(e)(3) suggests that Congress neither intended nor envisioned the FEC's interpretation.

The FEC chose not to appeal the ruling on the fundraiser regulation[70] and has reopened the rulemaking process pursuant to the remand.[71] Its Notice of Proposed Rulemaking, in addition to trumpeting that the *Shays* court held its interpretation of § 441i(e)(3) reasonable, contains two proposals: The first restates the original interpretation, correcting for the procedural error faulted in *Shays*.[72] The second interprets § 441i(e)(3) as intended and written — as a guarantee to politicians that they can attend, speak, or be featured guests at certain fundraising events without per se violating the Act's restrictions.[73] The FEC should adopt the latter rule, both because it "must give effect to the unambiguously expressed intent of Congress"[74] and because it should not turn Congress's attempt to "plug the soft-money loophole" into an occasion to open another one.

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65 *See* 148 CONG. REC. S1992 (daily ed. Mar. 18, 2002) (statement of Sen. Feingold).

66 *See* William N. Eskridge, Jr. & Philip P. Frickey, *The Supreme Court, 1993 Term—Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 101 (1994).

67 *See* Chisom v. Roemer, 501 U.S. 380, 396 n.23 (1991) (deducing from the lack of congressional discussion of a possible construction of a statutory provision that Congress did not intend that meaning).

68 *See id.* at 406 (Scalia, J., dissenting) (citing an isolated example from history of dogs failing to bark when danger loomed).

69 *See generally* STANLEY COREN, THE PAWPRINTS OF HISTORY: DOGS AND THE COURSE OF HUMAN EVENTS 1–13 (2002) (recounting the historical importance — and dependability — of dogs as sentinels).

70 *See* Press Release, Federal Election Comm'n, FEC Votes on Specifics of *Shays v. FEC* Appeal (Oct. 29, 2004), http://www.fec.gov/press/press2004/20041029shays.html (last visited Apr. 10, 2005).

71 *See* Candidate Solicitation at State, District, and Local Party Fundraising Events, 70 Fed. Reg. 9013 (proposed Feb. 24, 2005) (to be codified at 11 C.F.R. pt. 300).

72 *See id.*

73 *See id.*

74 Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 (1984).