UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STEVE SCHONBERG,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 1:10-cv-02040-RWR -JWR -CKK
	)	
FEDERAL ELECTION COMMISSION, and THE UNITED STATES,	)	THREE-JUDGE COURT
	)	
	)	FEC REPLY
Defendants.	)	

DEFENDANT FEDERAL ELECTION COMMISSION'S REPLY IN SUPPORT OF ITS MOTIONS TO DISSOLVE THREE-JUDGE COURT AND TO DISMISS THE SECOND AMENDED COMPLAINT

The Federal Election Commission ("FEC" or "Commission") has moved to dissolve this three-judge Court and to dismiss plaintiff's claims because Schonberg lacks standing and his complaint fails to present any substantial federal question. In his Response in Opposition (("Response") Doc. 37), plaintiff has confirmed that his legal arguments rest on the flawed premise that the Federal Election Campaign Act ("FECA" or "Act"), 2 U.S.C. §§ 431-57, is purportedly unconstitutional because it does not regulate enough conduct. His alleged injuries are neither traceable to FECA nor would be redressable by having the Act invalidated, and his substantive claims are frivolous. The Commission's motions therefore should be granted in their entirety.

I. THIS THREE-JUDGE COURT SHOULD BE DISSOLVED

At plaintiff's request, a three-judge district court was convened to hear this entire case. (Docs. 2, 4, 6.) Plaintiff now concedes in his partial opposition (Doc. 36 at 1) that the three-judge Court should be dissolved, at least with respect to plaintiff's FECA claims and his claims regarding the Members' Representational Allowance ("MRA") and earmarked legislation.

After dissolution of the three-judge Court, plaintiff suggests that his FECA claims be certified to the en banc court of appeals, and his MRA and earmarked legislation claims be decided solely by Judge Roberts. Plaintiff also has apparently abandoned all but one of his purported challenges to the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 ("BCRA"), for which he sought a three-judge court (Doc. 36 at 1; Doc. 36-1), and with respect to his remaining purported BCRA claims regarding 2 U.S.C. § 439a, plaintiff has failed to demonstrate that the activity he finds offensive results from a legislative change by BCRA. Thus, the three-judge Court should be dissolved, and action on the defendants' respective motions to dismiss should be conducted by a single district court judge.

A. FECA Claims

Plaintiff previously amended his complaint to invoke 2 U.S.C. § 437h (Doc. 13) and filed both a motion to trifurcate (Doc. 24) and second amended complaint (Doc. 31). Plaintiff now concedes that this three-judge Court has no jurisdiction over his FECA claims and states that only a single district court judge "can certify the constitutional questions directly to the Court of Appeals for en banc determination" pursuant to 2 U.S.C. § 437h. (Doc. 36 at 1 (citation omitted).) The Commission agrees that certification pursuant to 2 U.S.C. § 437h is performed by a single district court judge but, as discussed in the Commission's memorandum in support of its motions (("FEC Mem.") Doc. 33-1 at 12-20), plaintiff's FECA claims should be dismissed by Judge Roberts without certification because plaintiff lacks standing and has failed to present any substantial federal questions.[1]

[1] Even if plaintiff had satisfied these requirements, certification to the court of appeals pursuant to section 437h would be premature because the parties have not yet created a factual record upon which the district court would make findings of fact. *See SpeechNow.org v. FEC*, No. 08-0248-JR, 2009 WL 3101036 (D.D.C. Sept. 28, 2008); *Khachaturian v. FEC*, 980 F.2d 330, 331-32 (5th Cir. 1992) (en banc).

B. Claims Regarding the MRA and Earmarked Legislation

Plaintiff also has abandoned his prior contention that his MRA and earmarked legislations claims must be heard by both the court of appeals sitting en banc and the three-judge Court. He now concedes that those claims "must be decided by Judge Roberts sitting as a single District Court Judge, since those claims do not fall under either FECA or BCRA." (Doc. 36 at 1.) Thus, these portions of the case should also be returned to a single district court judge.[2]

C. BCRA Claims

Plaintiff initially challenged several provisions of BCRA which he claimed may be reviewed by a three-judge court under BCRA § 403 (*see* Doc. 31 ¶¶ 1, 5(b), 6), but he only discussed one statutory provision, 2 U.S.C. § 439a. In his partial opposition, plaintiff continues to discuss only section 439a, and he now appears to have abandoned all his other purported BCRA claims. (Doc. 36 at 1 n.1.) In fact, plaintiff's proposed order specifies that the motion to dissolve be denied only "with respect to Plaintiff's claims that 2 U.S.C. § 439a is unconstitutional." (Doc. 36-1 at 1.) However, because BCRA made no substantive change relevant to plaintiff's section 439a claims, he is not entitled to a three-judge court regarding the only BCRA claim he continues to pursue.

The crux of Schonberg's claims regarding section 439a is that it inadequately restricts the use of funds contributed to a candidate's campaign. (*See* Response (Doc. 37) at 24-25 & n.47.) But, to the extent BCRA substantively amended section 439a, it *strengthened* the provision. Thus, Schonberg's claim against section 439a does not rely on any changes made by BCRA.

[2] Plaintiff's claims regarding the MRA and earmarked legislation are further addressed in the United States' motion to dismiss (Doc. 34).

Prior to BCRA, section 439a stated that campaign contributions "in excess of any amount necessary to defray [campaign] expenditures" could be contributed to certain organizations described in 26 U.S.C. § 170(c) or

> used for any other lawful purpose, including transfers without limitation to any national, State, or local committee of any political party; except that no such amounts may be converted by any person to any personal use, other than to defray any ordinary and necessary expenses incurred in connection with his or her duties as a holder of Federal office.

2 U.S.C. § 439a (2001). The Commission's regulations provided additional detail. 11 C.F.R. §§ 113.2(1)-(2) (2001). In 2002, BCRA strengthened subsection 439a(a) by listing only four permitted uses of campaign funds in paragraphs (a)(1)-(4); new subsection 439a(b) continued the prohibition on converting campaign funds to personal use. Unlike the pre-BCRA version of section 439a, the revised provision did *not* include general permission to use campaign funds for "any other lawful purpose." 2 U.S.C. § 439a(a) (2002); BCRA § 301. Therefore, in post-BCRA rulemakings and advisory opinions, the Commission "had no choice but to interpret this statutory deletion as meaning that the list of permissible uses in section 439a was exhaustive."[3]

By omitting the "lawful purpose" exception, BCRA actually strengthened FECA, and Schonberg has failed to identify any BCRA changes that legalized activities relevant to his constitutional claims here; thus, he has presented no genuine BCRA claim. Moreover, although plaintiff contends that the list of permissible uses set forth in 2 U.S.C. § 439a(a) is

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[3] *See* FEC Legislative Recommendations 2004 , available at http://www.fec.gov/pages/legislative_recommendations_2004.htm. Congress's deletion of the "for any other lawful purpose" language may have been inadvertent. The language was restored, not in BCRA, but two years later by the Consolidated Appropriations Act of 2005, Pub. L. 108-477, § 532, 118 Stat. 3272 (Dec. 8, 2004) (adding paragraphs (a)(5) and (a)(6)), and the Commission revised its regulations to reflect the statutory change. *See* 11 C.F.R. § 113.3(e); Notice 2007-18, 72 Fed. Reg. 56,245, 56,246 (Oct. 3, 2007). Section 439a later was again amended by the Honest Leadership and Open Government Act of 2007, Pub. L. 110-81, § 601(a), 121 Stat. 774 (Sept. 14, 2007) (adding new subsection (c) concerning expenditures for aircraft flights).

unconstitutional, he admits that the "list was created by BCRA § 301 from what was a paragraph in the older FECA law." (Doc. 37 at 24.) Likewise, although plaintiff appears to challenge section 439a(b), which continues the pre-BCRA ban on conversion of funds to personal use, he acknowledges that this provision "perhaps 'clarified' permitted uses of campaign cash" (Doc. 37 at 24); the only example he gives regarding section 439a(b) is an *impermissible* use of campaign funds under section 439a(b)(2)(H), a restriction he appears to endorse (Doc. 37 at 25). Thus, plaintiff fails to identify any changes BCRA made to section 439a that are part of his claim that FECA, as amended, unconstitutionally allows improper use of campaign funds.

In sum, plaintiff concedes that this three-judge Court cannot decide his FECA, MRA, and earmarked legislation claims, and plaintiff has presented no genuine BCRA claim sufficient to merit decision by this Court. The three-judge Court therefore should be dissolved with respect to all of plaintiff's claims, and this case should be returned to a single district court judge for consideration of defendants' pending motions to dismiss.

II. IF FECA WERE INVALIDATED, NEITHER THE CONSTITUTION NOR BRIBERY STATUTES WOULD PROHIBIT THE CONDUCT THAT SCHONBERG FINDS OBJECTIONABLE

A. FECA Does Not Authorize Conduct That Would Otherwise Be Unlawful

As previously explained (FEC Mem. at 10-12), FECA does not affirmatively authorize any person to make contributions or any candidate to receive them. Rather, "[p]eople do not depend on Congressional 'authorization' . . . for their liberty to express their political preferences." *Whitmore v. FEC*, 68 F.3d 1212, 1215 (9th Cir. 1996). Since "Congress has no constitutional obligation to limit contributions at all," *Davis v. FEC*, 554 U.S. 724, 737 (2008), if FECA were struck down as Schonberg advocates, no limits on campaign contributions would

remain and corporations could contribute directly to candidates — an outcome apparently the opposite of what plaintiff seeks (*see* Response at 27).

Schonberg admits that his challenge "rests upon the . . . premise that the conflict of interest Congress *created by allowing* its members to receive money from the corporations they regulate is *unconstitutional* . . . ." (Response at 27; emphases added.) But as we have explained, Congress has not enacted any legislation — in FECA or any other statute — that "allows" campaign contributions, and Schonberg himself now concedes that "[t]he Constitution . . . neither limit[s] nor authoriz[es]" campaign contributions (*id.* at 28). Because Schonberg's various claims inextricably rest on the flawed premise that Congress has affirmatively authorized or "allowed" the flow of campaign contributions — and that the Constitution prohibits such purported authorization — FECA did not cause plaintiff's alleged injuries. Schonberg therefore lacks standing and his claims are frivolous. *See infra* Sections III and IV.

Plaintiff correctly notes that "[t]he word 'contribution' is not even used in the Constitution" (Response at 28), but the First Amendment guarantees freedom of speech and association. The Supreme Court has long held that contributing money to, and spending money on behalf of, political candidates implicates core First Amendment protections, and that restrictions on contributions and expenditures "operate in an area of the most fundamental First Amendment activities." *Buckley v. Valeo*, 424 U.S. 1, 14 (1976). The Court has also recognized, however, that the government has a compelling interest in the "prevention of corruption and the appearance of corruption," *id*. at 25, and it has generally upheld contribution limits. *See McConnell v. FEC*, 540 U.S. 93, 134-38 (2003); FEC Mem. at 8-10.

Schonberg disagrees that the First Amendment should be accorded the primacy the Supreme Court has unequivocally given it. He asserts that "[s]topping this ubiquitous corruption

is more important than the First Amendment." (Response at 6.) He expressed similar views in his complaint: "Fair elections, guaranteed by the Fifth Amendment to the Constitution, are more important than 'free speech' in elections, guaranteed by the First Amendment." (2nd Am. Compl. ¶ 161.) His rejection of the Supreme Court's First Amendment jurisprudence undermines his entire case.

B. Contrary to Plaintiff's Assertion, FECA Is Constitutional Regardless of Its Alleged Impact on Federal Bribery Law

Plaintiff asserts that FECA is unconstitutional because it purportedly "carves out a huge exception to the bribery laws." (Response at 27.) This argument rests on two false assumptions: First, the mere act of making a campaign contribution constitutes bribery and, second, FECA authorizes campaign contributions that would otherwise be unlawful. We have already shown the second assumption to be wrong. As we explain below, the language of the main federal anti-bribery statute applicable to public officials, 18 U.S.C. § 201(b), and the relevant case law disprove plaintiff's first assumption.

Bribery is a distinct crime, with specified elements. In a prosecution under 18 U.S.C. §§ 201(b)(1)(A) or (b)(2)(A), the basic bribery provisions, the government must prove the following: (1) The recipient was a public official who (2) was asked to or offered to take some "official act" (3) in return for "anything of value," and (4) the person providing the thing of value or the recipient official acted with criminal intent ("corruptly"). 18 U.S.C. §§ 201(b)(1)(A) (prohibits offering bribes), (b)(2)(A) (prohibits accepting them); *United States v. Sun-Diamond Growers of Calif.*, 526 U.S. 398, 404 (1999).[4] "[F]or bribery there must be a *quid pro quo* —

[4] Other subparts of section 201(b) address particularized kinds of bribery irrelevant to Schonberg's arguments. For example, subsections (b)(1)(B) and (b)(2)(B) concern fraud on the United States.

a specific intent to give or receive something of value *in exchange* for an official act." *Id*. at 404-05 (emphases in original). Thus, the bribery statute requires a connection between the "intent and a specific official act." *Id*. at 405.

A campaign contribution can be the "thing of value" required for a conviction under 18 U.S.C. §§ 201(b)(1)(A) or (b)(2)(A), but the other elements of bribery must also be satisfied. "[A]ccepting a campaign contribution does not equal taking a bribe unless the payment is made in exchange for an explicit promise to perform or not perform an official act." *United States v. Allen*, 10 F.3d 405, 411 (7th Cir. 1993)). *See also United States v. Tomblin*, 46 F.3d 1369, 1379 (5th Cir. 1995) ("Intending to make a campaign contribution does not constitute bribery, even though many contributors hope that the official will act favorably because of their contributions."); *United States v. Biaggi*, 909 F.2d 662, 695 (2d Cir. 1990) ("There is a line between money contributed lawfully because of a candidate's positions on issues and money contributed unlawfully as part of an arrangement to secure or reward official action.").[5]

Schonberg points to no precedent or language in 18 U.S.C. § 201(b) that suggests that FECA restricts the modern bribery statute, which was enacted years before FECA. Bribery, Graft and Conflicts of Interest Act of 1962, Pub. L. No. 87-849, 76 Stat. 1119; Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972). And post-FECA amendments to

[5] As we earlier explained (FEC Mem. at 9), similar restrictions apply to the crime of extortion under color of official right, 18 U.S.C. § 1951 (Hobbs Act). To convict a person under the Hobbs Act when a campaign contribution is the predicate, the government must prove that "the payments [were] made in return for an explicit promise or undertaking by the official to perform or not to perform an official act." *McCormick v. United States*, 500 U.S. 257, 273 (1991). Since *McCormick*, many lower courts have held that a *quid pro quo* is also required in other Hobbs Act contexts; the agreement in those contexts may be implicit rather than explicit. *See, e.g., United States v. Dean*, 629 F.3d 257, 261 (D.C. Cir. 2011) (discussing license renewals and noting, *inter alia*, that a *quid pro quo* entails an agreement); *United States v. Kincaid-Chauncey*, 556 F.3d 923, 937 (9th Cir.) (citing cases from various circuits), cert denied, 130 S.Ct. 795 (2009).

18 U.S.C. § 201 concerned technical changes unrelated to campaign finance.[6] *See generally Dixson v. United States*, 465 U.S. 482, 491-96 (1984) (discussing evolution of section 201). In sum, FECA presents no barrier to conviction under the bribery statute.

C. Contrary to Plaintiff's Assertion, FECA Does Not "Allow" the Abuses that Plaintiff Alleges

Plaintiff alleges a number of abuses (*see, e.g.*, Response at 13, 20-21, 23) for which he erroneously holds FECA responsible. For example, he claims that "FECA allows the staff of members of Congress to campaign for their bosses without charge" (*id*. at 13). He cites no FECA provision that "allows" that conduct; of course, unless otherwise prohibited by a law like the Hatch Act, 5 U.S.C. §§ 7323-7326, individuals have a right to campaign for candidates of their choice, as volunteers or paid staff. If Schonberg is alleging that an incumbent Congressman is violating House rules or the MRA, 2 U.S.C. § 57b, then he is not complaining about FECA but alleging lax enforcement of other provisions over which the Commission has no jurisdiction. The other conduct that plaintiff alleges (*see* Response at 20-21, 23) also appears to be governed, if at all, by non-FECA provisions.

In attributing all these alleged instances of abuse to FECA, plaintiff wrongly assumes that if a statute does not address certain conduct, it positively "allows" that behavior. That is the same kind of mistake Schonberg made when arguing that that FECA authorizes campaign contributions. (*See supra* pp. 5-6; FEC Mem. at 10-12.) Contrary to plaintiff's arguments, the American legal system reflects a "libertarian tradition" under which a person may choose to act

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[6] *See* Criminal Law and Procedure Technical Amendments Act of 1986, Pub. L. 99-646, § 46(a)-(l), 100 Stat. 3601-3604 (1986); Violent Crime Control and Law Enforcement Act of 1994, Pub. L. 103-322, Title XXXIII, §§ 330011(b), 330016(2)(D), 108 Stat. 2144, 2148 (1994).

as he or she sees fit unless a law prohibits or regulates the action. *Whitmore v. FEC*, 68 F.3d at 1215.

III. SCHONBERG LACKS STANDING TO PURSUE HIS CLAIMS AGAINST THE COMMISSION

The Commission has explained in detail why Schonberg lacks standing to pursue his claims against the Commission. (FEC Mem. at 20-30.) In response, plaintiff relies again upon two misconceptions: that FECA causes his alleged injuries because it does not regulate more than it does and that invalidating certain FECA provisions would redress his alleged injuries.[7] (*See, e.g.*, Response at 29, 30, 31, 32, 34.) Thus, despite denying the resemblance (Response at 36), Schonberg is like the plaintiff in *Sykes v. FEC*, 335 F. Supp. 2d 84 (D.D.C. 2004), who claimed that FECA unconstitutionally authorized certain kinds of contributions and who was held to lack standing. (*See* FEC Mem. at 23.)

Plaintiff cannot show that his alleged injuries are traceable to FECA. For example, he asserts that the MRA, 2 U.S.C. § 57b, is inadequately enforced and unconstitutionally discriminatory. (Response at, *e.g.*, 9, 32-33.) The Commission does not administer the MRA, and so any alleged deficiency in its enforcement or terms is not traceable to the Commission or FECA. *See* 2 U.S.C. §§ 437c(b)(1), 437d(6). Plaintiff can cite no constitutional principle or case

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[7] Also, in interpreting 2 U.S.C. § 437h, FECA's special judicial review provision for constitutional challenges, plaintiff confuses statutory standing with Article III standing. A person who comes within one of section 437h's listed categories of permissible challengers does not thereby also satisfy Article III's standing requirements. "A party seeking to invoke § 437h must have standing to raise the constitutional claim." *Calif. Med. Ass'n v. FEC*, 453 U.S. 182, 192 n.14 (1981). *See also Whitmore v. FEC*, 68 F.3d at 1214 (upholding district court's decision not to certify constitutional questions under section 437h because "[n]o such certification should be made if the plaintiff lacks standing or the case is frivolous"). In this regard, section 437h is like 2 U.S.C. § 437g(a)(8), providing for judicial review of the Commission's dismissal of an administrative complaint. *See, e.g., Common Cause v. FEC*, 108 F.3d 413, 419 (D.C. Cir. 1997) ("Section 437g(a)(8)(A) does not confer standing; it confers a right to sue upon parties who otherwise already have standing.").

law to support his theory (Response at 32) that a statute administered by one federal agency must fill any alleged gaps in a statute administered by a different agency. FECA suffers from no constitutional flaw because it does not regulate congressional benefits, a matter outside its scope.

Nor does plaintiff successfully rebut the Commission's showing that independent third parties not before the Court are the cause of his alleged monetary disadvantage, the so-called "insurance tithe," and the deposit of campaign funds in certain financial institutions. (*See* Response at 30, 31, 34-35.) Plaintiff's alleged monetary disadvantage results from the decisions of individuals such as those choosing to participate in the political committee of Blue Cross-Blue Shield of Florida to contribute to plaintiff's electoral opponent and the decision by that opponent to accept the contributions. FECA does not require anyone to contribute to a political committee or "PAC," nor does it require any candidate to accept contributions from a PAC. And Schonberg voluntarily chose not to solicit or accept any contributions. Finally, plaintiff's opponent, not FECA, determines in what financial institution to deposit his campaign funds. Even if FECA were struck down, the opponent could still garner campaign contributions and would choose an institution in which to place the funds.

Holding the challenged provisions of FECA unconstitutional would also not redress plaintiff's alleged injuries. First, striking down those provisions would not change the MRA or how it is enforced. (*See* Response at 32-34.) Second, as we have explained, without FECA, campaign contributions would neither cease nor suddenly become bribes. *Supra* pp. 5-9; FEC Mem. at 9-10. As a result, plaintiff's claim of a monetary disadvantage (Response at 30-31) would not be redressed because no limits on contributions to his opponent would suddenly arise if FECA were invalidated. Likewise, his claims about an "insurance tithe" (*id*. at 34-35) and

Veterans Administration drug costs (*id*. at 35-36) would not be redressed because no other law would prevent the contributions he complains of in the absence of FECA.[8]

In sum, even if Schonberg could satisfy Article III's injury-in-fact requirement — a proposition the Commission denies (*see* FEC Mem. 21-24) — he cannot satisfy the causation and redressability requirements. (*See id*. at 24-30.)[9] Since a "party invoking federal jurisdiction bears the burden of establishing" all three of the required elements for constitutional standing, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992), Schonberg lacks standing to challenge FECA, neither a three-judge court under BCRA § 403 nor en banc review under 2 U.S.C. § 437h is appropriate, and this Court lacks subject-matter jurisdiction. *See* Fed. R. Civ. P. 12(b)(1).

IV. PLAINTIFF'S CLAIMS ARE FRIVOLOUS

As discussed above and in our opening brief (*see* FEC Mem. at 30-38), plaintiff's substantive claims regarding BCRA and FECA rest on a variety of flawed assumptions and fail to state a claim. His response offers little to refute the Commission's prior showing; below, we briefly address his main points.

A. Schonberg continues to claim that FECA's provisions permitting corporate separate segregated funds ("PACs") to make contributions to political candidates, particularly incumbents serving on congressional committees, are unconstitutional. Plaintiff argues (Response at 11) that "FECA provides a 'monetary advantage' to the incumbent which results in

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[8] Plaintiff fails to allege clearly what injuries he is claiming. Most notably, he contradicts himself regarding whether he is still alleging an injury based upon having less money than his opponent in their electoral contest. In his Response at pages 30-31, for example, plaintiff cites his opponent's "monetary advantage," but on page 37 plaintiff states that his "claims are not dependent on how much money he has or does not have to spend on his campaign."

[9] To support his standing, plaintiff cites (Response at 36) *Shays v. FEC*, 337 F. Supp. 2d 28, 39 (D.D.C. 2004). (He does not cite the appellate court decision in that case, 414 F.3d 76 (D.C. Cir. 2005).) Unlike Schonberg, the plaintiffs in *Shays* were able to trace their alleged injuries to Commission regulations and, thus, invalidating those regulations would redress their harms. (*See* FEC Mem. at 23 n.10.)

invidious discrimination" to him. As we have already shown (FEC Mem. 31-32), however, FECA treats incumbents and challengers the same. The Act's contribution limits apply equally to all candidates. *See* 2 U.S.C. § 441a(a). If he wished to, Schonberg could solicit and receive contributions from the same corporate PACs that contribute to his electoral opponent — or from any other person or group that might agree with his views or disagree with his opponent's — subject to the same limits. Indeed, plaintiff undermines his own argument when he states that he "is *NOT* contending that contribution limits create the problem of invidious discrimination! The problem is created because the incumbent sits on committees regulating corporations." (Response at 12 (emphasis in original).) Thus, plaintiff concedes that the discrimination he alleges does not result from FECA. *See supra* pp. 5-7.

B. Plaintiff also complains (Response at 24-25) about 2 U.S.C. § 439a, which specifies permissible uses for campaign funds and prohibits conversion of those funds to personal use. In particular, Schonberg complains (Response at 25) that this provision permits donations to state and local candidates and "invidiously discriminates against the plaintiff in violation of the Fifth Amendment." As explained *supra* pp. 3-5 & n.3, with the exception of a few years following the passage of BCRA, this provision (2 U.S.C. § 439a(a)(5)) has been in effect for decades.[10] More generally, except for that brief period, section 439a has continuously permitted excess campaign funds to be used for the purposes enumerated in sections

[10] Originally, section 439a permitted "[a]mounts received by a candidate as contributions that are in excess of any amount necessary to defray his expenditures" to be used "to defray any ordinary and necessary expenses incurred by [the candidate] in connection with his duties as a holder of Federal office, may be contributed by him to any organization described in section 170(c) of the Internal Revenue Code of 1954, or may be used for any other lawful purpose." 2 U.S.C. § 439a (1975). When Congress amended the provision in 1979, it was modified to include "transfers without limitation to any national, State, or local committee of any political party." Former 2 U.S.C. 439a (2000); Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96-187, § 113, 93 Stat. 1399 (1980).

439a(a)(2)-(4) as well as for "any other lawful purpose." Regardless of the exact contours of section 439a, it applies equally to plaintiff and his opponents and thus does not discriminate against him.

C. Plaintiff still provides no support for his claim that the agency relationship between candidates and their campaign committees constitutes an "office" within the meaning of the Emoluments and Appointments Clauses. The Constitution does not define "civil office" and the courts have rarely interpreted the term. The only case plaintiff cites for the interpretation of "office" is *United States v. Hartwell*, 73 U.S. 385 (1867). In that case, the Supreme Court held that a clerk in the office of an assistant treasurer, who was "charged with the safe-keeping of the public moneys of the United States," was an "officer of the United States" within the meaning of a federal statute enacted pursuant to the Appointments Clause. 73 U.S. at 392-394. The Court's opinion emphasized that the "employment of the defendant was in the public service of the United States," and that he was appointed by an assistant treasurer of the United States with the approval of the Secretary of the Treasury, pursuant to a statute authorizing the appointment of a specified number of clerks who were to receive salaries fixed by law. Thus, rather than support plaintiff's expansive interpretation, *Hartwell* supports interpreting "office" more narrowly. As we previously explained, more recent decisions finding "officers" of the United States involved formal positions in government, such as judgeships, Cabinet positions, and military service. (FEC Mem. at 36-37 (citing *Edmonds v. United States*, 520 U.S. 651, 662 (1997); *Buckley*, 424 U.S. at 126.)[11] Despite plaintiff's conclusory allegations (*see* Response at 20),

[11] *See generally* Memorandum for the General Counsels of the Executive Branch, from Steven G. Bradbury, Acting Assistant Attorney General, Office of Legal Counsel (April 16, 2007) (collecting authorities), *available at* http://www.justice.gov/olc/opinions.htm. *Cf.* Application of the Emoluments Clause to a Member of the President's Council on Bioethics (March 9, 2005) ("A position that carried with it no governmental authority (significant or

when officeholders or other candidates act as agents for their campaign committees, they cannot exercise governmental authority, even if they may "entertain lobbyists" as part of their fundraising efforts.

Plaintiff also contends that, since members of Congress "are permitted to use campaign funds 'for ordinary and necessary expenses incurred in connection with duties of the individual as a holder of Federal office'" (2 U.S.C. § 439a(a)(2)), when they do so, they are "doing so under the authority of the United States." (Response at 22.) However, the fact that money can flow in one direction from the candidate's committee to the government when expenses are paid does not mean that the money originates from an office of the government or that an office is created. Otherwise, anyone who donates money to the government — for example, to help pay off the national debt — would be considered a civil officer of the United States. Plaintiff's argument proves too much.

D. Plaintiff's Compensation Clause claim rests on his argument that the "clear intent of the Constitution and Amendment XXVII is to prohibit members of Congress from receiving any government compensation over and above that contained in the Compensation Clause" (Response at 15), but plaintiff provides no authority for this proposition. He acknowledges that members of Congress receive salaries "as a result of the Salary Act of 1967 and its subsequent amendments." (*Id.*) As plaintiff concedes, however, campaign contributions made to federal candidates come from private persons and organizations — such as the corporate PACs and special interest groups Schonberg emphasizes (*id.*) — not the federal government. Thus, even if Schonberg's view of the "intent" of the Compensation Clause were correct, he fails to identify

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otherwise) would not be an office for purposes of the Appointments Clause, and therefore, under [prior OLC opinions], would not be an office under the [Article I, Section 9,] Emoluments Clause either").

any *government* funds provided to officeholder-candidates pursuant to FECA's contribution limits. Finally, the specific activities plaintiff lists (*id.* at 16-17) as part of his Compensation Clause argument are examples of expenditures *made by* candidates and their committees, not compensation they receive.[12]

E. FECA requires the disclosure of receipts and disbursements by federal candidates and their political committees. *See generally* 2 U.S.C. §§ 433-34. Plaintiff alleges that FECA is flawed by not also requiring disclosure of expenditures of MRA funds when Members of Congress use those funds for what plaintiff characterizes as campaign purposes (Response at 9, 23-24). The parties here agree, however, that MRA funds cannot be used for campaign purposes, so it is not surprising that FECA does not require reporting about the expenditure of MRA funds. Moreover, a complaint about alleged misuse of MRA funds cannot be filed with the Commission. *See* 2 U.S.C. § 437g(a)(1) (allowing administrative complaints alleging violations of campaign finance statutes to be filed with the Commission). Finally, if Schonberg is arguing that FECA is unconstitutional because it does not require greater reporting, he again fails to provide any legal support for the proposition that the Constitution *requires* any regulation of campaign financing. *See supra* pp. 5-7.

In sum, plaintiff's claims boil down to policy arguments that FECA should place greater limits on Members of Congress and persons who contribute to their reelection campaigns. These are arguments that should be directed to Congress, not the courts. *Cf. Stern v. FEC*, 921 F.2d 296, 299 (D.C. Cir. 1990) (acknowledging that corporate shareholder's arguments that corporation's PAC should not be permitted to make contributions to candidates for certain reasons "may raise interesting policy questions" but advance "no credible legal arguments").

[12] Moreover, the Twenty-Seventh Amendment involves the *timing* of changes in congressional compensation, and plaintiff makes no effort to show its relevance to this case.

CONCLUSION

For the foregoing reasons, defendant Federal Election Commission's motions to dissolve the three-judge Court and to dismiss plaintiff's claims regarding FECA and BCRA should be granted.

Respectfully submitted,

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