IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SENATOR MITCH McCONNELL, et al.,

Plaintiffs,

v.

FEDERAL ELECTION COMMISSION, et al.,

Defendants.

Civ. No. 02-0582 (CKK, KLH, RJL)

ALL CONSOLIDATED CASES

REDACTED

BRIEF OF DEFENDANTS

INTRODUCTION AND SUMMARY

Nearly a century ago, Congress reaffirmed our nation's commitment to one of its founding principles: that elected leaders ought to shape public policy based on the wishes of their constituents, or their honest judgment of what best serves the national interest, but not on the inducements of money. This democratic ideal lay at the heart of Congress's decision in 1907 to ban corporations from making federal campaign contributions. It has remained at the foundation of federal campaign finance laws ever since, as Congress has reacted to repeated cycles of scandal and disillusionment with "careful legislative adjustment of the federal electoral laws, in a 'cautious advance, step by step,'" to which the Supreme Court has accorded "considerable deference." FEC v. Nat'l Right to Work Comm., 459 U.S. 197, 209 (1982) ("NRWC"). The same democratic ideal that money should neither buy legislative favors, nor appear to buy them, underlies the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (2002) ("BCRA").

I. Some thirty years following its enactment, regulation under the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. 431 et seq. ("FECA"), no longer lives up to its intended purpose. FECA is meant to reduce the "opportunities for abuse inherent in a regime of large individual financial contributions," Buckley v. Valeo, 424 U.S. 1, 27 (1976) (per curiam), by limiting the amount of contributions that may be made to candidates. In light of the central role played by political parties as intermediaries between donors and candidates, see FEC v. Colorado Republican Fed. Campaign Comm., 533 U.S. 431, 452 (2001) ("Colorado II"), FECA has long imposed limits on contributions made to political party committees. FECA also incorporates previously enacted prohibitions against corporate and labor union spending on federal elections, to prevent unions and corporations from converting their aggregated wealth into political "war chests" that can distort and corrupt democratic processes. 2 U.S.C. 441b; see Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 660 (1990). In recent years, however, these mainstays of regulation under FECA have given way as political parties, corporations, unions, and other wealthy donors and organizations have systematically exploited two widening breaches in FECA's statutory scheme: "soft money," and "issue advocacy."

A. "Soft money" is the term used for contributions raised outside the framework of FECA's source and contribution limits and disclosure requirements. As Congress recognized, the increasing use of soft money permits evasion of FECA in two fundamental respects: (1) it allows corporations and labor unions to use their general treasury funds to influence federal elections; and (2) it allows all donors to make contributions to candidates and parties outside of FECA's limitations and disclosure provisions. Both avenues of circumvention pose the very risk of actual and apparent corruption that FECA was enacted to prevent. Unregulated contributions to political parties, like unregulated

contributions to individual candidates, can cause federal officeholders to feel obligated to advance the interests of large donors rather than the interests of constituents and the nation as a whole.

The concept of soft money derives from the fact that party committees engage in certain activity in connection with state and local elections that is not necessarily related to federal elections, and therefore is not necessarily within the scope of the language of FECA. Soft money was meant to be used by political parties solely for influencing the nomination or election of candidates for state or local office, and to conduct generic "party-building" activities.

In practice, however, the parties have raised and spent hundreds of millions of soft dollars for activities that, while nominally falling within the "party-building" category, in reality are intended to support the parties' candidates for federal office, and are indistinguishable from the types of activities that parties and candidates are required to use their hard money to fund. Indeed, in the 2000 election cycle, soft money constituted 42% of the national parties' total budget. The soft money loophole has grown from a narrow exception to FECA's limitations into a huge and ever-growing means of circumventing those limitations, reintroducing the very "opportunities for abuse inherent in a regime of large . . . financial contributions" that FECA was meant to foreclose. Buckley, 424 U.S. at 27.

The fundraising practices of the major political parties demonstrate the continued dangers of corruption that first led Congress to regulate the financing of federal elections nearly a century ago. Parties are today the central and largest force in raising, spending, and directing campaign dollars. In the 2000 election cycle, the Democratic and Republican parties raised a combined total of $1.236 billion dollars, a staggering increase over the past twenty years. Although parties play a valuable role in our system of representative democracy by, inter alia, unifying unwieldy factions,

the power accrued through that organizing role is enormous, and subject to abuse. The national parties solicit soft money from sources corporations and labor unions that have long been prohibited from making federal campaign contributions. The parties solicit soft money in amounts that far exceed the contribution limits that the Supreme Court upheld in Buckley, and they rely primarily upon federal officeholders and candidates to make those solicitations.

When parties attempt to gain financial support using these methods, they play a mediating role among large donors, candidates, and officeholders, essentially functioning as "bargaining agents for groups of lawmakers in their dealings with interest groups" who are themselves, in effect, "buying votes on proposals where those votes are cheapest." Cotton M. Lindsay & Michael T. Maloney, Party Politics and the Price of Payola, 26 Econ. Inquiry 203, 203 (1988). As the Supreme Court recently observed, "[p]arties thus perform functions more complex than simply electing candidates; whether they like it or not, they act as agents for spending on behalf of those who seek to produce obligated officeholders." Colorado II, 533 U.S. at 452. The parties actively promote the influence of their officeholders when soliciting large donations by organizing direct fundraising contact between contributors and legislators, and providing privileged access for contributors, thus heightening officeholders' awareness of the identities and interests of the large contributors to the party's electoral efforts. At some point, donors' contributions to a political party can become large enough to engender an overall sense of indebtedness from most or all of a party's members. See id. at 455 ("[P]arties continue to organize to elect candidates, and also function for the benefit of donors whose object is to place candidates under obligation, a fact that parties cannot escape."). Even if no actual corruption ensues, the public is left with the perception that democratic ideals don't matter and that federal officeholders favor the interests of large donors over the interests of their constituents.

Donors likewise believe that large soft money contributions to political parties benefit particular candidates that they wish to support and that making such donations is necessary to receive access to, and favorable consideration from, federal candidates and officeholders. The parties, by promising special access to federal officials in exchange for large soft money donations, exploit and foster this perception. Thus, many large donors, especially those in heavily regulated industries, believe that they must accede to requests for large soft money donations out of fear that adverse legislative consequences could otherwise result.

B. FECA's safeguards against corruption have also recently been breached by the rise of so-called "issue advocacy," television and radio advertisements that extol a candidate's virtues, or criticize his or her opponent, without specifically urging voters to elect one candidate or defeat the other. FECA § 441b requires that corporations and labor unions refrain from spending general treasury funds to support activities related to federal elections, but allows them to participate in electoral politics using "separate segregated funds" accounts maintained specifically for political purposes, containing contributions from individual shareholders, members, and executive or administrative personnel. Under a clarifying construction of FECA first adopted in Buckley, and, ten years later, in FEC v. Massachusetts Citizens for Life, Inc., 479 U.S. 238 (1986) ("MCFL"), application of § 441b, as well as FECA's requirements for disclosure of independent political expenditures, is limited to communications that expressly advocate the election or defeat of a candidate for federal office those using so-called "magic words" such as "vote for," "elect," "defeat" or "reject." Buckley, 424 U.S. at 44 n.52; MCFL, 479 U.S. at 249.

Since 1996, corporations, labor unions, and other interest groups have taken routine advantage of this construction of FECA to spend tens, if not hundreds, of millions of dollars on TV and

radio advertisements about candidates broadcast in the day s and weeks immediately preceding Election Day, and geographically targeted to the constituents who will decide the candidates' political futures which by the se and all other appearances, and the frequent admissions of the organizations that pay for them, are meant to affect voters' choices at the polls. Yet these expenditures escape regulation under FECA because the ads' sponsors simply omit words of express advocacy, which are largely historical artifacts of American political campaigns that are rarely used as means of political persuasion even by candidates themselves.

Untrammeled spending by corporations and labor unions for these thinly veiled campaign commercials has re-opened the political process to the "distorting effects of immense aggregations of wealth," Austin, 494 U.S. at 660, and the potentially corrupting influence of large-scale corporate and union spending on the elected officials who are aided thereby. NRWC, 459 U.S. at 209-10. Elected officials are well aware and keep track of who runs "issue" ads on their behalf, and they are naturally grateful to the unions and corporations that provide such assistance to their campaigns. Indeed, corporations and labor unions run "issue" ads for or against federal candidates with an expectation that investing hundreds of thousands if not millions of dollars in this fashion will pay off when it comes to legislation that concerns them. They do not hesitate to remind legislators of the assistance their advertising provided in helping these officials get elected.

The routine and effortless manner in which unions, corporations, and other groups and individuals now bypass regulation under FECA has also thwarted the purposes of FECA's disclosure requirements. As the Supreme Court recognized in Buckley, disclosure requirements serve important governmental interests: they assist voters in evaluating candidates for elected office by informing the electorate about the sources of candidates' political support; they deter corruption by expos-

ing large contributions and expenditures made on candidates' behalf; and they assist those charged with enforcing the law by facilitating the detection of violations of FECA's contribution and expenditure limitations. 424 U.S. at 66-68. By avoiding disclosure, many interest groups and organizations now run issue ads supporting or opposing a federal candidate while concealing their sources of financial support, and sometimes their identities information that the electorate needs to know, before casting their votes, so they may evaluate the interests to which candidates may be most responsive.

II. Thus, notwithstanding FECA, corporations, supposedly banned from making campaign contributions, now give millions of dollars to political parties to further the electoral prospects of their candidates. In the process, their executives and lobbyists gain a quality of access to elected officials that is not available to average citizens. Labor unions, supposedly prohibited from making expenditures for the purpose of influencing federal elections, spend millions of dollars on TV and radio advertisements that are indistinguishable from the candidates' own. Wealthy individuals, theoretically "capped" on the amounts they may contribute to federal campaigns, make unlimited donations to the parties, and form pseudonymous front groups to conceal their support for yet more political advertising on behalf of favored candidates. These practices albeit technically legal under the current system have fueled an unrelenting arms race for cash that gives at least the appearance that legislative votes are for sale. Congress enacted BCRA, after years of deliberation and debate, to put an end to these circumventions of FECA's restrictions, and to restore meaning to the regulatory scheme that had evolved over the course of nearly one-hundred years.

A. Title I of BCRA includes several interrelated provisions that address the threats that soft money presents to the integrity of federal elections. The cornerstone of Title I is the national party

soft money ban, which prohibits national party committees from soliciting, receiving, spending, or transferring any soft money. The ban closes the soft money loophole and thus prevents circumvention of FECA's limitations by the national parties. The statute imposes no limits on how the national party committees may spend their money; it simply requires that all money spent by the national parties must be raised in accordance with FECA's longstanding requirements. At the same time, Congress substantially raised the limits on contributions of hard money to national party committees and indexed those limits for inflation, making it easier for those committees to raise hard money.

Other provisions in Title I are carefully drawn to complement the national party soft money ban, eliminating additional existing and potential loopholes involving, among others, state, district, and local party committees ("state-level" party committees). As Congress recognized, state-level party committees have been a primary and willing vehicle through which the national parties have circumvented FECA. The national parties have transferred millions of dollars in soft money to their state-level counterparts, which have used those funds largely to support federal election activity, and under fewer restrictions than are applicable to the national parties. Title I prevents those committees from continuing the same abuse of soft money that the national parties have accomplished.

B. To close the "issue advocacy" loophole at the point where it has been subject to the greatest abuse, Title II of BCRA regulates "electioneering communications," defined as TV or radio communications that refer to clearly identified candidates for federal office within 60 days of a general election, or 30 days of a primary, and, in the case of House, Senate, and presidential primary elections, are broadcast to the state or district where the election will be held. Corporations and labor unions that sponsor electioneering communications must pay for them with funds contributed to their separate segregated funds by individual shareholders, members, or executive or admin-

istrative personnel, rather than with funds from their general treasuries. All persons spending $10,000 or more in a year for electioneering communications must file reports disclosing their identities, the cost of their communications, the elections to which the communications pertain, and (broadly speaking) the identities of persons making large donations to finance the communications.

These regulations of electioneering communications ban no speech whatsoever, but merely restore vigor to the statutory scheme as it has existed for the better part of a century, and do so in a narrowly tailored manner that focuses directly on the type of election-related spending by unions and corporations that has recently presented the greatest threat of distortion and corruption of political processes. At the same time, unions and corporations may still speak their minds using segregated funds that reflect the true power of political association rather than the might of the commercial marketplace. With equal precision, the disclosure provisions vindicate the interests of voters in knowing exactly who is behind electioneering messages of the type they have been receiving about candidates in the heat of recent campaigns.

Two other provisions in Title II of BCRA address the problem of coordinated spending among donors, candidates, and parties. Section 213 of BCRA gives political parties the opportunity, available to no one else, to choose between (1) making expenditures coordinated with a candidate in amounts much greater than FECA ordinarily permits, and (2) making expenditures, including independent expenditures, under the rules generally applicable to multicandidate committees. Section 214(b) of BCRA merely requires the FEC to promulgate new regulations defining what constitutes a communication that is "coordinated" with a federal candidate or party, based on congressional concern that the FEC's current regulations are too narrow to be effective in regulating coordinated activity in the real world of campaigns and elections.

The remaining provisions at issue were likewise enacted to prevent evasion of FECA's source and amount limitations, to strengthen disclosure for the benefit of an informed electorate, and to promote robust debate and competition in federal election campaigns. Section 318 of BCRA prohibits individuals age 17 or younger from making contributions to candidates or political parties, to prevent adults from circumventing FECA's contribution limits by making surrogate contributions through minors under their control. The so-called "millionaire provisions" of BCRA increase the standard contribution limits for a candidate whose opponent expends substantial personal funds on his or her own campaign, so that non-wealthy candidates are not discouraged from running against a self-funded opponent. Sections 305 and 504 of BCRA amend the Communications Act of 1934 to require disclosures about the source and sponsorship of political messages broadcast on television or radio.

Plaintiffs raise a series of facial challenges to these provisions of the new statute, but for any one or more these challenges to succeed, plaintiffs must demonstrate that the enactments in question could never be applied in a valid manner, or, to the extent their claims rest on the First Amendment, that the statute's provisions are substantially overbroad. New York State Club Ass'n v. City of New York, 487 U.S. 1, 11 (1988). Plaintiffs cannot discharge this heavy burden. This litigation makes abundantly clear that academics and consultants hold varying opinions about how best to reform the campaign finance system, but BCRA is a bipartisan attempt by the true experts in this area to devise the best solution to a complex problem. Every Member of Congress has been a successful participant in the federal campaign finance system. They must raise the funds necessary to run their election campaigns, and they must face the demands of their political parties and the pressures of large donors while performing their legislative duties. Having directly operated under this system,

Members of Congress are uniquely qualified based on personal experience to determine the need for and proper scope of additional regulation in this area. As with the other steps taken by Congress over the years to correct defects in the campaign finance system, the legislative judgments embodied in BCRA "warrant[] considerable deference." NRWC, 459 U.S. at 209. The statute that Congress has enacted is closely drawn to combat the widespread circumvention of statutory limits on the sources and amounts of spending on federal election campaigns. It renews a national commitment to the proposition that public policy should not wear a price tag. Accordingly, as explained in detail below, each of plaintiffs' facial challenges should be rejected.

FACTUAL AND LEGAL BACKGROUND

To protect the integrity of federal elections and to guard against corruption of federal office-holders, the nation's campaign finance statutes set monetary rules of engagement in political campaigns. As the Supreme Court has recognized, "[t]he overriding concern behind the enactment of [such] statutes . . . was the problem of corruption of elected representatives through the creation of political debts." First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 788 n.26 (1978). During the past century, Congress has found it necessary to make incremental changes to existing campaign finance statutes, aspiring both to encourage robust debate and to limit the potential for corruption inherent in a system of privately financed campaigns. Contrary to plaintiffs' attempt to portray BCRA as a radical new form of governmental regulation, BCRA simply revitalizes a long established legal tradition in this country limiting the potentially corrupting influence of labor unions, corporations, and unlimited campaign contributions upon electoral politics.

Building upon FECA's central pillars, BCRA does not ban speech, but instead limits large unregulated contributions to political parties, ensures that corporate and union campaign spending

reflects the power of true political association rather than of the commercial marketplace, and increases disclosure requirements. As we explain, these reforms are fully in step with longstanding campaign finance laws that have been upheld by the Supreme Court, and they were adopted by Congress after careful and extensive deliberation to address the substantial problems created by demonstrated and pervasive circumvention of the existing campaign finance rules.[1]

Parties, Corporations and Unions: The Heritage of Campaign Finance Laws

Recently, a United States Senator commented on "corporations and individuals [who] gave over $100,000 each to both [the Democratic and Republican] parties":

> They didn't contribute because of shared values, obviously. They contributed to cover their bets to make sure they had access to the winner. They had enough money to do that. That's how far this system has fallen. The parties advertise access. It's blatant. Both parties do it. Openly.

147 Cong. Rec. S3248 (Apr. 2, 2001) (Sen. Levin). A short time later, the Supreme Court likewise concluded:

> Parties are . . . necessarily the instruments of some contributors whose object is not to support the party's message or to elect party candidates across the board, but rather to support a specific candidate for the sake of a position on one, narrow issue, or even to support any candidate who will be obliged to the contributors.

Colorado II, 533 U.S. at 451-52.

These contemporary observations may just as accurately have been made of the situation as it existed in the late 19th and early 20th centuries, when wealthy corporate interests flooded the parties with money, and the parties, in turn, used their officeholders to satisfy the parties' contribu-

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[1] In the following discussion and throughout the defendants' brief, initial citations to the defendants' trial exhibits will include a reference to the volume and tab number where each exhibit is located in Defendants' Exhibit Volumes ("DEV") (e.g., "DEV 1-Tab 1," designating Tab 1 of Defendant's Exhibit Volume 1). Documents not designated by a Tab number will be cited by volume and bates-stamp number (e.g., DEV 21-INT00005). Citations to a previously cited exhibit (or in the case of documents, a previously cited bates-stamp series) will not include a DEV reference. Citation to transcripts of depositions and cross-examinations taken in these consolidated cases will be by name of witness and date, (e.g., "McCain Dep. Tr. (Sep. 9, 2002) at 12"). All deposition and cross-examination transcripts cited by the parties have been filed with the Court as a joint exhibit of the parties. Finally, citations to Plaintiffs' exhibits will be identified by plaintiff and document (e.g., " Decl. [AFL-CIO] ¶ 2").

tors.[2] These circumstances prompted charges that corporations "were corrupting government and gaining special favors in return for their campaign gifts." Thomas E. Mann, Report of Thomas E. Mann (Sep. 20, 2002) at 3 [DEV 1-Tab 1, hereinafter Mann Expert Rep.]; see United States v. UAW, 352 U.S. 567, 570-71 (1957).

Congress responded in 1907 by enacting the Tillman Act. Ch. 420, 34 Stat. 864. The Tillman Act for the first time prohibited corporations from making monetary contributions in connection with federal election campaigns. UAW, 352 U.S. at 575. The public debate preceding enactment of this and subsequent legislation reflected concern over the use of money for political purposes by organizations in a position to exercise disproportionate influence on federal elections, and, thereby, over the legislators whose political fates turn on the outcome of those contests. There was particular concern that political parties would become indebted to large corporate contributors and use their own leverage over candidates and elected officials to control government policy. See id. at 571-73, 76-77. The necessity of regulation was summarized in hearings on the Tillman Act:

> The idea is to prevent . . . the great aggregations of wealth from using their corporate funds . . . to send members of the legislature to these halls in order to vote for their protection and the advancement of their interests as against those of the public. It strikes at a constantly growing evil which has done more to shake the confidence of the plain people of small means of this country in our political institutions than any other practice which has ever obtained since the foundation of our Government. And I believe that the time has come when something ought to be done to put a check to the giving of $50,000 or $100,000 by a great corporation toward political purposes upon the understanding that a debt is created from a political party to it.

Id. at 571 (citation omitted). Nearly 20 years later, after the Teapot Dome scandal, Congress enacted the Federal Corrupt Practices Act of 1925, ch. 368, Title III, 43 Stat. 1070 ("FCPA"), a significant

[2] See, e.g., William A. White, The Old Order Changeth (1910), at 11-15. History includes such notorious examples of political corruption as the Boss Tweed and Tammany Hall machine, the 1876 Tilden/Hayes presidential election, the Custom House scandals of the 1880s, Teapot Dome, and the Prendergast Machine. See, e.g., Rebuttal Expert Report of Donald P. Green ("D. Green Rebuttal Expert Rep.") at 20-21 [DEV 5-Tab 1]; Decl. of Morton Keller at 17-21; Nathan Miller, The Founding Finagler (1976); Shelley Ross, Fall From Grace: Sex, Scandal, and Corruption in American Politics from 1702 to the Present (1988).

revision of existing legislation adopted in the midst of enduring concern over the disproportionate influence of aggregated corporate wealth on political parties and the political process:

> We all know . . . that one of the great political evils of the time is the apparent hold on political parties which business interests and certain organizations seek and sometimes obtain by reason of liberal campaign contributions. Many believe that when an individual or association of individuals makes large contributions for the purpose of aiding candidates . . . in winning the elections, they expect, and sometimes demand, and occasionally, at least, receive, consideration by the beneficiaries of their contributions which not infrequently is harmful to the general public interest.

UAW, 352 U.S. at 576-77 (quoting 65 Cong. Rec. S9507-9508 (Sen. Robinson)).

In 1943, temporary wartime legislation extended the proscription against campaign contributions by corporations to contributions by labor organizations. Smith-Connally Act, § 9, 57 Stat. 163, 167-68; see UAW, 352 U.S. at 578; Mann Expert Rep. at 4. Congress acted on this occasion out of a conviction that "just as the great corporations had made huge political contributions to influence government action or inaction . . . the powerful unions were pursuing a similar course, and with the same untoward consequences for the democratic process." UAW, 352 U.S. at 578.[3/] Despite the Smith-Connally Act, however, organized labor spent millions of dollars in connection with the national elections of 1944, to support a program of political "education" that included, among other things, the distribution of 200,000 pamphlets to the public-at-large opposing the re-election of Senator Taft. UAW, 352 U.S. at 580. Two years later, labor unions and numerous other political

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[3/] Testimony given before Congress by Lewis Hines, national legislative representative for the American Federation of Labor, did nothing to dispel this impression:

> [F]or many years the financial interests of this country have held sway; they have held pretty much their own way, and it has been done with money. That is the only thing that made any impression.
>
> Labor unions have grown strong. Labor unions recently have started to take an active interest in politics. Labor unions have money. . . . If it has been good over the years for the employers to elect Representatives to Congress and there are many Representatives in Congress elected by the employers why is it not good for organized labor and the trade-union movement to put forth a little effort and financial support, if necessary, to help elect their friends who have passed humanitarian legislation?

Hearings Before a Subcomm. of the House Committee on Labor, 78 Cong., 1st Sess., 1, 2 (1943).

committees and organizations spent additional millions of dollars on political advertising in the 1946 elections. These activities precipitated investigations by committees in both Houses of Congress, which concluded that the limitation on contributions by corporations and labor unions had been rendered ineffective due to widespread "expenditures" made by these organizations on behalf of favored candidates, and that Congress ought to "plug the existing loophole":

> "The intent and purpose of the provision of the act prohibiting any corporation or labor organization making any contribution in connection with any election would be wholly defeated if it were assumed that the term 'making any contribution' related only to the donating of money directly to a candidate, and excluded the vast expenditures of money in the activities herein shown to be engaged in extensively. Of what avail would a law be to prohibit the contributing direct to a candidate and yet permit the expenditure of large sums in his behalf?"

UAW, 352 U.S. at 581 (quoting H.R. Rep. No. 2739, 79th Cong., 2d Sess. 40 (1946)); see id. at 581-83. Congress acted quickly on this recommendation. The Taft-Hartley Act of 1947, ch. 120, 61 Stat. 136, ___, amended the FCPA again "to proscribe any 'expenditure' as well as 'any contribution' [and] to make permanent [its] application to labor organizations" in addition to corporations. UAW, 352 U.S. at 582-83.[4]

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[4] The prohibition was eventually codified at 18 U.S.C. 610, and later transferred to the Federal Election Campaign Act, 2 U.S.C. 441b, as part of a more general re-codification designed to enhance the civil enforcement powers of the FEC. Federal Election Campaign Act Amendments of 1976, P.L. 94-283, 90 Stat. 475. See S. Rep. No. 677, 94th Cong., 2d Sess. 2-3 (1976), reprinted in 1976 U.S.C.C.A.N. 929, 930-31.