SCRUTINIZING STANDING: AN EXAMINATION OF THE CONSTITUTIONAL STANDING ANALYSIS IN *SHAYS V. FEC*

Rebecca Ham Ormsbee[*]

INTRODUCTION

When the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") handed down its decision in *Shays v. FEC*[1] on July 15, 2005, United States Representatives Christopher Shays and Martin Meehan, the appellees in the action, praised the court's ruling.[2] Both Shays and Meehan released press statements that day asserting, respectively, that "today's decision affirm[s] that the FEC has not done its job,"[3] and "[t]oday, the appellate court confirmed that the FEC has been acting as a rogue agency and not an executor of the law."[4] In *Shays*, the Federal Election Commission ("FEC"), the independent federal agency charged with promulgating regulations to implement the Bipartisan Campaign Reform Act of 2002 ("BCRA"),[5] appealed a district court decision striking down and remanding many of the regulations that the agency had passed to execute this statute.[6] Congressmen Shays and Meehan were the primary House sponsors of BCRA,[7] which Congress passed to address its "concerns about the increasing use of soft money and issue advertising to influence federal elections."[8] The D.C. Circuit affirmed the district court decision in *Shays*, holding that all five of the FEC regulations on which the agency appealed were invalid.[9]

---

[*] George Mason University School of Law, Juris Doctor Candidate, May 2008; Notes Editor, GEORGE MASON LAW REVIEW, 2007-2008; Wake Forest University, B.A. Political Science, May 2002. Thanks to Professor Allison Hayward for her guidance, and to my family and husband for their encouragement.

1 414 F.3d 76 (D.C. Cir. 2005).

2 Press Release, Congressman Martin T. Meehan, Appeals Court Upholds Ruling Striking FEC Provisions; Meehan Applauds Appellate Court: "Yet Another Victory for Campaign Finance Reform" (July 15, 2005), http://www.house.gov/list/press/ma05_meehan/NR050715FEC.html; Press Release, Congressman Christopher Shays, Appeals Court Upholds Ruling Striking FEC Provisions (July 15, 2005), http://www.house.gov/shays/news/2005/july/julyfec.htm.

3 Press Release, Congressman Christopher Shays, *supra* note 2.

4 Press Release, Congressman Martin T. Meehan, *supra* note 2.

5 Pub. L. No. 107-155, 116 Stat. 81 (codified primarily in scattered sections of 2 and 47 U.S.C.). The FEC's rule-making authority was to last for 270 days and is codified at 2 U.S.C. § 431 note (Supp. 2004).

6 Shays v. FEC, 337 F. Supp. 2d 28 (D.D.C. 2004), *aff'd*, 414 F.3d 76 (D.C. Cir. 2005).

7 *Shays*, 414 F.3d at 82.

8 McConnell v. FEC, 540 U.S. 93, 132 (2003).

9 *Shays*, 414 F.3d at 79.

Both Representative Shays and Representative Meehan are crusaders for campaign finance reform. They fought long and hard to pass reform legislation amid staunch opposition from representatives who felt such a law would infringe upon First Amendment freedoms and curb citizens' ability to participate and voice their opinions in the national political arena.[10] These representatives clearly felt that the regulations the FEC adopted to implement the BCRA weakened and damaged the law as it was passed by Congress.[11] Thus, Shays and Meehan decided to challenge the FEC regulations in federal district court.[12]

The problem with this scenario is that the jurisdiction of the federal courts is critically limited by Article III of the United States Constitution, which restricts United States courts to the adjudication of "Cases" or "Controversies."[13] Several principles have developed over time to ensure that the federal judiciary is constrained to its constitutional role of only deciding such cases or controversies and to preserve the separation of powers among the coordinate branches of the United States government.[14] One of the most crucial doctrines, Article III standing, asks "whether the litigant is entitled to have the court decide the merits of the dispute."[15] The essence of constitutional standing is that, in order to invoke the jurisdiction of a federal court, "[a] plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief."[16] The litigant must prove that he has suffered an injury in some "concrete," non-"hypothetical" way, that the person he is suing is responsible for his harm, and that the court can resolve or remedy the injury.[17]

These principles comprise the "irreducible constitutional minimum" that must be established by every litigant seeking to invoke federal court jurisdiction.[18] The Article III standing requirements cannot be bent, waived, or minimized because an individual feels very strongly that an executive

---

10 Helen Dewar, *House Passes Campaign Reforms; 252 to 177 Vote Puts Pressure on Senate*, WASH. POST, Sept. 15, 1999, at A1; *cf.* Press Release, Congressmen Christopher Shays and Martin T. Meehan, Statement by Reps. Marty Meehan and Christopher Shays on the Upcoming Debate on Campaign Finance Reform (Feb. 5, 2002), http://www.house.gov/shays/news/2002/february/cfrdebate.htm (stating that reform legislation that the congressmen sponsored was poised to be voted on for a third time in the House of Representatives).

11 *Shays*, 414 F.3d at 79; Press Release, Congressman Christopher Shays, *supra* note 2.

12 Shays v. FEC, 337 F. Supp. 2d 28, 35 (D.D.C. 2004), *aff'd*, 414 F.3d 76, 82 (D.C. Cir. 2005).

13 U.S. CONST. art. III, § 2, cl. 1.

14 Allen v. Wright, 468 U.S. 737, 750 (1984) (citing Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 471-76 (1982); Warth v. Seldin, 422 U.S. 490, 498 (1975)).

15 *Id.* at 750-51 (quoting *Warth*, 422 U.S. at 498).

16 *Id.* at 751 (citing *Valley Forge*, 454 U.S. at 472).

17 Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 103-04 (1998) (citing Whitmore v. Arkansas, 495 U.S. 149, 155 (1990); Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 41-42, 45-46 (1976)).

18 Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992).

branch agency has not acted in compliance with the law, as "[t]he desire to obtain a sweeping injunction cannot be accepted as a substitute for compliance with the general rule that the complainant must present facts sufficient to show that his individual need requires the remedy for which he asks."[19] Thus, despite Shays' and Meehan's apparent dismay and frustration with what they saw as the FEC's misinterpretation, or possibly even misconstruction, of BCRA, as evidenced by the agency's implementing regulations,[20] the Congressmen still had to demonstrate that they had suffered concrete harm as a result of these regulations in order to properly bring their case before a federal court.[21]

This Casenote argues, consistent with Judge Henderson's dissent in *Shays* ("*Shays* dissent"), that it was precisely this particularized, non-hypothetical harm caused by the FEC's regulations that Shays and Meehan lacked.[22] Therefore, this Casenote contends that the *Shays* dissent correctly concluded that the Congressmen did not have proper constitutional standing to bring their claims for resolution in federal court,[23] and it explores the possible implications of the *Shays* court's contrary holding. Part I of this Casenote provides a brief overview of some of the relevant history of campaign finance reform, including passage of BCRA and the FEC regulations that led to *Shays*, and describes the doctrine of constitutional or Article III standing. Part II analyzes the *Shays* holding on constitutional standing, discusses many of the *Shays* dissent's critiques of the majority's analysis, and contends that the majority's ruling is incorrect. Finally, Part III examines the implications of the *Shays* court's holding on constitutional standing in terms of the precedent that this decision sets for Article III standing analyses in the D.C. Circuit and the effect it may have on the concept of separation of powers.

I. BACKGROUND

A. *Factual Background of* Shays v. FEC

Initially, the Federal Election Campaign Act of 1971 ("FECA")[24] mandated disclosure of certain political contributions[25] and enacted detailed

---

19 McCabe v. Atchison, Topeka & Santa Fe Ry. Co., 235 U.S. 151, 164 (1914).

20 *See supra* text accompanying notes 2-4, and 11.

21 *See supra* text accompanying notes 16-19.

22 Shays v. FEC, 414 F.3d 76, 116 (D.C. Cir. 2005) (Henderson, J., dissenting).

23 *Id.* at 115.

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

25 McConnell v. FEC, 540 U.S. 93, 117-18 (2003).

reporting requirements for federal candidates,[26] and the Federal Election Campaign Act Amendments of 1974[27] restricted the political contributions that private individuals could make to federal election campaigns.[28] Many factors, including case law and agency decisions after FECA was passed, led the political parties to turn to the use of "soft" money, or contributions not subject to FECA's limitations on donors and contribution amounts, and led corporations to begin financing "sham issue ads," or political advertisements that discussed candidates and their views, but refrained from advocating for candidates.[29] Both of these campaign fundraising techniques fell outside the purview of FECA's limitations, and Congress passed BCRA in 2002 in response to these developments.[30] BCRA was a sweeping law that instituted several new restrictions. Title I of BCRA limited "the use of soft money by political parties, officeholders, and candidates," while Title II prevented "corporations and labor unions from using general treasury funds for communications that [we]re intended to, or ha[d] the effect of, influencing the outcome of federal elections."[31]

After the Supreme Court upheld the constitutionality of much of BCRA in *McConnell v. FEC*,[32] Representatives Shays and Meehan, the two House of Representatives sponsors of BCRA, challenged many of the regulations that the FEC had promulgated to implement the statute.[33] The Congressmen brought their case in the U.S. District Court for the District of Columbia, arguing that the FEC's implementing rules were too narrow, and that they allowed conduct that BCRA would otherwise have proscribed.[34] The two House members claimed that they had standing to challenge these regulations under the Administrative Procedure Act,[35] which provides a right of judicial review to "a person . . . adversely affected or aggrieved by agency action within the meaning of a relevant statute" such as BCRA.[36] The D.C. District Court held that, "because 'the [FEC] regulations shape the environment in which plaintiffs must operate' as officeholders and candidates," Shays and Meehan had standing to bring suit.[37]

The specific FEC regulations that the Congressmen contested in the district court included those governing coordinated communications, or

---

26 2 U.S.C. § 434 (2000).

27 Pub. L. No. 93-443, 88 Stat. 1263 (codified as amended at 2 U.S.C. §§ 431-56 (2000)).

28 *McConnell*, 540 U.S. at 118-19.

29 *Shays*, 414 F.3d at 80-81.

30 *Id*. at 79-82.

31 *McConnell*, 540 U.S. at 132.

32 540 U.S. 93 (2003); *see also Shays*, 414 F.3d at 79 (stating that *McConnell* "upheld BCRA's core provisions").

33 *Shays*, 414 F.3d at 82.

34 *Id.*

35 Shays v. FEC, 337 F. Supp. 2d 28, 47 (D.D.C. 2004), *aff'd*, 414 F.3d 76 (D.C. Cir. 2005).

36 5 U.S.C. § 702 (Supp. 2004).

37 *Shays*, 414 F.3d at 82 (quoting *Shays*, 337 F. Supp. 2d at 44).

"expenditures by a noncandidate that are 'controlled by or coordinated with the candidate and his campaign'"[38] and which "may be treated as indirect contributions subject to FECA's source and amount limitations."[39] Shays and Meehan also challenged several of the FEC's implementing regulations concerning soft money, or donations not subject to FECA's "source and amount limitations,"[40] as well as agency regulations addressing electioneering communications, or "(1) . . . broadcast[s], (2) referring to a clearly identified candidate for federal office, (3) aired within 30 days of a primary election or 60 days of a general election, (4) that [are] targeted to the electorate of the candidate mentioned."[41] The district court proceeded to strike down and remand to the FEC fifteen of the agency's regulations, while sustaining several others.[42]

The FEC appealed the district court's invalidation of five of their BCRA-implementing regulations to the D.C. Circuit: "(1) standards for 'coordinated communication'; (2) definitions of the terms 'solicit' and 'direct' [in the soft money context]; (3) the interpretation of 'electioneering communication'; (4) allocation rules for state party employee salaries; and (5) a de minimis exemption from allocation rules governing certain contributions."[43] The FEC also unsuccessfully contested the Congressmen's standing to bring suit in federal court.[44]

B. *Legal Background of Constitutional Standing*

Article III, Section 2 of the United States Constitution establishes that the judicial power of the United States extends only to "Cases" and "Controversies."[45] The case or controversy limitation defines the reach of the judicial branch's authority, and expresses the Founders' concern with the appropriate function of the *courts* in a government of separated powers.[46] A federal court must determine whether a litigant has constitutional standing

---

38 *Shays*, 337 F. Supp. 2d at 55 (quoting McConnell v. FEC, 540 U.S. 93, 219 (2003)).

39 *Id.* (quoting *McConnell*, 540 U.S. at 219 (2003)).

40 *Id*. at 73.

41 *Id*. at 124.

42 *Shays*, 414 F.3d at 82.

43 *Id*.

44 *Id*. at 82-83, 95. The *Shays* decision was heard by a three-judge panel of the D.C. Circuit, and a majority of that panel ("*Shays* majority") concluded that the Congressmen had established Article III standing. *Id.* at 95. The FEC subsequently filed a petition for rehearing en banc before the D.C. Circuit which challenged the *Shays* majority's finding that the Congressmen had demonstrated Article III standing. Petition for Rehearing En Banc by the FEC, Shays v. FEC, 414 F.3d 76 (D.C. Cir. 2005) (No. 04-5352). However, the D.C. Circuit denied the FEC's petition for rehearing. Shays v. FEC, 414 F.3d 76 (D.C. Cir. 2005), *reh'g denied*, No. 04-5352 (D.C. Cir. Oct. 21, 2005).

45 U.S. CONST. art. III, § 2, cl. 1.

46 Allen v. Wright, 468 U.S. 737, 750 (1984).

as a mandatory prerequisite to the court's adjudication of a litigant's claims, as the standing inquiry provides evidence as to "whether the [litigant's] dispute . . . will be presented in an adversary context and in a form historically viewed as capable of judicial resolution."[47]

1. Constitutional Minimum of Standing

In *Lujan v. Defenders of Wildlife*,[48] the United States Supreme Court explicated the "constitutional minimum of standing."[49] According to *Lujan*, a plaintiff must prove (1) that he has "suffered an injury in fact . . . which is (a) concrete and particularized, and (b) 'actual or imminent, not conjectural or hypothetical;'"[50] (2) that there is "a causal connection between the injury and the conduct complained of—the injury has to be 'fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court;'"[51] and (3) that it is "'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'"[52]

For instance, in *Lujan*, several environmentalist groups brought suit against the Secretary of the Interior ("Secretary") for his interpretation of the geographic reach of a provision of the Endangered Species Act ("ESA").[53] The ESA provision at issue required federal agencies to consult with the Secretary before taking any action that might adversely affect endangered species or their habitats, and the Secretary promulgated a regulation mandating such consultation only for "actions taken in the United States or on the high seas," thereby exempting foreign agency activities from the requirement.[54] The environmentalists claimed that they had suffered an "injury in fact" because federal agencies' participation in foreign activities without consultation "increase[ed] the rate of extinction of endangered and threatened species."[55] To demonstrate that the injury was not only cognizable, but also particularized, two individual environmentalists alleged that they had traveled abroad to observe endangered species at foreign sites and that American agencies' involvement in certain foreign pro-

---

47 Flast v. Cohen, 392 U.S. 83, 101 (1968).

48 504 U.S. 555 (1992).

49 *Id*. at 560.

50 *Id.* (citations, internal quotation marks, and footnote omitted) (citing Allen v. Wright, 468 U.S. 737, 756 (1984)) (quoting Whitmore v. Arkansas, 495 U.S. 149, 155 (1990)).

51 *Id.* at 560-61 (alterations in original) (quoting Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 41-42 (1976)).

52 *Id.* at 561 (quoting *Simon*, 426 U.S. at 38, 43).

53 *Id*. at 558-59.

54 *Lujan*, 504 U.S. at 558-59.

55 *Id*. at 562.

jects threatened these endangered animals.[56] Both of the environmentalists also asserted that they intended to return to these areas and would be harmed if the animals there were adversely affected.[57] However, Justice Scalia, delivering the opinion for the United States Supreme Court, found that these allegations did not satisfy the injury-in-fact prong of Article III standing because the environmentalists' past trips to the foreign sites did not demonstrate "how damage to the species will produce 'imminent' injury" to themselves.[58] Additionally, Justice Scalia concluded that their "'inten[t]' to return to the places they had visited . . . where they will presumably, this time, be deprived of the opportunity to observe animals . . . is simply not enough" to satisfy the "injury" requirement, as it establishes neither imminent nor actual harm.[59]

The Supreme Court did not address causation in *Lujan*, although Justice Scalia, no longer writing for a majority of the Court, did conclude that the redressability prong of Article III standing was not satisfied.[60] Instead of suing the individual agencies responsible for financing the problematic foreign projects, the environmentalists sued the Secretary of the Interior for the regulation he promulgated.[61] Thus, although the Court could instruct the Secretary to rewrite the regulation at issue, "this would not remedy [the environmentalists'] alleged injury unless the funding agencies were bound by the Secretary's regulation, which is very much an open question" since they were not joined in the suit.[62] Additionally, the environmentalists did not provide proof that a discontinuation of American funding would terminate these foreign projects altogether and prevent harm to the animals, further establishing a lack of redressability in the action.[63] Justice Scalia held that because the *Lujan* environmentalists failed both the injury-in-fact and redressability prongs, they did not have constitutional standing to bring their claims before the Supreme Court.[64]

2. Prudential Standing

In addition to satisfying each element requisite to establish constitutional standing, plaintiffs such as Shays and Meehan who are seeking to establish standing under the Administrative Procedure Act must demonstrate prudential standing, or that "their claims fall 'arguably within the

56 *Id.* at 563-64.
57 *Id.*
58 *Id.* at 564.
59 *Id.* (first alteration in original).
60 *Lujan*, 504 U.S. at 568.
61 *Id.*
62 *Id.*
63 *Id.* at 571.
64 *Id.* at 562.

zone of interests to be protected or regulated by the statute in question.'"[65] The prudential standing requirement is a "judicially self-imposed limit[]," [66] which is "founded in concern about the proper—and properly limited—role of the courts," [67] and which "denies a right of review if the plaintiff's interests are . . . marginally related to or inconsistent with the purposes implicit in the statute" at issue in a case.[68] However, the statute in question need not contain an "indication of congressional purpose to benefit the would-be plaintiff" in order to satisfy the prudential standing requirement.[69]

For instance, in *Association of Data Processing Service Organizations, Inc. v. Camp*,[70] a group of data processing businesses ("businesses") sued the Comptroller of the Currency ("Comptroller"), arguing that his decision to allow national banks to provide data processing services to their bank customers was erroneous.[71] The businesses alleged that this ruling violated both the Bank Service Corporation Act of 1962, which stated that "[n]o bank service corporation may engage in any activity other than the performance of bank services for banks," [72] and the National Bank Act, which affirmed that banks may "exercise 'all such incidental powers as shall be necessary to carry on the business of banking.'"[73] The businesses asserted standing to sue the Comptroller under the Administrative Procedure Act, which provides that standing may be granted to those "aggrieved by agency action within the meaning of a relevant statute" [74] or to those whose "interest . . . is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." [75] The United States Supreme Court held that although neither the National Bank Act nor the Bank Service Corporation Act "in terms protect[ed] a specified group . . . their general policy is apparent." [76] Because "[i]t [wa]s clear that [the businesses], as competitors of national banks which [we]re engaging in data processing services, [we]re within that class of 'aggrieved' persons . . . entitled to judicial review," the Court held that the businesses were within

---

65 Shays v. FEC, 414 F.3d 76, 83 (D.C. Cir. 2005) (quoting Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co., 522 U.S. 479, 488 (1998)).

66 Bennett v. Spear, 520 U.S. 154, 162 (1997) (quoting Allen v. Wright, 468 U.S. 737, 751 (1984)).

67 *Id.* (quoting Warth v. Seldin, 422 U.S. 490, 498 (1975)).

68 *Nat'l Credit Union*, 522 U.S. at 491 (alteration in original) (quoting Clarke v. Sec. Indus. Ass'n, 479 U.S. 388, 399 (1987)).

69 *Id.* (quoting Clarke v. Sec. Indus. Ass'n, 479 U.S. 388, 399-400 (1987)).

70 397 U.S. 150 (1970).

71 *Id.* at 151.

72 *Id.* at 155 (quoting 12 U.S.C. § 1864).

73 *Id.* at 157 n.2 (quoting 12 U.S.C. § 24(7)).

74 *Id.* at 153 (quoting 5 U.S.C. § 702).

75 *Id.*

76 *Data Processing*, 397 U.S. at 157.

the "zone of interests" of the statutes and had established prudential standing.[77]

II. ANALYSIS OF CONSTITUTIONAL STANDING IN *SHAYS V. FEC*

In attempting to invoke the jurisdiction of the federal courts, Representatives Shays and Meehan sought to establish their standing to challenge the FEC's implementing regulations as "Members of Congress and candidates for reelection"[78] and as "voters, recipients of campaign contributions, fundraisers, and political party members."[79] This section analyzes the Congressmen's attempts to demonstrate constitutional standing and evaluates the D.C. Circuit's conclusion that Shays and Meehan appropriately established both the injury-in-fact and the causation prongs of Article III standing. Because invalidation of the challenged agency rules would redress the Congressmen's purported harm since they asserted that their alleged injuries stemmed directly from the particular FEC regulations they contested, the third prong of constitutional standing, redressability, is not critiqued here. Additionally, it is fairly evident that as U.S. Representatives, candidates for re-election, and participants in the federal election system, Shays and Meehan fell within the fairly broad boundaries of the "zone of interests" test, as they are parties who both benefited from and were regulated by BCRA's requirements.[80] Although this Casenote concedes that the Congressmen satisfied this prudential standing requirement, the Congressmen did not have standing under Article III to bring their claims before a federal court because they failed to satisfy the injury-in-fact and causation prongs of constitutional standing.

A. *Injury-in-Fact*

In attempting to establish the first prong of constitutional standing, injury-in-fact,[81] Shays and Meehan asserted that BCRA "protect[ed] them from prohibited campaign practices."[82] The Congressmen alleged that the FEC regulations, which they contended would allow many activities that BCRA proscribed, "cause[d] them injury redressable though judicial review"[83] because FECA prohibited the imposition of penalties upon anyone

77 *Id.* at 156-57.

78 Shays v. FEC, 414 F.3d 76, 84 (D.C. Cir. 2005).

79 Shays v. FEC, 337 F. Supp. 2d 28, 40 (D.D.C. 2004), *aff'd*, 414 F.3d 76 (D.C. Cir. 2005).

80 *Shays*, 414 F.3d at 83.

81 *See supra* Part I.B.1.

82 *Shays*, 414 F.3d at 83-84.

83 *Id.* at 84.

who relied upon such agency regulations.[84] Thus, Shays and Meehan suggested that this statutory defense might allow their opponents to freely engage in activities that, while permissible under the FEC regulations, would otherwise be forbidden by BCRA, thus undermining "their BCRA-protected interest in BCRA-compliant elections."[85] They also contended that, as candidates for re-election to Congress, they were influenced by any opportunities that the FEC regulations opened for their "potential election opponents" and for "contributors to and supporters of [their] opponents."[86] The Congressmen asserted that if any BCRA provisions were evaded or made less effective by the FEC's regulations, they would be "forced once again to raise money, campaign, and attempt to discharge [their] important public responsibilities in a system that is widely perceived to be, and [that they] believe in many respects [would] be, significantly corrupted by the influence of special-interest money."[87] Finally, in attempting to provide the court with specific examples of the harms they might suffer, Shays and Meehan alleged that the FEC regulations caused them to be "'open to attack' by BCRA-banned advertising" and "[to] face the 'strong risk' that opponents [would] use improper soft money spending against them."[88]

In their Appellate Brief to the D.C. Circuit, Shays and Meehan primarily grounded their standing claims in their status as federal candidates and Members of Congress and thus two of the purported "principal intended beneficiaries" of BCRA's reforms.[89] They also alleged that their ability to establish that they had suffered injury-in-fact as federal candidates was supported by two specialized standing doctrines known as "procedural rights" standing and "competitive standing."[90] Although the D.C. Circuit found both of these standing doctrines highly relevant to the Congressmen's case, this Casenote argues that in applying the doctrines in this context, the court was forced to over-extend their logic and, as stated by the *Shays* dissent, the court may have turned at least one of these doctrines "on its head."[91] This subsection first analyzes the *Shays* court's determination that the Congressmen displayed injury-in-fact through a discussion of the traditional injury requirements for Article III standing, and argues the Congressmen did not satisfy this first prong of constitutional standing under the traditional test. The subsection then compares *Shays* to several "procedural rights" standing and "competitive standing" cases and determines that the

84 2 U.S.C. § 438(e) (Supp. 2004); *Shays*, 414 F.3d at 83-84.

85 *Shays*, 414 F.3d at 84.

86 *Id.*

87 *Id.*

88 *Id.* at 85.

89 *See* Brief for Christopher Shays and Martin Meehan at 6-7, Shays v. FEC, 414 F.3d 76 (D.C. Cir. 2005) (No. 04-5352).

90 *Id.* at 9-10.

91 *Shays*, 414 F.3d at 118 (Henderson, J., dissenting) (stating that the *Shays* majority's procedural rights standing theory "turn[ed] the procedural rights doctrine on its head").

Shays court misconstrued these doctrines in finding that Shays and Meehan experienced injury-in-fact.

1. Shays and Meehan Failed to Demonstrate a Concrete and Particularized, Actual or Imminent Injury-in-Fact

As a preliminary matter, there are several problems with the injuries Shays and Meehan claimed that they might experience with respect to the traditional injury-in-fact requirements for establishing Article III standing. First, the harms that the Congressmen asserted they might face, such as being "open to attack" by their opponents' campaign advertising and having to seek re-election in flawed races that allowed what they considered to be BCRA-prohibited activities,[92] were not "concrete and particularized."[93] As noted by the *Shays* dissent, the Congressmen alleged no damages that they had actually experienced as a result of the FEC regulations.[94] The Representatives also failed to describe any changes that they had been forced to affirmatively make within their own re-election campaigns to account for the potential of a direct threat from their political opponents or their opponents' supporters,[95] which is contrary to a long line of precedent requiring a demonstration of direct threat to establish injury-in-fact.[96] For instance, cases such as *Rainbow/PUSH Coalition v. FCC*[97] conclude that a plaintiff must demonstrate a "specific injury directly attributable" to the defendant's challenged conduct.[98] Further, according to *Lujan*, the particularity prong of the injury-in-fact requirement is especially hard to prove when a harm is alleged to result from "the government's allegedly unlawful regulation (or lack of regulation) of *someone else*" because the harm's occurrence then crucially depends on the reactions of third parties to the regulations in place.[99] This is especially problematic in a case such as *Shays*, where in order for the Congressmen to be personally affected by the harms that they alleged, actors within their own particular congressional districts would have to respond to the FEC regulations that they disputed in order for the candidates to be harmed. The Congressmen failed to demonstrate the likelihood of such a localized risk of harm.[100] Further, while the Congressmen

92 *See supra* Part II.A.

93 *See supra* Part I.B.1.

94 *Shays*, 414 F.3d at 116, 122 (Henderson, J., dissenting).

95 *See id.* at 121-23.

96 *E.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555, 574-76 (1992); O'Shea v. Littleton, 414 U.S. 488, 495 (1974).

97 396 F.3d 1235 (D.C. Cir. 2005).

98 *Id.* at 1241.

99 *Lujan*, 504 U.S. at 561-62.

100 *See* Brief for the FEC at 12, Shays v. FEC, 414 F.3d 76 (D.C. Cir. 2005) (No. 04-5352) (noting that the Congressmen "recite[d] no facts indicating that any identifiable person or entity has had any

clearly believed that the history of the campaign finance system showed a lengthy record of widespread abuse and circumvention of agency regulations, cases have established that "[p]ast exposure to illegal conduct does not in itself show a present case or controversy . . . if unaccompanied by any continuing, present adverse effects."[101]

Second, the harms that Shays and Meehan claimed were also not "actual or imminent."[102] Rather, as detailed above,[103] the Congressmen repeatedly presented various hypothetical situations in their complaint which allegedly demonstrated that they might be "open to" various speculative "risks" as a result of the FEC regulations in future electoral races.[104] In other words, the Congressmen failed to allege any specific injuries that they had suffered as a result of the FEC regulations because they had not yet concretely experienced any harm. The *Lujan* case established that when no precise injury has been demonstrated by a plaintiff seeking to establish standing, the imminence consideration becomes crucial.[105] However, the type of "some day" possibilities alleged by the Congressmen in *Shays*, "without any description of concrete plans, or indeed even any specification of *when* the some day will be," are not sufficient to satisfy the imminence requirement.[106] Additionally, the case of *FEC v. Akins*[107] further described the importance of the injury requirement as a constraint which "helps assure that courts will not 'pass upon . . . abstract, intellectual problems,' but adjudicate 'concrete, living contest[s] between adversaries'"[108] since it is not the nature of the judiciary's role to resolve problems that might never come to fruition. On their face, the conjectural, vague harms that Shays and Meehan alleged in their case before the D.C. Circuit did not satisfy the traditional injury-in-fact requirements for Article III standing.[109]

2. The *Shays* Majority Combined and Misinterpreted Two Constitutional Standing Doctrines to Find Injury-in-Fact

Perhaps conceding that Shays and Meehan had not firmly established the requisite injury-in-fact for Article III standing based on the traditional

---

plans to engage in any activities to affect their *own* election campaigns"); *cf. Shays*, 414 F.3d at 122 (Henderson, J., dissenting) (stating that the FEC regulations applied to all candidates equally).

101 O'Shea v. Littleton, 414 U.S. 488, 495-96 (1974).

102 *See supra* Part I.B.1.

103 *See supra* Part II.A.

104 *Shays*, 414 F.3d at 116 (Henderson, J., dissenting).

105 *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 564 n.2 (1992).

106 *Id.* at 564.

107 524 U.S. 11 (1998).

108 *Id.* at 20 (alterations in original) (quoting Coleman v. Miller, 307 U.S. 433, 460 (1939) (Frankfurter, J., dissenting)).

109 *Shays*, 414 F.3d at 116 (Henderson, J., dissenting).

two-prong analysis described above, the majority in *Shays* began its standing analysis by stating that courts have regularly allowed litigants to bring cases alleging the types of injuries asserted by Shays and Meehan as harms due to the "illegal structuring of a competitive environment."[110] However, as noted by the *Shays* dissent,[111] despite the fact that the applicability of competitive standing to political or election contexts had never been fully resolved by the D.C. Circuit,[112] the *Shays* court commenced its standing analysis with a discussion in which two standing doctrines, standing based on an overlooked "procedural right" and "competitive standing," were examined in an overlapping fashion.[113]

a. *Standing Based on a Procedural Right*

The *Shays* court first attempted to draw a comparison between *Shays* and several cases that established a plaintiff's right to seek adjudication of claims based on a disregarded procedural right in situations where "agencies adopt[ed] procedures inconsistent with statutory guarantees, [and] parties who appear[ed] regularly before the agency suffer[ed] injury to a legally protected interest in 'fair decisionmaking.'"[114] These "procedural rights" cases do not stand for the proposition that "illegal structuring of a competitive environment"[115] may confer Article III standing, and the *Shays* majority may have disregarded several key aspects of these and other procedural rights cases which demonstrated that this particular standing doctrine was inapplicable to the Congressmen's case.[116]

The first case cited by the *Shays* majority as demonstrating standing based on a procedural right[117] was *Electric Power Supply Ass'n v. Federal Energy Regulatory Commission*.[118] In *Electric Power*, a trade association that regularly represented its members' interests in hearings before the Federal Energy Regulatory Commission ("FERC") challenged agency-initiated regulations relaxing statutory rules barring ex parte communications in FERC proceedings for the benefit of certain FERC hearing participants.[119]

---

110 *Id.* at 85 (majority opinion).

111 *Id.* at 120 n.4 (Henderson, J., dissenting).

112 Gottlieb v. FEC, 143 F.3d 618, 620 (D.C. Cir. 1998) (noting that the court "ha[d] never completely resolved this 'thorny issue'" (quoting Common Cause v. FEC, 108 F.3d 413, 419 n.1 (D.C. Cir. 1997))).

113 *See Shays*, 414 F.3d at 116 (Henderson, J., dissenting).

114 *Id.* at 85 (majority opinion) (quoting Elec. Power Supply Ass'n v. Fed. Energy Regulatory Comm'n, 391 F.3d 1255, 1262 (D.C. Cir. 2004)).

115 *Id.*

116 *Id.* at 116 (Henderson, J., dissenting).

117 *Id.* at 85 (majority opinion).

118 391 F.3d 1255 (D.C. Cir. 2004).

119 *Id.* at 1257.

Although the FERC suggested that the trade association did not face any definite risk of financial harm due to the new agency regulations, and thus could not demonstrate an injury, the *Electric Power* court dismissed the FERC's argument as "off the mark."[120] Rather, the D.C. Circuit noted that in procedural rights cases, a litigant must demonstrate that the disregard of a procedure by a government actor will pose a distinctive, personal risk to the particular litigant before the court.[121] Thus, since the trade association in *Electric Power* regularly participated in proceedings before the FERC, the D.C. Circuit found that it had standing to contest the new agency regulations on the basis of its statutory right to just rules and outcomes in FERC hearings, a right which would be threatened if restrictions on ex parte communications were eased.[122]

The *Shays* majority tried to analogize the right to fair FERC proceedings without ex parte communications and the right to fair re-elections accorded Shays, Meehan and other federal candidates, but even the majority itself seemed to concede that its logic was a bit strained when it admitted it was "[t]rue [that] the forum here is an election, not agency rulemaking or adjudication."[123] The *Shays* dissent properly pointed out the importance of the factual dissimilarity between *Shays* and *Electric Power*, noting that the litigants in *Electric Power* acquired their procedural right to agency hearings without ex parte communications *because of* their regular participation in FERC adjudications.[124] It is difficult to discern how Shays' and Meehan's situation is truly analogous and how they might have gained a similar procedural right without participating in a proceeding before the FEC in which a procedural right was denied them.[125]

Although the *Shays* majority failed to cite any specific procedural rights that Shays and Meehan possessed, it appears the court believed the Congressmen's disregarded procedural rights derived from the FEC regulations that they were challenging, as the majority stated that "campaign finance rules establish procedures through which candidates seek reelection."[126] However, a procedural right is one that "helps in the protection or enforcement of a substantive right."[127] Conversely, the BCRA-granted rights that the Congressmen sought to defend on appeal before the D.C. Circuit[128] were related to substantive campaign finance regulations on soft

120 *Id.* at 1262.

121 *Id.*

122 *Id.* at 1261-62; *see also Shays*, 414 F.3d at 117 (Henderson, J., dissenting) (recounting *Electric Power*).

123 *Shays*, 414 F.3d at 85.

124 *See id.* at 117-18 (Henderson, J., dissenting) (underscoring the point).

125 *See id.*

126 *Id.* at 91 (majority opinion).

127 BLACK'S LAW DICTIONARY 1348 (8th ed. 2004).

128 *See supra* Part I.A.

money contributions and advertising expenditures.[129] Rules that "establish procedures through which candidates seek reelection"[130] would be more likely to include regulations related to nominations or ballot access, rather than the substantive campaign finance rules at issue in *Shays*. Furthermore, the *Shays* dissent noted:

> Those BCRA provisions which [might] be considered "procedural"—that is, the provisions governing disclosure, recordkeeping, and reporting . . . . were designed to protect only the rights of voters generally to be informed about candidates and to exercise their franchise in an electoral system untainted (or less tainted) by corruption. They were not designed to benefit or protect candidates running for office.[131]

Thus, because any procedural rights to fair future elections potentially contained within BCRA were intended for the benefit of the voting public, and not for Shays and Meehan as candidates, such rights were not implicated in the Congressmen's suit.[132]

The *Shays* majority also cited the case of *Florida Audubon Soc'y v. Bentsen*[133] as a parallel procedural rights action brought before the D.C. Circuit.[134] In that case, a group of environmentalists sued the Secretary of the Treasury and the IRS Commissioner for approving a tax credit for the use of an alternative fuel additive, ETBE, without producing an environmental impact statement ("EIS").[135] The environmentalists believed such a statement might have revealed that the tax credit would lead farmers to increase production of the component parts of this additive, causing environmental damage in areas the environmentalists "use[d] and enjoyed."[136] In *Florida Audubon*, the D.C. Circuit noted that while a procedural rights litigant's burden to establish standing may be somewhat relaxed because the focus in these cases is primarily on "whether a plaintiff who has suffered personal and particularized injury" has sued a party that is responsible for that harm, the standing inquiry does not end with a determination of whether a procedural right has been disregarded.[137] Rather, a procedural rights litigant must still prove that it is "substantially probable" that *his personal interests* will be affected by the lacking procedure.[138] Thus, in *Florida Audubon*, the D.C. Circuit held that the litigants were required to prove that "the omission or insufficiency of an EIS may cause the agency to overlook

---

129 *See Shays*, 414 F.3d at 120 (Henderson, J., dissenting).

130 *Id.* at 91 (majority opinion).

131 *Id.* at 119 (Henderson, J., dissenting).

132 *See id.* at 118-19.

133 94 F.3d 658 (D.C. Cir. 1996).

134 *Shays*, 414 F.3d. at 85, 91-92.

135 *Fla. Audubon*, 94 F.3d at 662.

136 *Id.*

137 *Id.* at 664.

138 *Id.* at 664-65.

the creation of a demonstrable risk not previously measurable . . . of serious environmental impacts that imperil [the litigants'] particularized interest."[139] The *Florida Audubon* court held that because the case involved a generalized rulemaking with potential national ramifications, the litigants had to particularize the potential for widespread environmental harm to themselves in order to establish standing; because the environmentalists were unable to establish a "geographic nexus," or that farmers near the distinct locations they frequented would increase their agricultural output and possible damage to the land in response to the tax credit, the environmentalists did not have standing to sue.[140]

Although the *Shays* majority correctly found *Florida Audubon* relevant to the Congressmen's case, it may have misinterpreted the central message of *Florida Audubon* as it applied the decision to Shays' and Meehan's cause of action. The *Shays* majority found that the Congressmen had particularized the risk of harm that the challenged FEC regulations posed to their re-election campaigns through their contention that these agency rules could be abused by the Congressmen's political opponents.[141] The *Shays* majority concluded that the Congressmen had standing to challenge the FEC regulations on the basis of their thwarted procedural entitlement to BCRA's campaign procedures without demonstrating that "the challenged rules [would] disadvantage their reelection campaigns" because procedural rights standing does not require a litigant to demonstrate that the lacking procedure actually caused him damage, just that its omission increased his risk of injury.[142]

However, *Florida Audubon* also recognized that the question relevant to the environmentalists' standing was not whether they could positively establish that the tax credit would *actually lead to environmental damage* in the areas the litigants visited.[143] Rather, the environmentalists had to show that farmers near those particular locations would react to the tax credit by increasing their farming capacity, thus increasing the risk of environmental damage.[144] It was not sufficient that the environmentalists simply asserted the general risk that the tax credit would cause farming output to increase nationally, and, "by implication," also near the areas that the environmentalists visited.[145]

Similarly, Shays' and Meehan's attempts to establish constitutional standing based on their asserted right to the protection of BCRA campaign

---

139 *Id.* at 666 (citing City of Los Angeles v. Nat'l Highway Traffic Safety Admin., 912 F.2d 478, 483-84 (D.C. Cir. 1990)).

140 *Id.* at 666-68.

141 Shays v. FEC, 414 F.3d 76, 91-92 (D.C. Cir. 2005).

142 *Id.*

143 *See Fla. Audubon*, 94 F.3d at 664-65, 667-68.

144 *Id.* at 667-68.

145 *Id.*

procedures suffer from a comparable defect. They presented no affirmative proof that opponents in their particular congressional districts would react and abuse the alleged loopholes that the FEC regulations created with regard to unregulated soft money contributions, sham issue ads, or electioneering communications in the manner they presumed.[146] Further, as *Florida Audubon* demonstrates, it is not enough to simply invoke "'the hard lesson of circumvention' evident in 'the entire history of campaign finance regulation'"[147] to establish the likelihood that the presumed national effects of the FEC regulations will be felt by the Congressmen's local campaigns. While the *Shays* majority may have been correct in asserting that, because the Congressmen were trying to establish standing on the basis of an omitted procedural right, they did not have to demonstrate that the FEC regulations that they were challenging had actually caused them injury, they did have to at least particularize the risk of injury to themselves by showing that actors within their congressional districts would respond to the agency rules.

Finally, a third case brought against the FEC before the D.C. Circuit, *Common Cause v. FEC*,[148] provides further evidence that the *Shays* majority's standing conclusion was inconsistent with the Court's own precedent. In *Common Cause*, a political group filed a complaint with the FEC alleging that two Republican organizations had violated FECA by making excessive contributions to a Republican Senatorial candidate's campaign and by neglecting to disclose those contributions.[149] The suit asserted that the political group had "suffered a particularized injury when the FEC dismissed its complaint in a manner contrary to law."[150] Despite the fact that Common Cause was asserting a procedural harm that it had suffered—a purported violation of its right to just evaluations of its complaints in proceedings before the FEC—the *Common Cause* court held that FECA's provision allowing those "aggrieved by an order . . . dismissing a complaint" to file suit in District Court did not itself bestow standing upon litigants.[151] Rather, litigants still had to prove a "discrete injury flowing from the alleged violation of FECA," aside from the FEC's failure to follow the law in processing their complaint, in order to establish standing.[152]

The *Common Cause* court's key holding was that citizens attempting to establish standing on the basis of a procedural right do not establish that they have suffered particularized harm when they merely assert that a government actor has disregarded a required procedure and failed to act accord-

146 *See* Brief for the FEC at 12, Shays v. FEC, 414 F.3d 76 (D.C. Cir. 2005) (No. 04-5352); *cf. Shays*, 414 F.3d at 122 (Henderson, J., dissenting) (stating that Shays and Meehan failed to allege any specific competitive disadvantage from the regulations).

147 *Id.* at 90 (majority opinion) (quoting McConnell v. FEC, 540 U.S. 93, 165 (2003)).

148 108 F.3d 413 (D.C. Cir. 1997).

149 *Id.* at 415, 417.

150 *Id.* at 418.

151 *Id.* at 418-19 (quoting 2 U.S.C. § 437g(a)(8)(A)).

152 *Id.* at 419.

ing to law, unless they can show that such failures have harmed them particularly.[153] The political group in *Common Cause* was unable to show how the excessive campaign contributions and failed disclosures had harmed it in some individual way, so the D.C. Circuit panel determined that it did not satisfy the injury-in-fact requirement for constitutional standing.[154] Similarly, Shays and Meehan could not establish standing to bring their case before the D.C. Circuit by asserting that the FEC disregarded their procedural right to the disputed campaign finance rules in BCRA when implementing the contested regulations unless they could also show particular, discrete harm that they suffered from the alleged violations of BCRA. However, the Congressmen only asserted that the FEC regulations opened them up to possible, non-particularized harms and risks in the future, and could not show any distinct injury that they had endured or any imminent threats to their campaigns.[155] Therefore, as *Common Cause* demonstrates,[156] the Congressmen could not establish procedural standing merely based on their interest in having the FEC follow the law so that they did not have to "compete for office in contests tainted by BCRA-banned practices," as the *Shays* majority suggested.[157]

Thus, these three precedents demonstrate that, as the *Shays* dissent concluded,[158] Shays and Meehan did not establish proper constitutional standing to bring their claims before the D.C. Circuit on the basis of a disregarded procedural right.

b. *Competitive Standing*

The *Shays* majority next discussed several "competitive standing" cases,[159] but these decisions were also inapplicable to the Congressmen's cause of action. The line of cases holding that a competitive injury or disadvantage may confer Article III standing concludes that "when the particular statutory provision invoked . . . reflect[s] a legislative purpose to protect a competitive interest, the injured competitor has standing to require compliance with that provision."[160] The *Shays* majority found that Shays and Meehan exhibited competitive standing because, "under FEC rules permitting what BCRA prohibit[ed], the two Congressmen [had to] anticipate and

153 *Id*. at 418-19.

154 *Common Cause*, 108 F.3d at 419.

155 Shays v. FEC, 414 F.3d 76, 116, 122 (D.C. Cir. 2005) (Henderson, J., dissenting); *see supra* Part II.A.

156 *Common Cause*, 108 F.3d at 419.

157 *Shays*, 414 F.3d at 85.

158 *Id*. at 117 (Henderson, J., dissenting).

159 *Id*. at 85-87 (majority opinion).

160 Hardin v. Ky. Utils. Co., 390 U.S. 1, 6 (1968).

respond to a broader range of competitive tactics."[161] For instance, although the *Shays* majority conceded that "the challenged rules create[d] neither more nor different rival candidates—the electoral analogue to participants in a market," the majority expressed concern that under the FEC regulations on coordinated communications, "rival candidates [might] have supporters finance issue ads more than 120 days before the election [although] according to Shays and Meehan, BCRA restricts such spending."[162]

Several of the first cases cited by the *Shays* majority demonstrate why the competitive standing doctrine is inapplicable to the Congressmen's case. First, *Hardin v. Kentucky Utilities Co.*,[163] a case discussed by the *Shays* majority, found that a private utility company had standing to challenge a local government's interpretation of a statutory provision extending competition in their service area because one of the main purposes of the statute at issue was "to protect private utilities from TVA competition."[164] Although the *Shays* majority attempted to correlate this case to the Congressmen's action, they failed to assert which particular provisions of BCRA manifested a similar legislative purpose to protect the competitive interests of candidates such as Shays and Meehan, likely because, as the *Shays* dissent succinctly noted, "the provisions the [Congressmen sought] to enforce [we]re 'in no way concerned with protecting against competitive injury.'"[165] Rather, as the *Shays* dissent pointed out, the United States Supreme Court has found that the "primary purpose of [FECA], which BCRA amends, was 'to limit the actuality and appearance of corruption resulting from large individual financial contributions,'"[166] not to protect the competitive interests of candidates.

The *Shays* majority also cited *Ass'n of Data Processing Service Organizations, Inc. v. Camp*,[167] where the United States Supreme Court found that existing data processing businesses had standing to sue the Comptroller of the Currency on the basis of a competitive injury after the Comptroller decided to allow national banks to begin marketing similar data services.[168] However, in that case, the businesses alleged that one bank had already negotiated to perform similar services for two of the businesses' former clients, demonstrating a specific competitive disadvantage that the businesses had *already experienced* as a result of the Comptroller's decision.[169] Unlike in *Data Processing*, the FEC regulations did not permit any new

161 *Shays*, 414 F.3d at 86.

162 *Id.*

163 390 U.S. 1 (1968).

164 *Id.* at 5-6.

165 *Shays*, 414 F.3d at 120 (Henderson, J., dissenting) (quoting *Hardin*, 390 U.S. at 6).

166 *Id.* at 118-19 (internal quotation marks omitted) (quoting McConnell v. FEC, 540 U.S. 93, 120 (2003)).

167 397 U.S. 150 (1970).

168 *Id.* at 151, 157.

169 *Id.* at 151-52.

opponents to challenge the Congressmen, and Shays and Meehan were unable to present any concrete evidence of affirmative actions taken by their political opponents or their opponents' supporters which subjected them to an analogous competitive injury as a result of the challenged FEC regulations.[170] Further, in *MD Pharmaceutical, Inc. v. DEA*,[171] another case cited and analogized by the *Shays* majority as presenting a comparable example of competitive standing,[172] a current pharmaceutical producer challenged an agency's decision to approve a bulk manufacturer's application to produce a generic formulation of a medication that the current producer already made.[173] The *MD Pharmaceutical* court held that the current producer had standing to challenge this decision, as "increased competition represents a cognizable Article III injury."[174]

However, unlike *MD Pharmaceutical* and *Data Processing*, and as the majority in *Shays* admitted, none of the FEC regulations that the two candidates challenged[175] allowed new or different competition to enter the market.[176] Although regulations governing, for instance, nominations might have caused the Congressmen to face new or different opponents, no such regulations were at issue in *Shays*. Rather, the *Shays* court tried to analogize *MD Pharmaceutical* and similar cases where particular agency decisions allowed *fresh* competition to enter the market by suggesting that Shays and Meehan might be forced to respond to "*intensified* competition" because, according to the candidates' allegations, the FEC regulations allowed activities that BCRA would otherwise forbid.[177] However, this nebulous competitive harm suggested by the D.C. Circuit[178] does not seem truly analogous to the clear disadvantage faced by a current drug producer when a new competitor enters the market as a result of an agency decision and is able to directly threaten the current producer's market share.

Within their competitive standing discussion, the *Shays* court also argued that preparing for the additional competitive *practices* that the FEC regulations might allow, rather than any new or different rivals that the rules might cause the Congressmen to face, altered the electoral environment in such a way as to afford Shays and Meehan competitive standing.[179] For instance, the *Shays* majority alleged that under the challenged FEC

---

170 *Shays*, 414 F.3d at 121-22 (Henderson, J., dissenting).

171 133 F.3d 8 (D.C. Cir. 1998).

172 *Shays*, 414 F.3d at 86-87.

173 *MD Pharm.*, 133 F.3d at 9.

174 *Id.* at 11-13 (quoting Liquid Carbonic Indus. Corp. v. Fed. Energy Regulatory Comm'n, 29 F.3d 697 (D.C. Cir. 1994)).

175 *See supra* Part I.A.

176 *Shays*, 414 F.3d at 86.

177 *Id.*

178 *See id.* at 122 (Henderson, J., dissenting) (referring to the majority's assertion of "*intensified* competition" as a "vague, hypothetical and novel . . . [competitive] injury").

179 *Id.* at 86-87 (majority opinion).

regulation on coordinated communications, which precluded such communications from being made within 120 days of a general or primary election, the Congressmen's "rival candidates [might] have supporters finance issue ads more than 120 days before the election."[180] However, even if the majority's extension of the doctrine to encompass new competitive tactics was correct, the *Shays* dissent responded that the coordinated communications regulation promulgated by the FEC simply did not require the Congressmen to prepare to address any *new* competitive practices.[181] Rather, because "BCRA indisputably permit[ted] soft-money-funded coordinated expenditures," the FEC's regulation only "permit[ed] more of these same [coordinated communications] activities than the [Congressmen] believe[d] BCRA authorize[d]."[182]

The *Shays* majority also contended that because of the new competitive tactics that might be initiated by Shays's and Meehan's political rivals, the Congressmen might be forced to "adjust their campaign strategy," thereby demonstrating that "they too suffer[ed] harm to their legally protected interests."[183] A comparable case decided in the First Circuit addressed the issue of whether the re-structuring of a competitive political strategy might confer competitive standing. In *Vote Choice, Inc. v. DiStefano*,[184] a gubernatorial candidate in Rhode Island challenged certain state campaign finance regulations which encouraged candidates, upon declaring their candidacy, to accept public funding and obey certain restrictions on their campaign funding by permitting those who did to receive greater individual campaign contributions and free television airtime.[185] The candidate in *Vote Choice* chose not to accept public funding, and sought to challenge Rhode Island's provisions on the basis of competitive standing because, once her primary election opponent chose to accept public funding, she was forced "to structure her campaign to account for her adversaries' potential receipt of television time, fundraising advantages, and the like."[186] Because these regulations concretely impacted this candidate and had a clear effect on her campaign structure and approach, the First Circuit found that this competitive disadvantage was satisfactory to establish competitive standing.[187] Unlike in *Vote Choice*, Shays and Meehan failed to describe *any* affirmative alterations that they had made, or that they intended to make, within their respective re-election campaigns in preparation for the increased competitive tactics that they asserted their competitors might em-

180 *Id.* at 86, 98.

181 *Id.* at 122 (Henderson, J., dissenting).

182 *Shays*, 414 F.3d at 122 (Henderson, J., dissenting).

183 *Id.* at 87 (majority opinion).

184 4 F.3d 26 (1st Cir. 1993).

185 *Id.* at 29-30.

186 *Id.* at 37.

187 *Id.*

ploy due to the FEC regulations.[188] Furthermore, the Congressmen also did not allege that any competitors were actually using the disputed FEC regulations to their competitive disadvantage.[189]

Finally, the *Shays* majority cited *Gottlieb v. FEC*,[190] a D.C. Circuit case in which the court expressly stated that it had *never decided* whether the competitive, or competitor, standing doctrine applied within the political context.[191] Although the *Shays* majority found that *Gottlieb* "support[ed] applying competitor standing to politics as well as business,"[192] the issue was never definitively settled in that case.[193] Rather, in *Gottlieb*, the D.C. Circuit found that even assuming a competitor standing theory could apply to the political context, *Gottlieb*'s organizational plaintiff, who alleged that President Clinton illegally diverted campaign contributions, did not satisfy standing because the group was not *competing* as a candidate in the election.[194] Although the D.C. Circuit stated that "[o]nly another candidate could make such a claim,"[195] this comment merely indicated that only another candidate would be able to *test* the theory's applicability to the political context.[196] *Gottlieb* provides little basis for utilizing the competitor standing theory within the political arena, and, as the *Shays* dissent noted, even if this theory could apply to the Congressmen's cause of action, they would still be unable to utilize it as a basis for establishing constitutional standing since they failed to demonstrate a competitive harm.[197]

Case law drawn primarily from the D.C. Circuit's own precedent, as well as from other federal circuits, demonstrates that competitive standing was not applicable to Shays' and Meehan's attempts to establish the injury-in-fact prong of constitutional standing. Because the Congressmen were unable to satisfy the traditional injury-in-fact requirement for constitutional standing, and also did not demonstrate injury-in-fact on the basis of a disregarded procedural right or competitive standing, the *Shays* dissent's conclusion that Shays and Meehan failed the injury-in-fact prong of Article III standing altogether was correct.[198]

---

188 *See Shays*, 414 F.3d at 121-23 (Henderson, J., dissenting); Brief for the FEC at 14, Shays v. FEC, 414 F.3d 76 (D.C. Cir. 2005) (No. 04-5352).

189 *Shays*, 414 F.3d at 121-23.

190 143 F.3d 618 (D.C. Cir. 1998).

191 *Id.* at 620.

192 *Shays*, 414 F.3d at 87.

193 *Gottlieb*, 143 F.3d at 620.

194 *Id.* at 620-21.

195 *Id.* at 621.

196 *See id.*

197 *Shays*, 414 F.3d at 120 n.4 (Henderson, J., dissenting).

198 *Id.* at 123.

B. *Causation*

Shays and Meehan also failed to satisfy the second prong of the test for constitutional standing;[199] they did not show that any injury they might suffer is fairly traceable to, or will be caused by, the FEC's regulations implementing BCRA. The *Shays* majority stated that the Congressmen's harm "is fairly traceable to the FEC's rules because absent those rules BCRA's prohibitions would prevent their opponents from tainting their electoral fights."[200] While this assertion may establish but-for causation, it does not demonstrate that the Congressmen's potential injuries are the proximate result of the FEC rules, because any injury that Shays and Meehan may someday suffer is not just dependent on the agency's regulations, but also crucially requires "the independent action of some third party not before the court."[201]

For instance, in the *Gottlieb* case, four individual voters also brought suit alleging that President Clinton illegally diverted certain campaign contributions and that this weakened their ability, as both voters and supporters of the opposing candidate, to influence the presidential election.[202] The D.C. Circuit determined that these voters did not have standing to raise their claims because their purported injury resulted from the government's choice not to regulate *someone else*, and causation was ultimately dependent on "the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict."[203] Likewise, in *Shays*, the actions of third parties that might result from the challenged FEC regulations were also speculative and dependent upon presumptions. Shays and Meehan were unable to attribute any harm that they had suffered or that they might suffer to any particular group or person.[204] Unlike in *Gottlieb*,[205] the Congressmen's purported harm did not arise from regulations that only affected others since the Congressmen's own electoral activities were also limited by the FEC rules, but Shays and Meehan only disputed the manner in which those rules regulated the behavior of others.[206] However, the Congressmen could provide no affirmative proof of how those unknown people or groups would react to the agency regulations,[207] and they were thus un-

199 *See supra* Part I.B.1.

200 *Shays*, 414 F.3d at 92.

201 Allen v. Wright, 468 U.S. 737, 757 (1984) (quoting Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 42 (1976)).

202 *Gottlieb*, 143 F.3d at 619-21.

203 *Id.* at 621 (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 562 (1992)).

204 *See Shays*, 414 F.3d at 121-22 (Henderson, J., dissenting).

205 *Gottlieb*, 143 F.3d at 621.

206 *Shays*, 414 F.3d at 116, 122-23 (Henderson, J., dissenting).

207 *See id.* at 122-23.

able to supply the missing causal link between the FEC rules and their alleged harm.

In *Freedom Republicans, Inc. v. FEC*,[208] a minority-run, independent Republican group sued the FEC for providing federal funds to the Republican National Convention because of the group's asserted belief that certain Republican Party activities violated the Civil Rights Act of 1964.[209] The Freedom Republicans contended that the Republican Party's use of a "bonus delegate" system for determining the number of representatives each state would send to the Republican nominating convention discriminated against states with greater minority populations.[210] In *Freedom Republicans*, the D.C. Circuit noted that while the causation and redressability prongs of the constitutional standing analysis fused somewhat when litigants alleged that their injury resulted from an agency's lax regulation of a third party, "[c]ausation remains inherently historical; redressability quintessentially predictive."[211] Thus, noting that the bonus delegate system utilized by the Republican Party had a long-standing history, that it was enacted in response to a particularly disastrous nominating convention and election for the Republican Party, and that the scheme predated public convention funding by fifty-eight years, the D.C. Circuit concluded that the FEC's provision of funds to the Republicans had not caused the Freedom Republicans' asserted harm.[212]

Similarly, Shays and Meehan were also unable to trace any injuries to the FEC regulations that they challenged before the D.C. Circuit. First, unlike the Freedom Republicans, who were at least able to pinpoint the Republican Party as the third-party source of the harm experienced by their organization, the Congressmen were unable to isolate any people or groups who might injure them in their re-election efforts.[213] They had not yet experienced any concrete injury resulting from abuse of the FEC implementing regulations.[214] Furthermore, timing defeats both litigants in *Shays*. While the Republican Party's "bonus delegate" system was in place long before the FEC began providing funding for the Party's nominating convention, preventing the Freedom Republicans from showing that FEC funding

---

208 13 F.3d 412 (D.C. Cir. 1994).

209 *Id*. at 413.

210 *Id*. at 414. The Freedom Republicans asserted "that the 'bonus delegate' system result[ed] in decreased representation for the states in which minority groups [we]re disproportionately settled." *Id.* The bonus delegate system rewarded "states electing Republican presidents, senators, or governors or sending a predominantly Republican delegation to the House of Representatives . . . [by giving them] bonus delegates" to the Republican nominating convention in addition to their base number of delegates determined by the state's electoral college vote. *Id.* at 413.

211 *Id*. at 418.

212 *Id*. at 418-19.

213 *See* Shays v. FEC, 414 F.3d 76, 116, 122-23 (D.C. Cir. 2005) (Henderson, J., dissenting).

214 *Id*. at 123.

caused their harm,[215] the Congressmen initiated their suit so quickly after the FEC's rulemaking that there was *no* history of causal connection between the newly-established FEC rules and campaign finance abuse.[216] Because the Congressmen instituted their suit before Shays and Meehan had experienced any concrete harm,[217] their ability to demonstrate causation was necessarily speculative.

Overall, it seems clear that Shays and Meehan were unable to establish both the injury-in-fact and causation prongs of constitutional standing, and that the *Shays* dissent properly concluded that the Congressmen did not have constitutional standing.

III. IMPLICATIONS OF THE *SHAYS* HOLDING ON CONSTITUTIONAL STANDING

A. *Expansive Notion of Standing*

The central problem with the *Shays* decision is that it appears to allow both federal office-seekers and members of Congress to obtain judicial review of FEC regulations that they feel were improperly implemented, even if they are unable to prove that the opposed rules caused them any distinct harm or have influenced the behavior of others.[218] The federal courts considered Shays' and Meehan's claims merely based on the Congressmen's concern that exploitation of the federal election system would result from the contested FEC rulemaking.[219] The D.C. Circuit's conclusion that Shays and Meehan had standing to sue creates a low standing bar for future litigants, especially those raising concerns in their capacity as candidates or members of Congress, in cases before that court. This is problematic for two main reasons.

First, this sets a dangerous precedent that hypothetical, abstract, generalized injuries qualify litigants for standing before the D.C. Circuit. The D.C. Circuit's determination that Shays and Meehan had constitutional standing to sue the FEC despite the conjectural nature of the Congressmen's claims of injury placed the court in the position of possibly "unconstitutionally render[ing] an advisory opinion by 'deciding a case in which

---

215 *Freedom Republicans*, 13 F.3d at 418-19.

216 *See Shays*, 414 F.3d at 122 (Henderson, J., dissenting) ("Notably, neither the appellees nor the majority cites any instance when the [regulatory] safe harbors were exploited to a candidate's detriment in the 2004 election campaigns.").

217 *Id.* at 123.

218 Press Release, FEC, FEC Files Petition for Rehearing in *Shays v. FEC* (Aug. 29, 2005), http://www.fec.gov/press/press2005/20050829ShaysRehearing.html.

219 *See supra* Part II.A.

no injury would have occurred at all.'"[220] It may be true that the nature of the campaign finance system demonstrates that whatever restrictions are in place have been, and likely will be, so widely and consistently abused that these particular FEC rules were bound to have a negative impact upon the Congressmen in some future election.[221] However, encouraging claimants to come to court before problems have actually arisen, especially in such a contentious and dynamic area of law as campaign finance, is certainly undesirable as it may waste judicial resources, clog crowded court calendars, and engage the judiciary in acting beyond the scope of its authority.

Furthermore, the nebulous, generalized nature of the Congressmen's injuries, such as harm to "their BCRA-protected interest in BCRA-compliant elections"[222] was basically an allegation that the FEC did not implement BCRA in the way the Congressmen anticipated the agency would. However, such a vague interest in having an executive agency adhere to the law does not just implicate the Congressmen's interests; rather, this "would extend nationwide"[223] the ability to bring claims against an agency such as the FEC for their rulemakings to anyone who felt that the regulations were contrary to law, thus "transform[ing] the federal courts into 'no more than a vehicle for the vindication of the value interests of concerned bystanders.'"[224]

There is some debate as to whether restrictions on asserting the type of non-specific, generalized injuries just described in order to establish standing are reflections of the "concrete and particularized component of standing," or are a prudential limitation that provides guidance on which types of *cases* should be properly determined by the courts.[225] However, Ryan Guilds has persuasively argued that the "generalized grievance" limitation has always comprised part of the constitutional minimum required for standing.[226] Guilds identifies case law that appears to be the genesis of much of the confusion surrounding this area of law,[227] and suggests that viewing general grievances as a prudential limitation has led some trial courts to "look at the underlying merits and assess judicial competency" which "distort[s] the court's traditional focus on the party and the injury"

---

220 Fla. Audubon Soc'y v. Bentsen, 94 F.3d 658, 663 (D.C. Cir. 1996) (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 564 n.2 (1992)).

221 *See Shays*, 414 F.3d at 90 (predicting that candidates would inevitably "seize opportunities created by the challenged rules").

222 *Id*. at 84.

223 Allen v. Wright, 468 U.S. 737, 756 (1984).

224 *Id.* (quoting United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669, 687 (1973)).

225 Ryan Guilds, *A Jurisprudence of Doubt: Generalized Grievances as a Limitation to Federal Court Access*, 74 N.C. L. REV. 1863, 1899-1902 (1996).

226 *Id*. at 1903-04, 1911.

227 *Id*. at 1901-04.

when assessing standing.[228] If a limitation on general grievances indeed comprises part of the "Article III requirements of a particularized injury,"[229] all courts would be prohibited from disregarding this restraint when analyzing a litigant's demonstration of standing.[230] Since the Congressmen's standing in *Shays* appears doubtful due to the generalized, vague nature of the injuries they asserted, the D.C. Circuit's determination that the Congressmen established proper standing not only provides a low bar for future litigants, potentially easing their path into federal court, but it may disregard a constitutionally-required component of Article III standing.

Second, according to Barry H. Gottfried and Jarrett S. Taubman, the D.C. Circuit is recognized as a court that endeavors to respect its own judicial precedent, especially in contexts such as administrative law where the D.C. Circuit judges are uniquely and deeply experienced.[231] For instance, these scholars cite two D.C. Circuit cases, one that was brought before the court in the 1960s[232] and one from the late 1980s[233] that developed the doctrine of "listener standing," which is relevant to plaintiffs seeking to appeal Federal Communications Commission ("FCC") decisions in federal court.[234] Listener standing basically "conferred automatic judicial standing on the residents of a station's community of license to appeal [FCC] decisions concerning that station's license" strictly on the basis of their status as listeners, because broadcasters were thought to be uniquely accountable to their local audiences.[235] In both of the cases that produced this specialized standing doctrine, the D.C. Circuit determined that no one was more directly impacted by FCC licensing decisions than the local listeners.[236] Therefore, "to safeguard the public interest in broadcasting . . . some 'audience participation' must be allowed in license renewal proceedings" before the courts.[237]

Although it might have been expected that this expansive notion of standing would be rejected in the wake of the three-prong constitutional standing analysis explicated by the Supreme Court in *Lujan*, an analysis which demands that plaintiffs demonstrate personal, actual harm in order to establish standing,[238] the D.C. Circuit has remained loyal to the listener

---

228 *Id.* at 1911.

229 *Id.* at 1903.

230 *See id.* at 1899.

231 Barry H. Gottfried & Jarrett S. Taubman, *What is Left of Listener Standing? The D.C. Circuit's Continuing Flirtation with a Dying Doctrine*, 14 COMMLAW CONSPECTUS 403, 404-05 (2006).

232 Office of Commc'n of the United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966).

233 Llerandi v. FCC, 863 F.2d 79 (D.C. Cir. 1988).

234 Gottfried & Taubman, *supra* note 231, at 404.

235 *See id.* at 403-04.

236 *See Llerandi*, 863 F.2d at 85; *United Church of Christ*, 359 F.2d at 1002.

237 *United Church of Christ*, 359 F.2d at 1005.

238 *See supra* Part I.B.1.

standing cases.[239] Gottfried and Taubman assert that the D.C. Circuit has held that the listener standing conclusions in both cases remain good law and that the court has repeatedly differentiated the facts of those cases from new settings to which plaintiffs have tried to apply them.[240] In fact, these scholars have argued that while there is now little remaining of listener standing in its purest form because it cannot be rationalized in light of *Lujan*'s particularized injury-in-fact requirements, the fact that the doctrine has not been definitively overruled by the D.C. Circuit may supply a "vivid illustration of the efforts to which a court may go to avoid overturning its own precedent."[241]

Because *Shays* establishes a particularly weak standing doctrine, allowing future litigants to raise hypothetical, non-personalized injuries in order to challenge FEC regulations, it is possible that this will open the federal courts to a greater number of plaintiffs interested in challenging agency regulations based upon speculative fears of the future effects these regulations might have. As noted, this may engage the D.C. Circuit in improperly resolving cases where these conjectural injuries might never materialize. Additionally, if the experience with the doctrine of listener standing proves analogous to the D.C. Circuit's holding that Shays and Meehan had proper standing in *Shays*, there is a possibility that the court may adhere to this weak precedent in future cases for at least some period, resulting in a watered-down version of constitutional standing in the D.C. Circuit.

B. *Separation of Powers Implications*

In 1983, then-D.C. Circuit Judge Antonin Scalia suggested in a law review article that standing is a critical aspect of separation of powers, and that requiring a litigant to demonstrate that he has suffered concrete and particularized harm in order to bring his case before a federal court ensures that the judiciary is acting within that branch's proper role to vindicate the rights of individuals who have been injured.[242] *Marbury v. Madison*,[243] the U.S. Supreme Court case establishing the concept of judicial review, as-

---

239 Gottfried & Taubman, *supra* note 231, at 404.

240 *Id.*; *see, e.g.*, KERM, Inc. v. FCC, 353 F.3d 57, 60-61 (D.C. Cir. 2004) (holding that "KERM cannot establish standing here as a listener of [a station] . . . because it has not alleged any continuing wrongs," and "easily" distinguishing the facts of *United Church of Christ*, where "[t]he petitioners . . . proffered convincing evidence that the challenged FCC action would result in substantial and ongoing injuries"); Jaramillo v. FCC, 162 F.3d 675, 677 (D.C. Cir. 1998) (holding that the petitioners' assertion of standing as mere listeners in this case was insufficient, and distinguishing both *Llerandi* and *United Church of Christ*).

241 Gottfried & Taubman, *supra* note 231, at 404-05.

242 Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 881-82 (1983).

243 5 U.S. (1 Cranch) 137 (1803).

serted that "[t]he province of the court is, solely, to decide on the rights of individuals."[244] Scalia derived from *Marbury* and other historical understandings and case law precedents that wide-spread societal concerns, such as concerns with whether the government is abiding by the law, are often best resolved through the debates and negotiations of the political process; they do not confirm that there is a need for judicial involvement until an actual injury has been experienced by some individual.[245] Thus, "concrete injury removes from the realm of speculation whether there is a real need to exercise the power of judicial review in order to protect the interests of the complaining party."[246]

The *Shays* holding on constitutional standing implicates such separation of powers concerns. First, if the measure of whether an individual's case is justiciable involves inquiry into whether an individual has suffered a particularized injury-in-fact requiring judicial remediation, the Congressmen's case did not qualify since they were unable to demonstrate any discrete harm or "actual injury" that they had endured, that they were immediately in danger of enduring, or that people within their congressional districts were contemplating as a result of the FEC regulations.[247] Furthermore, *Shays* involved two Congressmen challenging an executive agency in federal court for the agency's alleged improper implementation of a bill that those same legislators sponsored in the U.S. House of Representatives.[248] BCRA itself granted the FEC their rulemaking authority in this instance, stating that "the Federal Election Commission shall promulgate regulations to carry out this Act and the amendments made by this Act that are under the Commission's jurisdiction."[249] It is clear that the Congressmen were not suing in their capacity as the bill's sponsors.[250] However, the fact that these Congressmen sued the FEC because they opposed certain regulations that the agency generated within their authority to implement the law may evoke the Constitutional Founders' fears of "the danger from legislative usurpations"[251] and their belief that a system of separated, checking powers was requisite to ensure that none of the branches "possess[ed] directly or indirectly, an overruling influence over the others in the administration of their respective powers."[252]

Furthermore, according to the FEC, in past decisions federal courts such as the D.C. Circuit have held that federal agencies are entitled to sig-

---

244 *Id*. at 170.

245 Scalia, *supra* note 242, at 894-95.

246 Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 221 (1974).

247 *See supra* Part II.A.

248 Shays v. FEC, 414 F.3d 76, 82 (D.C. Cir. 2005).

249 Bipartisan Campaign Reform Act of 2002, 2 U.S.C. § 431 note (Supp. 2004).

250 *Shays*, 414 F.3d at 82.

251 THE FEDERALIST NO. 48, at 241(James Madison) (George W. Carey & James McClellan eds., 2004).

252 *Id*. at 256.

nificant deference in their rulemaking processes.[253] For instance, in *Whitman v. American Trucking Ass'ns*,[254] the United States Supreme Court addressed the discretion granted to executive agencies in their rulemaking processes in the context of the Clean Air Act and that law's requirement that Christine Todd Whitman, as Administrator of the Environmental Protection Agency ("EPA"), generate regulations establishing air quality standards.[255] In that case, after Whitman modified several air quality standards, per the statute's mandate, she was sued by a group of private businesses and U.S. states who claimed that the Clean Air Act conceded too much rulemaking discretion to the EPA.[256] However, the Supreme Court disagreed, holding that although "the degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred,"[257] the authority granted to the EPA in this instance fell within the bounds of its jurisdiction because "a certain degree of discretion, and thus of lawmaking, inheres in most executive or judicial action."[258]

This conclusion appears applicable to the Congressmen's case. Like the Clean Air Act's mandate that Whitman pass air quality standards, BCRA explicitly granted the FEC authority to "promulgate regulations to carry out"[259] the very detailed provisions of BCRA. Because BCRA was so comprehensive, the FEC's freedom of choice and judgment in generating implementing regulations might not have been tremendous, but BCRA clearly afforded the FEC "a certain degree of discretion."[260] Additionally, once the Act was passed, it became the FEC's unique responsibility to pass implementing standards according to the statute's mandate. Thus, when Shays and Meehan sued the FEC over the agency regulations without waiting for them to play out in practice, and without having experienced a discrete, personal injury as a result of the agency rules, they may have been trying to maintain some legislative control over BCRA despite the fact that the Act was then within the jurisdiction of another branch of government. If the D.C. Circuit had concluded that the Congressmen in *Shays* did not have proper standing to bring this case because the Congressmen's suit represented legislative overreaching into the role of an executive agency, the court may have more firmly preserved the separation of powers between the legislative and executive branches of the United States government.

---

253 Press Release, FEC, FEC Files Petition for Rehearing in *Shays v. FEC* (Aug. 29, 2005), http://www.fec.gov/press/press2005/20050829ShaysRehearing.html.

254 531 U.S. 457 (2001).

255 *Id.* at 462-63.

256 *Id.* at 463.

257 *Id.* at 475.

258 *Id.* (quoting Mistretta v. United States, 488 U.S. 361, 417 (1989) (Scalia, J., dissenting)).

259 Bipartisan Campaign Reform Act of 2002, 2 U.S.C. § 431 note (Supp. 2004).

260 *Whitman*, 531 U.S. at 475 (quoting *Mistretta*, 488 U.S. at 417 (Scalia, J., dissenting)).

CONCLUSION

The D.C. Circuit's determination that Congressmen Christopher Shays and Martin Meehan had standing as candidates and elected officials to challenge the FEC regulations implementing BCRA in *Shays v. FEC*[261] was based on a fusion of two independent standing doctrines,[262] and may have resulted from a misapplication of certain cases interpreting these standing doctrines to the Congressmen's cause of action. Therefore, the *Shays* dissent's conclusion that the Congressmen lacked standing was correct.[263] The injuries that the Representatives alleged they had suffered in *Shays* were far too speculative, abstract and conjectural to qualify these candidates to bring their claims before a federal court under traditional standing principles. The Congressmen also failed to establish a causal link between the regulations that the FEC implemented and their hypothetical harm. However, the D.C. Circuit held that Shays and Meehan demonstrated proper constitutional standing based on an unusual combination of "procedural rights" standing and the "competitive standing" doctrine. The court's acceptance of such weak standing qualifications may have far-reaching implications as future federal candidates or Congressmen may be able to more easily challenge FEC implementing regulations before the D.C. Circuit. Furthermore, the principle of separation of powers may be weakened if federal courts step in and resolve matters that are not based on individual harm and that are thus inappropriate for judicial review, or address situations where legislators have challenged an executive agency's implementation of statutes without waiting to ensure that actual harm results from the rules and that judicial remediation is required. The D.C. Circuit's conclusion that Shays and Meehan had proper constitutional standing sets an ineffective, unfavorable precedent for the future.

261 414 F.3d 76 (D.C. Cir. 2005).

262 *See id.* at 116 (Henderson, J., dissenting).

263 *Id.* at 115.