

A CONUNDRUM IN A QUAGMIRE: UNRAVELING NORTH DAKOTA'S CAMPAIGN FINANCE LAW

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I. INTRODUCTION

The 2004 general election was the first major election since the United States Supreme Court decided the constitutionality of the Bipartisan Campaign Reform Act of 2002 (BCRA),¹ also known as the McCain-Feingold Act.² The explosion of the renowned 527 political committees (527s)³ in the run-up to the election appears to have been one of the consequences of the passage of the BCRA. A particular type of 527 dealing only with financing state election campaigns has placed increased pressure upon states to police campaign activities. This article illustrates the growing problem with special focus on North Dakota.

II. THE HISTORICAL CONTEXT OF CAMPAIGN FINANCE REFORM

The influence of money on politics has been a subject of concern for well over a century in the United States. Rapid industrial expansion following the Civil War led to vast concentrations of wealth.⁴ The populist movements of the latter part of the nineteenth and early twentieth centuries were reactions to the profound impact that those economic conditions had upon American life.⁵ The result was a series of legislated reforms aimed at curbing the influences of great wealth. One of the reform movements

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1. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (codified at 2 U.S.C. §§ 431, 434, 439, 441, 453; 18 U.S.C. § 607; 28 U.S.C. § 994; 36 U.S.C. § 510; 47 U.S.C. § 315).

2. *Shays v. Fed. Election Comm'n*, 337 F. Supp. 2d 28, 37 n.4 (D.D.C. 2004).

3. See 26 I.R.C. § 527 (2005) (providing the section of the Internal Revenue Code defining political committees for purposes of federal tax exemption). The IRS requires periodic reporting of contributions to and disbursements from such organizations, but only for the purposes of establishing tax-exempt status. 26 I.R.C. § 527(j)(2).

4. *United States v. UAW-CIO*, 352 U.S. 567, 570 (1957).

5. *Id.*

started during that period was the effort to stop the corrupting influence of big money over the political process.⁶

The 1904 presidential election was a watershed moment in campaign finance reform. The Democratic presidential nominee, Alton B. Parker, complained that corporations made large money contributions to the Theodore Roosevelt campaign to buy influence with the administration.⁷ President Roosevelt denied the claims.⁸ However, Parker's allegations fueled the growing popular sentiment for action to purge national politics of the influence of corporate aggregations of wealth.⁹ An investigation following the election produced hard evidence that several corporations had, in fact, made large contributions to the Roosevelt campaign.¹⁰

President Roosevelt quickly responded to the controversy and the growing national mood by calling upon Congress to pass legislation prohibiting corporate political contributions.¹¹ He stated plainly that "directors should not be permitted to use stockholders' money" for political purposes.¹² Bowing to the combined pressures, in 1907 Congress passed the Tillman Act,¹³ which completely banned corporate monetary contributions in connection with federal elections.¹⁴

The campaign contribution reform movement continued throughout the twentieth century. In 1925, Congress passed the Federal Corrupt Practices Act¹⁵ which enhanced the provisions of the Tillman Act.¹⁶ During the late 1930s, the growing political influence of labor unions, through their contributions to Democratic party candidates, came under increased scrutiny. The concern over labor unions' political activity and the potential disruption of war-time industry through this activity led to the passage of the

6. See *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 115-20 (2003); *UAW-CIO*, 352 U.S. at 570-84 (providing a comprehensive discussion of the history of federal campaign finance reform in America).

7. Anthony Corrado, *A History of Federal Campaign Finance Law*, in 73:1 THE REFERENCE SHELF 1, CAMPAIGN FINANCE REFORM 5-6 (Christopher Luna ed., 2001).

8. *Id.*

9. *UAW-CIO*, 352 U.S. at 571-72.

10. *Id.* at 572.

11. *Id.*

12. *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 115 (2003) (internal quotations omitted).

13. Tillman Act, ch. 420, 34 Stat. 864 (1907) *declared unconstitutional in part in* *Newberry v. United States*, 256 U.S. 232, 258 (1921), and *amended by* Federal Corrupt Practices Act, ch. 368, 43 Stat. 1070 (1925) (codified at 2 U.S.C. §§ 241-248) (repealed 1972). See also *Weber v. Heaney*, 793 F.Supp. 1438, 1444 (D. Minn. 1992) (offering the historical perspective of the Tillman Act).

14. *United States v. UAW-CIO*, 352 U.S. 567, 571-75 (1957).

15. Federal Corrupt Practices Act, ch. 368, 43 Stat. 1070 (1925) (codified at 2 U.S.C. §§ 241-248) (repealed 1972).

16. *UAW-CIO*, 352 U.S. at 576-77.

Smith-Connally Act in 1943.¹⁷ Smith-Connally extended the restrictions of the Federal Corrupt Practices Act on direct political contributions to labor organizations for the duration of the war.¹⁸ The restrictions upon union contributions were made permanent by the Taft-Hartley Act¹⁹ following the war.²⁰

Labor reacted quickly to Smith-Connally by spawning a new political animal—the political action committee (PAC).²¹ In 1943, the labor organization known as the Congress of Industrial Organizations formed the Congress of Industrial Organizations Political Action Committee (CIO-PAC) as a separate segregated fund (SSF).²² SSFs were made up of voluntary member donations, no part of which came from union dues.²³ In time, corporations and other organizations caught on and began forming their own PACs.²⁴

In 1972, Congress passed the Federal Election Campaign Act (FECA),²⁵ which replaced earlier prohibitions of corporate and union contributions.²⁶ FECA also acknowledged and ratified the existence of PACs.²⁷ It expressly permitted corporations, unions, and certain other organizations to establish and administer SSFs for election-related expenditures.²⁸

Restrictions upon political contributions burden free speech. Restrictions upon corporate and union contributions have, nonetheless, been found to be constitutional as long as the organization has the ability to express its ideas through a PAC.²⁹ The rationale is that contributions made to a PAC more accurately reflect political views sympathetic to the views of the

17. War Labor Disputes Act, ch. 144, 57 Stat. 163 (1943) (codified at scattered sections of 50 U.S.C., 2 U.S.C. § 251) (repealed 1945) [hereinafter Smith-Connally].

18. *UAW-CIO*, 352 U.S. at 578-79.

19. Taft-Hartley Act, ch. 120, 61 Stat. 136 (1947) (codified as amended at 18 U.S.C. § 610 and scattered sections of 29 U.S.C.).

20. *UAW-CIO*, 352 U.S. at 567-98.

21. JOSEPH E. CANTOR, POLITICAL SPENDING BY ORGANIZED LABOR: BACKGROUND AND CURRENT ISSUES, THE LIBRARY OF CONGRESS, CRS Doc. No. 96-484 GOV, at 1-2 (1998).

22. *Id.*

23. *Id.*; see *Minn. Ass'n of Commerce & Indus. v. Foley*, 316 N.W.2d 524, 527 (Minn. 1982).

24. *Foley*, 316 N.W.2d at 527-28.

25. Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972) (codified as amended in scattered sections of 2 U.S.C., 18 U.S.C., and 47 U.S.C.).

26. *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 117-18 (2003).

27. *Id.* at 118.

28. *Id.* See also 2 U.S.C. § 431(4)-(8) (2000) (explaining the definition of “political committee” which includes separate segregated funds).

29. *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 657-61 (1990).

organization establishing the PAC.³⁰ Funds accumulated through stock sales, member dues, or from sources unrelated to political activities of the organization do not share the same assurances and are subject to regulation.³¹ Persons contributing to the SSF understand that their money will be used solely for the political views espoused by the organization.³² Treasury funds, on the other hand, do not necessarily represent the political views of those providing the money.³³ The restriction on the use of treasury funds for political purposes, therefore, does not unduly burden free speech.³⁴

BCRA is the most recent iteration of federal campaign finance reform. Among other things, BCRA put an end to so-called “soft-money” contributions.³⁵ The term “soft money” referred to money raised or spent by federal candidates or parties for state election activities.³⁶ Those funds were not subject to FECA’s contribution limits and expenditure caps because FECA’s jurisdiction only extended to federal elections.³⁷

III. CAMPAIGN FINANCE LAWS IN THE STATES

Individual states have also entered the arena of campaign finance regulation. In 1981, North Dakota joined the ranks with the adoption of a new election code (North Dakota Act).³⁸ As Table 1 illustrates, many provisions of the North Dakota Act are similar to those of FECA, particularly with regard to corporate contributions.

30. Fed. Election Comm’n v. Mass. Citizens for Life, Inc., 479 U.S. 238, 257-58 (1986).

31. *Id.*

32. *Id.* at 258.

33. *Id.*

34. *See Austin*, 494 U.S. at 659-60 (holding that a state statute prohibiting corporations from making political contributions out of treasury funds is constitutional so long as corporations are permitted to make political contributions through separate segregated funds).

35. *See generally* McConnell v. Fed. Election Comm’n, 540 U.S. 93, 132-34 (2003) (discussing more thoroughly the full impact of BCRA).

36. James Weinstein, *Campaign Finance Reform and the First Amendment: An Introduction*, 34 ARIZ. ST. L.J. 1057, 1068 (2002).

37. *Id.*

38. *See* Alexander J. Bott, *North Dakota’s New Election Code*, 57 N.D. L. REV. 427, 427-30 (1981) (providing an overview of North Dakota’s election code as adopted in 1981).

TABLE 1

	FECA	NORTH DAKOTA ACT
Definition of "association"		N D CENT CODE § 16 1-08 1-01(1) (2003) (emphasis added) "any club, association, union, brotherhood, fraternity, organization, or group of any kind of two or more persons which assesses any dues, membership fees, or license fees or which maintains a treasury fund does not include corporations, [co-ops, L L C s], <i>political committees</i> , or political parties "
Definition of "political committee"	2 U S C § 431(4) (2000) (emphasis added) Any of the following are political committees: • "any <i>committee</i> , club, association, or other group of persons which receives contributions" or makes "expenditures" of more than \$1,000 per year; • any SSF established under § 441b(b); • "any local committee of a political party which receives contributions" or makes non-contribution payments of more than \$5,000 per year, or which makes contributions or expenditures of more than \$1,000 per year	N D CENT CODE § 16 1-08 1-01(8) "any committee, club, association, or other group of persons which receives contributions or makes expenditures for political purposes and includes political action committee of a corporation, [coop, L L C], or association prohibited from making direct political contributions
Definition of "connected organization"	2 U S C § 431(7) (emphasis added) "any organization <i>which is not a political committee</i> but which directly or indirectly establishes, administers or financially supports a political committee "	
Definition of "person"	2 U S C § 431(11) (emphasis added) "includes an individual, partnership, <i>committee</i> , association, corporation, labor organization or group of persons " But does not include the Federal Government	N D CENT CODE § 16 1-08 1-01(7) (emphasis added) "an individual, partnership, <i>political committee</i> , association, corporation, cooperative corporation, limited liability company, or other organization or group of persons "
Ban on corporate contributions	2 U S C § 441b(a) (2000) "It is unlawful for any national bank, or any corporation," "or any labor organization, to make a contribution or expenditure in connection with any" federal election	N D CENT CODE § 16 1-08 1-03 3(1) Corporations, co-ops, L L C s and associations may not make direct contributions to aid any political party, any <i>political committee</i> , any corporation, L L C , or association maintained for political purposes, or any candidate §16 1-08 1-01(4) - the term "corporations" includes nonprofit corporations
Allowance of SSF	2 U S C § 441b(b)(2)(C) contribution or expenditure does not include "the establishment, administration, and solicitation of contributions to" an SSF used for political purposes "by a corporation, labor organization, membership organization, cooperative, or corporation without capital stock "	N D CENT CODE § 16 1-08 1-3 3(2) § 16 1-08 1-3 3 "does not prohibit the establishment, administration, and solicitation of contributions" to an SSF used for political purposes by a corporation, co-op, L L C , or association
Solicitations to SSF	2 U S C § 441b(b)(4) (A) Corporations may only solicit contributions from stockholders and executive/administrative personnel and their families Labor organizations may only solicit from members and their families (C) Membership organizations, co-ops, and corporations without capital stock may solicit from members of such organizations (D) Trade associations may solicit from stockholders and executive/administrative personnel of member corporations and their families so long as it is approved by the member corporation A member corporation may only approve one trade association per year to receive contributions	N D CENT CODE § 16 1-08 1-3 3(2)(a), (e) An SSF may not use "money from dues, fees, treasury funds, or other money required as a condition of membership in an association" or contributions "from any person who is not an employee, stockholder, patron, or member" of the corporation, co-op, L L C , or association maintaining the political action committee

The North Dakota Act has undergone various minor amendments since then, but there has been no significant case law interpreting it.³⁹

Since the enactment of BCRA, individual states have had reason to examine campaign funding under their respective laws. Prior to 2002, political organizations funding campaigns in various states did so often through soft money accounts of one of the national parties, or through a committee affiliated in some way with a national party.⁴⁰ Under that scheme, even though the soft money accounts were, by definition, unregulated funds, there was at least some oversight by the Federal Elections Commission (FEC) over the activities of the organizations, because federal committees or the national parties were involved.⁴¹

The situation changed with the passage of BCRA. The soft money bans now require a wall of separation between political organizations contributing to state candidates, and those affiliated with federal candidates.⁴² After BCRA, the national parties cut ties with political funds previously maintained for state candidate contributions.⁴³ Some of those funds reorganized as stand-alone political 527 committees.⁴⁴ One consequence of the separation was that there was no longer *any* FEC oversight over the campaign activities of organizations participating in non-federal elections.⁴⁵ That responsibility now falls solely upon individual states through the enforcement of each state's campaign finance laws.⁴⁶ Greater vigilance will now be required in the states to adequately police campaign financing.⁴⁷

39. *See generally* N.D. CENT. CODE § 16.1-08.1 (2003) (providing amendment dates and historical information following each sub-section).

40. *McConnell v. Fed. Election Comm'n*, 251 F. Supp. 2d 176, 830-31 (D.D.C. 2003).

41. *See generally In re Sealed Case*, 223 F.3d 775, 782 (D.C. Cir. 2000) (acknowledging that it was appropriate for FEC to look into certain contributions to the Republican National State Election Committee notwithstanding the committee's non-federal status).

42. *See* 2 U.S.C. § 441(i) (2000) (discussing the new rules as applicable to national versus state, district, and local committees).

43. *See McConnell*, 251 F. Supp. 2d at 830-31 (discussing non-federal accounts maintained by the Republican National Committee (RNC) prior to passing BCRA). For example, the RNC maintained twelve non-federal accounts known as Republican National State Election Committee accounts. *Id.* Each account was set up to hold funds raised and spent pursuant to unique legal requirements of particular states; corporate funds were placed in one account, individual contributions were placed in another, etc. *Id.* *See also*, John Sents, *The New Soft Money: Gubernatorial Associations Skirt Campaign Finance Laws*, CENTER FOR PUBLIC INTEGRITY, Sept. 25, 2003, available at <http://www.openairwaves.net/527/report.aspx?aid=8>.

44. Sents, *supra* note 43.

45. *Id.*

46. Kevin Bogardus, *527s Run Aground in the States: Groups Continue to Raise Money as Some Regulators Crack Down*, CENTER FOR PUBLIC INTEGRITY, Oct. 24, 2005, available at <http://www.openairwaves.net/527/report.aspx?aid=755>.

47. *Id.*

Most of the states have placed limitations upon corporate contributions used for political purposes. Twenty-four states enacted statutes which, like FECA, prohibit direct corporate contributions except through SSFs.⁴⁸ Twenty-one states allow direct corporate contributions subject to dollar-amount limitations similar to those imposed upon individual contributions.⁴⁹ Illinois, New Mexico, Oregon, Utah, and Virginia allow unlimited direct corporate contributions.⁵⁰

This article focuses upon the corporate contribution restrictions contained in the North Dakota Act, comparing other decisional authorities implementing similar federal and sister-state provisions. This article also illustrates the difficulties in obtaining enforcement of the North Dakota Act. Finally, an alternative enforcement mechanism is proposed.

IV. ILLUSTRATIVE CASE STUDY—THE CONUNDRUM

One political organization that has been particularly active in North Dakota since 2002 is the Republican State Leadership Committee (RSLC). Prior to BCRA, the Republican National Committee directed funds into state and local election campaigns through a non-federal campaign fund known as the Republican National State Elections Committee.⁵¹ In light of

48. See ALASKA STAT. § 15.13.074 (2004); ARIZ. REV. STAT. ANN. § 16-919(A) (2004); COLO. REV. STAT., § 1-45-103.7 (2005); CONN. GEN. STAT. ANN. §§ 9-333a, 9-333b (West 2006); IOWA CODE ANN. § 68A.503 (West 2005); KY. REV. STAT. ANN. § 121.025 (West 2006); MASS. GEN. LAWS ANN. ch. 55 § 8 (West 2005); MICH. COMP. LAWS ANN. § 169.254 (West 2006); MINN. STAT. ANN. § 211B.15 (West 2005); MONT. CODE ANN. § 13-35-227 (2005); NEB. REV. STAT. § 49-1469 (2005); N.H. REV. STAT. ANN. § 664:4 (2006); N.C. GEN. STAT. § 163-278.15 (2006); N.D. CENT. CODE § 16.1-08.1-03.3 (2003); OHIO REV. CODE ANN. § 3517.082 (LexisNexis 2006); OKLA. STAT. ANN. tit. 74 § 257:10-1-2(d) (2005); PA. STAT. ANN. tit. 25 § 3253 (West 2005); R.I. GEN. LAWS § 17-25-10.1(h)(1) (2006); S.D. CODIFIED LAWS § 12-25-2 (2006); TENN. CODE ANN. § 2-19-132(a) (2005); TEX. ELEC. CODE ANN., § 253-094 (Vernon 2005); W. VA. CODE § 3-8-8 (2005); WIS. STAT. ANN. § 11.38 (West 2006); WYO. STAT. § 22-25-102 (2006).

49. See, ALA. CODE 1975 §§ 10-2A-70.1, 10-2A-70.2 (2005); ARK. CODE ANN. §§ 7-6-201, 7-6-203 (2005); CAL. GOV. CODE §§ 82047, 85301 (West 2006); DEL. CODE. ANN. tit. 15 §§ 8002, 8010 (2005); FLA. STAT. ANN. §§ 106.08, 106.11 (West 2005); GA. CODE ANN. § 21-5-41 (2005); HAW. REV. STAT. § 11-204 (2005); IDAHO CODE ANN. § 67-6610A (2005); IND. CODE § 3-9-2-3 (2006); KAN. STAT. ANN. §§ 25-4143, 25-4153 (West 2005); LA. REV. STAT. ANN. § 18:1505.2 (2006); ME. REV. STAT. ANN. tit. 21 § 1015 (2006); MD. CODE ANN. ELECTION § 13-226 (LexisNexis 2006); MISS. CODE ANN. § 97-13-15 (2006); MO. CODE. ANN. § 130.029 (2006); NEV. REV. STAT. §§ 294A.009, 294A.100 (2005); N.J. STAT. ANN. § 19:44A-11.3 (West 2005); N.Y. ELECTION LAW § 14-116 (McKinney 2005); S.C. CODE ANN. §§ 8-13-1300, 8-13-1314 (2006); VT. SAT. ANN. tit. 17 §§ 2801(6), 2805 (2005); WASH. REV. CODE §§ 42.17.020, 42.17.640 (2006).

50. Nat'l Conference of State Legislatures, *Limits on Corporate Contributions to Candidates*, <http://www.ncsl.org/programs/legman/about/CorpCand.htm> (last visited May 11, 2006).

51. *McConnell v. FEC*, 251 F. Supp. 2d 176, 829-32 (D.D.C. 2003). See Republican State Leadership Committee, <http://www.rslconline.com/about/index.html> (last visited on Mar. 16, 2005).

the soft money bans imposed by BCRA, the RSLC has since taken over some of that activity.⁵² The RSLC holds itself out as a non-party and non-federal 527 political committee acting as the umbrella organization for the Republican Attorneys General Association (supporting Republican Attorney General candidates), the Republican Legislative Campaign Committee (supporting Republican state legislative candidates) and the Republican Lieutenant Governors Association (supporting Republican lieutenant governor candidates).⁵³ The RSLC's website states that it and its supported associations are independent of the Republican National Committee, and, therefore, are able to solicit and accept contributions from corporations, trade associations, and individuals in any amount.⁵⁴ The organization was formed in 2002 and was incorporated in the District of Columbia as a nonprofit corporation⁵⁵ with no members in December of 2003.⁵⁶

Between January and August of 2004, the RSLC contributed \$100,000 to the Re-elect Wayne Stenehjem Campaign Committee—54 percent of the committee's reported contributions.⁵⁷ During the same period, the RSLC contributed \$10,000 to the Bob Stenehjem for Senate state senate campaign committee in North Dakota—53 percent of his reported contributions.⁵⁸

52. The Republican Attorneys General Association, for example, formerly operated under the Republican National State Elections Committee umbrella. 2002 Republican Attorneys General Association Benefits, listing of benefits to contributors, Republican Attorneys General Association (on file with author). RSLC, formed in late 2002, has now taken over that function. See *infra* note 56 (providing references to RSLC Articles of Incorporation, specifically Article V); see also *infra* note 53 and accompanying text.

53. Republican State Leadership Committee website, available at <http://www.rslconline.com/about/index.html> (last visited on Mar. 16, 2005).

54. *Id.*

55. The federal regulation, 11 C.F.R. § 114.12(a) (2005), states “[a]n organization may incorporate and not be subject to the provisions of this part if the organization incorporates for liability purposes only, and if the organization is a political committee” The federal regulation, however, does not apply to RSLC because it only applies to committees involved in federal elections. *Id.*

56. The Articles of Incorporation on file with the District of Columbia Department of Consumer and Regulatory Affairs, Business and Professional Licensing Administration state that, “[t]he Corporation will have no members,” and that “[t]he Corporation shall be formed and operated to influence or attempt to influence the selection, nomination, election, or appointment of Republican candidates to positions of leadership in state and local governing bodies.” REPUBLICAN STATE LEADERSHIP COMM., INC., ARTICLES OF INCORPORATION, art. III. “The Corporation will not attempt to influence federal elections.” *Id.* at art.V. The Articles also state that “[t]he Corporation was initially created on November 1, 2002, as an unincorporated political organization. It is not affiliated with the Republican National Committee.” *Id.* at art. XIV.

57. Pre-General Election Report for the Wayne Stenehjem for Attorney General campaign committee, filed with the North Dakota Secretary of State on October 21, 2004, lists \$100,000 in contributions in 2004 from the “Republican State Leadership Committee” and reports \$184,447.79 in total contributions. Campaign Contribution Statement Statewide Candidates and Candidate Comm., North Dakota Sec. of State, Oct. 21, 2004, at 3 (on file with author).

58. Pre-General Election Report for Bob Stenehjem, filed with the North Dakota Secretary of State on October 20, 2004, lists \$10,000 in contributions in 2004 from the “Republican State

Wayne and Bob are brothers. At the time, Wayne was the incumbent Republican attorney general and Bob was the incumbent Republican state senator from District 30 in North Dakota.⁵⁹ Both campaigned for re-election to their respective offices in the 2004 general election.

The Burleigh County State’s Attorney, the prosecutor with statutory jurisdiction over the contributions, was advised of concerns over the legality of the activities of the RSLC in North Dakota.⁶⁰ However, the Burleigh County State’s Attorney declined prosecution.⁶¹ The state’s attorney agreed that, under state law, “a corporation such as RSLC may not make a *direct* contribution to any candidate.”⁶² However, the State’s Attorney reasoned that the Stenehjem contributions were not illegal because they came from an “individual account” maintained by RSLC, Inc., as a segregated account for individual contributions.⁶³

V. NORTH DAKOTA STATUTORY PROVISIONS—THE QUAGMIRE

The North Dakota Act prohibits corporations and associations from making direct political contributions.⁶⁴ The Act does, however, permit corporations, associations, and certain other entities to establish SSFs or PACs restricted in ways similar to PACs under FECA.⁶⁵ There are three

Leadership Committee” and reports \$19,025 in total contributions. Campaign Contribution Statement Legislative Candidates, North Dakota Sec. of State, Oct. 20, 2004, at 2-4.

59. *See supra* notes 57 and 58.

60. N.D. CENT. CODE § 16.1-08.1-03.3(7) (2003); *see* Letter from Cynthia M. Feland, Assistant States Attorney, Burleigh County State’s Attorney’s Office, to Bruce A. Schoenwald (Oct. 18, 2004) (on file with author).

61. *See* Letter from Cynthia Feland to Bruce Schoenwald, *supra* note 60.

62. *Id.* (emphasis added).

63. *Id.*

64. N.D. CENT. CODE § 16.1-08.1-03.3(1) (2003). The statute states:

A corporation, cooperative corporation, limited liability company, or association may not make a direct contribution:

- a. To aid any political party, political committee, or organization.
- b. To aid any corporation, limited liability company, or association organized or maintained for political purposes.
- c. To aid any candidate
- d. For any political purpose

Id.

65. N.D. CENT. CODE § 16.1-08.1-03.3(2) (2003). This relevant portion provides:

This section does not prohibit the establishment, administration, and solicitation of contributions to a separate and segregated fund to be utilized for political purposes by a corporation, cooperative corporation, limited liability company, or association. It is unlawful for:

- a. The person . . . controlling the fund to make contributions or expenditures utilizing . . . money from dues, fees, treasury funds, or other money required as a

striking features of the North Dakota Act. The first is that the corporate contribution ban includes a prohibition on providing aid to any political organization.⁶⁶ Thus, a prohibited entity may not support a political organization which is not its own SSF.

Second, there is no mechanism to allow a political committee to have an SSF. The PAC exception contained in the North Dakota Act allows only corporations, cooperative corporations, limited liability companies, and associations to maintain SSFs.⁶⁷ The definition of “association” specifically excludes political committees and parties.⁶⁸ The approach is consistent with that taken by FECA in defining a “connected organization” as “any organization *which is not a political committee* but which directly or indirectly establishes, administers or financially supports a political committee.”⁶⁹ The third important feature of the North Dakota Act is the provision stating, “for purposes of this chapter ‘corporations’ includes non-profit corporations.”⁷⁰ These three features should be kept in mind as we examine RSLC’s activities in North Dakota.

VI. ARGUMENTS PROHIBITING CONTRIBUTIONS FROM RSLC— THE CONUNDRUM IN THE QUAGMIRE

The RSLC’s contributions raise three major areas of concern under North Dakota’s express prohibition against corporate funding of candidate political campaigns. First, the RSLC has no members from whom to solicit contributions to a “segregated account” as required by section 16.1-08.1-03.3(2)(e). Second, the RSLC is a political committee or a corporation organized for political purposes receiving aid from other corporations in

condition of membership in an association Moneys from fees, dues, treasury funds, or money obtained in a commercial transaction may, however, be used to pay costs of administration of the fund.

. . . .

e. Any contribution to be accepted from any person who is not an employee, stockholder, patron, or member of the corporation, cooperative corporation, limited liability company, or association maintaining the political action committee.

66. *Id.* at § 16.1-08.1-03.3(1)(a) & (b).

67. *Id.* at § 16.1-08.1-03.3(2).

68. *Id.* at § 16.1-08.1-01(1) defines “[a]ssociation” as “any . . . group of any kind . . . which is united for any purpose . . . and which assesses any . . . membership fees . . . or which maintains a treasury fund *The term does not include corporations, cooperative corporations, limited liability companies, political committees, or political parties.*” *Id.* (emphasis added).

69. 2 U.S.C. § 431(7) (2000) (emphasis added).

70. N.D. CENT. CODE § 16.1-08.1-01(4) (2003).

violation of section 16.1-08.1-03.3(1)(a) & (b). Third, the RSLC may not act as a “conduit,” for contributions to a North Dakota candidate.⁷¹

A. THE RSLC AS A NONPROFIT CORPORATION

1. *Member Contribution Requirements*

In *Federal Election Commission v. National Right to Work Committee*,⁷² a nonprofit corporation established an SSF for political contributions to federal candidates.⁷³ Another group filed an objection with the FEC because the National Right to Work Committee (NRWC), as a nonprofit corporation, was soliciting contributions to its SSF from persons other than members of the corporation.⁷⁴

The United States Supreme Court noted that FECA made it unlawful for any corporation to make a contribution or expenditure in connection with federal campaigns.⁷⁵ The federal statute contained an exception for the establishment, administration, and solicitation of contributions to an SSF to be used for political purposes.⁷⁶ However, that exception was limited in the case of a nonprofit corporation as a corporation without capital stock to allow solicitations only from its members.⁷⁷

The NRWC argued that it issued membership cards to anyone who made a contribution, or in some other way, expressed support for the nonprofit’s political philosophy.⁷⁸ The Supreme Court, however, rejected that argument and held that contributions from the segregated fund were illegal corporate contributions.⁷⁹ Membership in the organization required more than a shared political philosophy and a contribution to the SSF.⁸⁰ The membership limitation required that only persons who were attached in some meaningful way to the corporate structure could contribute.⁸¹

71. N.D. CENT. CODE § 16.1-08.1-03.3(5) (2003) (“[a] person may not make a payment of that person’s money or of another person’s money to any other person for a political purpose in any name other than that of the person who supplies the money . . .”). The term “person” is defined by N.D. Century Code section 16.1-08.1-01(7) as “an individual, partnership, political committee, association, corporation, cooperative corporation, limited liability company, or other organization or group of persons.” *Id.* at § 16.1-08.1-01(7).

72. 459 U.S. 197 (1982).

73. *Nat’l Right to Work Comm’n*, 459 U.S. at 200.

74. *Id.* at 200-01.

75. *Id.* at 201.

76. *Id.*

77. *Id.* at 201-02.

78. *Id.* at 202-06

79. *Id.* at 205-06.

80. *Id.* at 210-11.

81. *Id.* at 202.

Examples of such an attachment indicating membership were voting rights, management responsibility, or some other significant involvement in the operation of the nonprofit.⁸²

The corporate contribution limitations found in the North Dakota Act at section 16.1-08.1-03.3 are based upon the same considerations as the FECA statute addressed in *National Right to Work Committee*. Just as in FECA, North Dakota's section 16.1-08.1-03.3(2)(e) places limitations upon solicitations to a corporation's SSF.⁸³ One of the limitations in North Dakota, just as in the federal statute, is that a nonprofit cannot solicit contributions to the SSF from anyone but its members.⁸⁴

2. *The RSLC Does Not Meet the Member Contribution Requirement*

RSLC is a nonprofit corporation incorporated in the District of Columbia.⁸⁵ The RSLC's Articles of Incorporation indicate it shall have no members.⁸⁶ Thus, the RSLC is a corporation under the North Dakota Act.⁸⁷ As will be discussed later, most of its contributions come directly from corporate and trade association treasuries.⁸⁸ The balance comes from a handful of corporate and trade association PACs and an even smaller number of individuals.⁸⁹ None of the contributors could be classified as "members" under *National Right to Work Committee*.⁹⁰

Nonetheless, it was asserted that RSLC complied with the North Dakota Act because it made the Stenehjem contributions from an SSF which it called the "RSLC, Inc.—Individual Account."⁹¹ It was argued that the "RSLC, Inc.—Individual Account" fit into the SSF exception set forth in section 16.1-08.1-01(2), which states, "This section does not prohibit the establishment, administration, and solicitation of contributions to a separate

82. *Id.* at 205-06.

83. *See* N.D. CENT. CODE § 16.1-08.1-03.3(2)(e) (2003) (prohibiting contributions to an SSF "from any person who is not an employee, stockholder, patron, or member of the corporation, cooperative corporation, limited liability company, or association maintaining the political action committee.").

84. N.D. CENT. CODE § 16.1-08.1-03.3(2)(e).

85. *See supra* note 56.

86. REPUBLICAN STATE LEADERSHIP COMM., INC., ARTICLES OF INCORPORATION, art. III.

87. N.D. CENT. CODE § 16.1-08.1-01(4) (2003).

88. *See infra* note 125 and accompanying text.

89. *See infra* note 125 and accompanying text.

90. *See supra* note 56. RSLC's Articles of Incorporation provide that it will have no members. The Articles do not allow for any significant involvement of contributors as required by *National Right to Work Committee*. *See* Fed. Election Comm'n v. Nat'l Right to Work Comm., 459 U.S. 197, 205-06 (1982).

91. Letter from Cynthia Feland to Bruce Schoenwald, *supra* note 60.

and segregated fund to be utilized for political purposes by a corporation”⁹²

North Dakota’s SSF or PAC exception is modeled after the federal SSF exception found at 2 U.S.C. section 441b(b)(2)(C).⁹³ Both the federal statute and the North Dakota Act place specific limitations upon the sources of contributions to the SSF.⁹⁴ Under both statutory schemes, the contributions must come from individuals who have some membership affiliation or other specified relationship to the connected organization.⁹⁵ In the case of the RSLC, however, no contributor to the “RSLC, Inc.—Individual Account” had a qualifying relationship with the RSLC or its SSF.⁹⁶

3. *The RSLC’s Corporate Status Creates an Issue*

The RSLC, as a nonprofit corporation, is a “corporation” for purposes of the North Dakota Act.⁹⁷ The argument may be advanced, however, that the RSLC is merely a political committee incorporated for only liability purposes, and that it should enjoy an exemption from the anti-corporate contribution statute.⁹⁸ Federal regulations allow just such an exemption for incorporated political committees subject to federal control.⁹⁹ Some of the states which ban direct corporate contributions also permit the incorporation of political committees.¹⁰⁰ North Dakota, however, is not one of those

92. N.D. CENT. CODE § 16.1-08.1-01(2) (2003).

93. 2 U.S.C. § 441b(b)(2)(C) (2004). This section provides that the ban on corporate political contributions and expenditures does *not* extend to “the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation, labor organization, membership organization, cooperative, or corporation without capital stock.” *Id.*

94. 2 U.S.C. § 441b(b)(4)(C) states, “[t]his paragraph shall not prevent a membership organization, cooperative, or corporation without capital stock, or a separate segregated fund established by a membership organization, cooperative, or corporation without capital stock, from soliciting contributions to such a fund from members of such organization, cooperative, or corporation without capital stock.” 2 U.S.C. § 441b(b)(4)(C) (2004).

N.D. CENT. CODE § 16.1-08.1-03.3(2)(e) states, “[i]t is unlawful for . . . [a]ny contribution to be accepted from any person who is not an employee, stockholder, patron, or member of the corporation. . . maintaining the political action committee.” N.D. CENT. CODE § 16.1-08.1-03.3(2)(e) (2003).

95. 2 U.S.C. § 441b(b)(2)(C) (2004); *see also* N.D. CENT. CODE § 16.1-08.1-03.3(2)(e) (2003).

96. *See supra* note 90 and accompanying text.

97. *See* N.D. CENT. CODE § 16.1-08.1-01(4) (2003) (including “nonprofit corporations” in definitions of corporations as used in this chapter).

98. *E.g.*, 11 C.F.R. § 114.12(a) (2005) (allowing political committees to incorporate for liability purposes under FECA)

99. 11 C.F.R. § 114.12(a).

100. For example, in Arizona, the statute states that “[i]t is unlawful for a corporation . . . to make any contribution . . . for the purpose of influencing an election This subsection does

states.¹⁰¹ Moreover, North Dakota also forbids contributions from nonprofit corporations and other limited liability companies.¹⁰² The argument that there is no incorporated political committee exemption under the North Dakota Act is compelling in light of the fact that the exemption is expressly included in other statutory schemes and absent in the North Dakota Act.¹⁰³ North Dakota's express ban on nonprofit corporate contributions further bolsters the argument against the legality of the RSLC contributions.¹⁰⁴

B. THE RSLC AS A POLITICAL COMMITTEE

Even if we disregard the corporate status of RSLC and consider it simply as a 527 political committee, it still cannot maintain an SSF for use in North Dakota.¹⁰⁵ Section 16.1-08.1-03.3(2) of the North Dakota Century

not apply to political committees that are incorporated . . .” ARIZ. REV. STAT. ANN. § 16-919A (2004). In Pennsylvania, the statute states, “It is unlawful for any . . . corporation, . . . except those corporations formed primarily for political purposes or as a political committee, to make a contribution or expenditure in connection with the election of any candidate . . .” PA. STAT. ANN. tit. 25, § 3253(a) (West 2005). In Texas, the statute reads, “If a political committee the only principal purpose of which is accepting political contributions and making political expenditures incorporates for liability purposes only, the committee is not considered to be a corporation for purposes of this subchapter.” TEX. ELEC. CODE ANN. § 253.092 (Vernon 2005). Oklahoma allows the incorporation of political committees if no more than 10 percent of the committee's contributions come from corporations. OKLA. STAT. ANN. tit. 74 § 257:10-1-2(d)(5) (2005). Five other direct corporate contribution-banning states also allow for the incorporation of political committees. *See* MICH. COMP. LAWS ANN. § 169.254(2) (West 2006); NEB. REV. STAT. §§ 49-1413, 49-1438 (2005); N.C. GEN. STAT. § 163-278.19(g) (2006); OHIO REV. CODE ANN. § 3517.01(19) (LexisNexis 2006); TENN. CODE ANN. § 2-19-132(b) (2005).

101. *See supra* note 97.

102. *See id.* N.D. CENT. CODE §§ 16.1-08.1-01(4), 16.1-08.1-03.3(1) (prohibiting for profit and nonprofit corporations and other limited liability companies from making direct political contributions). In *Fed. Election Comm'n v. Mass. Citizens for Life, Inc.*, it was held that a provision of FECA prohibiting direct corporate political contributions violated free speech rights as applied to nonprofit corporations which (1) are formed to promote certain political ideas, (2) have no shareholders, and (3) do not receive contributions from business corporations. 479 U.S. 238, 263-64 (1986). The Supreme Court reasoned that there is little danger of corrupting the political process where the contributors know the political nature of the entity to which they are contributing. *Id.* Funding of such an organization reflects political views sympathetic to those views of the organization which is soliciting money in order to advance such views. *Id.* at 262-64. There is no constitutional question here, however, because RSLC appears to receive a large percentage of its contributions directly from business corporations. *See infra* note 125 and accompanying text. The real question here, as in *National Right to Work Committee*, 459 U.S. 197 (1982), is who may contribute to a nonprofit's SSF?

103. *See supra* note 100 and accompanying text and note 102.

104. *See supra* note 102.

105. *See Op. Att'y Gen. N.D. L-150* (1996) [hereinafter Letter Opinion 96-L-150]. Then-Attorney General Heidi Heitkamp was asked whether a 527 known as the Democratic Governors' Association was an “association,” requiring an SSF for making political contributions, or whether it is a “political committee,” able to make direct political contributions under the North Dakota Act. *Id.* Heitkamp opined that, due to the fundamentally political nature of the organization, it was a political committee for purposes of the Act. *Id.* If the same analysis is applied here and corporate status is ignored, RSLC would likely be deemed a “political committee” able to make direct political contributions assuming it obtains its funds from legal sources. *Id.* Heitkamp's

Code provides that an SSF may only be established by a “corporation, cooperative corporation, limited liability company, or association.”¹⁰⁶ The term association is expressly defined to include labor unions and trade associations, for example, and to *exclude* political committees and parties.¹⁰⁷ A political committee cannot have an SSF; or to put it another way, a PAC cannot have a PAC.¹⁰⁸

I. Nonconnected Committees

The RSLC may assert that the “RSLC, Inc.—Individual Account” should be considered to be a nonconnected committee, and, therefore, is not subject to the member contribution requirement. A nonconnected committee is a political committee allowable under federal campaign finance law that is not a party committee, a candidate committee, or an SSF established by a corporation or labor organization.¹⁰⁹

A nonconnected committee differs from an SSF in at least three respects. First, a nonconnected committee has no connected organization, such as a corporation or a labor union, while an SSF does.¹¹⁰ Second, any support provided to a nonconnected committee by a sponsoring organization, such as the payment of administrative expenses, is considered to be a contribution to the committee subject to the same contribution limitations and prohibitions as other money contributions.¹¹¹ In contrast, an SSF may receive unlimited administrative support from its connected organization.¹¹² Third, a nonconnected committee may solicit contributions from anyone in the general public who may lawfully make political contributions, whereas an SSF may only solicit contributions from individuals having specific

opinion did not address any issue concerning the source of funds used by the Democratic Governors’ Association. *Id.*

106. N.D. CENT. CODE § 16.1-08.1-03.3(2) (2003).

107. *Id.* at § 16.1-08.1-01(1).

108. *See* 11 C.F.R. § 100.6(a) (2005) (stating that “[c]onected organization’ means any organization which is not a political committee but which directly or indirectly establishes, administers, or financially supports a political committee.”); 11 C.F.R. § 100.5 (b) (2005) (stating that “[a]ny separate segregated fund . . . is a political committee.”). Thus, even under FECA, a political committee may not have a connected SSF or PAC. 11 C.F.R. § 100.5 (b).

109. *See* 11 C.F.R. § 106.6(a) (2005) (indicating the propriety of such committees has been recognized by the FEC if the committee is not controlled or financially supported by the forming organization). *See also* Darryl Wold, Fed. Election Comm’n Adv. Op. No. 2000-20 (Sept. 15, 2000), available at <http://ao.nictusa.com/ao/no/20020.html> (providing a discussion of the requirements for the establishment of nonconnected committees).

110. FEDERAL ELECTION COMM’N, CAMPAIGN GUIDE FOR NONCONNECTED COMMITTEES 3 (2002).

111. *Id.*

112. *Id.*

relationships to the connected organization.¹¹³ The primary advantage of a nonconnected PAC is that it can solicit contributions from a broader pool of contributors.¹¹⁴ The main disadvantage is that it has no parent organization to pay its administrative costs.¹¹⁵

In North Dakota, the RSLC is being treated to the best of both worlds. On one hand, by treating the account like a nonconnected committee, it is allowed to solicit from a broad pool of non-member contributors to the “RSLC, Inc.—Individual Account.”¹¹⁶ On the other, like a connected PAC, the RSLC administers and controls the account.¹¹⁷ However, even if non-connected committees were provided for under North Dakota law, the “RSLC, Inc.—Individual Account” does not fit the model.¹¹⁸

2. *Affiliated Committees*

FECA states “[f]or purposes of the limitations . . . [on political contributions], all contributions made by political committees established or financed or maintained or controlled by any corporation, labor organization, or any other person, . . . or by any group of such persons, shall be considered to have been made by a single political committee”¹¹⁹

The rules interpreting FECA state:

[A]ll contributions made or received by more than one affiliated committee, regardless of whether they are political committees . . . shall be considered to be made or received by a single political committee. [A]ll contributions made or received by the following committees shall be considered to be made or received by a single political committee . . . [c]ommittees (including a separate segregated fund, . . .) established, financed, maintained or controlled by

113. *Id.*

114. Weinstein, *supra* note 36, at 1065 n.61.

115. *Id.*

116. *See supra* notes 110-13 and accompanying text.

117. *See supra* note 108.

118. It could be argued that RSLC is itself a nonconnected committee allowing it to solicit from a broad group of non-member contributors. *See supra* note 110-13 and accompanying text. Even assuming, however, that nonconnected committees are recognized under state law, the “RSLC, Inc.—Individual Account” still cannot be an SSF. As discussed earlier, a political committee, including a nonconnected committee, may not have its own SSF. *See supra* note 108 and accompanying text.

119. *See* 2 U.S.C. § 441a(a)(5) (2005). For purposes of FECA, “person” means “an individual, partnership, committee, association, corporation, labor organization, and any other organization, or group of persons, but does not include the Federal government or any authority of the Federal government. 11 C.F.R. § 100.10 (2005).

the same corporation, labor organization, person or group of persons¹²⁰

In other words, all of the political committees or SSFs set up by the same group of persons are treated as the same political committee.¹²¹

120. 11 C.F.R. §110.3(a)(1) (2005). *See also* 11 C.F.R. § 100.5 (2005). The relevant portion states:

Political committee means any group meeting one of the following conditions:

. . . .

(b) Any separate segregated fund . . . is a political committee.

. . . .

(g) Affiliated committee.

(2) All committees (including a separate segregated fund . . .) established, financed, maintained or controlled by the same corporation, labor organization, person, or group of persons, including any parent, subsidiary, branch, division, department, or local unit thereof, are affiliated . . .

(3) Affiliated committees sharing a single contribution limitation under paragraph (g)(2) of this section include all of the committees established, financed, maintained or controlled by—

. . . ;

(v) The same person or group of persons.

. . . .

(4)(ii) In determining whether committees . . . are affiliated, the [FEC] will consider the [following factors] . . . in the context of the over all relationship between committees or sponsoring organizations to determine whether the presence of any factor or factors is evidence of one committee or organization having been established, financed, maintained or controlled by another committee or sponsoring organization. . . :

. . . .

(C) Whether a sponsoring organization or committee has the authority or ability to hire, appoint, demote, or otherwise control the officers, or other decisionmaking employees or members of another sponsoring organization or committee;

. . . ;

(E) Whether a sponsoring organization or committee has common or overlapping officers or employees with another sponsoring organization or committee which indicates a formal or ongoing relationship between the sponsoring organizations or committees;

. . . ;

(G) Whether a sponsoring organization or committee provides funds or goods in a significant amount or on an ongoing basis to another sponsoring organization or committee such as through direct or indirect payments for administrative, fundraising, or other costs. . . ;

(H) Whether a sponsoring organization or committee causes or arranges for funds in a significant amount or on an ongoing basis to be provided to another sponsoring organization or committee. . . ;

(I) Whether a sponsoring organization or a committee or its agent had an active or significant role in the formation of another sponsoring organization or committee; and

(J) Whether the sponsoring organization or committees have similar patterns of contributions or contributors which indicates a formal or ongoing relationship between the sponsoring organizations or committees.

11 C.F.R. § 100.5 (2005).

Accordingly, under FECA, all accounts set up and maintained by a political committee, such as the RSLC, would be deemed affiliated.¹²² As such, the RSLC and all of its accounts would be deemed to be a single political committee for contribution purposes.

The same rationale should be applicable under the North Dakota Act. The “RSLC, Inc.—Individual Account,” which was purported to have been an SSF, is actually an affiliated committee. The RSLC, and all of its funds encompassed within, is considered to be a single political committee. None of its funds should be segregated for contribution purposes. The corporate contributions it receives taint all of its funds.

3. *Corporate Contributions to the RSLC Violate State Law*

The North Dakota Act prohibits direct contributions from corporations or associations “to aid any . . . political committee, or organization . . . corporation, limited liability company, or association organized or maintained for political purposes.”¹²³

Like other 527s, the RSLC is required to file periodic Form 8872 reports of contributions and expenditures with the IRS.¹²⁴ Based upon those reports, from the date of its formation through the date of its last report before the November 2004 general election, the RSLC took in over \$8.7 million in contributions.¹²⁵ Approximately 93% of those contributions were from corporations and associations, and 5% came from PAC’s.¹²⁶ Only 2% constituted individual contributions.¹²⁷ Only the individual and PAC contributions would be lawful under the North Dakota Act if made directly.¹²⁸

121. *See* *Walther v. Fed. Election Comm’n*, 468 F. Supp. 1235, 1241 (D.D.C. 1979) (interpreting FECA’s affiliation rules to mean “if two or more PACs are controlled by one person or group of persons, then the PACs should be treated as one PAC for purposes of controlling political contributions).

122. *Id.*

123. N.D. CENT. CODE § 16.1-08.1-03.3(1) (2003).

124. *See* 26 U.S.C. § 527(j) (2005) (requiring periodic reporting of all contributions and disbursements by political committees claiming tax-exempt status).

125. According to figures compiled by author from the RSLC Form 8872, filings covering the period from July 1, 2002, through October 13, 2004, RSLC reported a total of \$8,726,579 in contributions. \$8,091,451 of that amount appears to be direct contributions from corporations and trade associations. \$435,238 was from PACs and \$199,890 was from individuals. *See* Form 8872 filings for RSLC covering periods from July 1, 2002, through October 13, 2004 (on file with the IRS) (compilations on file with author).

126. *See supra* note 125.

127. *Id.*

128. N.D. CENT. CODE § 16.1-08.1-03.3 (2003).

According to the Form 8872 reports, during that same period of time, the RSLC paid over \$4 million in salaries and administrative expenses.¹²⁹ Most, if not all, of the money for administration came from the corporate/association contributions.¹³⁰ Corporations are supporting the RSLC, a corporation organized for political purposes. The corporate support of the RSLC renders its activities in North Dakota unlawful.

A similar situation was prohibited in *Arizona State Democratic Party v. State*.¹³¹ There, the Arizona Democratic Party solicited and accepted donations from corporations and labor unions to pay its operating expenses such as rent, payroll, utilities, insurance, supplies, and other overhead and administrative expenses.¹³² Like North Dakota, Arizona prohibited direct corporate and union contributions for political purposes.¹³³ The Arizona Democratic Party, nonetheless, contended that the practice did not violate state law because it maintained a segregated account for individual donations used for campaign funding.¹³⁴ The Arizona Court of Appeals disagreed, holding that the law prohibiting direct corporate and union contributions also applied to contributions used solely for administrative support of a political organization.¹³⁵

Outside corporate contributions may not be used to pay administrative costs of a political committee even if individual contributions are segregated for political use.¹³⁶ The SSF exception does not apply because the North Dakota Act only allows a corporation or association to pay administrative expenses for its own SSF.¹³⁷ Although the North Dakota Act does not prohibit the existence of the RSLC as a non-North Dakota entity, RSLC's funds are tainted because corporations and associations have made direct contributions to it as aid to a "political committee" or as a corporation or association "organized or maintained for political purposes."¹³⁸

C. THE RSLC MAY NOT ACT AS A "CONDUIT" FOR CONTRIBUTIONS TO A NORTH DAKOTA CANDIDATE

North Dakota Century Code section 16.1-08.1-03.3(5) states:

129. See Form 8872 filings for RSLC covering periods from July 1, 2002, through October 13, 2004 (on file with the IRS) (compilations on file with author).

130. *Id.*

131. 98 P.3d 214 (Ariz. App. 2004).

132. *Arizona State Democratic Party*, 98 P.3d at 216-17.

133. *Id.* at 217, 222-23.

134. *Id.* at 216-17.

135. *Id.* at 226.

136. *Id.*

137. N.D. CENT. CODE, § 16.1-08.1-3.3(2)(a) (2003).

138. *Id.* at § 16.1-08.1-3.3(1)(a) & (b).

A person may not make a payment of that person's money or of another person's money to any other person for a political purpose in any name other than that of the person who supplies the money and a person may not knowingly receive the payment nor enter nor cause the payment to be entered in that person's account or record in any name other than that of the person by whom it actually was furnished.¹³⁹

The term "person" is defined broadly by the North Dakota Act as "an individual, . . . political committee, association, corporation, . . . or other organization or group of persons."¹⁴⁰

If contributions to the Stenehjem campaigns were made from the few individual contributions to the RSLC, those funds should have been denoted and recorded as such from the person who actually supplied the money. However the contribution reports filed with the North Dakota Secretary of State by the Stenehjem campaign committees list the contributions from RSLC in its own name.¹⁴¹

The Burleigh County State's Attorney agreed that the RSLC may not make direct contributions to a candidate in North Dakota.¹⁴² However, the State's Attorney observed that a "corporation may utilize individual contributions for political purposes if said corporation establishes and administers a separate and segregated fund which contains only individual contributions."¹⁴³ The Stenehjem contributions were purportedly made from such an account.¹⁴⁴ If the account is not an SSF, it could be argued that it consists of "conduit" or "earmarked" contributions such as discussed under the Federal Act. 11 C.F.R. section 110.6 regulates interpretation of the Federal Act concerning such contributions.¹⁴⁵ It states in relevant part:

(a) All contributions by a person made on behalf of or to a candidate, including contributions which are in any way earmarked or otherwise directed to the candidate through an intermediary or conduit, are contributions from the person to the candidate.

(b)(2)(ii) *Any person who is prohibited from making contributions or expenditures in connection with an election for Federal office*

139. N.D. CENT. CODE § 16.1-08.1-03.3(5).

140. N.D. CENT. CODE § 16.1-08.1-01(7).

141. Campaign Contribution Statement Statewide Candidates and Candidate Comm., North Dakota Sec'y of State, Oct. 21, 2004, at 3 (on file with author); Campaign Contribution Statement Legislative Candidates, North Dakota Sec'y Of State, Oct. 20, 2004, at 2-4 (on file with author).

142. Letter from Cynthia Feland to Bruce Schoenwald, *supra* note 60.

143. *Id.*

144. *Id.*

145. 11 C.F.R. § 110.6 (2005).

*shall be prohibited from acting as a conduit for contributions earmarked to candidates or their authorized committees.*¹⁴⁶

In other words, a corporation may not act as a conduit.

*Federal Election Commission v. Harman*¹⁴⁷ is a case illustrating that concept. In *Harman*, an employee of Hughes Aircraft Company solicited and collected approximately \$20,000 in individual employee contributions for a congressional candidate.¹⁴⁸ The contributions were challenged by the FEC as a violation of 11 C.F.R. § 110.6(b)(2)(ii).¹⁴⁹ The court agreed, holding that the corporation acted as an unlawful conduit or intermediary for the contributions.¹⁵⁰ The court reasoned that the action of the corporate employee in collecting the individual checks conferred something of value upon the candidate.¹⁵¹ In and of itself, that was sufficient to violate the statute, whether or not the funds were segregated or commingled.¹⁵²

The RSLC may not act as a “conduit” for the alleged individual contributions for two reasons. First, there is a statutory bar for such actions under the North Dakota Act.¹⁵³ Second, as in *Harman*, the RSLC, in acting as such an intermediary, confers an unlawful corporate benefit upon a North Dakota candidate.¹⁵⁴ Regardless of what the “RSLC, Inc.—Individual Account” is called, contributions from the account must be considered to be contributions directly from the RSLC’s general funds. Those funds are commingled with direct corporate contributions and are illegal under North Dakota law.

VII. RECOMMENDATIONS FOR DEALING WITH THE CONUNDRUM

Presently, the enforcement mechanism available under the North Dakota Act leaves much to be desired.¹⁵⁵ State’s Attorneys in North

146. *Id.* (emphasis added).

147. 59 F. Supp. 2d 1046 (C.D. Cal. 1999).

148. *Harmon*, 59 F. Supp. 2d at 1048-51.

149. *Id.* at 1054; *see supra* note 146 and accompanying text.

150. *Id.* at 1056.

151. *Id.*

152. *Id.*

153. N.D. CENT. CODE section 16.1-08.1-03.3(5) states, “[a] person may not make a payment of that person’s money or of another person’s money to any other person for a political purpose in any name other than that of the person who supplies the money. . . .” N.D. CENT. CODE § 16.1-08.1-03.3(5) (2003).

154. *Fed. Election Comm’n v. Harmon*, 59 F. Supp. 2d 1046, 1056 (C.D. Cal. 1999).

155. *See* Todd Lochner, *Surveying the Landscape of State Campaign Finance Enforcement: A Preliminary Analysis*, 4 ELECTION L.J. 329, 338 (2005) (noting that North Dakota was one of the weaker states for campaign finance auditing mechanisms). Thus, the article concluded that North Dakota would “have a very difficult time detecting, and consequently enforcing, violations.” *Id.*

Dakota are charged with the primary statutory authority to prosecute violations.¹⁵⁶ Yet North Dakota State's attorneys, as elected officials, are often affiliated with one of the major political parties. Consequently, a State's Attorney charged with authority to prosecute a campaign contribution violation is subject to political pressure to prosecute or not to prosecute, depending upon which party the offending candidate belongs to.

Another vehicle for enforcement of campaign finance laws is a request for an opinion from the North Dakota Attorney General.¹⁵⁷ However, the Attorney General is also a partisan elected official subject to pressure from one party or the other.¹⁵⁸ Moreover, where the Attorney General is the focus of the complaint, there is simply no adequate mechanism. It is unlikely that the Attorney General would look critically upon contributions to his or her own campaign. Furthermore, the Attorney General, as chief law enforcement officer, has direct control over the State's Attorneys. A State's Attorney cannot reasonably be expected to prosecute a sitting Attorney General without serious risk to his or her own political career.

Election contests do not appear to be viable either. Campaign laws, such as North Dakota Century Code section 16.1-08.1-03.3, impose criminal penalties for violations.¹⁵⁹ If the office to which the offending party is elected, then the party is subject to the impeachment process; however, no grounds for a civil election contest exist.¹⁶⁰ It is not reasonable to expect consistent and unbiased enforcement of campaign finance laws by a single elected official. A better enforcement mechanism would be through a bipartisan committee established for the sole purpose of resolving campaign finance disputes. Such a committee could be appointed by the governor with members of the legislature representing both parties in equal numbers. The committee would meet as called upon to resolve questions involving campaign issues, including finance issues such as those raised in this article. If a ruling is requested prospectively regarding the acceptance of a particular contribution, for example, the committee ruling could absolve the requesting candidate or committee of any further liability should the ruling

156. N.D. CENT. CODE § 16.1-08.1-03.3(7) (2003).

157. See, e.g., Letter Opinion 96-L-150, *supra* note 105.

158. See generally Christopher D. Friez, Note, *What Is a Candidate? What Is a Contribution? An Analysis of How North Dakota's New Campaign Finance Definitions Compare to the Rest of the States*, 80 N.D. L. REV. 441 (2004) (providing an interesting illustration of this problem).

159. N.D. CENT. CODE § 16.1-08.1-03.3(8) (2003).

160. *Dist. One Republican Comm. v. Dist. One Democrat Comm.*, 466 N.W.2d 820, 827-28 (N.D. 1991).

later be determined to be incorrect. A similar process is used for FEC complaints.¹⁶¹

The establishment of such a committee would require legislation. However, it should be seriously considered because of the emerging problems of otherwise unregulated campaign financing. Because of BCRA, states must take a larger role in campaign finance regulation. A bi-partisan campaign finance committee seems to be the only viable option for meeting that obligation in a fair and meaningful way.

VIII. CONCLUSION

Contributions such as those from the RSLC do not fit well into the North Dakota campaign finance scheme. If the campaign contribution activity like that of the RSLC is permissible in North Dakota, then it could be argued that formalized PACs are no longer necessary. *Any* entity desiring to make political contributions would only need to set up a separate checking account. Moreover, *any* contribution could be used to fund the administrative expenses of a political committee. Such an interpretation, however, would appear to be in direct conflict with the North Dakota Act.¹⁶² More importantly, we need a better mechanism for dealing with problems such as those illustrated in this article. The adoption of a bi-partisan campaign finance regulation committee law would accomplish much to alleviate the problems inherent in the current enforcement system.

161. See 2 U.S.C. § 437f(c) (2000) (providing that an “advisory opinion rendered by the FEC may be relied upon by any person involved in the transaction for which the opinion [wa]s rendered and any person involved in a transaction which is indistinguishable in all material respects”). The statute further provides that “any person who relies upon any provision or finding of an advisory opinion and who acts in good faith” thereon will not be subject to sanction. 2 U.S.C. § 437f(c).

162. N.D. CENT. CODE § 16.1-08.1-03.3(1)-(2) (2003).