Issue Advertisements: The First Amendment Is Not a Loophole
By Kenneth A. Gross*

During the 1996 election cycle, the face of campaigning changed. The airwaves were flooded with advertisements discussing candidates and their voting records, as they were in past campaigns. This time, however, the candidates and their campaigns were not sponsoring the ads. Rather, corporations, labor unions, the national party committees and other special interest groups sponsored these ads as permissible issue ads. Indeed, a report published by the Annenberg Institute suggests that over $135 million was spent on these issue ads.[i] The ads are called issue ads because they advocate issues rather than expressly advocate the candidacy of a particular individual.

Issue advocacy, in theory, discusses social issues, ideas, or policies rather than sending campaign messages. In practice, many issue advertisements are used to discuss a particular candidate's voting record, background, or experience, and sometimes are designed to bolster support for that candidate. The only thing these ads do not do is Aexpressly advocate@ the election or defeat of a clearly identified candidate by using words such as Avote for,@ Avote against,@ Asupport,@ or Adefeat.@

Issue ads are exempt from regulation under the current campaign finance laws because of the protections afforded political expression under the First Amendment of the Constitution. Therefore, expenditures for issue ads are not subject to the restrictions or limitations on contributions imposed by the Federal Election Campaign Act of 1971, as

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* Kenneth A. Gross is a partner and head of the election law department at the law firm of Skadden, Arps, Slate, Meagher, & Flom, L.L.P. This article was prepared with the assistance of Margaret C. Minifie. Ms. Minifie is an associate at Skadden, Arps, Slate, Meagher & Flom, L.L.P.

amended (AFECA@).[ii] Also, these ads are not subject to the disclosure and disclaimer requirements imposed under FECA.[3] The only exception is if the issue ads are produced by the national party committees. The national party committees must pay for part of the costs of producing and airing their issue ads with funds that are regulated under FECA and they must fully disclose the cost of those ads. For example, in presidential election years sixty-five percent (65%) of the cost of party committee issue ads must be paid for by money regulated under FECA. That requirement is presently under attack in Ohio Democratic Party v. FEC.[4] In that case, both the Democratic and Republican parties are arguing that all the funds they spend on issue ads should be from unregulated dollars, i.e., "soft money."

The Federal Election Commission ("FEC" or "Commission") is currently trying to regulate expenditures for issue ads by using enforcement actions in which the FEC treats those expenditures as coordinated expenditures. Also, it has not given up the fight to regulate issue ads, even if they are produced independent of any candidate or campaign. The FEC is only acknowledging defeat on a circuit by circuit basis. So far, the First and the Fourth Circuit have struck down the FEC interpretation in Maine Right to Life v. FEC[5] and FEC v. Christian Action Network, Inc.[6] The campaign finance reform efforts sought by Congress in the wake of the scandals related to the 1996 elections contain provisions attempting to restrain issue advocacy spending. Any attempts at reform, however, must draw narrow and bright lines to avoid chilling constitutionally protected political expression.

I. The Law

A. The Supreme Court Articulates the Express Advocacy Standard

In the landmark case of Buckley v. Valeo,[7] the Supreme Court assessed the constitutionality of FECA, Congress=s first broad attempt at campaign finance reform. The Court first upheld the limits on contributions to federal candidates, political parties, and political action committees as necessary to prevent the actual, or the appearance of, a *quid pro quo* exchange of contributions for official favors or influence.[8]

The Court then turned its attention to FECA=s limit on "any expenditure . . . relative to a clearly identified candidate." Before it decided whether any limit on expenditures was permissible, the Court first decided that "relative to" a candidate must be read to mean more than merely "advocating the election or defeat" of a candidate. Instead, the Court required the limit to apply only to expenditures that contain *express* words of advocacy of election or defeat, such as "vote for," "elect," "support," "cast your ballot for," "Smith for Congress," "vote against," "defeat," "reject."[9]

This limiting construction was necessary to prevent the expenditure limit from being unconstitutionally vague. A less explicit standard would not provide enough guidance to a potential speaker and thus presented the risk of chilling that speaker's political expression. In imposing its narrowing construction on the inexplicit language contained in the definition of expenditures, the Court explained in this telling passage:

> [T]he distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions. Not only do candidates campaign on the basis of their positions on various public issues, but campaigns themselves generate issues of public interest . . . 'whether words intended and designed to fall short of invitation would miss that mark is a question both of intent and of effect. No speaker, under such circumstances, safely could assume that anything he might say upon the general subject would not be understood by some as an invitation. In short, the supposedly

> clear-cut distinction between discussion, laudation, general advocacy, and solicitation puts the speaker in these circumstances wholly at the mercy of the various understanding of his hearers and consequently whatever inference may be drawn as to his intent and meaning. Such a distinction offers no security for free discussion. In these conditions. . . It compels the speaker to hedge and trim.'[10]

The Court also struck down the limit on independent expenditures made by individuals. That decision rested in part on the Court's recognition that FECA treated any expenditure coordinated with or controlled by a candidate as an expenditure authorized or requested by the candidate, and thus as an Ain-kind@ contribution.[11] In the Court's view, these coordinated expenditures presented the potential for abuse of the political system recognized as a compelling state interest. Since FECA captured those expenditures by treating them as in-kind contributions, a restriction on all expenditures regardless of coordination was unnecessary.

Since Buckley, the Supreme Court has only revisited the express advocacy standard once, in FEC v. Massachusetts Citizens for Life, Inc.[12] Massachusetts Concerned Citizens for Life was a non-profit, non-stock corporation[13] whose purpose was to advance support for the anti-abortion movement through a variety of educational and political activities.

In September of 1978, MCFL published a special election guide edition of its newsletter for the September primary election. The newsletter exhorted readers in large bold letters to @VOTE PRO LIFE@ and then identified the various candidates according to each candidate=s stance on abortion. The candidates for each state and federal district were listed with a Ay@ or an An@ next to their names to reflect that stance. The special edition also disclaimed that it was endorsing the election of any of the listed candidates.

The Court held that for purposes of FECA's prohibition on corporate expenditures made "in connection with" a federal election, expenditures made on communications may be prohibited only if that communication contained Aexpress advocacy.@ Thus, although the Court recognized special dangers of corporate contributions, namely the distorting effect of monies from corporate treasuries and their implications regarding the integrity of the political system, this recognition did not alter the Court's determination of how corporate issue advocacy may be regulated. Next, the Court held that the publication of the special election edition constituted express advocacy because it contained an exhortation to vote for a particular candidate. According to the Court, the combination of an explicit directive to vote in support or against a particular matter or policy and an identification or designation of a candidate=s stance on that matter or policy was distinguishable from Amere@ issue advocacy.

B. Lower Court Application of the Express Advocacy Standard

Since the Supreme Court's decision in Buckley, the lower courts have wrestled with the application of the "express advocacy" standard. In general, the courts have refused to look beyond the explicit language of a communication to its sponsor's motive or external factors surrounding the communication to determine whether the communication expressly advocates the election or defeat of a clearly identified candidate, even when circumstances suggest that the communication was intended to influence an election. In fact, recent opinions suggest that courts will adhere to the strict bright line rule they deem mandated by Buckley, even if it opens the floodgates to evasively written communications that undermine the effectiveness of campaign finance regulation.

Early cases to follow Buckley established that naming a particular candidate and describing his or her voting record on public issues is insufficient to qualify as express advocacy of that candidate.[14] Informing members of the general public of a candidate's views even when addressing them as voters also does not qualify as express advocacy.[15]

More recently, in Faucher v. FEC,[16] the Maine Right to Life Committee ("MRLC"), another non-profit corporation organized for the purpose of promoting pro-life issues, challenged the FEC's regulations that prohibited a corporation from publishing voter guides that expressed, implicitly or explicitly, an opinion on issues. Like the special election edition of the newsletter in MCFL, the voter guides pictured each candidate and explained that a "y" next to the candidate's name indicated that the candidate agreed with the National Right to Life position on each issue. The voter guide also contained a disclaimer that it did not represent an endorsement of any candidate. However, unlike the newsletter in MCFL, the guides did not contain any explicit language referencing an election or exhorting the reader to vote in a particular manner. The court first held that the publication of voter guides could be prohibited only if the guides contained express advocacy. The court then rejected the FEC's assertion that the guides contained express advocacy because "trying to discern when issue advocacy . . . crosses the threshold and becomes express advocacy invites just the sort of constitutional questions the Court sought to avoid in adopting the bright-line express advocacy test in Buckley."[17]

The Fourth Circuit has refused to find express advocacy in an advertisement where the directive asked only that the audience contact the sponsor of the communication to obtain more information. In FEC v. Christian Action Network,[18] the FEC brought an

enforcement action against the Christian Action Network ("CAN") for violating the prohibition on corporate expenditures at 2 U.S.C. ' 441b(a)(1982). CAN, a non-profit corporation whose purpose is to promote traditional Christian family values, sponsored an issue advertisement describing candidate Clinton's alleged support for homosexuals. The advertisement opened with candidate Clinton's face superimposed over an American flag. As the advertisement began to describe his attitude toward homosexuals, the picture darkened to a black and white negative, the flag disappeared, and the music grew ominous.

The FEC argued that when the communication is a television advertisement, the use of imagery and the "more subtle forms" of communication available through television require a less strict application of the express advocacy standard. The court rejected that notion.

The court determined that the advertisement was "devoid of any language that directly exhorted the public to vote" and stated that it was not permitted by Buckley to consider the advertisement's color, tone, or editing. Such a rule would open the "Pandora's box" that the Court closed in Buckley when it refused to consider external or subjective factors to find express advocacy, and would render the Court's bright line standard meaningless. The court also reasoned that the FEC attached "undue significance" to the timing of the ad. The court stated that a "magic timing approach" would be no better than a "magic words" approach and would lead to "anomalous results."[19]

The Circuit Court first confirmed the lower court[20] and then, for good measure, in a subsequent opinion ordered the FEC to pay CAN's attorney's fees.[21] The Circuit Court criticized the FEC for advocating the application of a totality of the circumstances standard to

an advertisement which contained no words of express advocacy, in an attempt to subject the advertisement to regulation under FECA. The court said that such an argument "simply cannot be advanced in good faith . . . much less with substantial justification."[22]

Only the Ninth Circuit has found express advocacy where the call to action did not contain an explicit electoral directive.[23] In Furgatch, the FEC brought suit against an individual who failed to report to the FEC expenditures for an advertisement that criticized President Carter and stated "Don't Let Him Do It" in reference to Carter shortly before the Presidential election. The court rejected the idea that express advocacy exists only where certain "key phrases" listed in Buckley are used because such a standard eviscerated FECA. Instead, speech need not include any of the words of express advocacy under FECA, as long as "when read as a whole and with limited reference to external events, it is susceptible of no other reasonable interpretation than an exhortation to vote for or against a specific candidate."[24]

The court found such an exhortation although the ad contained only an explicit call to action and failed to specify what action was required. According to the court, given that the ad was printed only three days before the Presidential election, the only action available to those who would "not let him do it" was to vote against or defeat President Carter. Unlike the other express advocacy cases, Furgatch only dealt with the issue of whether the cost of the communication required disclosure. It did not deal with the substantive issue of the source of the funds since the ad was paid for with "hard money," permissible funds under FECA. It is possible that since Furgatch was just a disclosure case, it made easier for the court

to loosen the express advocacy standard. In any event, not surprisingly, the FEC has run with the Furgatch definition of express advocacy.

In a rulemaking, the FEC attempted to incorporate the Furgatch standard into its definition of express advocacy. The FEC's new standard reads:

> Expressly advocating means any communication that . . . (b) [w]hen taken as a whole and with limited reference to external events, such as the proximity to the election, could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s) because**B**-
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> (1) the electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning; and
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> (2) [r]easonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action.[25]

Shortly after the new rule went into effect, the District Court in Maine held that the language in part (b) of the regulation was beyond the power of the FEC because it unconstitutionally expanded the bright-line test established in Buckley and confirmed in MCFL.[26] Indeed, the court appreciated that the regulation was narrowly drawn and a reasonable attempt to address the real world truth that "one does not need to use the explicit words 'vote for' or their equivalent to communicate clearly the message that a particular candidate is to be elected."[27] However, the court felt compelled by precedent to strike down the FEC's new express advocacy standard. The court said that the bright-line express advocacy standard was the result of a deliberate policy that

> the Supreme Court and the First Circuit have used to trump all the arguments suggested above . . . What the Supreme Court did was draw a bright line that may err on the side of permitting things that affect the election process, but at all costs avoids restricting, in any way, discussion of public issues. The Court seems to have been quite serious in limiting FEC enforcement to express

> advocacy, with examples of words that directly fit that term. The advantage of this rigid approach, from a First Amendment point of view, is that it permits a speaker or writer to know from the outset exactly what is permitted and what is prohibited.[28]

In a petition for a rehearing, the FEC argued that if the courts continued to follow a narrow and rigid application of the bright-line rule to find unambiguous express advocacy only where the specific words listed in Buckley are used, the floodgates to undisclosed corporate and restricted funds will open at the expense of the integrity of the electoral system.[29]

The FEC's petition was presumably denied and the Supreme Court declined to grant certiorari in that case.[30] The most recent opinion to address the FEC's new regulations joined with Maine Right to Life in ruling that the FEC's new definition of express advocacy is unconstitutional.[31] The majority of the circuits to address this issue seem willing to follow Buckley's choice to protect speech with a bright-line rule despite the potential for abuse and manipulation inherent in such a precise standard. Thus, it appears that issue advertisements are alive and legal, at least outside of the Ninth Circuit.

II. Regulation of Issue Advertisements as Coordinated Expenditures

A. The Coordination Standard

As part of its analysis, and only in *dicta*, the Buckley Court recognized that FECA treats coordinated expenditures separately from independent expenditures and as in-kind contributions.[32] However, the Supreme Court did not specify whether the express advocacy

standard applies only to expenditures that are independent. Thus, it is unclear whether coordinated expenditures must contain express advocacy before they can be regulated as in-kind contributions. Also left open under current campaign finance law, is what kind of communication or contact between a campaign and a sponsor of an issue advertisement constitutes coordination.

To be consistent with the rationale of Buckley and its progeny, if coordination is to replace express advocacy for purposes of rendering expenditures for communications subject to regulation, then coordination must present the public dangers of contributions and provide the constitutional safeguards of express advocacy. Activities between a candidate and the sponsor of an advertisement must be sufficiently entwined to present an actual, or the appearance of, a *quid pro quo* exchange. Also, the content of the speech must be sufficiently influenced by the candidate that it is no longer the sponsor's own political expression or opinion but instead, like a contribution, becomes the "undifferentiated symbolic act" of giving money to a candidate. Thus, any definition of coordination with a candidate or his or her committee must be sufficiently bright-line that it does not chill or unduly burden political expression and captures only communications that are "on behalf of" that candidate.

Given the recent nature of the proliferation of issue ads, few courts have had the opportunity to assess the implications of coordinated issue advocacy advertisements. The federal court in Maine, which for purposes of independent issue advertisements has strictly adhered to the bright-line rule established in Buckley, has implied that coordinated issue advertisements do not have to contain express advocacy to constitute in-kind contributions.[33] In Clifton, that court suggested that MCFL might permit issue advocacy engaged to be

regulated as a coordinated expenditure as a function of MCFL's construction of "expenditures in connection with" a federal election for purposes of the prohibition on corporate expenditures.

At issue in Clifton was the MRLC's third challenge to the FEC. This time the non-profit corporation challenged the FEC's regulations prohibiting contacts between the candidate and the corporation when the corporation prepared voting guides or voting records. The regulations prohibited any contact between the candidate and the corporation in the preparation of voting guides containing only issue advocacy, except in some circumstances when written communication would be permissible. With respect to voting records, the regulation prohibited any coordination with the candidate on decisions of content or distribution. The court held that contacting the campaigns to obtain information to use in the voting guides and voting records was constitutionally protected issue advocacy.

The court's opinion then suggests that had the FEC regulation focused on whether the issue advocacy was engaged in on behalf of the candidate, rather than on whether there was any contact with the candidate, the regulation could have withstood constitutional scrutiny. Indeed, the court suggested that the voting record regulations came "closer to being within the FEC's" authority, but not if "coordination" included seeking information and clarification from a candidate regarding his voting record. However, the court also rejected the FEC's reliance on Buckley's definition of coordination because that definition interpreted language that does not appear in the corporate restriction at issue. Thus, the opinion suggests that some type of coordination may substitute for express advocacy in determining

which expenditures may be regulated under FECA, but it must be sufficient to render expenditures "on behalf" of a candidate.

Mere contact with a candidate or candidate organization is insufficient to render an expenditure on behalf of a candidate and thus prohibited corporate in-kind contribution. At the other end of the spectrum, coordination that results in what is essentially "third-party payment" for a candidate's communications would not be subject to the same constitutional protections as other expenditures.[34]

Less clear is the middle ground, where there is some substantive communication between a candidate or party and an issue advocacy sponsor. Some guidance is provided by the Supreme Court's opinion in Colorado Republican which suggests that coordination occurs when the candidate participates in decisions regarding specific communications and does not exist where there are only general discussions of campaign strategy between a party and a campaign. The Court seemed to rely in part on the fact that the only people to review the content of the advertisements were party officials. However, this opinion's usefulness is limited by the fact that the party committee had yet to nominate an opponent to the opposing candidate referred to in the party's advertisements. The alleged coordination was to have taken place between the party committee and its not-yet designated candidate.[35] The opinion would set a clearer standard if the party committee had a nominated a candidate with whom it could actually have coordinated on the content or message of specific advertisements.

B. The Federal Election Commission Approach: Coordination and an Electioneering Message

The courts have told the FEC that it does not have the authority to impose restrictions on the abilities of any entity or individual to engage in issue advocacy.[36] However, the Commission takes the position that communications that are the result of coordination with a candidate are subject to regulation if those communications contain only an electioneering message.[37] However, the Commission does not provide an explicit standard for when activities engaged in with a candidate become coordination[38] or when the discussion of issues creates an electioneering message. Instead, it appears the Commission looks at each communication on a case-by-case basis. Indeed, the Commission has permitted a corporation to invite a candidate to make a speech on issues that would be raised in his campaign if the corporation complied with certain conditions that would prevent something of value from being given to that candidate's campaign.[39] Thus, the Commission's standard for determining whether speech should be regulated is anything but a bright-line. Indeed, it is little more than a "they know it when they see it" standard. Hardly, a sufficient clear standard to regulate core First Amendment speech without chilling speech that may come close to the line.

Commission advisory opinions do explain that, at a minimum, electioneering messages include statements "designed to urge the public to elect or defeat a certain candidate or party"[40] or exist in ads whose entire purpose is to garner or diminish support for a particular candidate.[41] A reference to an election or a candidate's candidate-status can create an electioneering message as the FEC will analyze an ad to determine the intent behind it or its effect on the ad's listeners or viewers.[42] Also, external circumstances such as proximity to an election are relevant to the determination of whether an advertisement contains an

electioneering message.[43] Thus, according the FEC, the existence of an electioneering message can depend on factors otherwise prohibited in a determination of whether an independent issue ad contains express advocacy.

Perhaps daunted by the reception it received from the Clifton court in its attempt to regulate coordinated issue advocacy, the Commission has taken its coordinated issue advocacy enforcement efforts directly to the source. Indeed, it has been reported that the most publicized sponsors of issue advertisements in the 1996 election cycle are now subject to enforcement actions before the Commission. For example, in 1996, the AFL-CIO, a national labor union prohibited from making express advocacy expenditures, held a much publicized press conference to announce that it had raised millions of dollars expressly for the purpose of sponsoring an issue advocacy campaign to promote its legislative and elective agenda.[44] In response, a coalition of business associations organized through the United States Chamber of Commerce raised funds and sponsored its own issue advocacy campaign.[45] These ads did not contain explicit terms of express advocacy.[46] Indeed, both entities' advertisements typically criticized a candidate, but did not contain an explicit request to vote for or against that candidate or an affiliated policy. According to press reports, Commission investigations regarding these cases purportedly seeks to determine if there was any coordination with candidates in targeted districts.[47] Thus, the Commission is making clear its position that coordinated issue advocacy is campaign activity and should be treated as an in-kind contribution. As a practical matter, this is true regardless of the substance of the communication.

That position leads to the next question, when does the Commission deem a communication to be the result of coordination? The Commission is currently engaged in rulemaking to revise the definition of coordination to account for the Colorado[48] opinion and articulate a standard for issue ads. The regulation seeks to distinguish when coordination, regardless of content, results in a contribution to a campaign. The standard would apply to "party committees as well as other committees, corporations, labor organizations, and individuals."[49] The Commission has not yet settled on a single definition. At a minimum, the FEC must take into account the Clifton court rejection of "mere inquiries" as a basis for regulation. As it should, any standard that is less than clear or overreaches in an attempt to regulate issue advocacy and will likely be met by the Courts with the same inhospitable reaction to prior attempts at regulation.

Although the FEC has yet to prescribe a regulation on issue advocacy and the role of coordination in defining the parameters of regulation, distressly it has been using its enforcement authority to regulate expenditures for issue advocacy. It is axiomatic that the FEC's authority is limited to enforcing the existing law and not crafting new law through creative enforcement theories. Thus, true reform should not and cannot take place except through legislative action.

III. Campaign Finance Reform

In the wake of the campaign finance scandals during the 1996 elections, campaign reform efforts have sprung up in the House and in the Senate. To withstand constitutional scrutiny, however, any proposal to regulate issue ads must heed the strictures of Buckley and provide a bright-line standard that will not chill political expression. Two bills have moved

to the forefront of the reform effort, H.R. 2183,[50] the "Freshman Bill," so-called because it's main proponents are freshmen Congressmen, and S. 1663,[51] the McCain Feingold Bill. Each of these bills attempts to regulate what has been to date considered issue advocacy expenditures. Congressional reform is the appropriate forum for implementing such a proposal, rather than an FEC enforcement action.

For example, the Freshman Bill would redefine express advocacy as "advocating the election or defeat of a candidate by: (1) using explicit phrases, or words, or slogans that in context can have no other reasonable meaning than election advocacy ("Reasonable Standard"); (2) referring to a candidate in a paid radio or TV broadcast ad that appears in the affected state within 60 days of the election (or, for President and Vice-President, within 60 days of a general election); or (3) expressing unmistakable, unambiguous election advocacy, when taken as a whole and with limited reference to external events ("Unambiguous Election Advocacy Standard")." The bill requires disclosure of and prohibits corporate and union expenditures for "express advocacy" communications as defined under the Freshman Bill.

The McCain-Feingold Bill, on the other hand, defines an "electioneering communication" as "referring to a clearly identified federal candidate in an advertisement broadcast within 60 days of a general or 30 days of a primary election, to an audience that includes voters in that election." Once certain thresholds are met, expenditures and contributions for electioneering communications must be disclosed. For-profit corporations and unions are prohibited from making electioneering communications.

Both bills contain a moratorium on any advertisements referring to a clearly identified candidate within 60 days of an election. Although this is a bright-line standard, and not an

absolute prohibition, it is not clear whether such a moratorium could withstand constitutional scrutiny. References to a candidate alone have never been deemed sufficient to establish express advocacy for that candidate. Nor could the limited timing basis cure this constitutional defect. Maine Right to Life[52] rejected an express advocacy standard that relied on proximity to an election as a factor. Indeed, in CAN I,[53] the court rejected the FEC's reference to proximity to an election in arguing that an ad contained a message of express advocacy. Even Furgatch,[54] the only case to look to external factors such as timing when construing express advocacy dealt with a communication that contained a call to action for voters.

Buckley's progeny, especially the Maine Right to Life decision, suggests that the Freshman Bill's two other express advocacy standards cannot pass constitutional muster. The Reasonableness Standard and the Unambiguous Election Advocacy Standard basically parrot the FEC's regulation incorporating the standard set out in Furgatch. That regulation was rejected in Maine Right to Life because it would permit the regulation of communications lacking language of express advocacy. Also, the court in CAN II penalized the FEC for relying on a standard that, like the Reasonableness Standard, was based on circumstances and not on language. Thus, it appears that these tests would be difficult to uphold, unless Buckley and its progeny are overturned - a highly unlikely prospect.[55]

Both of these bills also provide for the regulation of coordinated issue advocacy.[56] However, as discussed, in Clifton, the district court in Maine, a strict champion of the express advocacy standard handed down in Buckley, does leave the door open to regulating issue advocacy communications where coordination constitutes a communication that is

essentially made on behalf of a candidate or his or her campaign. Also, the Buckley court recognized that FECA treats coordinated expenditures differently than independent expenditures and left open the possibility that the express advocacy standard does not apply to coordinated expenditures. Thus, a coordinated standard may be more likely to withstand constitutional scrutiny under the First Amendment than an express advocacy standard that relies on external circumstances or subjective factors.

IV. Conclusion

The threat of infringing on political expression at the heart of the First Amendment necessitates a bright-line standard for when such speech may be regulated. The result is the distinction between issue advocacy and express advocacy. However, issue advocacy, as presently defined by the courts, also permits undisclosed money to influence federal elections. This undisclosed activity may be the price we have to pay to preserve core First Amendment rights. One thing is for sure, if Congress wants to get at this undisclosed issue speech, it must be done with clear guidelines that prevent the chilling effect feared in Buckley and it must be done by Congress, not through the backdoor of FEC enforcement actions.

Specifically, any standard regulating coordinated issue advocacy must be bright enough to guide issue advocates in permissible activities and communications with candidates so that they can engage in constitutionally protected political expression. Also, any standard defining coordination must be narrowly drawn so that it only reaches activities that are coordinated to such a degree that the resulting communication is rendered on behalf of a candidate. Only then could coordination constitutionally substitute for express advocacy in subjecting issue advocacy to regulation. It is true that the fuzzier standard preferred by the

regulators prevents the regulated community from stepping over and around a bright-line, but a fuzzy standard also means that the regulated community must guess where the line is. It is precisely that imprecision that will doom an effort to regulate as unconstitutional chilling of free speech.

i. Deborah Beck, Paul Taylor, Jeffrey Stanger, and Douglas Rivlin, *Issue Advocacy Advertising During the 1996 Campaign Cycle*, Annenberg Public Policy Center, (1997)("Annenberg Report").

ii. 2 U.S.C. ' 431 et seq (1982).

3. The following are some of the provisions issue advocacy proponents avoid: Independent campaign expenditures by individuals are not subject to monetary limits, but must be disclosed if they exceed $250 in a calendar year. 2 U.S.C. ' 434(c). Unincorporated associations may also make unlimited expenditures, but once they reach a $1,000 threshold, they must register and report as a political committee. 2 U.S.C. '' 431(4), 433, 434 (1982). Such registration is accompanied by limits on contribution to and from the political committee. 2 U.S.C. ' 441a. Corporations and labor unions may not make expenditures or contributions in connection with federal elections. 2 U.S.C. ' 441b(a)(1982).

4. No. 98-CV-00991 (D.D.C. Plaintiff's Expedited Motion For Summary Judgement Filed April 20, 1998).

5. 914 F. Supp. 8 (D.Me. 1996), aff'd. 98 F.3d 1 (1st Cir 1996), cert. denied, 118 S.Ct.52 (1997) ("Maine Right to Life"). See supra note 26 and accompanying text.

6. 894 F. Supp. 946 (W.D. Va. 1995)("CAN I"). See infra note 18 and accompanying text.

7. 424 U.S. 1 (1976) ("Buckley").

8. Buckley, 424 U.S. at 21-37.

9. Id. at 44 n. 52.

10. Id. at 42-43 (quoting Thomas v. Collins, 323 U.S. 516 (1945)).

11. Id. at 47.

12. 479 U.S. 238 (1986)("MCFL").

13. This case also carved out an exemption to the prohibition on certain non-profit corporations making independent expenditures.

14. See, e.g., FEC v. Central Long Island Tax Reform Immediately Comm., 616 F.2d 45, 53 (2nd Cir. 1980) (en banc).

15. See FEC v. National Org. for Women, 713 F. Supp. 428 (D.D.C. 1989).

16. 928 F.2d 468 (1st Cir. 1991), cert denied sub nom FEC v. Keetes, 502 U.S. 820 (1991) ("Faucher").

17. Id. at 472.

18. 894 F. Supp. 946 (W.D. Va. 1995)("CAN I").

19. Id. at 958.

20. FEC v. Christian Action Network, 92 F.3d 1178 (4th Cir. 1996).

21. FEC v. Christian Action Network, Inc., 110 F.3d 1049 (4th Cir. 1997).

22. Id. at 1064 (quotation omitted) (citation omitted).

23. FEC v. Furgatch, 807 F.2d 857 (9th Cir. 1987), cert. denied 484 U.S. 850 (1997)("Furgatch").

24. The court's test is: (1) speech is "express" if its message is unmistakable, unambiguous, and suggestive of only one plausible meaning even if not present in clearest, most explicit language, (2) speech is "advocacy" if it presents a clear plea for action rather than being merely informative, and (3) speech must clearly encourage a vote for or against a candidate rather than some other kind of action. Even under this loosened standard, the court admonished that speech cannot be express advocacy "when reasonable minds could differ as to whether it encourages a vote for or against a candidate or encouraged the reader to take some other kind of action." Id. at 863.

25. 11 C.F.R. ' 100.22 (1997). Indeed, the regulation parrots standard elaborated in Furgatch.

26. Maine Rights to Life Comm., v. FEC,914 F. Supp. 8 (D.Me. 1996), aff'd. 98 F.3d 1 (1st Cir 1996), cert. denied, 118 S.Ct.52 (1997) ("Maine Right to Life").

27. Id. at 11.

28. FEC v. Maine Right to Life Comm., Inc.,118 S. Ct. 52 (1997).

29. FEC Petition for Rehearing and Suggestion for Rehearing En Banc, Maine Right to Life Committee v. FEC, 98 F.3d 1(1st Cir. 1996) excerpted and reprinted in Trevor Potter, *Issue Advocacy and Express Advocacy*, (Anthony

Corrado et al. eds.)(1997).

30. 118 S.Ct.52 (1997).

31. See Right to Life of Dutchess County v. FEC, 97 Civ. 2614 (SHS)(S.D.N.Y. June 1, 1998).

32. Buckley, 424 U.S. at 47.

33. Clifton v. FEC, 927 F. Supp 493, 500 (D. Mc. 1996), aff'd on alternate grounds 114 F.3d 1309 (1st Cir. 1997) cert. denied 118 S.Ct. 1036 (1998) ("Clifton").

34. In *dicta*, the court in Clifton distinguished the speech in the voting guides and records as remaining the direct political speech of the Maine Right to Life Committee instead of the speech of the candidate as a result of collaboration that amounted to "mere third party billing" for the candidate's media advertisements. Id. at 499.

35. The FEC was able to assert this somewhat illogical position because the FEC presumed coordination between the candidate and the sponsor of an issue ad in that candidate's favor if the sponsor is a party committee. That presumption was struck down by the Court in Colorado Republican. Id. at 622.

36. See, e.g., Faucher, 928 F.2d at 472 (the FEC has no authority no regulate voter guides containing only issue advocacy). Also, the only regulation that explicitly restricts a sponsor's ability to make expenditures for advertisements that are coordinated with a campaign applies only to party committees. 2.U.S.C.' 441a(d) (1998). Even then, the regulation restricts only the party's ability to use "hard money", i.e. ,money that was raised subject to FECA's restrictions and prohibitions, to make coordination expenditures. Thus, there is no applicable restriction for corporation, labor unions, or other interest groups.

37. FEC Advisory Opinion 1985-14, Fed. Election Camp. Fin. Guide (CCH)& 5819 (1985) (Citing FEC Advisory Opinion 1984-15, Fed. Election Camp. Fin. Guide (CCH) & 5766 (1984)) (hereinafter "AO 1985-14"); See also FEC Advisory Opinion 1991-17, Fed. Election Camp. Fin. Guide (CCH) & 6021 (1991).

38. FEC regulations provide a definition of coordination only for independent expenditures, expenditures that by definition contain expressions of express advocacy. See 11 C.F.R ' 109.1(b)(4) (1997). However, FEC regulations governing permissible corporate political activity such as communicating with

its restricted class distinguish between permissible and prohibited coordination with a candidate. See e.g., 11 C.F.R. ' 114.4(b)(vii)(1997).

39. Those conditions were (1) no communications by the corporation, anyone on its behalf, the candidates their staff, or agent could expressly advocate the nomination, election, or defeat of any candidate, (2) anyone introducing the speaker could not discuss the candidate's candidacy; (3) there could be no solicitation, acceptance, or making of contributions to the candidate's campaign or distribution of campaign materials at convention functions; (4) any contribution to the candidate from the corporation must not be in return for the candidate's appearance; (5) the corporation could not pay for the candidate's travel if the candidate's campaign committee were to sponsor collateral fundraising events at the convention; and (6) the corporation could not use its general treasury funds to announce or publicize campaign events where such communications were directed to the general public attending the convention. FEC Advisory Opinion 1996-11, Fed. Election Camp. Fin. Guide (CCH) &6194 (1996).

40. AO 1985-14.

41. Id.

42. Id.

43. Id.

44. See Donna Casatta, *Independent Groups' Ad Increasingly Steer Campaigns*, 1997 Cong. Q. 1108, 1114.

45. Id. at 1108.

46. See Annenberg Report, supra note 2.

47. See Jim VandeHei, *FEC Probes Boehner's 'Thursday Group' Links Between Coalition Issue-Ad Campaign Are Focus of Investigation*, Roll Call, June 29, 1998.

48. The Commission requires that party committees pay for coordinated ads that contain electioneering messages with hard money. Before the Supreme Court in Colorado Republican told the FEC it couldn't, the FEC presumed that any party committee communication was coordinated with the party's candidate. Now, the Ohio Democratic Party is challenging the FEC's restriction of the party committee's ability to use unregulated funds for issue advocacy communications as an unconstitutional burden on the party committee's First

and Fifth Amendment Rights.

49. Summary, Draft Notice of Proposed Rulemaking, Agenda Doc. No. 97-25 (April 17, 1997) at 1.

50. 105th Cong. (1997). This bill was introduced originally as H.R. 493, 105th Cong. (1997).

51. 105th Cong. (1998). This bill was originally introduced as S. 25, 105th Cong. (1997).

52. 914 F. Supp. 8 (D.Me. 1996), aff'd. 98 F.3d 1 (1st Cir 1996), cert. denied, 118 S.Ct.52 (1997).

53. 894 F.Supp. 946 (W.D. Va. 1995).

54. 807 F.2d 857 (9th Cir.), cert. denied 484 U.S. 850 (1997).

55. See E. Joshua Rosenberg, Buckley Stops Here. (The Century Foundation Press 1998)(staking out theories that the Supreme Court originally consider in overturing Buckley).

56. Both bills amend "contribution" to include anything of value provided in coordination with a candidate to influence a federal election, whether or not it contains express advocacy. Also, these proposals provide an explicit definition of coordination.