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## Campaign Finance Reform: A Legal Analysis of Issue and Express Advocacy

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### Summary

Issue advocacy communications have become increasingly popular in recent federal election cycles. These advertisements are often interpreted to favor or disfavor certain candidates, while also serving to inform the public about a policy issue. However, unlike communications that expressly advocate the election or defeat of a clearly identified candidate, the Supreme Court has determined that issue ads are constitutionally protected First Amendment speech that cannot be regulated in any manner. According to most lower court rulings, only speech containing express words of advocacy of election or defeat, also known as “express advocacy” or “magic words” can be regulated as election-related communications and therefore be subject to the requirements of the Federal Election Campaign Act (FECA). Unlike express advocacy communications, therefore, issue ads may be paid for with funds unregulated by federal law, *i.e.*, soft money.

H.R. 2356 (Shays/Meehan) would create a new term in federal election law, “electioneering communication,” which would regulate political ads that: “refer” to a clearly identified federal candidate, are broadcast within 30 days of a primary or 60 days of a general election, and, for House and Senate elections, are “targeted to the relevant electorate.” Generally, it would require disclosure of disbursements over \$10,000 for such communications, including identification of each donor of \$1,000 or more, and would prohibit the financing of such communications with union or certain corporate funds. Likewise, S. 27 (McCain/Feingold) would regulate the same communications as H.R. 2356 in the same manner except, with regard to the audience receiving the communication, S. 27 provides that the communication be made to an audience that “includes” voters in that election. H.R. 2360 (Ney-Wynn) would require disclosure for spending on communications disseminated within 120 days of a federal election that, if broadcast, “mention” or, if non-broadcast, “refer to or depict” a clearly identified federal candidate by name, image or likeness and for non-broadcast communications, are “targeted to the relevant electorate,” and total over \$50,000 in a year.

## Background

Used to describe political advertisements, the terms “issue advocacy” and “express advocacy,” were created by the Supreme Court and do not appear in federal campaign finance law, *i.e.* the Federal Election Campaign Act (FECA).<sup>1</sup> However, whether an advertisement is classified as either “issue advocacy” or “express advocacy” will determine whether it is subject to FECA regulation. The attendant practical implications are significant. If a communication is deemed to constitute “express advocacy,” it will be subject to the disclosure requirements, source restrictions, and contribution limits set forth in FECA.<sup>2</sup> On the other hand, if a communication is deemed to be “issue advocacy,” it cannot be constitutionally subject to any regulation and, therefore, may be funded with unregulated or “soft money.”

## Supreme Court Decisions

In the 1976 landmark decision, *Buckley v. Valeo*,<sup>3</sup> the Supreme Court provided the genesis for the concept of issue and express advocacy communications. In *Buckley*, the Court evaluated the constitutionality of provisions of the Federal Election Campaign Act (FECA) that applied to expenditures “relative to a clearly identified candidate” and “for the purpose of influencing an election.” The Court found that such provisions did not provide a sufficiently precise description of what conduct was regulated and what conduct was not regulated, in violation of First Amendment “void for vagueness” jurisprudence. Furthermore, the Court was concerned, under the overbreadth doctrine, that the statute could encompass not only communications with an electoral connection, but could encompass constitutionally protected issue-based speech as well.

In order to avoid these vagueness and overbreadth problems, the Court held that the government’s regulatory power under FECA would be construed to reach only those funds spent for communications that “include express words of advocacy of the election or defeat” of a clearly identified candidate. Hence, the *Buckley* Court began to distinguish between communications that expressly advocate the election or defeat of a clearly identified candidate and those communications that advocate a position on an issue. The Court found that the latter type of communication is constitutionally protected First Amendment speech and that only “express advocacy” speech could be subject to regulation.<sup>4</sup> Further, in an important footnote, the Court provided some guidance as to how to determine whether a communication is “express advocacy” or “issue advocacy.” That is, the Court stated that its construction of the subject provisions of FECA would only apply to communications that included words “such as,” “vote for,” “elect,” “support,” “cast your ballot for,” “Smith for Congress,” “vote against,” “defeat,” or

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<sup>1</sup> Codified at 2 U.S.C. § 431 *et seq.*

<sup>2</sup> See 2 U.S.C. § 434 (disclosure); 2 U.S.C. § 441b (source restrictions); 2 U.S.C. § 441a (contribution limits).

<sup>3</sup> 424 U.S. 1 (1976).

<sup>4</sup> *Id.* at 40-44.

“reject.”<sup>5</sup> These terms are often referred to as the “magic words,” which many lower courts have ruled are required, under *Buckley*, in order for a communication to constitute express advocacy.

In the 1986 decision of *Federal Election Commission v. Massachusetts Citizens for Life, Inc.*, (*MCFL*), the Supreme Court continued to distinguish between issue and express advocacy, holding that an expenditure must constitute express advocacy in order to be subject to the Federal Election Campaign Act (FECA) prohibition against corporations using treasury funds to make an expenditure “in connection with” any federal election.<sup>6</sup> In *MCFL* the Court ruled that a publication urging voters to vote for “pro-life” candidates, while also identifying and providing photographs of certain candidates who fit that description, could not be regarded as a “mere discussion of public issues that by their nature raise the names of certain politicians.” Instead, the Court looked at the “essential nature” of the publication and found that it “in effect” provided an “explicit directive” to the reader to vote for the identified candidates. Consequently, the Court held that the publication constituted express advocacy.<sup>7</sup>

## Federal Election Commission Regulations

In 1995, the Federal Election Commission (FEC) promulgated regulations defining express advocacy, which are currently in effect:

Expressly advocating means any communication that—(a) Uses phrases such as “vote for the President,” “re-elect your Congressman,” “support the Democratic nominee,” “cast your ballot for the Republican challenger for U.S. Senate in Georgia,” “Smith for Congress,” “Bill McKay in ’94,” “vote Pro-Life” or “vote Pro-Choice” accompanied by a listing of clearly identified candidates described as Pro-Life or Pro-Choice, “vote against Old Hickory,” “defeat” accompanied by a picture of one or more candidate(s), “reject the incumbent,” or communications of campaign slogan(s) or individual word(s), which in context can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidate(s), such as posters, bumper stickers, advertisements, etc. which say “Nixon’s the One,” “Carter ‘76,” “Reagan/Bush” or “Mondale!”; or

(b) When 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—

(1) The electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning; and

(2) Reasonable 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.<sup>8</sup>

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<sup>5</sup> *Id.* at 44 n.52.

<sup>6</sup> 479 U.S. 238, 249-250 (1986). 2 U.S.C. § 441b(a) prohibits corporations from making expenditures in connection with any federal election.

<sup>7</sup> *Id.* at 249.

<sup>8</sup> FEC definition of “Expressly advocating,” 11 C.F.R. § 100.22 (2001).

## Prevailing View of Federal Circuit Courts

With the exception of the Ninth Circuit, the prevailing view of the U.S. appellate courts is that Supreme Court precedent mandates that a communication contain express words advocating the election or defeat of a clearly identified candidate in order to be constitutionally regulated. In *Federal Election Commission v. Furgatch*, the Ninth Circuit in 1987 found that in order to constitute express advocacy, speech need not include any of the specific words set forth in *Buckley v. Valeo*.<sup>9</sup> Instead, the court of appeals presented a three part test for determining whether a communication is issue advocacy:

First, even if it is not presented in the clearest, most explicit language, speech is ‘express advocacy’ for the present purposes if its message is unmistakable and unambiguous, suggestive of only one plausible meaning. Second, speech may only be termed ‘advocacy’ if it presents a clear plea for action, and thus speech that is merely informative is not covered by the Act. Finally, it must be clear what action is advocated. Speech cannot be ‘express advocacy of the election or defeat of a candidate’ when reasonable minds could differ as to whether it encourages a vote for or against a candidate or encourages the reader to take some other kind of action.<sup>10</sup>

Notably, the third prong of the test exempts speech from constituting “express advocacy” when reasonable minds could disagree as to whether it encourages a vote for or against a candidate or encourages some other kind of action.

In contrast, in *Maine Right to Life Committee v. Federal Election Commission*, (*MRLC*), the First Circuit invalidated the “reasonable person” standard, which the Federal Election Commission has promulgated into regulations consistent with the *Furgatch* decision.<sup>11</sup> In *MRLC*, the court found that the Supreme Court in *Buckley* had drawn a “bright line” that errs toward “permitting things that affect the election process, but at all costs avoids restricting, in any way, discussion of public issues.” According to the First Circuit, the advantage of this rigid approach, as presented in *Buckley*, is that it notifies a speaker or writer at the outset of what communication is regulated and what is not.<sup>12</sup> Consistent with *MRLC*, in the 1997 case of *Federal Election Commission v. Christian Action Network*, the Fourth Circuit also found that the Supreme Court has “unambiguously” held that the First Amendment “forbids the regulation of our political speech under...indeterminate standards.” Further, the court noted that the Supreme Court has held that express words advocating the election or defeat of a candidate are the “constitutional minima.”<sup>13</sup>

In June 2000, in *Vermont Right to Life v. Sorrell*, the Second Circuit similarly interpreted *Buckley* to stand for the proposition that in order to regulate a communication, it must expressly advocate the election or defeat of a clearly identified candidate.

<sup>9</sup> 807 F.2d 857 (9<sup>th</sup> Cir. 1987), *cert. denied*, 484 U.S. 850 (1987).

<sup>10</sup> *Id.* at 864.

<sup>11</sup> 914 F. Supp. 8, 12 (D. Maine 1996), *aff’d* 98 F.3d 1 (1<sup>st</sup> Cir. 1996), *cert. denied*, 118 S. Ct. 52 (1997). See *supra* text accompanying note 6 for the FEC regulation defining express advocacy.

<sup>12</sup> *Id.*

<sup>13</sup> 110 F.3d 1049, 1064 (4<sup>th</sup> Cir. 1997).

According to the Second Circuit, the Supreme Court limitation reflects a concern that because disclosure requirements can significantly infringe on privacy of association and belief as guaranteed by the First Amendment, they “must be specifically directed to the government’s legitimate purpose in seeking to insure ‘the reality and the appearance of the purity and openness of’ the election process.” The Supreme Court adopted the standard of express advocacy, the Second Circuit opined, to insure that the regulations were neither too vague nor intrusive on First Amendment protected issue advocacy.<sup>14</sup>

Most recently, on January 17, 2001, in *Florida Right to Life v. Lamar*,<sup>15</sup> the Eleventh Circuit upheld a lower court ruling striking down a Florida statute because it unconstitutionally regulated issue advocacy through an overbroad definition of “political committee.” The Florida statute required disclosure of any group whose “primary or incidental purpose” is to support or oppose candidates, issues, or parties. The court found no error in the lower court enjoining the enforcement of the statute because it was “unconstitutionally overbroad under the First Amendment.”<sup>16</sup>

## Legislative Overview in the 107<sup>th</sup> Congress

S. 27, the “Bipartisan Campaign Reform Act of 2001,” also known as the McCain/Feingold bill, passed the Senate on April 2, 2001. With regard to issue and express advocacy, it incorporates the Snowe/Jeffords amendment language and would create a new term in federal election law, “electioneering communication.” Specifically, it would regulate political ads that: “refer” to a clearly identified federal candidate, are broadcast within 30 days of a primary or 60 days of a general election, and are made to an audience that “includes” voters in that election. Generally, it would require disclosure of disbursements over \$10,000 for such communications, including identification of each donor of \$1,000 or more, and such communications would be prohibited from being financed with union or certain corporate funds. With respect to corporate funds, it exempts Internal Revenue Code § 501(c)(4) or § 527 tax-exempt corporations from making “electioneering communications” with funds solely donated by individuals, who are U.S. citizens or permanent resident aliens, unless the communication is “targeted,” *i.e.*, it was distributed from a broadcaster or cable or satellite service whose audience “consists primarily” of residents of the state in which the candidate is running for office. S. 27 expressly exempts from the definition news events, “expenditures,” and “independent expenditures.” If this definition of “electioneering communication” is ruled unconstitutional, S. 27 provides an alternative definition, based on *FEC v. Furgatch*, (807 F.2d 857 (9<sup>th</sup> Cir. 1987)): a communication promoting, supporting, attacking, or opposing a candidate, regardless of whether it expressly advocates a vote for or against a candidate and is suggestive of no plausible meaning other than an exhortation to vote for or against a candidate.

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<sup>14</sup> 221 F.3d 376, 386 (2d Cir. 2000)(quoting *Buckley v. Valeo*, 424 U.S. at 76-79).

<sup>15</sup> 238 F.3d 1288 (11<sup>th</sup> Cir. 2001). *See also*, *Iowa Right to Life Comm., Inc. v. Williams*, 187 F.3d 963 (8<sup>th</sup> Cir. 1999)(granting a preliminary injunction against a state statute defining “express advocacy” beyond the specific words of advocacy or “magic words” set forth in *Buckley*).

<sup>16</sup> *Id.*

H.R. 2356, the “Bipartisan Campaign Finance Reform Act of 2001,” also known as the Shays/Meehan bill, was introduced on June 28, 2001. With regard to issue and express advocacy, H.R. 2356 is similar to S. 27: it would create a new term in federal election law, “electioneering communication,” which would regulate political ads that: “refer” to a clearly identified federal candidate, are broadcast within 30 days of a primary or 60 days of a general election, and (differing from S. 27) for House and Senate elections, is “targeted to the relevant electorate.” Generally, it would require disclosure of disbursements over \$10,000 for such communications, including identification of each donor of \$1,000 or more, and such communications would be prohibited from being financed with union or certain corporate funds. With respect to corporate funds, it exempts Internal Revenue Code § 501(c)(4) or § 527 tax-exempt corporations from making “electioneering communications” with funds solely donated by individuals, who are U.S. citizens or permanent resident aliens, unless the communication is “targeted,” *i.e.*, (differing from S. 27) it was distributed from a broadcaster or cable or satellite service and is received by 50,000 or more persons in the state or district where the Senate or House election, respectively, is occurring. H.R. 2356 expressly exempts from the definition news events, “expenditures,” and “independent expenditures,” and (differing from S. 27) candidate debates and certain other communications expressly exempted by FEC regulation. If this definition of “electioneering communication” is ruled unconstitutional, H.R. 2356 provides an alternative definition, based on *FEC v. Furgatch*, (807 F.2d 857 (9<sup>th</sup> Cir. 1987)): a communication promoting, supporting, attacking, or opposing a candidate, regardless of whether it expressly advocates a vote for or against a candidate and is suggestive of no plausible meaning other than an exhortation to vote for or against a candidate.

On June 28, 2001, H.R. 2360, (Ney-Wynn) was introduced. With regard to issue and express advocacy, H.R. 2360 would require disclosure only for spending on communications disseminated within 120 days of a federal election that, if broadcast, “mention” or, if non-broadcast, “refer to or depict” a clearly identified federal candidate by name, image or likeness and for non-broadcast communication, are “targeted to the relevant electorate” and total over \$50,000 in a year on all such communications. H.R. 2360 expressly exempts from its regulation: broadcast news stories and commentaries, “expenditures,” payments by vendors acting solely pursuant to a contractual agreement with person sponsoring the communication, and for non-broadcast media, communications by a membership organization (including labor unions) or a corporation solely to its members, stockholders, or executive and administrative personnel, if the entity is not organized primarily for purposes of influencing federal elections.

## Conclusion

The Supreme Court, in *Buckley* and *Massachusetts Citizens for Life*, has distinguished between express advocacy and issue advocacy communications. With the exception of the Ninth Circuit, the prevailing view of the federal circuit courts is that Supreme Court precedent mandates that a communication contain express words advocating the election or defeat of a clearly identified candidate in order to be constitutionally regulated. If a communication fails to meet this “bright line” express advocacy standard, most lower courts have considered it issue advocacy, notwithstanding whether the communication is likely to be interpreted to favor or disfavor certain candidates while also informing the public about an issue.