

The New Campaign Finance Sourcebook

Chapter 8

ISSUE AND EXPRESS ADVOCACY

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INTRODUCTION

In 1994, the Clinton Administration's health care reform package was, in part, killed by the "Harry and Louise" issue ads produced by the Health Insurance Association of America. Political parties and interest groups took note, and political issue advocacy communications then exploded during the 1996 congressional and presidential elections and have continued unabated through the 2002 elections. Political parties and private groups now saturate radio and television airwaves across the country during political campaigns with issue-oriented advertisements that often praise or disparage a candidate, but are outside the disclosure and funding requirements of the federal election laws.² Similar targeted mass mailings are becoming a new staple of election seasons. While some of these ads and mailings appear designed to achieve their stated purpose of shaping public opinion on selected policy matters, most appear aimed primarily at decreasing (or occasionally increasing) support for the featured candidate.³ Accordingly, the Bipartisan Campaign Reform Act of 2002 ("BCRA") provides a section that more accurately defines the line between issue advocacy (not regulated under current federal campaign finance law) and express advocacy (regulated). Its provisions dealing with issue advocacy, among others, are currently being attacked as unconstitutional infringements of the First Amendment. We will

update this article to reflect the state of the law once the Supreme Court has ruled, presumably in December 2003.

Although the specific arguments and evidence relied upon by either side are beyond the scope of this article, the background leading up to the enactment of BCRA is useful. In *Buckley v. Valeo*, the Supreme Court drew a distinction between communications expressly advocating the election or defeat of a federal candidate and those referring to candidates, but not expressly mentioning a candidate's election or defeat.⁴ The Court has held that the First Amendment⁵ forbids the application of the limits and restrictions of the Federal Election Campaign Act of 1971, as amended ("FECA" or "Act")⁶ to issue advocacy (unless it is "controlled") by a candidate.⁷ The Court said its holding was necessary to provide sufficient notice of government regulation to speakers, and to protect non-election speech.⁸

Therefore, the distinction between issue advocacy and express advocacy is crucial to determining the permissibility of financing political communications with certain sources of money. For instance, it is permissible to finance issue advocacy with corporate and labor contributions or treasury monies, but impermissible to use such funds for express advocacy. While the definition is relatively simple to state, however, actually distinguishing between issue advocacy exempt from federal campaign finance regulation and express advocacy subject to reporting requirements and limits on sources of payment has proven contentious in practice in recent years, especially when engaged in by political parties or in consultation with candidates.⁹

This chapter begins by defining issue advocacy and related terms and concepts. It then traces the evolution of issue advocacy from the Supreme Court's seminal *Buckley* decision through the ensuing decisions of the lower federal courts and the Federal Election Commission's

(“FEC”) response to these court rulings. Finally, it briefly discusses BCRA’s efforts to regulate “sham” issue advocacy and of FEC enforcement actions against issue advocacy campaigns.

I. ISSUE ADVOCACY: WHAT IS IT AND WHERE DID IT COME FROM?

A. Overview

When issue advocacy advertisements avoid the narrow legal definition of federal election spending, the sponsors are free to underwrite the campaigns with money that is prohibited or severely restricted when used in connection with federal elections—including corporate and labor treasury funds and unlimited individual contributions. Moreover, because the advertisements are not deemed to be in connection with a federal election, the sponsoring organizations are not required to disclose the sources of their funding, or where and how it is spent. Simply stated, issue advocacy has come to mean political speech which mentions specific candidates or political parties but *does not* expressly advocate the election or defeat of a clearly identified federal candidate.

Critics, however, and often even candidates, find many of these issue advertisements to be clearly designed to influence the outcome of selected races.¹⁰ Indeed, the sponsors and beneficiaries of many of these advertisements often confirm reformers’ worst fears by proudly proclaiming that the advertisements have achieved the goal of influencing an election.¹¹ There are many examples, but one ad captures the essence of “sham issue advocacy”: often-vicious descriptions of a federal candidate that look like every other negative political ad in the midst of an election campaign, but simply omit the tag line of “Vote for” or “vote against.” The following advertisement was broadcast in Montana a few days before a federal election by an out of state not-for-profit corporation, which appeared to be a shell entity used to funnel funds

anonymously into the election campaign in its closing days. The ad, about a congressional candidate named Bill Yellowtail, said in its entirety:

Who is Bill Yellowtail? He preaches family values, but he took a swing at his wife. And Yellowtail's response? He only slapped her. But "her nose was broken." He talks law and order . . . but is himself a convicted felon. And though he talks about protecting children, Yellowtail failed to make his own child support payments—then voted against child support enforcement. Call Bill Yellowtail. Tell him to support family values.¹²

Nevertheless, courts have steadily begun to conclude that regardless of a sponsor's intent and/or the advertisement's impact, only communications expressly supporting a candidate constitute express advocacy.¹³ More dramatically, the Fourth Circuit pointedly noted that communications designed to influence an election, but not containing express advocacy, still constitute issue advocacy.¹⁴ In some congressional districts, unlimited and undisclosed funds spent on issue broadcasts and mailers exceeded that spent by the candidates themselves.¹⁵

B. Vocabulary

A short summation of the current legal definitions governing issue and express advocacy may be helpful. First, if a communication contains *express advocacy* of the election or defeat of a clearly identified candidate, the communication may be regulated under current federal law. Thus, express advocacy is a political communication that includes specific language—such as “vote for,” “Smith 2000,” or “defeat”—advocating election or defeat of a candidate. A more expansive definition would also include language that could only be interpreted by a reasonable person as containing advocacy of the election or defeat of a candidate—but not necessarily containing the “magic words” such as “vote for” or “defeat.”

Second, if a communication does not contain express advocacy—it is not deemed to be in connection with a federal election (unless it raises coordination issues noted below) and is

therefore outside the scope of current federal law. Thus, a sponsor may run an unlimited number of such *issue advocacy* communications and may pay for the communication however it chooses, including from sources (such as corporations and unions) and in amounts otherwise prohibited by federal election laws.

Third, if a communication containing issue advocacy has been made in consultation with a candidate, it may be considered *coordinated*, and this *may* result in an in-kind contribution by the speaker to the candidate. But this result depends upon the outcome of current and future legal battles over the definition of coordination, and whether courts will allow coordinated issue advocacy to be regulated.

Fourth, none of this involves *independent expenditures*, which are communications expressly advocating the election or defeat of a clearly identified federal candidate, financed with federal “hard” dollars, and publicly disclosed. Independent expenditures may not be coordinated with any candidate or campaign committee. Individuals and organizations, including political action committees (“PACs”) and parties, may make independent expenditures, but must report these expenditures to the FEC. Generally, organizations that are not registered with the FEC and do not have PACs may engage in issue advocacy, but may *not* run independent expenditure campaigns.¹⁶

In summary, issue advocacy is best understood by what it does *not* do—it is a communication that does not expressly advocate the election or defeat of a clearly identified federal candidate. Whether it must affirmatively do something else—such as present a clear view about a political, social, or economic issue—is a current matter of debate.

II. THE SUPREME COURT ESTABLISHES AN EXPRESS ADVOCACY TEST

A. The Genesis: *Buckley v. Valeo*

Buckley was a facial challenge to the constitutionality of FECA. This meant that the courts had no specific political spending before it, but were judging the constitutional validity of the Act as drafted by Congress. As a result, the courts were declaring general principles of constitutional law disconnected from any practical application in specific election contests.

The first decision in *Buckley* came from the Court of Appeals for the D.C. Circuit, which largely upheld the law as passed by Congress. The D.C. Circuit did, however, strike down the Act's broadly drafted issue advocacy provision. It would have required disclosure of all contributions of over \$10 received by any organization that publicly referred to any candidate, or the candidate's voting record, positions, or official acts of candidates who were federal officeholders.¹⁷

In *Buckley*, the Supreme Court confronted a wide array of congressionally enacted prohibitions and restrictions on contributions and expenditures in connection with federal elections. Congress had written the Act broadly, regulating all spending "in connection with," or "for the purpose of influencing" a federal election, or "relative to" a federal candidate. One of the questions the Court faced was whether these statutory phrases were so vague and overbroad as to provide an unconstitutional lack of notice to persons potentially affected by the Act. The Court stressed that vagueness concerns are especially acute where, as here, "the legislation imposes criminal penalties in an area permeated by First Amendment interests."¹⁸ "The test is whether the language . . . affords the [p]recision of regulation [that] must be the touchstone in an

area so closely touching our most precious freedoms.”¹⁹ The Court noted that Congress had failed to define “in connection with” an election or “relative to a candidate.”

The Supreme Court held that greater precision and clarity were required to avoid vagueness and held that specific words were acceptable narrowing constructions for candidate-related speech within the Act’s provisions.²⁰ The Court gave examples of terms: “‘vote for,’ ‘elect,’ ‘support,’ ‘cast your ballot for,’ ‘Smith for Congress,’ ‘vote against,’ ‘defeat,’ ‘reject.’”²¹

The Court explained that such a clear test was useful because:

*the 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.*²²

Buckley cautioned that a standard that turned on the speaker’s purpose or the listener’s understanding would have a chilling effect on political speech.²³

In narrowing the reach of the Act to avoid declaring it as vague, the Court in *Buckley* significantly restricted the reach of the federal election laws. Instead of Congress’s intended broad coverage of “all spending” to “influence” federal elections (phrases presumably to be defined with greater specificity over time by the courts and the FEC), the law as interpreted by the Supreme Court was narrowed (at least for non-candidate and non-political committee purposes) to speech that constituted express advocacy. While that new term was not yet defined in practice, it prospectively meant that much of the political speech that Congress intended to regulate and disclose could instead be beyond the reach of the campaign finance laws.

B. The Court’s First Application of the Express Advocacy Test: *FEC v. Massachusetts Citizens for Life, Inc.*²⁴

Although the Supreme Court enunciated the express advocacy test in *Buckley* in 1976, it was not until ten years later, in *FEC v. Massachusetts Citizens for Life, Inc.* (“*MCFL*”),²⁵ that the Supreme Court had occasion to apply the test to an actual communication. *MCFL* was a non-profit, non-stock corporation organized to advance anti-abortion goals. In 1972, *MCFL* began publishing a newsletter that typically contained information on the organization’s activities, including the status of various proposed bills and constitutional amendments. In September 1978—just weeks before the primary elections—*MCFL* published a special edition of the newsletter. While prior newsletters had been sent to approximately 2,000-3,000 people, *MCFL* published more than 100,000 copies of the special edition. The front page of the publication was headlined, “EVERYTHING YOU NEED TO KNOW TO VOTE PRO-LIFE,” and readers were reminded that “[n]o pro-life candidate can win in November without your vote in September.” “VOTE PRO-LIFE” appeared in large black letters on the back page, and a coupon was available to clip and take to the polls to remind voters of the names of the “pro-life” candidates. Next to this statement was the following disclaimer: “This special election edition does not represent an endorsement of any particular candidate.” An accompanying flyer placed a “y” next to the names of candidates who supported the *MCFL* view on a particular issue; an “n” indicated that a candidate opposed *MCFL*’s position.

Section 441b of the Act prohibits any corporation from using treasury funds “in connection with” a federal election, and requires that any expenditure for such purpose be financed by voluntary contributions into a PAC. The FEC alleged that *MCFL*’s expenditures in financing the special election newsletter constituted an illegal corporate contribution to the

candidates named in the newsletter. As in *Buckley*, the Court ruled that an expenditure “must constitute ‘express advocacy’ in order to be subject to the prohibition of § 441b.”²⁶

The Court, however, went on to hold that the MCFL newsletter constituted express advocacy because it urged readers “to vote for ‘pro-life’ candidates,” and provided the names and photographs of candidates meeting that description. Said the Court:

The Edition cannot be regarded as a mere discussion of public issues that by their nature raise the names of certain politicians. Rather, it provides in effect an explicit directive: vote for these (named) candidates. *The fact that this message is marginally less direct than “Vote for Smith” does not change its essential nature.* The Edition goes beyond issue discussion to express electoral advocacy. The disclaimer of endorsement cannot negate this fact.²⁷

The Court’s application of the express advocacy test in *MCFL* is noteworthy in two respects. First, in determining whether the MCFL newsletter was express advocacy, the Court did not appear to consider any factual circumstances outside the communication itself. While the Court noted external circumstances such as proximity of the publication to the election, the number of copies published (which was well in excess of the normal newsletter distribution) and the intent of the speakers in the recitation of facts, it did not appear to rely on any of these factual circumstances in its finding of express advocacy. In this regard *MCFL* is consistent with *Buckley*: The express advocacy test turns on the communication itself. Second, the Court clarified the *Buckley* definition of express advocacy to include words that are “in effect” an explicit directive “marginally less direct” than the *Buckley* language.²⁸ As a result, *MCFL* has been used by the FEC in court pleadings to justify a definition of express advocacy based on implied and/or non-verbal electoral messages.

III. COMPETING APPROACHES: *FEC V. FURGATCH* AND *FAUCHER V. FEC*

Using *Buckley* (and later *MCFL*) the federal courts initially struggled to apply the express advocacy test. The courts disagreed over the evidentiary threshold for ascertaining whether or not a given communication contains specific terms of advocacy. Some courts looked at external evidence to help illuminate the meaning of the terms contained within a given communication. Other courts limited their inquiries to solely the text of the communication in question. These two contrasting approaches led the courts to apply the express advocacy standard with what appeared to be inconsistent results.

The Ninth Circuit's ruling in *FEC v. Furgatch*,²⁹ which was the first major decision post-*MCFL*, is perhaps the most pro-regulation decision. *Furgatch* focused on the purpose of the Act and sought to reconcile the *Buckley* standard to the practical issues of regulating spending on candidate-specific communications. In *Furgatch*, an individual published a full-page advertisement in the *New York Times* one-week prior to the 1980 presidential election. The advertisement read:

DON'T LET HIM DO IT

The president of the United States continues degrading the electoral process and lessening the prestige of the office.

It was evident months ago when his running mate outrageously suggested Ted Kennedy was unpatriotic. The President remained silent.

And we let him.

It continued when the President himself accused Ronald Reagan of being unpatriotic.

And we let him do it again.

In recent weeks, Carter has tried to buy entire cities, the steel

industry, the auto industry, and others with public funds.

We are letting him do it.

He continues to cultivate the fears, not the hopes of the voting public by suggesting the choice is between “peace and war,” “black or white,” “north or south,” and “Jew vs. Christian.” His meanness of spirit is divisive and reckless McCarthyism at its worst. And from a man who once asked, “Why not the best?”

It is an attempt to hide his own record, or lack of it. If he succeeds the country will be burdened with four more years of incoherencies, ineptness and illusion, as he leaves a legacy of low-level campaigning.

DON'T LET HIM DO IT.³⁰

The Ninth Circuit ruled that the advertisement was express advocacy and therefore could be regulated under the Act. The court began its analysis by contending that the *Buckley* express advocacy test “does not draw a bright and unambiguous line [W]here First Amendment concerns are present, we must construe the words of the regulatory statute precisely and narrowly, *only as far as is necessary to further the purposes of the Act*”³¹ Because of these important regulatory concerns, the court concluded in *Furgatch* that it must

prevent speech that is clearly intended to affect the outcome of a federal election from escaping, either fortuitously or by design, the coverage of the Act. This concern leads us to fashion a more comprehensive approach to the delimitation of ‘express advocacy,’ and to reject some of the overly constrictive rules of interpretation³²

The Ninth Circuit in *Furgatch* rejected the notion that express advocacy is limited to the list of specific terms identified by the Supreme Court in *Buckley*. Instead the court ruled that when evaluating whether a communication constitutes express advocacy, a reviewing court must take into account the context in which the communication is made. The court established a standard that, to be express advocacy, speech “must, when read as a whole, and with limited reference to external events, be susceptible of no other reasonable interpretation but as an

exhortation to vote for or against a specific candidate.”³³ The Ninth Circuit left no mistake, however, that it believed implied meanings can form the basis for a finding of express advocacy: “A consideration of the context in which speech is uttered may clarify ideas that are not perfectly articulated, or supply necessary premises that are unexpressed but widely understood by readers or viewers.”³⁴

The *Furgatch* standard has three specific components. “First, even if it is not presented in the clearest, most explicit language, speech is ‘express’ for present purposes if its message is unmistakable and unambiguous, *suggestive of only one plausible meaning*.”³⁵ “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.”³⁶ Third, “it must be clear what action is advocated. Speech cannot be ‘express advocacy of the election or defeat of a clearly identified 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.”³⁷ The third *Furgatch* component appears to require advocacy of *electoral* action for or against a particular candidate, as opposed to a communication that includes a plea for some other kind of action, such as writing an officeholder or making a political contribution.

Applying the foregoing standard, the Ninth Circuit ruled that the *Furgatch* advertisement expressly advocated the defeat of President Carter.³⁸ In making this determination, the court focused on the words “‘don’t let him.’ They are simple and direct. ‘Don’t let him’ is a command. The words ‘expressly advocate’ action of some kind.”³⁹ The court acknowledged that there was no express indication in the advertisement of what kind of action the reader should take. However, it ruled “that this failure to state with specificity the action required does not remove political speech from [the Act] . . . [r]easonable minds could not dispute that *Furgatch*’s

advertisement urged readers to vote against Jimmy Carter.”⁴⁰ *Furgatch* remains the most pro-regulatory and increasingly isolated decision on what constitutes express advocacy.⁴¹

At the other end of the spectrum is the First Circuit’s ruling in *Faucher v. FEC*.⁴² In that case, the Maine Right to Life Committee (“MRLC”) published a voting guide surveying the positions of federal and state candidates on pro-life issues, and distributed it widely immediately prior to election day. Using its general corporate monies, MRLC produced the 1988 voting guide titled “November Election Issue 1988,” and sub-headed “Federal & State Candidate Surveys Enclosed—Take-Along Issue for Election Day!” It included candidate and party positions on pro-life issues, and stated: “PLEASE NOTE: A ‘yes’ response indicates agreement with the National Right to Life position on each question.”⁴³ The guide also carried the following disclaimer: “The publication of the MRLC [November Election Issue 1988] does not represent an endorsement of any candidate(s) by MRLC.”⁴⁴

The First Circuit, citing *Buckley* and *MCFL*, hewed to a strict definition of express advocacy requiring explicit “vote for, support/oppose” language in the communication. The court stressed that:

[d]iscussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The FEC nevertheless has sought to restrain the very same activity which the [Supreme] Court in *Buckley* sought to protect. This we cannot allow.⁴⁵

The court ruled that the MRLC voting guide was not express advocacy, concluding that “trying to discern when issue advocacy in a voter guide crosses the threshold and becomes express advocacy invites just the sort of constitutional questions the [Supreme] Court sought to avoid in adopting the bright-line express advocacy test in *Buckley*.”⁴⁶ The implication of the *MRLC* court’s ruling is that a voting guide which contains a discussion of public policy issues and does

not include “elect” or “defeat” or any of the other “magic words” identified in *Buckley* and *MCFL* is *per se* issue advocacy and cannot be regulated—even if candidates are the focus of the guide and the manner in which the issues are discussed is clearly favorable or unfavorable to particular candidates. At the very least, *Faucher* can be read as rejecting any consideration of implied meanings in determining whether a communication contains express advocacy.

IV. THE FEC RESPONDS

In the wake of these Supreme Court and lower federal court rulings, the FEC promulgated new regulations in 1995 regarding what kinds of communications constitute express advocacy. The regulation states:

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.⁴⁷

Two aspects of the FEC's new express advocacy regulation bear comment. First, part (a) of the regulation includes all of the express advocacy terms that the Supreme Court identified in *Buckley* and thereby incorporates and broadens the Court's decision into the Commission's regulations. In subpart (b) of the regulation, however, the FEC clearly attempted to incorporate the more flexible *Furgatch* Ninth Circuit express advocacy standard. But in 1999, a successful challenge to the FEC's new express advocacy regulations resulted from the First Circuit's ruling in *Maine Right to Life Comm., Inc. v. FEC* ("MRLC"). The First Circuit affirmed the district court's finding that subpart (b) of the Commission's new regulations was unconstitutional on its face, regardless of how it might be applied.⁴⁸ The court stressed that a Supreme Court precedent bound its decision, even if the ruling served to restrict the scope of the federal election laws and leave much election-related speech unregulated:

If the Supreme Court had not decided *Buckley* and [MCFL] and if the First Circuit had not decided *Faucher*, I might well uphold the FEC's subpart (b) definition of what should be covered. After all, the Federal Election Campaign Act is designed to avoid excessive corporate financial interference in elections and the FEC presumably has some expertise on the question what form that interference may take based on its history of complaints, investigations and enforcement actions.

But there is another policy at issue here and it is one that I believe the Supreme Court and the First Circuit have used to trump all the arguments suggested above. Specifically, the Supreme Court has been most concerned not to permit intrusion upon "issue" advocacy – discussion of the issues on the public's mind from time to time or of the candidate's positions on such issues – that the Supreme Court has considered a special concern of the First Amendment. . . . *FEC restriction of election activities was not to be permitted to intrude in any way upon the public discussion of issues. 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.⁴⁹

The court also highlighted the tensions between the purposes of the election laws (as upheld by the Supreme Court) and the Court's strict express advocacy test:

The advantage of this . . . [strict] 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. In the stressful context of public discussions with deadlines, bright lights and cameras, the speaker need not pause to debate the shades of meaning in language. The result is not very satisfying from a realistic communications point of view and does not give much recognition to the policy of the election statute to keep corporate money from influencing elections in this way, but it does recognize the First Amendment interest as the Court has defined it.⁵⁰

Since the First Circuit's affirmation of the district court's decision on appeal,⁵¹ the FEC has been enjoined from enforcing this part of its regulations,⁵² and the Second and Fourth Circuit's precedents indicate they would take this same view of the unconstitutionality of the express advocacy regulations in subpart (b).⁵³ So far, the FEC has not withdrawn its "reasonable person" express advocacy definition despite court decisions ruling it to be unenforceable.⁵⁴ However, it has become extremely passive in its defense.⁵⁵

V. OTHER MAJOR COURT RULINGS

Several other circuit courts have adopted the strict approach to express advocacy exemplified by *Faucher*. For example, in *FEC v. Central Long Island Tax Reform Immediately Committee* ("CLITRIM"),⁵⁶ the Second Circuit considered whether an issues bulletin published by a non-profit association prior to a general election was express advocacy.

The bulletin detailed the voting record of a local congressman but did not refer to any federal election, reference the congressman's party affiliation, nor identify the congressman's

electoral opponent. The FEC concluded that the bulletin was express advocacy. The Second Circuit rejected that conclusion, reaffirming that the federal election laws do not:

reach all partisan discussion . . . [but only] those expenditures that expressly advocate a particular election result. . . . This is consistent with the firmly established principle that the right to speak out at election time is one of the most zealously protected under the Constitution.⁵⁷

The court stressed that:

contrary to the position of the FEC, the words “expressly advocating” mean exactly what they say. . . . [T]he FEC would apparently have us read “expressly advocating the election or defeat” to mean for the purpose, express or *implied*, of encouraging election or defeat. This would, by statutory interpretation, nullify the change in the statute ordered in *Buckley v. Valeo* and adopted by Congress in the 1976 amendments. This position is totally meritless.⁵⁸

Similarly, in *FEC v. Christian Action Network*,⁵⁹ a district court adopted this strict view of defining “express advocacy,” and the Fourth Circuit summarily affirmed.⁶⁰ The Christian Action Network (“CAN”) describes itself as a grass-roots organization that seeks to inform the public about “traditional family values.” During the weeks immediately prior to the 1992 presidential election, CAN aired television advertisements criticizing the alleged “militant homosexual agenda” of the Clinton/Gore ticket. The district court’s opinion describes the advertisement as opening

with a full-color picture of candidate Bill Clinton’s face superimposed upon an American flag, which is blowing in the wind. Clinton is shown smiling and the ad appears to be complimentary. However, as the narrator begins to describe Clinton’s alleged support for “radical” homosexual causes, Clinton’s image dissolves into a black and white photographic negative. The negative darkens Clinton’s eyes and mouth, giving the candidate a sinister and threatening appearance. Simultaneously, the music accompanying the commercial changes from a single high pitched tone to a lower octave. The commercial then presents a series of pictures depicting advocates of

homosexual rights, apparently gay men and lesbians, demonstrating at a political march.

As the scenes from the march continue, the narrator asks in rhetorical fashion, “Is this your vision for a better America?” Thereafter, the image of the American flag reappears on the screen, but without the superimposed image of candidate Clinton. At the same time, the music changes back to the single high pitched tone. The narrator then states, “[f]or more information on traditional family values, contact the Christian Action Network.”⁶¹

The FEC argued that any viewer would understand the advertisement to advocate Clinton’s defeat. Specifically, it contended that the way the American flag was used in the commercial sent an explicit anti-Clinton message: “By graphically removing Clinton’s superimposed image from the presidential setting of the American flag, the advertisement visually conveys the message that Clinton should not become President. [It] is a powerful visual image telling voters to defeat Clinton.”⁶² The FEC also noted:

(1) the visual degrading of candidate Clinton’s picture into a black and white negative; (2) the use of the visual text and audio voice-overs; (3) ominous music; (4) unfavorable coloring; (5) codewords such as “vision” and “quota”; (6) issues raised that are relevant only if candidate Clinton became president; (7) the airing of the commercial in close proximity to the national election; and (8) abrupt editing linking Clinton to the images of the gay rights marchers.⁶³

Nevertheless, the court ruled that the Christian Action Network’s advertisement was constitutionally protected issue advocacy that could not be regulated:

Concededly, the advertisements “clearly identified” the 1992 Democratic presidential and vice presidential candidates. . . . Similarly, it is beyond dispute that the advertisements were openly hostile to the proposals believed to have been endorsed by the two candidates. Nevertheless, the advertisements were devoid of any language that directly exhorted the public to vote. Without a frank admonition to take electoral action, even admittedly negative advertisements such as these, do not constitute “express advocacy” as that term is defined in *Buckley* and its progeny It is clear from the cases that expressions of hostility to the positions of an official, implying that [the] official should not be reelected – even

when that implication is quite clear – do not constitute express advocacy . . .⁶⁴

After summarily affirming the district court’s ruling,⁶⁵ the Fourth Circuit later awarded the Christian Action Network attorneys fees and costs under the Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(A).⁶⁶ In a blistering opinion highly critical of the FEC’s legal arguments, the Fourth Circuit found that the Commission’s legal position “if not assumed in bad faith, was at least not ‘substantially justified.’”⁶⁷ The court held that there was no legal basis for the FEC’s contention that the Christian Action Network’s advertisement could ever be express advocacy without the required “magic” words.⁶⁸

VI. CONSENSUS OF THE CIRCUIT COURTS

A clear pattern emerges from the foregoing rulings on issue and express advocacy. Other than the Ninth Circuit in *Furgatch*, every other federal appeals court that has considered the question—including the First, Second and Fourth, Eighth, Tenth and Eleventh Circuits—has adopted a narrow interpretation of the express advocacy test set out in *Buckley*, as further clarified in *MCFL*.⁶⁹ Thus, these circuits have concluded that only communications containing *explicit* and unambiguous words, urging readers (or viewers) to elect or defeat a clearly identified candidate, will meet the express advocacy test. This bright-line approach “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.”⁷⁰

These circuit decisions have rejected attempts to find express advocacy based on implied electoral meanings, even if the implicit electoral message is clear and arguably unmistakable. In several cases, they have done so while directly acknowledging that this standard will effectively exempt much candidate-related political speech intended to affect the outcome of federal elections from the disclosure requirements and restrictions on corporate and labor funding of the

federal election laws. Nevertheless, these appeals courts have indicated that they do not believe that *Buckley* provides any leeway for lower courts to regulate such speech.⁷¹ Federal district and state courts that have addressed state laws regulating issue advocacy, however, have not been quite as uniform in their approach.⁷²

VII. AN UNRESOLVED ISSUE: WHAT HAPPENS WHEN ISSUE ADVOCACY SPEAKERS (PARTIES OR OTHERS) COORDINATE WITH CANDIDATES?

The Supreme Court in *Buckley* distinguished between independent advocacy and advocacy coordinated with a candidate when it declared restrictions on independent spending by individuals unconstitutional:

[I]ndependent advocacy . . . does not presently appear to pose dangers of real or apparent corruption comparable to those identified with large campaign contributions. The parties defending [the law] contend that it is necessary to prevent would-be contributors from avoiding the contribution limitations by the simple expedient of paying directly for media advertisements or for other portions of the candidate's campaign activities. They argue that expenditures controlled by or coordinated with the candidate and his campaign might well have virtually the same value to the candidate as a contribution and would pose similar dangers of abuse. Yet such controlled or coordinated expenditures are treated as contributions rather than expenditures under the Act. Section 608(b)'s contribution ceilings . . . prevent attempts to circumvent the Act through prearranged or coordinated expenditures amounting to disguised contributions *The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate.*⁷³

*FEC v. National Conservative Political Action Committee*⁷⁴ and *Colorado Republican Federal Campaign Comm. v. FEC (Colorado I)*⁷⁵ have continued to define coordination such that individuals, PACs and political parties are permitted to make unlimited independent expenditures

in connection with a federal election (communications containing express advocacy), provided that the expenditures are made independently of candidates and their agents. If, however, an entity's expenditures are coordinated with candidates, these expenditures are treated as in-kind contributions that are applicable to the entity's contribution limits.⁷⁶

The application of what coordination and independence actually mean, however, is unclear, and lower courts have hesitated to conclude that all contact between candidates, political committees, and advocacy groups comprises coordination.⁷⁷ For example, the First Circuit shed some light on this issue when it determined that the FEC's voting guide regulation⁷⁸ was invalid insofar as it limited *any* contact with candidates to written inquiries.⁷⁹ Accordingly, the court held that a non-profit corporate advocacy group could contact candidates orally to obtain information to be published in an issue-oriented voter guide without making an illegal in-kind contribution to the candidates.⁸⁰ On the other hand, the Supreme Court appears to have a broader view of what constitutes coordination.⁸¹ The confusion in this area makes the FEC's refusal to appeal *FEC v. Christian Coalition*⁸² all the more troubling.⁸³

Furthermore, there is a lack of agreement as to whether limits on coordinated spending should apply where such spending finances issue advocacy rather than express advocacy. This disagreement was highlighted by the U.S. Department of Justice's decision not to continue its probe of issue advocacy ads run by the Democratic National Committee ("DNC") in key states in 1995 and 1996. These ads were conceived, controlled and funded through the efforts of President Clinton and the Clinton/Gore '96 campaign staff. The legal issue is whether they constituted spending subject to party and Clinton campaign spending and contribution limits. In a letter to U.S. Senator Orrin Hatch (R-UT) dated April 14, 1997, U.S. Attorney General Janet Reno claimed that one reason for not pursuing the matter was that based on her understanding of

the coordination standard, “the proper characterization of a particular expenditure depends not on the degree of coordination, but rather on the content of the message.”⁸⁴ Thereafter, based on an FEC staff recommendation that the FEC should count the DNC ads as (excessive) Clinton campaign activity, Ms. Reno commenced a preliminary investigation that could have led to an independent counsel probe. The Attorney General decided not to proceed further with the matter, however, after the FEC Commissioners rejected their staff’s recommendation on the grounds that the current law and regulations are insufficiently clear about the degree of coordination permitted between a party and its Presidential candidate.⁸⁵

On the other hand, in *FEC v. Christian Coalition*,⁸⁶ the U.S. District Court for the District of Columbia rejected the argument that limits on coordinated spending should apply only where such spending is for express advocacy. The court indicated that limiting the relevance of coordination to spending on express advocacy would “raise the potential for corruption” by, among other things, permitting union and corporate financing of “expensive, gauzy candidate profiles prepared for television broadcast or use at a national political convention.”⁸⁷ Similarly, the court expressed concern that requiring express advocacy in order to find coordination as a matter of law would undermine the anti-corruption and disclosure goals of the federal election laws by presenting “the opportunity to launch coordinated attack advertisements, through which a candidate could spread a negative message about her opponent, at corporate or union expense, without being held accountable for negative campaigning.”⁸⁸

Independent business, labor, and ideological groups were also investigated by the FEC for allegedly coordinating issue ad campaigns in the 1996 election cycle.⁸⁹ Despite this flurry of investigative activity, however, issue ads were prevalent in 1998.⁹⁰ To questions of whether investigations of 1996 activity were affecting political committees’ 1998 efforts, the National

Republican Congressional Committee’s spokeswoman Mary Crawford summarized the sentiments of most involved with issue ads when she replied, “not that I have seen.”⁹¹ Doug Rivlin, an Annenberg Public Policy Center analyst, similarly stated, “‘My sense is that [sponsors of issue ads] are not doing anything differently’ because of probes launched by the Justice Department and the Federal Election Commission.”⁹²

Prior to the enactment of BCRA, the FEC promulgated a new rule designed to clarify what constitutes coordination with parties or candidates by outside groups or individuals.⁹³ The FEC’s definition of the types of interactions that would give rise to a finding of coordination was based on the district court’s interpretation of this concept in *Christian Coalition*.⁹⁴ Under these regulations, an “expenditure for a general public political communication” mentioning a federal candidate made by an individual or group other than the candidate, the candidate’s committee, or a party committee is “coordinated” if created, produced, or distributed:

- “At the request or suggestion of, or is authorized by, the candidate, the candidate’s authorized committee, [or] a party committee . . . ”;
- “After the candidate . . . , or a party committee . . . , has exercised control or decision-making authority over the content, timing, location, mode, intended audience, volume of distribution, or frequency of placement of that communication”; or
- “After substantial discussion or negotiation between the creator, producer or distributor of the communication, . . . and the candidate, the candidate’s authorized committee or a party committee, regarding the content, timing, location, mode, intended audience, volume of distribution or frequency of placement of that communication, the result of which is collaboration or agreement.”⁹⁵

On the distinct issue of whether only disbursements for “express advocacy” constitute an “expenditure for a general public political communication” covered by the coordination standard, the FEC did not reach a decision.⁹⁶ The FEC did note in its explanation of the rule, however, that allowing candidates and parties to coordinate advertising that includes express advocacy and

refers specifically to candidates as candidates could be “under-inclusive” and undermine the government’s interest in preventing actual and apparent corruption.⁹⁷

Subsequently, BCRA weighed in on the issue of “coordination” in two important respects. First, it repealed the current FEC rule defining coordination with candidates and parties by outside groups and individuals and mandated that the agency issue a new rule in this area that could not require “agreement” or “formal collaboration” to establish coordination.⁹⁸ Second, BCRA expressly states that coordinated spending on “electioneering communications”—which by definition extend beyond express advocacy⁹⁹—should be treated as a “contribution” to the candidate or party benefiting from such spending.¹⁰⁰

VIII. THE BIPARTISAN CAMPAIGN REFORM ACT: THE FUTURE OF ISSUE ADVOCACY

On March 27, 2002, President Bush signed the Bipartisan Campaign Reform Act of 2002 (“BCRA”) into law. BCRA had passed the Senate 60-40 and the House by a 240-189 vote. BCRA represents the most significant changes to campaign finance laws since those enacted after the Watergate scandal more than 25 years ago. Most of BCRA’s provisions went into effect immediately following the 2002 election, so the 2002 election was conducted entirely under the old laws. Accordingly, it is unclear what the impact of BCRA’s changes will be.

In fact, it is not certain what provisions of BCRA will in place by the time the 2004 election season swings into full force. As explained in more detail below, legal challenges have been filed against much of the new law.¹⁰¹ This lawsuit, *McConnell v. FEC*, will hopefully be decided by the U.S. Supreme Court by December of 2003. In addition, for most of BCRA’s major provisions, the FEC has conducted rulemakings, which determine how the law is implemented. Some of these rulemakings are currently being contested in court as, among other things, “thwart and undermine the language and congressional purposes . . . of BCRA.”¹⁰²

If upheld in court challenges and FEC rulemakings in its current form, BCRA would:

- ban soft money contributions to the national political parties;
- increase individual hard money contribution limits;
- leave PAC contribution limits unchanged;
- restrict the ability of corporations (including non-profit corporations) and labor unions to run “electioneering” ads featuring the names and/or likenesses of candidates close to an election; and
- require the FEC to issue new regulations that will ultimately determine the reach of the prohibition on corporations and unions coordinating campaign activities with federal candidates.

Of primary importance for this chapter are the provisions addressing “electioneering communications” (originally authored by Senators Snowe (R-ME) and Jeffords (R-VT)). The purpose of these provisions is to restrict what supporters of BCRA call “sham issue ads”—communications that promote or disparage the views of a federal candidate but which are carefully worded to avoid any use of the magic words. Opponents of these restrictions argue (in and out of court) that this definition of “electioneering communications” is unconstitutional because it impermissibly expands the definition of issue ads beyond the “magic words” test.

Supporters of BCRA believe the magic words test has become a distinction without difference over the past ten years as sham issue ads have played an increasingly prominent role.¹⁰³ Moreover, studies show that even federal candidates’ ads usually do not use “magic words.”¹⁰⁴ Accordingly, the prohibition against corporate and union spending in federal elections has been rendered wholly unenforceable and election influencing communications avoid disclosure typically required of such communications.

To remedy this situation, BCRA prohibits corporations, trade associations, and labor organizations from financing “electioneering communications” within 60 days of a general

election and 30 days of a primary election using “treasury money.” An electioneering communication is a broadcast, cable, or satellite television ad that refers to a clearly identified federal candidate and is targeted to the candidate’s state or district. (A corporate, trade association or union PAC may still run or finance such ads because its funds are, by definition, *hard money*). These provisions also would require non-corporate or non-union persons or entities that spend in excess of \$10,000 on electioneering communications during a calendar year to file disclosure reports listing the person(s) making or controlling the disbursements and the custodian of the records, all contributors who gave more than \$1,000 to finance the communications, and those to whom disbursements of more than \$200 have been made.

In short, BCRA would restrict a corporation’s or union’s ability to run “sham issue ads” that mention the names of candidates in the 60-day period before a general election and the 30-day period before a primary election. Both entities would, however, retain the right to spend unlimited funds on issue advocacy, including ads just days before an election, so long as the communications within the pre-election time periods did not specifically mention the names of federal candidates. Furthermore, by its terms, these restrictions do not even apply to candidate-specific advertising *outside* the designated pre-election period, direct mailings, telephone banks, or other forms of communication.

Thus, while courts have employed a narrow express advocacy standard for a quarter of a century, it is important to remember that these interpretations have been in regards to the limits of current federal election law. BCRA drastically alters the wording of federal law. This new context provides the courts with an opportunity to address the constitutional, rather than statutory, limits of the federal government’s ability to regulate the conduct of federal elections.

IX. *McCONNELL v. FEC*

Almost immediately after President Bush signed BCRA into law, plaintiffs began filing lawsuits seeking to strike down the Act on constitutional grounds. On the final day for filing complaints, more than 80 plaintiffs were challenging nearly every provision of the Reform Act.

The plaintiffs in these suits - consolidated into *McConnell v. FEC* - mirror the political coalition that fought reform in Congress. They span the political spectrum from the Republican National Committee and the Christian Coalition to the California Democratic Party and the U.S. Public Interest Research Group. BCRA is defended in this case by the FEC, the Department of Justice, and the Act's principal Congressional sponsors.

Because a provision in the bill calls for expedited judicial review, the suit is following an unusual litigation process. An unusually extensive discovery process was conducted, oral arguments heard, and a decision issued by a special three-judge panel of the United States District Court for the District of Columbia within 12 months. That panel consisted of Circuit Court Judge Karen LeCraft Henderson, a Bush 41 appointee, who presided; District Court Judge Colleen Kollar-Kotelly, a Clinton appointee; and District Court Judge Richard J. Leon, a Bush 43 appointee. The opinion itself was complex and fractured.¹⁰⁵ At 1,638 pages, it was the longest decision in the court's history and upheld major provisions of BCRA while striking down and/or modifying key provisions involving soft money and issue advertising.

With regard to issue advocacy, the court acknowledged that the problem of "sham" issue advocacy was real and a threat to the integrity of the federal election process.¹⁰⁶ Nevertheless, citing First Amendment concerns, the court **struck down** the Act's primary restriction on independent corporate or labor spending, which forbade the use of treasury funds to finance broadcast, cable or satellite communications mentioning a clearly identified federal candidate

within 30 days of a primary or 60 days of a general election and targeted the candidate's electorate.¹⁰⁷ The court **upheld**, however, part of the Act's "backup" restriction on independent corporate or labor spending.¹⁰⁸ The "backup" restriction targets any political ad that supports or attacks a federal candidate "regardless of whether the communication expressly advocates a vote for or against a candidate."¹⁰⁹ But to prevent the "backup" from being unconstitutionally vague, the court excised the restriction's final clause that also required the message to be "suggestive of no plausible meaning other than an exhortation to vote."¹¹⁰

The practical effect of this decision, the majority held, was still a prohibition on the use of corporate or labor-union treasury funds to finance broadcast, cable or satellite communications that promote, support, attack or oppose a federal candidate at any time. Likewise, the District Court upheld FEC disclosure requirements for spending by individuals and organizations on these advertisements. The District Court concluded, however, that despite its decision to allow Congress to broaden the definition of express advocacy, such groups would be able to seek advisory opinions from the FEC to determine whether their communications are in fact regulated by BCRA. These two suggestions, taken together,¹¹¹ suggest the court was ultimately urging a narrow, case-by-case approach to "sham" issue advocacy to be handled by the FEC that would develop over time.

On the very same day the court issued the decision, parties on both sides began filing notices of appeal with the U.S. Supreme Court. Under the provision in the Act regarding judicial review, the case will bypass the normal circuit court review process and proceed directly to the High Court. The late date of the District Court issuing its decision has made uncertain the schedule on which the Supreme Court can hear the case. The Court's current term ends, unofficially, on July 5, and the next term begins on October 1. However, pending Supreme

Court review, a number of litigants asked the district court to “stay” all or part of its judgment from taking effect. The court ultimately decided to stay the entirety of its judgment.

In response, several plaintiffs represented by the James Madison Center—including the Club for Growth and the National Right to Life Committee—appealed the stay. The Madison Center also asked the Court, in a separate filing, to enjoin enforcement of BCRA’s provisions on “electioneering communications.” Chief Justice William Rehnquist personally denied both requests today as circuit justice for the District of Columbia, but noted that he had consulted with the other members of the Court before rendering a decision. The Court’s decision leaves BCRA as a whole (as implemented by FEC regulations) in effect until the Supreme Court issues a final ruling in the case.¹¹²

CONCLUSION

During the 2002 election cycle, interest groups, individuals, and political parties continued to communicate via “issue advertisements” that undoubtedly had an (intended) impact on federal elections. In some U.S. House races, more money was spent on issue advocacy than was spent by the two major party candidates combined. Clearer legal and more accurate standards appear likely to emerge as a result of the passage of BCRA for the 2004 election cycle and beyond, but the extent of those improvements hinge on the pending Supreme Court decision, litigation regarding the FEC rulemakings, and the FEC’s enforcement of whatever standards are ultimately adopted.

¹ TREVOR POTTER is President and General Counsel and KIRK L. JOWERS is Director of Academic Affairs and Legal Counsel of the Campaign and Media Legal Center. Messrs. Potter and Jowers are members of the law firm Caplin & Drysdale in Washington, D.C. Mr. Potter is the Editor and Mr. Jowers the Assistant Editor of the “New Developments in Campaign Finance Law” Web site (www.Brookings.edu/campaignfinance) at the Brookings Institution. Mr. Potter previously served as a Commissioner and as the Chairman of the FEC. Mr. Jowers previously served as General Counsel to the Washington, D.C. Republican Party.

² According to a study conducted by the Annenberg Public Policy Center, “more than two dozen organizations engaged in issue advocacy during the 1995-1996 election cycle, at an estimated total expense of \$135 million to \$150 million.” DEBORAH BECK ET AL., ISSUE ADVOCACY ADVERTISING DURING THE 1996 CAMPAIGN 3 (1997). A study of the 1999-2000 election cycle by the Annenberg Public Policy Center estimates that more than \$509 million was spent on issue advocacy. KATHLEEN HALL JAMISON ET AL., ISSUE ADVOCACY ADVERTISING IN THE 1999-2000 ELECTION CYCLE 4 (2001). “The Republican and Democratic parties accounted for almost \$162 million (32%) of this spending.” *Id.*

³ Professor David B. Magelby studied the scope and impact of outside issue advocacy efforts in the 2000 presidential primaries. He summarized his research as follows:

The idea that most issue advocacy is not election-related is disproved by the data we collected. Less than one-tenth (8.9 percent) of all communications we intercepted were pure issue advocacy (had no reference to a candidate or the election). Rather issue advocacy provides a powerful tool for agenda setting and candidate definition.

[W]hen issues are discussed in the context of an election and candidates’ positions are presented, compared, and judged, much of this communication is intended to influence a vote. Although some groups legitimately present nonpartisan information about candidates up for reelection, usually, these communications are thinly veiled advocacy.

David B. Magelby, *Getting Inside the Outside Campaign* at 4, 26 (July 2000).

⁴ *Buckley v. Valeo*, 424 U.S. 1, 46 (1976).

⁵ The First Amendment to the U.S. Constitution states that “Congress shall make no law . . . abridging the freedom of speech . . .” U.S. CONST. amend. I.

⁶ 2 U.S.C. § 431-455.

⁷ *Buckley*, 424 U.S. at 46.

⁸ *Id.* at 41-44; *see also* FEC Advisory Opinion 1996-11 (holding that a nonprofit membership organization could invite candidates for federal office to speak at its convention on issues of interest to its members without violating federal election laws provided there was *no* express advocacy of the nomination, election or defeat of any candidate).

⁹ The Annenberg Public Policy Center concluded “after analyzing hundreds of ads over a seven year period” that the “distinction between issue advocacy and express advocacy is a fiction.” KATHLEEN HALL JAMISON ET AL., ISSUE ADVOCACY ADVERTISING IN THE 1999-2000 ELECTION CYCLE 2 (2001). The report also found that “candidates appeared in a majority of distinct issue ads and were more likely to be mentioned than pictured. In this election cycle 73%

of all unique ads mentioned a candidate and 58% (of TV ads) pictured one. In the 1995-1996 election 87% of distinct issue ads mentioned a candidate or official, and 57% (of TV ads) pictured one.” *Id.* at 14.

¹⁰ FEC General Counsel Lawrence M. Noble stated, “It is very easy to write these ads and do these commercials without using those magic words, but they are very clearly campaign ads.” Eliza Newlin Carney, *Air Strikes*, THE NATIONAL JOURNAL, June 6, 1996, at 1313. David L. Hunter, campaign manager to Senator Max Baucus (D-MT), commenting on the National Right to Work Committee’s issues ads that criticized Senator Baucus and more than a half dozen other Senators, complained that “[t]his is totally about influencing the outcome of the election.” *Id.*

¹¹ President Bill Clinton discussed the effectiveness of the issue ads that he and his reelection staff ran through the Democratic National Committee at a fundraising event: “I cannot overstate to you the impact that these [ads] have had in the areas where they have run [I]n the areas where we have shown these ads we are basically doing 10 to 15 points better.” Jill Abramson, *Political Parties Channel Millions to “Issue” Attacks*, N.Y. TIMES, Oct. 26, 1998, at A1. Likewise, Senator Bob Dole, in commenting on a 60 second Republican National Committee issue ad titled “The Story” that never mentioned the presidential election but devoted 56 seconds to a biography of candidate Dole, quipped that the ad “never says that I’m running for President,” but “hope[d] that’s fairly obvious, since I’m the only one in the picture.” Adam Clymer, *System Governing Election Spending Found in Shambles*, N.Y. TIMES, June 16, 1996, at A1.

The poster child organization of 527 infamy in the 2000 presidential campaign is “Republicans for Clean Air.” This group, led by George W. Bush supporter Sam Wyly, launched a \$2.5 million issue ad campaign against GOP presidential candidate John McCain in the form of criticizing Senator McCain’s environmental record. “Mr. Wyly said that ‘of course’ he hoped the commercials would benefit Mr. Bush.” Richard W. Stevenson & Richard Perez-Pena, *The 2000 Campaign: The Tactics; Wealthy Texan Says He Bought Anti-McCain Ads*, N.Y. TIMES, Mar. 4, 2000, at A1.

¹² U.S. SENATE COMMITTEE ON GOVERNMENTAL AFFAIRS, INVESTIGATION OF ILLEGAL OR IMPROPER ACTIVITIES IN CONNECTION WITH THE 1996 FEDERAL ELECTION CAMPAIGNS, S. Rep. No. 105-167, at 6304-05 (1998).

¹³ *See, e.g., North Carolina Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 708 (4th Cir. 1999), *cert. denied*, 120 S. Ct. 1156 (2000).

¹⁴ *Id.*

¹⁵ *See* Jonathon S. Krasno and Daniel E. Seltz, *Buying Time: Television Advertising in the 1998 Congressional Election* at 9 (2000). Although *Buying Time* noted that “[c]andidates remain the major players nationwide” in running ads, it found that candidates are at a disadvantage in competing with issue advertisers for two major reasons. First, candidates are limited in the amounts of money they may raise (\$1,000 from individuals, \$5,000 from PACs, and are prohibited from raising funds from corporations or unions) while issue advertisers suffer no such

limitations. Second, candidates, unlike issue advertisers, must file regular disclosure forms with the FEC. *Id.* at 5. A Democratic pollster concurred, concluding that “[c]andidates are losing control of their own campaigns.” Ron Faucheux, *The Indirect Approach*, CAMPAIGNS AND ELECTIONS, June 1998, at 20.

¹⁶ 11 C.F.R. § 114.2. Non-profits that do not accept corporate or labor funds and otherwise meet the terms of the FEC regulation adopted after the Supreme Court’s decision in *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986), are the exception. *See* 11 C.F.R. § 114.10.

¹⁷ *Buckley v. Valeo*, 519 F.2d 821, 869-78 (D.C. Cir. 1975). The D.C. Circuit held that this language, which used a “for the purpose of influencing the outcome of an election” standard to regulate even non-partisan communications by groups which were not political committees, was unconstitutional. The D.C. Circuit cited two reasons: the provision was too vague (providing no real guidance as to regulated or unregulated speech) and too inclusive (requiring disclosure by groups not overtly involved in political activity). This provision, intended to provide disclosure of all donors to “many groups, including liberal, labor, environmental, business and conservative organizations,” was declared unconstitutional in its entirety by the D.C. Circuit, and that holding was the only part of the D.C. Circuit’s decision not appealed to the Supreme Court.

The D.C. Circuit cited with approval another issue advocacy case decided in 1972 by the Second Circuit, *United States v. Nat’l Comm. for Impeachment*, 469 F.2d 1135, 1142 (2d Cir. 1972). There, the Department of Justice had prosecuted a group that took out newspaper advertisements urging the impeachment of President Nixon for failure to register as a political committee under the disclosure provisions of the 1971 Act. The Second Circuit held that communications primarily directed towards advocacy of a position on a public issue, rather than urging a vote for or against a candidate, did not qualify as an election expenditure, and thus political committee status was not triggered.

¹⁸ *Buckley*, 424 U.S. at 41.

¹⁹ *Id.* (internal quotation omitted).

²⁰ *Id.* at 43 (emphasis added).

²¹ *Id.* at 44 n.52 (describing the list of terms as “express words of advocacy of election or defeat, *such as* ‘vote for’, ‘elect’ . . .”) (emphasis added). These have become known as the “magic words,” although *Buckley* and subsequent cases indicate that they do not constitute an exhaustive list of phrases meeting the “express advocacy” definition. *Id.*; *see also* *MCFL*, 479 U.S. at 249 (“The fact that this message is marginally less direct than ‘Vote for Smith’ does not change its essential nature. The Edition goes beyond issue discussion to express electoral advocacy”); *FEC v. Furgatch*, 807 F.2d 857 (9th Cir.), *cert. denied*, 484 U.S. 850, 861 (1987) (concluding that the *Buckley* express advocacy test “does not draw a bright and unambiguous line”).

²² *Id.* at 42 (emphasis added).

23 *Id.* at 43.

24 479 U.S. 238 (1986).

25 *Id.*

26 *Id.* at 249.

27 *Id.* (Emphasis added). Because the Court found the *MCFL* newsletter to be express advocacy, it ruled that *MCFL*'s expenditures violated the Act. The Court then ruled that the ban on federal election expenditures by incorporated entities was unconstitutional as applied to issue-oriented organizations such as *MCFL*, and other 501(c)(4)-type organizations that are not themselves funded by for-profit corporations. In reaching this conclusion, the Court first noted that the expenditures were made independently of any candidate. *Id.* at 251 (“independent expenditures ‘produce speech at the core of the First Amendment’”) (quoting *FEC v. Nat’l Conservative Political Action Comm.*, 470 U.S. 480, 493 (1985)); *Buckley*, 424 U.S. at 39 (invalidating a \$1,000 limit on independent individual expenditures). Second, the Court relied on several institutional aspects of *MCFL* that differentiated the organization from most corporations. These aspects included the fact that *MCFL*:

- “was formed for the express purpose of promoting political ideas, and cannot engage in business activities”;
- “has no shareholders or other persons affiliated so as to have a claim on its assets or earnings”; and
- “was not established by a business corporation or a labor union, and [has a] policy not to accept contributions from such entities.”

MCFL, 479 U.S. at 264.

28 *See id.* at 249 (concluding that the *MCFL* publication provides “*in effect* an explicit directive: vote for these (named) candidates” (emphasis added); *see also id.* (acknowledging that the electoral message in *MCFL* is “marginally less direct than ‘Vote for Smith’ [and other terms identified in *Buckley*.]”).

29 807 F.2d 857 (9th Cir.), *cert. denied*, 484 U.S. 850 (1987).

30 *Id.* at 858 (emphasis in original).

31 *Id.* at 861 (emphasis added).

32 *Id.* at 862.

33 *Id.* at 864.

34 *Id.* at 863-64.

35 *Id.* at 864 (emphasis added).

36 *Id.*

37 *Id.*

38 *Id.* at 864-65.

39 *Id.* at 864.

40 *Id.* at 865 (emphasis added).

41 *FEC v. Nat'l Org. for Women*, 713 F. Supp. 428 (D.D.C. 1989) (“*NOW*”) applied *Furgatch*’s express advocacy test to evaluate speech allegedly calling for the election or defeat of particular persons seeking federal office. The FEC argued that three mailings contained express advocacy and therefore contended that *NOW* had violated FECA. The court held that these letters did not contain express advocacy, *despite* their use of “magic words,” identification of specific candidates, and direct references to upcoming elections. It explained:

Under *Furgatch*’s broad test of whether speech constitutes express advocacy, the central message of all three letters was to expand the organization. . . .

Further implementation of *Furgatch* necessarily involves the “reasonable minds could differ” test. Reasonable minds could certainly dispute what *NOW*’s letters urged the readers to do. The letters make numerous appeals: . . . raise the nation’s consciousness, . . . , speak out, . . . , and put pressure on the Senate and the President. *The letters call for action, but they fail to expressly tell the reader to go to the polls and vote against particular candidates in the 1984 election. Because the letters are suggestive of several plausible meanings, because there are numerous pleas for action, and because the types of action are varied and not entirely clear, NOW’s letters fail the express advocacy test proposed by the Ninth Circuit in Furgatch.*

NOW, 713 F. Supp. at 434-35 (emphasis added) (citations omitted).

42 928 F.2d 468 (1st Cir.), *cert. denied*, 502 U.S. 820 (1991).

43 *Id.* at 469.

44 *Id.*

45 *Id.* at 471 (internal citations and quotations omitted).

46 *Id.* at 472.

47 11 C.F.R. § 100.22.

48 914 F. Supp. 8, 12 (D. Me.), *aff'd*, 98 F.2d 1 (1st Cir. 1996), *cert. denied*, 118 S. Ct. 52 (1997).

49 *Maine Right to Life*, 914 F. Supp. at 11-12 (emphasis added).

50 *Id.* at 12.

51 98 F.3d 1 (1st Cir. 1996).

52 Subsection (b) was enjoined in *Right to Life of Dutchess County, Inc. v. FEC*, 6 F. Supp. 2d 248 (S.D.N.Y. 1998), and enjoined nationwide in *Virginia Soc’y for Human Life, Inc. v. FEC*, 83 F. Supp. 2d 668 (E.D. Va. 2000). The Fourth Circuit recently overturned the district court’s nationwide injunction on the FEC’s express advocacy rule, however, finding that the district court had abused its authority by issuing a nationwide injunction and noting that such an “injunction . . . encroaches on the ability of other circuits to consider the constitutionality of” the FEC’s express advocacy regulations. The court upheld the injunction, however, as applied to the pro-life organization that brought the law suit and concluded that the regulation violated the First Amendment “because it is not limited to communications that contain express words of advocacy as required by *Buckley v. Valeo*.” The court explained that the regulation violates *Buckley’s* and *MCFL’s* prohibition that the government may not define “express advocacy with reference to the reasonable listener’s or reader’s overall impression of the communication.” Thus, “the regulation goes too far because it shifts the determination of what is ‘express advocacy’ away from the words ‘in and of themselves’ to ‘the unpredictability of audience interpretation.’” *Virginia Soc’y for Human Life v. FEC*, Nos 00-1252 and 00-1332 (4th Cir. Sept. 17, 2001).

53 *FEC v. Christian Action Network*, 92 F.3d 1178 (4th Cir. 1996); *FEC v. Cent. Long Island Tax Reform Immediately Comm.* (“*CLITRIM*”), 616 F.2d 45 (2d Cir. 1980).

54 In 1998, the FEC declined a petition to initiate a rulemaking to rescind its definition. 63 Fed. Reg. 8363 (Feb. 19, 1998) (citing Supreme Court cases such as *United States v. Mendoza*, 464 U.S. 154 (1984), which state approval of a standard agency practice of seeking review in several circuits in order to facilitate Supreme Court resolution of difficult issues).

55 For example, the FEC decided not to appeal the *Right to Life of Dutchess County, Inc. v. FEC*, 6 F. Supp. 2d 248, 250 (S.D.N.Y. 1998), which found that the FEC’s definition of express advocacy was impermissible.

56 616 F.2d 45 (2d Cir. 1980).

57 *Id.* at 53 (internal quotations and citations omitted).

58 *Id.*
59 894 F. Supp. 946 (W.D. Va. 1995).
60 92 F.3d 1178 (4th Cir. 1996).
61 *Christian Action Network*, 894 F. Supp. at 948-49 (internal citations omitted).
62 *Id.* at 956 (internal quotations and citations omitted).
63 *Id.*
64 *Id.* at 953 (internal quotations and citations omitted).
65 92 F.3d 1178 (4th Cir. 1996).
66 *FEC v. Christian Action Network*, 110 F.3d 1049, 1050 (4th Cir. 1997).
67 *Id.*
68 The court stated:

In the face of unequivocal Supreme Court and other authority discussed, an argument such as that made by the FEC in this case, that “no words of advocacy are necessary to expressly advocate the election of a candidate,” simply cannot be advanced in good faith . . . much less with “substantial justification.” . . . It may be that “[i]mages and symbols without words can also convey unequivocal meaning synonymous with literal text.” [FEC Brief at 28] It may well be that “[m]etaphorical and figurative speech can be more pointed and compelling, and can thus more successfully express advocacy, than a plain, literal recommendation to “vote” for a particular person[,]” and that “it would indeed be perverse to require FECA regulation to turn on the degree to which speech is literal or figurative, rather than on the clarity of the message,” “[g]iven that banal, literal language often carries less force.” [FEC Brief at 25-26] It may even be, as the FEC contends in this particular case, that “the combined message of words and dramatic moving images, sounds, and other non-verbal cues such as film editing, photographic techniques, and music, involving highly charged rhetoric and provocative images . . . taken as a whole[] sent an unmistakable message to oppose [Governor Clinton].” [FEC Memorandum at 8] But the Supreme Court has unambiguously held that the First Amendment forbids the regulation of our political speech under such indeterminate standards. “Explicit words of advocacy of election or defeat of a candidate,” “express words of advocacy,” the Court has held, are

the constitutional minima. To allow the government’s power to be brought to bear on less, would effectively be to dispossess corporate citizens of their fundamental right to engage in the very kind of political issue advocacy the First Amendment was intended to protect – as this case well confirms.

Id. at 1064.

69 *Id.* at 249 (citing *Buckley*, 424 U.S. at 44 n.52); *see, e.g., See Florida Right to Life v. Lamar*, 238 F.3d 1288 (11th Cir. 2001) (striking down Florida’s definition of “political committee” as unconstitutionally overbroad, because it swept within its regulatory ambit groups whose primary purpose is to engage in issue advocacy); *Citizens for Responsible Gov’t v. Davidson*, 236 F.3d 1174 (10th Cir. 2000) (applying a bright-line view of what constitutes express advocacy and then finding the Colorado law’s definitions of “independent expenditure,” “political committee,” and “political message” to be unconstitutional because they extended the reach of the Act’s “substantive provisions ‘to advocacy with respect to public issues, which is a violation of the rule enunciated in *Buckley* and its progeny’”); *Perry v. Bartlett*, 231 F.3d 155 (4th Cir. 2000) (finding a disclosure statute requiring the sponsors of political advertisements that “intended” to advocate the election or defeat of a candidate to be unconstitutionally overbroad because the statute would allow regulation beyond the bright-line rule of express advocacy established by *Buckley*), *cert. denied*, 532 U.S. 905 (2001); *Vermont Right to Life, Inc. v. Sorrell*, 221 F.3d 376 (2d Cir. 2000) (reversing a lower court decision which had upheld a Vermont law that required individuals and organizations who run advertisements “expressly or implicitly advocat[ing] the success or defeat of a candidate” to identify the name and address of the buyer of the advertisement because it unconstitutionally limited issue advocacy in violation of *Buckley*’s bright-line test); *Iowa Right to Life Comm. v. Williams*, 187 F.3d 963 (8th Cir. 1999) (finding a state disclosure statute modeled on the *Furgatch* standard to be in violation of the *Buckley* bright-line test); *North Carolina Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 713, 718 (4th Cir. 1999) (finding a statute unconstitutionally vague and overbroad because it encompassed entities engaging in issue advocacy and did not limit its coverage to entities engaging in express advocacy), *cert. denied* 528 U.S. 1153 (2000); *FEC v. Christian Action Network*, 110 F.3d 1049 (4th Cir. 1997); *Faucher v. FEC*, 928 F.2d 468 (1st Cir. 1991); *see also CLITRIM*, 616 F.2d at 52-53 (stating that section 441d of the FECA “clearly establish[es] that, contrary to the position of the FEC, the words ‘expressly advocating’ mean[] exactly what they say”); *Right to Life of Dutchess County, Inc. v. FEC*, 6 F. Supp. 2d 248, 250 (S.D.N.Y. 1998) (citing with approval the approach of the First and Fourth Circuits in ruling that the FEC’s definition of express advocacy was impermissible); *Maine Right to Life Comm., Inc. v. FEC*, 914 F. Supp. 8, 12 (D. Me.), *aff’d*, 98 F.2d 1 (1st Cir. 1996), *cert. denied*, 118 S. Ct. 52 (1997). *But see FEC v. Furgatch*, 807 F.2d 857 (9th Cir. 1987) (permitting some reference to outside circumstances in evaluating whether words constitute express advocacy).

70 *Maine Right to Life*, 914 F. Supp. at 12.

71 *See, e.g., n. 58, supra.*

72 *Compare Kansans for Life, Inc. v. Gaede*, 38 F. Supp. 2d. 928, 936-37 (D. Kan. 1999)

(finding that the Kansas Governmental Ethics Commission’s definition of express advocacy—“a communication which, when viewed as a whole, leads an ordinary person to believe that he or she is being urged to vote for or against a particular candidate for office”—was unconstitutionally vague), and *Planned Parenthood Affiliates of Michigan, Inc. v. Miller*, 21 F. Supp. 2d 740, 741, 746 (E.D. Mich. 1998) (finding a state rule “prohibit[ing] the use of a candidate’s name or likeness in a communications made by a corporation forty-five days prior to an election as “overbroad and [likely to] chill the exercise of constitutionally protected ‘issue advocacy’”), and *Right to Life of Michigan, Inc. v. Miller*, 23 F. Supp. 2d 766, 771 (W.D. Mich. 1998) (same), and *Vermont Right to Life Comm., Inc. v. Sorrell*, 19 F. Supp. 2d 204, 214 (D.Vt. 1998) (narrowly construing the term “political advertisements,” as used in statutes, to mean express advocacy communications because “[i]f the Vermont legislature intended to regulate communications that impliedly advocate for or against a candidate, it has flouted the United States Supreme Court’s holdings in *Buckley* and *Massachusetts Citizens For Life*”), *rev’d* by 221 F.3d 376 (2nd Cir. 2000), and *Stenson v. McLaughlin*, 2001 WL 1033614 at *159 (D.N.H. Aug. 24, 2001) (striking part of a statute regulating “implicit advocacy” because it was too vague and went “beyond the express advocacy limitations of *Buckley*”) and *Virginia Soc’y for Human Life, Inc. v. Caldwell*, 500 S.E.2d 814, 817 (Va. 1998) (narrowing “the broad sweep of the phrase for the purpose of influencing . . . so as to have no application to individuals or groups that engage solely in issue advocacy”), with *Chamber of Commerce v. Moore*, 191 F. Supp. 2d 747 (S.D. Miss. 2000), *rev’d* by 288 F.3d 187 (5th Cir. 2002) (rejecting the Chamber’s request that the court declare that it could broadcast certain issue ads without being subject to contribution limits and disclosure and reporting requirements); *Osterberg v. Peca*, 12 S.W.3d 31 (S. Ct. Tex 2000), *cert. denied* 530 U.S. 1244 (2000) (adopting a broad view of express advocacy based on *MCFL* to find that an advertisement was subject to disclosure requirements); and *Wisc. Mfrs. & Commerce*, 597 N.W.2d at 733 (ruling that it may well be appropriate for a court to rely on implications that are made clear by the “context” of speech, but electing not to apply that standard in this case because defendants had not been given fair advance notice); and *State ex rel. Crumpton v. Keisling*, 982 P.2d 3, 10 (Or. Ct. App. 1999) (“The purpose is not to search for magic words—which careful drafters can, as in this case, usually avoid—but to find the essential message that the publication communicates to the reader.”), *review denied*, 994 P.2d 132 (Or. 2000). *See also Anderson v. Spear*, 189 F. Supp. 2d 644, 652 (2002) (holding that *Buckley*’s distinction between express and issue advocacy “lacks currency outside the campaign finance context”).

⁷³ *Buckley*, 424 U.S. at 46-47 (emphasis added).

⁷⁴ 470 U.S. 480 (1985) (striking down a FECA provision making it a criminal offense for an independent political committee to expend more than \$1,000 to further the election of a presidential candidate who receives public funding).

⁷⁵ 518 U.S. 604 (1996) (holding that political parties have a constitutional right to make unlimited independent expenditures). This decision is commonly known as *Colorado I*, to distinguish it from a subsequent U.S. Supreme Court decision regarding the constitutionality of party coordinated expenditure limits. *See infra* note 76 and accompanying text.

⁷⁶ In *Colorado I*, the Supreme Court remanded to the lower courts the issue of whether

limiting political parties' coordinated expenditures is constitutional. The United States District Court in Colorado held that such a limit is unconstitutional, stating that the FEC "failed to offer relevant, admissible evidence which suggests that coordinated party expenditures must be limited to prevent corruption or the appearance thereof." *FEC v. Colorado Republican Fed. Campaign Comm.*, 41 F. Supp.2d 1197, 1213 (D. Colo. 1999). The United States Court of Appeals for the Tenth Circuit affirmed the district court's holding, 213 F.3d 1221 (10th Cir. 2000). The U.S. Supreme Court, however, reversed the lower court decisions and upheld the constitutionality of party coordinated expenditure limits. *FEC v. Colorado Republican Fed. Campaign Comm.*, 533 U.S. 431 (2001) (*Colorado II*). The Court held that party coordinated expenditure limits further the government's interest in combating corruption, by minimizing circumvention of limits on contributions to candidates. *See id.* at 457 ("Despite years of enforcement of the challenged limits, substantial evidence demonstrates how candidates, donors, and parties test the limits of the current law, and it shows beyond serious doubt how contribution limits would be eroded if inducement to circumvent them were enhanced by declaring parties' coordinated spending wide open.").

⁷⁷ *See, e.g., FEC v. Christian Coalition*, 52 F. Supp. 2d 45 (D.D.C. 1999) (denying the majority of plaintiff's charges of illegal coordinated spending by the Christian Coalition, on grounds that various contacts between high-level Coalition officials and the campaign staffs of certain federal candidates prior to the Coalition's expenditures on voter guides and get-out-the-vote telephone solicitations were insufficient to trigger a finding of coordination); *Democratic Senatorial Campaign Comm. v. FEC*, 745 F. Supp. 742, 745-46 (D.D.C. 1988) (denying plaintiff's suit to compel an FEC investigation of the use of common consultants as prohibited by coordination); *Stark v. FEC*, 683 F. Supp. 836, 839-40 (D.D.C. 1988) (denying plaintiff's suit to compel an FEC investigation of coordination between a political opponent and several associations and political action committees).

⁷⁸ The Commission's latest voter guide regulations prohibited *any* contact between voting guide corporate sponsors and candidates, with the sole exception that sponsors were allowed to direct questions to be included in the guide to the candidates in writing, and the candidates were allowed to respond in writing. 11 C.F.R. § 114.4(c)(4) & (5).

⁷⁹ *Clifton v. FEC*, 114 F.3d 1309 (1st Cir. 1997), *cert. denied*, 118 S. Ct. 1036 (1998).

⁸⁰ *Clifton*, 114 F.3d at 1314. In *Clifton*, a non-profit corporate sponsor contended that it had the *constitutional* right to engage in issue advocacy even while communicating with candidates beyond the minor exception permitted by the FEC's regulation – such as by contacting candidates directly and orally discussing their positions on various issues. In striking down the Commission's regulations, the court warned the FEC against inhibiting the public's ability to confer and discuss public matters with their legislative representatives or candidates for such offices:

[W]e think it is beyond reasonable belief that, to prevent corruption or illicit coordination, the government could prohibit voluntary discussions between citizens and their legislators and candidates on public issues. . . .

The court in *Clifton* did not indicate what kind of communications (if any) between issue advocacy sponsors and candidates will result in spending “authorized or requested” or “in cooperation with or with the consent of” a candidate, and thus might be considered coordinated expenditures with potential federal election law disclosure and limit implications. However, it did state that the Court’s coordination standard “imply[s] some measure of collaboration beyond a mere inquiry as to the position taken by a candidate on an issue.” *Id.* at 1311.

⁸¹ See, e.g. *Buckley*, 424 U.S. at 47 (defining independent expenditures as those made “totally independent of the candidate and his campaign”); *Colorado I*, 518 U.S. at 614 (stating that coordination would be found if there was “a general or particular understanding with a candidate”).

⁸² 52 F. Supp. 2d 45 (D.D.C 1999).

⁸³ By a vote of four to two, the FEC Commissioners decided not to appeal the district court’s decision in *FEC v. Christian Coalition*. See Statement for the Record: Chairman Scott E. Thomas & Comm’r Danny Lee McDonald Re: *FEC v. Christian Coalition*, available at <http://www.fec.gov/members/thomas/thomasstatement04.htm> (“We also believe the Commission should have appealed this decision to afford the courts an opportunity to settle, once and for all, the vital and significant issues raised in this litigation. The decision of a single district court cannot finally resolve these important issues.”)

⁸⁴ Letter from Janet Reno, United States Attorney General, to Sen. Orrin G. Hatch of 4/14/97 at 6-7 (Apr. 14, 1997).

⁸⁵ E.g., Robert Suro & Michael Grunwald, *Reno Sets 90-Day Clinton Probe—Process Could Lead to Independent Counsel*, WASH. POST, September 9, 1998, at A1.

⁸⁶ 52 F. Supp. 2d 45 (D.D.C 1999).

⁸⁷ *Id.* at 88.

⁸⁸ *Id.* The *Christian Coalition* court, however, found that the majority of interactions between the Christian Coalition and certain federal candidates at issue did not amount to what it described as being “coordinated” as a matter of law. *Id.* at 93.

⁸⁹ FEC investigations were ultimately dropped against The Coalition (MUR 4624—alleging that a coalition of major business groups coordinated their issue ad campaign with Republicans) in May of 2001 and against the AFL-CIO (MUR 4921—alleging that the AFL-CIO coordinated its issue ad campaign with Democrats) in July of 2000.

⁹⁰ See *supra*, note 2.

⁹¹ Kenneth P. Doyle, *Investigation of “Issue Ads” in ‘96 Has Not Blocked Airwaves This Year*, MONEY & POLITICS REPORT, Sept. 30, 1998, at 860.

⁹² *Id.*

⁹³ General Public Political Communications Coordinated With Candidates and Party Committees; Independent Expenditures Rule, 65 Fed. Reg. 76,138 (Dec. 6, 2000) (to be codified at 11 C.F.R. pts 100, 109-110). The FEC did not include in this regulation a definition of what constitutes coordination with candidates by political parties. The FEC intended to defer a rulemaking on that issue until after the U.S. Supreme Court rendered a decision on the constitutionality of party coordinated spending limits. In 2001, the Supreme Court upheld the validity of such spending limits in its *Colorado II* decision. *See supra* note 76.

⁹⁴ General Public Political Communications Coordinated With Candidates and Party Committees; Independent Expenditures Rule, 65 Fed. Reg. at 76,138 (“The Commission is promulgating new rules at 11 C.F.R. § 100.23 that define the term *coordinated general public political communication*. They generally follow the standard articulated by the United States District Court for the District of Columbia in the *Christian Coalition* decision.”). *See also Christian Coalition*, 52 F. Supp. 2d at 92.

⁹⁵ 11 C.F.R. § 100.23(c).

⁹⁶ General Public Political Communications Coordinated With Candidates and Party Committees; Independent Expenditures Rule, 65 Fed. Reg. at 76141 (“The argument that a communication must constitute express advocacy in order to fall within the definition of ‘expenditure’ in all circumstances [and thus be controlling for purpose of defining a ‘coordinated expenditure’] is not being addressed in this rulemaking.”).

⁹⁷ *Id.* at 76141.

⁹⁸ Bipartisan Campaign Reform Act (“BCRA”) §214 (b) & (c) (2002).

⁹⁹ *Id.* at §201

¹⁰⁰ *Id.* at §202, 2 U.S.C. § 441a(a)(7)(C).

¹⁰¹ BCRA is “severable”—meaning that a court may strike down certain provisions as unconstitutional without endangering the other provisions that it upholds as constitutional.

¹⁰² *Shays v. FEC*, No. 02-CV-1984, First Amended Complaint for Declaratory and Injunctive Relief at ¶ 6 (D.D.C. Jan. 21, 2003). Congressmen Shays and Meehan’s complaint focuses on the FEC’s soft money regulations, decision to exempt 501(c)(3) tax-exempt organizations from financing and disclosure requirements for “electioneering communications,” narrow content standard for coordination analysis, and interpretation of other aspects of the BCRA regulations.

¹⁰³ David Magelby, *Dictum without Data: the Myth of Issue Advocacy and Party Building*, 2001 CTR. FOR THE STUDY OF ELECTIONS & DEMOCRACY AT BRIGHAM YOUNG UNIVERSITY 8.

¹⁰⁴ Craig B. Holman & Luke P. McLoughlin, *Buying Time 2000: Television Advertising in the 2000 Federal Election*, BRENNAN CENTER FOR JUSTICE 29.

¹⁰⁵ *See McConnell v. FEC*, Civ. No. 02-0582 (D.D.C. May 2, 2003).

¹⁰⁶ See *McConnell v. FEC*, Judge Leon’s memorandum opinion, p. 89 (“[T]he factual record unequivocally establishes that [“sham” issue ads] have not only been crafted for the specific purpose of directly affecting federal elections, but have been very successful in doing just that.”); Judge Kollar-Kotelly’s memorandum opinion, p. 388 (“The Findings of Fact with regard to the evisceration of Section 441b resemble a mosaic with each piece of evidence building on the next, and when viewed as a whole, present a damaging portrait of corporations and labor unions using their general treasury funds to directly influence federal elections.”).

¹⁰⁷ See BCRA § 203.

¹⁰⁸ The “backup” restriction was included by Congress in the event a reviewing court found Congress’ primary definition of electioneering communication to be unconstitutional – as it was here. See BCRA § 201(a).

¹⁰⁹ *Id.*

¹¹⁰ *Id.* That phrase closely tracked the Ninth Circuit’s definition of when advocacy becomes express even when it does not contain the “magic words.” See discussion of *Furgatch*, 807 F.2d at 857, *infra* Section II.

¹¹¹ See *McConnell v. FEC*, Judge Leon’s memorandum opinion, p. 95.

¹¹² The brief *order* says, in relevant part:

Applicants have filed an application to vacate the stay entered by the District Court. After consulting with other members of the Court, I shall deny the application to vacate the stay entered by the District Court. An act of Congress is presumed to be constitutional, see *Bowen v. Kenrick*, 483 U.S. 1304 (1987), and the Bipartisan Campaign Reform Act should remain in effect until the disposition of this case by the Supreme Court. The application to vacate the stay is denied, and the application for an injunction pending appeal, which was contingent on my vacating the District Court's stay, is thereby rendered moot.