98-282 A
Updated May 15, 1998

CRS Report for Congress
Received through the CRS Web

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

L. Paige Whitaker
Legislative Attorney
American Law Division

Summary

Issue advocacy communications have become increasingly popular over the last two federal election cycles. Often these advertisements could be interpreted to favor or disfavor certain candidates, while also serving to inform the public about a policy issue. However, unlike communications that expressly advocate the election or defeat of a clearly identified candidate, the Supreme Court has ruled that issue ads are constitutionally protected First Amendment speech and cannot be regulated. Only speech containing express words of advocacy of election or defeat, also known as "express advocacy," can be regulated and therefore be subject to the requirements of the Federal Election Campaign Act (FECA). Currently, in the federal circuit courts, an apparent conflict exists as to *precisely* which type of communications constitute express advocacy versus which types of communications constitute First Amendment protected issue advocacy.

H.R. 2183 (Hutchinson/Allen) would regulate an advocacy communication (by requiring disclosure) that "mentions" or "includes (by name, representation, or likeness)" any House or Senate candidate. H.R. 3526 (Shays/Meehan) would regulate an advocacy communication (by subjecting it to full FECA coverage) that contains explicit language that in context could have no other reasonable meaning than the express advocacy of the election or defeat of a clearly identified candidate; or is a paid broadcast citing a candidate within 60 days of the election; or taken as a whole, with limited reference to external events, contains unambiguous advocacy.

Supreme Court Decisions

In the 1976 landmark decision, *Buckley v. Valeo*,[1] the Supreme Court distinguished between communications that expressly advocate the election or defeat of a clearly identified candidate and those communications that advocate a position on an issue. The

[1] 424 U.S. 1 (1976).

Court found that the latter type of communication is constitutionally protected First Amendment speech and that only speech containing express words of advocacy of election or defeat, also known as "express advocacy," could be subject to regulation.[2] Further, the Court found that express advocacy included certain words of advocacy of election or defeat, such as, "vote for," "elect," "support," "cast your ballot for," "Smith for Congress," "vote against," "defeat," or "reject."[3] These words are often referred to as the "magic words," required under *Buckley,* in order for a communication to constitute express advocacy.

More recently, in the 1986 decision of *Federal Election Commission v. Massachusetts Citizens for Life, Inc., (MCFL)*, the Supreme Court continued to distinguish between issue and express advocacy, holding that an expenditure must constitute express advocacy in order to be subject to the Federal Election Campaign Act (FECA) prohibition against corporations using treasury funds to make an expenditure "in connection with" any federal election.[4] In *MCFL* the Court ruled that a publication urging voters to vote for "pro-life" candidates, while also identifying and providing photographs of certain candidates who fit that description, could not be regarded as a "mere discussion of public issues that by their nature raise the names of certain politicians." Instead, the Court found, that the publication effectively provided a directive to the reader to vote for the identified candidates and ergo, constituted express advocacy.[5]

Federal Election Commission Regulations

In 1995, the Federal Election Commission (FEC) promulgated regulations defining express advocacy:

> Expressly advocating means any communication that--(a) Uses phrases such as "vote for the President," "re-elect your Congressman," "support the Democratic nominee," "cast you 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] *Id.* at 40-44.

[3] *Id.* at 44 n.52.

[4] 479 U.S. 238, 249-250 (1986). 2 U.S.C. § 441b(a) prohibits corporations from making expenditures in connection with any federal election.

[5] *Id.* at 249.

> (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.[6]

Circuit Court Conflict

Currently, it appears that the circuit courts have not *clearly* defined what constitutes express advocacy versus what constitutes issue advocacy. In *Federal Election Commission v. Furgatch*, the Ninth Circuit found that in order to constitute express advocacy, speech need not include any of the specific words set forth in *Buckley v. Valeo*.[7] Instead, the court of appeals presented a three part test for determining whether a communication is issue advocacy:

> First, even if it is not presented in the clearest, most explicit language, speech is 'express advocacy' for the present purposes if its message is unmistakable and unambiguous, suggestive of only one plausible meaning. Second, speech may only be termed 'advocacy' if it presents a clear plea for action, and thus speech that is merely informative is not covered by the Act. Finally, it must be clear what action is advocated. Speech cannot be 'express advocacy of the election or defeat of a candidate' when reasonable minds could differ as to whether it encourages a vote for or against a candidate or encourages the reader to take some other kind of action. [8]

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

In contrast, in *Maine Right to Life Committee v. Federal Election Commission, (MRLC)*, the First Circuit invalidated the "reasonable person" standard, which the Federal Election Commission has promulgated into regulations consistent with the *Furgatch* decision.[9] In *MRLC*, the court found that the Supreme Court in *Buckley* had drawn a "bright line" that errs toward "permitting things that affect the election process, but at all costs avoids restricting, in any way, discussion of public issues." According to the First Circuit, the advantage of this rigid approach, as presented in *Buckley*, is that it notifies a speaker or writer at the outset of what communication is regulated and what is not.[10] Consistent with *MRLC*, most recently in the 1997 case of *Federal Election Commission v. Christian Action Network*, the Fourth Circuit also found that the Supreme Court has "unambiguously" held that the First Amendment "forbids the regulation of our political speech under...indeterminate standards." Further, the court noted that the Supreme Court

---

[6] FEC definition of "Expressly advocating," 11 C.F.R. § 100.22 (1997).

[7] 807 F.2d 857 (9th Cir. 1987), *cert. denied*, 484 U.S. 850 (1987).

[8] *Id.* at 864.

[9] 914 F. Supp. 8, 12 (D. Maine 1996), *aff'd* 98 F.3d 1 (1st Cir. 1996), *cert. denied*, 118 S. Ct. 52 (1997). *See supra* text accompanying note 6 for the FEC regulation defining express advocacy.

[10] *Id.*

has held that express words advocating the election or defeat of a candidate are the "constitutional minima."[11]

Conclusion

The Supreme Court has distinguished between express advocacy and issue advocacy communications. According to the Court in *Buckley* and *Massachusetts Citizens for Life*, issue advocacy is First Amendment protected speech and cannot constitutionally be regulated. Communications that expressly advocate the election or defeat of a clearly identified candidate, however, can be subject to regulation. According to the First and Fourth Circuit Courts, in order to qualify as express advocacy, a communication must contain the "magic words" identified by the Supreme Court in *Buckley v. Valeo*. In contrast, the Ninth Circuit has ruled that, even if the "magic words" are not present, a communication could constitute express advocacy if it passes the "reasonable person" test. The Federal Election Commission regulations defining express advocacy are consistent with the Ninth Circuit opinion.

---

[11] 110 F.3d 1049, 1064 (4th Cir. 1997).