CAMPAIGN FINANCE REFORM SERIES

REGULATING ELECTIONEERING:
DISTINGUISHING BETWEEN "EXPRESS ADVOCACY" & "ISSUE ADVOCACY"

BY GLENN MORAMARCO

BRENNAN CENTER FOR JUSTICE
AT NYU SCHOOL OF LAW

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Introduction

For most of this century, one of the primary goals of federal campaign finance laws has been to restrict wealthy interests from exerting undue influence over the political process. Thus, in 1907, Congress passed legislation that prevented corporations from making financial contributions or expenditures in connection with any election for federal office. Forty years later, the ban was extended to labor unions, and in the early 1970s, Congress passed the Federal Election Campaign Act (FECA), which sought, among other things, to limit contributions by "fat cat" or wealthy donors to political parties and candidates.

Although these reforms did not completely remove the influence of "big money" from politics, the reforms nevertheless enjoyed some modest success in preventing the appearance of corruption that arises when wealthy donors and powerful corporations contribute directly and heavily to political campaigns. However, in recent years these reforms have lost their effectiveness, as wealthy donors, including prohibited contributors such as corporations and labor unions, have evaded the clear intent of the law.

In the 1996 federal elections, corporations, labor unions, political parties, and advocacy groups spent an estimated $135 to $150 million in advertisements that were wholly unregulated by the federal government because, the sponsors of the ads claimed, they were engaged in "issue advocacy" rather than "express advocacy." However, rather than educating the public broadly about issues, the typical "issue ad" mentioned a single candidate, targeted the segment of the public eligible to vote for that candidate, began to run when an election was imminent, and ended abruptly on Election Day. The following is an example of an advertisement, run during the 1996 campaign, which the sponsor claimed was an unregulated "issue ad" rather than a regulated electioneering ad:

> It's our land; our water. America's environment must be protected. But in just 18 months, Congressman Ganske has voted 12 out of 12 times to weaken environmental protections. Congressman Ganske even voted to let corporations continue releasing cancer-causing pollutants into our air. Congressman Ganske voted for the big corporations who lobbied these bills and gave him thousands of dollars in contributions. Call Congressman Ganske. Te ll him to protect America's environment. For our families. For our future.

The sponsors of this advertisement claim it is an "issue ad" because, rather than urging viewers to "vote against" or "defeat" Congressman Ganske, the ad merely urges them to call Congressman Ganske. Surgically excising explicit words of advocacy, such as "elect" or "defeat," they claim, converts blatant electioneering into mere "issue advocacy," which is wholly unregulated and immune from federal disclosure laws.

Of course, to the eyes of the voting public, the above advertisement is indistinguishable from electioneering ads that Congressman Ganske's opponent would run. This ad and the vast majority of so-called "issue ads" that appeared during the 1996 federal election season had the unmistakable intent of encouraging the viewer to vote for or against

particular candidates. Although there are no reliable estimates concerning the dollar amount spent on "issue advocacy" in state and local races, it is nevertheless clear that the problem is not limited to federal elections. The presentation of electioneering ads under the guise of "issue advocacy" has given rise to a separate parallel track of wholly unregulated electioneering, a development that threatens to make a mockery of the entire scheme of federal and state campaign finance regulation.

This paper reviews the history of the rise of "issue advocacy," describes the current legal landscape, and explains some of the leading regulatory approaches for defining "express advocacy" and "issue advocacy" in a more realistic and constitutionally-permissible manner. ❑

"Issue Advocacy" and "Express Advocacy" -- The Paradigm Cases

The phrase "issue advocacy," like the phrase "express advocacy," appears nowhere in the statutes that comprise federal campaign finance law. Rather, the concepts were created by the Supreme Court in *Buckley v. Valeo*, 424 U.S. 1 (1976), which held that political advertisements that expressly advocate the election or defeat of a candidate are subject to federal regulation, but political advertisements that merely relate to political issues (without expressly advocating the election or defeat of a candidate) are not subject to regulation.

Relying on the *Buckley* decision, some lower federal court decisions have adopted a very narrow, bright-line test -- the "magic words" test. Under the "magic words" test, regardless of the intent of the speaker or the effect of the advertisement on the listener, an advertisement that fails to use "magic words" such as "elect," "defeat," "support," "reject" (or nearly identical synonyms) is considered "issue advocacy" rather than "express advocacy." However, the proper legal test for defining "express advocacy" and "issue advocacy" remains a hotly contested legal issue. Before that issue can be addressed, it is necessary to understand what it is the law is attempting to differentiate between when it uses the terms "issue advocacy" and "express advocacy."

The paradigms are relatively easy to describe. A paradigmatic "issue advocacy" advertisement: (1) addresses an issue of national or local political importance, (2) discusses only the issue and not the actions of particular political actors in regard to that issue, and (3) is broadcast at a time when legislative or executive action on the issue may be pending or contemplated, but no election is imminent.

Recent examples of the "issue advocacy" paradigm are advertisements that labor unions ran in late 1993, when the Senate was considering ratification of the North American Free Trade Agreement (NAFTA):

> In Washington, big corporations and lobbyists are spending millions making false claims about the NAFTA trade deal. But across America, people going to factories, to farms, to offices know it means jobs going south. Economists who've studied job loss say we'll lose up to 500,000 jobs to NAFTA. Americans want to expand trade, but not by trading away their jobs. NAFTA: It's a bad deal for America, and Americans know it.

When these anti-NAFTA advertisements were broadcast, there was no national election pending, and the primary purpose of the advertisements was to sway public and Congressional opinion on this important public policy choice.

Similarly, in late 1993 and early 1994, when President Clinton proposed comprehensive national health care reform, the Health Insurance Association of America ran a series of paradigmatic "issue advocacy" radio and television spots. The advertisements featured an ordinary American couple -- Harry and Louise -- discussing their fears about the proposed health care reform package. Again, there were no national elections pending, and the advertisements were intended to sway public opinion against health care reform and convince Congress to reject the President's health care initiatives.

A paradigmatic "express advocacy" advertisement: (1) names one or more individual candidates for public office, (2) attributes one or more actions or beliefs to the candidate, (3) appears in close proximity to an election, and (4) explicitly urges the viewer to vote either for or against the candidate. The following advertisement is an example of "express advocacy":

> Senator Smith is standing in the way of reform. Voting against curbs on frivolous lawsuits that cost jobs. What's worse, Senator Smith's made a career of putting the rights of criminals ahead of the rights of victims. Voting to deny employers the right to keep convicted felons out of the workplace. That's wrong, that's liberal, but that's Senator Smith. On Tuesday, vote against Senator Smith.

The majority of political advertisements that appear during an electoral season fall in between these paradigms. The decision to classify an advertisement as either "express advocacy" or "issue advocacy" has enormous practical implications. If the communication is deemed to be "express advocacy," then three consequences follow under federal election law. First, the communication is subject to disclosure rules. FECA requires that speakers engaging in "express advocacy" disclose the sources of their money and the nature of their expenditures. Second, the communication is subject to source restrictions. FECA bars certain speakers, such as corporations and unions, from spending money to engage in "express advocacy." Third, the communication is subject to fund-raising restrictions. FECA limits not only the sources from which speakers may raise their money, but also the size of contributions they may receive.

If, however, the communication is deemed to be "issue advocacy," then the communication is not, and indeed cannot constitutionally be, subject to regulation, including source restrictions, fund-raising restrictions, or even public disclosure. Thus, it is vitally important that campaign finance law be able to distinguish intelligently between "issue advocacy," which is intended to educate the public about important public issues, and "express advocacy," which is intended to persuade a voter to support or defeat a particular candidate at the polls. ❑

The Supreme Court Invents "Issue Advocacy"

In 1974, on the heels of President Nixon's resignation and public hearings on the Watergate scandals, Congress built on reforms begun initially in 1971, and enacted FECA -- a comprehensive set of campaign reforms that established: (1) contribution limits for donations to politicians and political parties; (2) expenditure limits that applied to private parties, political parties, and those seeking public office; (3) disclosure rules for both contributions and expenditures; and (4) public financing of presidential elections. These reforms, which were set to go into effect with the upcoming 1975-76 election cycle, were immediately challenged in the courts.

The Supreme Court reviewed the constitutionality of FECA in *Buckley v. Valeo*, 424 U.S. 1 (1976). In general, the Court upheld the disclosure rules and the public financing of presidential elections. However, on the issue of limits on campaign contributions and expenditures, the Court issued a split decision. The Court upheld the limits on contributions as necessary to further the government's compelling interest in avoiding corruption or the appearance of corruption. However, the Court struck down the limits on expenditures as violating a candidate's First Amendment rights without serving a compelling government interest.

FECA attempted to regulate not only candidate and party expenditures, but also expenditures by private parties. One section of FECA imposed a $1,000 limit on expenditures "relative to a clearly identified candidate." Another section of FECA imposed reporting requirements for persons who make independent expenditures of over $100 "for the purpose of influencing" a federal election. The Court in *Buckley* concluded that these regulations presented potential problems both of vagueness and overbreadth.

Under First Amendment "void for vagueness" jurisprudence, the government cannot punish someone without providing a sufficiently precise description of what conduct is legal and what is illegal. A vague or imprecise definition of "express advocacy" might serve to "chill" some political speakers who, although they desire to engage in discussions of political issues, may be afraid that their speech could be construed as electioneering. The Court in *Buckley* found that the FECA regulations, which applied to expenditures "relative to a clearly identified candidate" and "for the purpose of influencing an election" were not sufficiently precise to provide the certainty necessary for those wishing to engage in political speech.

Similarly, the overbreadth doctrine in First Amendment jurisprudence is concerned with a regulation that, however precise, sweeps too broadly and reaches constitutionally protected speech. In *Buckley*, the Court was concerned that a regulation that applies to any expenditure that is done "for the purpose of influencing" a federal election or that is "relative to a clearly identified candidate" could encompass not only direct electioneering, but also protected speech on issues of public and political importance. For example, the Harry and Louise health care advertisements, which were intended to be "issue advocacy" communications, might nevertheless have the effect of *influencing* viewers to oppose Democrats in general or President Clinton in particular. If the FECA regulations were interpreted to reach all expenditures that merely mention a political candidate or could influence the outcome of a federal election, the sweep would be broad indeed.

In order to avoid these vagueness and overbreadth problems, the Court held that the government's regulatory power under FECA would be construed to reach only funds used for communications that "expressly advocate" the election or defeat of a clearly identified candidate. Thus, it was the Supreme Court, and not the Congress, that invented the distinction between "express advocacy," which may be regulated, and "issue advocacy," which cannot be regulated. Although the words "express advocacy" and "issue advocacy" appear nowhere in the statutory language, they are now an important part of the statutory and constitutional federal election law framework.

The "Magic Words" Test

In an important footnote in the *Buckley* opinion, the Supreme Court provided some guidance on how to decide whether a communication is "express advocacy" or "issue advocacy." The Court stated that its construction of FECA would limit the reach of the statute "to communications containing express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'" It is this footnote from *Buckley* that has led some to conclude that the Supreme Court has adopted a "magic words" test for distinguishing between "express advocacy" and "issue advocacy." Under the "magic words" approach, unless a communication contains one of the words listed by the Supreme Court in this footnote, or a near-perfect synonym, the communication is "issue advocacy," regardless of the intent of the speaker or the likely reaction of any reasonable listener.

Proponents of the "magic words" approach interpret it strictly. Thus, the following advertisement, even if aired within days of an election, would be considered "issue advocacy" by strict constructionists:

> Congresswoman Smith voted to increase income taxes, sales taxes and capital gains taxes by over a billion dollars. Then she voted against the largest property tax cut in history. Is she: (a) a liberal, (b) a big spender, (c) out of touch, or (d) all of the above? If you said "(d) all of the above," you've made the right call. Make another right call to Congresswoman Smith. She never met a tax she didn't hike.

Because the tag line on the ad says "call" Congresswoman Smith rather than "defeat" Congresswoman Smith, it would be deemed an "issue ad" under the strict "magic words" approach. If adopted by the courts, the "magic words" approach, with its narrow and wooden definition of "express advocacy" would create a potentially massive loophole in the campaign finance laws that would allow advocacy groups and prohibited donors to spend unlimited resources on unregulated electioneering advertisements like the one cited above.

The Appellate Courts Disagree About How To Define "Express Advocacy"

The Supreme Court has only once applied the "express advocacy" test to a concrete set of facts, and that case, *FEC v. Massachusetts Citizens for Life, Inc*., 479 U.S. 238 (1980), has aspects that both support and undermine the "magic words" approach. In that case, Massachusetts Citizens for Life, a nonprofit corporation, published a "Special Election Edition" of its newsletter which urged its readers to "vote pro-life" in an upcoming primary election, listed every candidate for state and federal office, and identified each candidate's view on pro-life issues, together with a disclaimer stating that the newsletter did not endorse any particular candidate.

The Supreme Court held that, despite the disclaimer, the pro-life newsletter contained "express advocacy." The Court began its analysis by returning to *Buckley*, and reiterating that a finding of "express advocacy" depends upon the use of language such as "vote for," "elect," or "support." However, despite the fact that the newsletter used the explicit phrase "vote pro-life," the Court did not limit its analysis to the mere presence or absence of these "magic words." Rather the Court examined the newsletter as a whole and rested its decision on the "essential nature" of the message and what it conveyed "in effect." Thus, *Massachusetts Citizens for Life* can be read as supporting a test for "express advocacy" that looks beyond the mere presence or absence of "magic words" and considers the context and true intent of a communication.

Because the Supreme Court has not definitively settled the issue of how to differentiate between advertisements that constitute "issue advocacy" and advertisements that constitute "express advocacy," the issue has been left to the lower federal courts. The federal courts of appeals have split in their interpretation of "issue advocacy."

One of the earliest decisions in this area is *FEC v. Furgatch*, 807 F.2d 857 (9th Cir. 1987). In that case a private citizen, Harvey Furgatch, placed a full page advertisement in the *New York Times* and the *Boston Globe* that was critical of President Carter during the week preceding the 1980 election. Furgatch's advertisement stated that President Carter was "cultivat[ing] the fears, not the hopes, of the voting public," and "degrading the electoral process and lessening the prestige of the office." Furgatch's advertisement accused President Carter of trying "to buy entire cities, the steel industry, the auto industry, and others with public funds" during the election campaign. Finally, the advertisement warned that "[i]f 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."

The FEC sued Furgatch for, among other things, failing to report his expenditures on these newspaper advertisements. The United States Court of Appeals for the Ninth Circuit held that, even though Furgatch's advertisements did not use any of the "magic words" listed in *Buckley*, they nevertheless expressly advocated the defeat of President Carter, and thus had to be reported to the FEC as independent expenditures.

According to the appellate court, the "magic words" test urged by Furgatch would preserve the First Amendment interest in unfettered expression only at the expense of eviscerating FECA. Nominally independent campaign spenders could too easily circumvent the Act by simply avoiding certain key words while conveying a message that is unmistakably an electioneering message. The Court held that a communication is "express advocacy" when the communication, when read as a whole and with limited reference to external events, is reasonably susceptible to interpretation only as an exhortation to vote for or against a specific candidate.

Despite this important early ruling by the United States Court of Appeals for the Ninth Circuit, the recent trend among federal appellate courts has been to adopt the "magic words" approach for "express advocacy." For example, in *FEC v. Christian Action Network, Inc.*, 110 F.3d 1049 (4th Cir. 1997), the FEC brought an enforcement action against the Christian Action Network, alleging that the following advertisement, which was aired in the weeks leading up to the November 3, 1992 presidential election, should not have been funded with corporate money because it expressly advocated the defeat of President Clinton and Vice-President Gore:

Bill Clinton's vision for America includes job quotas for homosexuals, giving homosexuals special civil rights, allowing homosexuals in the armed forces. Al Gore supports homosexual couples' adopting children and becoming foster parents. Is this your vision for a better America? For more information on traditional family values, contact the Christian Action Network.

Despite the obvious intent of this television commercial, the United States Court of Appeals for the Fourth Circuit, in very strong language, criticized the FEC's position that the ad, which failed to use "magic words" such as "defeat" or "vote against," was expressly advocating the defeat of Clinton and Gore. The court found that the Supreme Court had limited the FEC's regulatory authority to communications containing explicit words urging election or defeat of candidates. ❑

The Real World Practices

Corporations, labor unions, political parties, and advocacy groups have seized upon the "magic words" approach adopted by some courts and have engaged in multi-million dollar electioneering campaigns under the guise of "issue advocacy." A recent report by the Annenberg Public Policy Center at the University of Pennsylvania examined the "issue advocacy" expenditures of 27 organizations in the 1995-96 election cycle (groups such as the AFL-CIO, the NRA, the NEA, and the Sierra Club) and found that these 27 organizations alone spent an estimated $135 million to $150 million in election-related advertising. This was at a time when all federal candidates for office combined (President, Senate, and House of Representatives) spent an estimated $400 million on advertising. Indeed, in some races, "issue advocacy" spending by interested groups exceeded the advertising expenditures of the candidates themselves. As the Annenberg Center noted, this level of spending by unregulated groups is "unprecedented, and represents an important change in the culture of campaigns."

The "issue advocacy" advertisements sponsored by these organizations are virtually indistinguishable from the campaign commercials put out by the candidates. For example, during the 1996 election season, Citizens for the Republic Education Fund, a tax-exempt organization founded by Lyn Nofziger on June 20, 1996, spent hundreds of thousands of dollars on "issue ads" that were intended to help Republican Senate candidates. Citizens for the Republic Education Fund aired the following television commercial against Arkansas Democratic Senate candidate Winston Bryant:

> Senate candidate Winston Bryant's budget as Attorney General increased 71%. Bryant has taken taxpayer funded junkets to the Virgin Islands, Alaska, and Arizona. And spent about $100,000 on new furniture. Unfortunately, as the state's top law enforcement official, he's never opposed the parole of any convicted criminal, even rapists and murderers. And almost 4,000 Arkansas prisoners have been sent back to prison for crimes committed while they were out on parole. Winston Bryant: government waste, political junkets, soft on crime. [Superimposed: Call Winston Bryant and tell him to give the money back.]

Because the ad urges the viewer to "call Winston Bryant," rather than vote against him, the Citizens for the Republic Education Fund considered this an issue advertisement, not subject to federal regulation, rather than "express advocacy," which would have been subject to spending limits and disclosure.

Similarly, the Democratic National Committee in 1996 ran an advertisement in which the announcer states:

> Protect families. For millions of working families, President Clinton cut taxes. The Dole/Gingrich budget tried to raise taxes on eight million. The Dole/Gingrich budget would've slashed Medicare $270 billion, cut college scholarships. The President defended our values, protected Medicare. And now a tax cut of $1,500

> a year for the first two years of college, most community colleges free. Help adults go back to school. The President's plan protects our values.

Because the advertisement never used the magic words, "vote for" Clinton or "defeat" Dole, the Democratic National Committee considered this an issue ad that did not expressly advocate the reelection of President Clinton or the defeat of Senator Dole.

The "magic words" approach is a loophole that threatens to swallow the entirety of federal campaign financing law. The bans on corporate and labor union expenditures are rendered meaningless when corporations and labor unions run multi-million dollar advertising campaigns that target individual legislators for defeat under the banner of "issue advocacy." Similarly, the $5,000 limit on contributions to PACs, which was upheld by the Supreme Court, is rendered meaningless when individuals contribute sums substantially in excess of that amount in order to fund multi-million dollar advertising campaigns that attempt to influence the outcome of specific electoral races. And the expenditure limits which the presidential candidates voluntarily agreed to abide by as a condition for receiving public matching funds are rendered meaningless when the national party committees run unregulated advertising campaigns that mirror those of their nominees. ❑

"Magic Words" and First Amendment Jurisprudence

The federal court decisions that reject the Ninth Circuit approach in *Furgatch* and adopt a "magic words" test for "express advocacy" construe *Buckley* as imposing restrictions that are beyond those imposed in any other First Amendment context. In every area of First Amendment jurisprudence, courts are required to engage in delicate line drawing between protected speech and speech that properly may be regulated. For example, in another election-related context -- union representation elections -- employers are permitted to make "predictions" about the consequences of unionizing, but they may not issue "threats." Although the courts have developed an extensive jurisprudence to distinguish between "predictions" and "threats," there is no bright-line test, and an employer could harbor considerable uncertainty as to whether the words he is about to utter are either protected under the First Amendment or sanctionable as illegal advocacy.

Similarly, in libel cases involving the press, an area of core First Amendment concern, the Court has eschewed the simple bright-line approach of imposing liability based on the truth or falsity of the statement published. Instead, the Court utilizes a multi-factor analysis that examines, among other things, whether the subject of the statement is a public figure, whether the statement involves matters of public concern, whether the speaker acted with reckless disregard for the truth or falsity of the statement, and whether a reasonable reader would perceive the statement as stating actual facts or merely rhetorical hyperbole.

In no area of First Amendment jurisprudence has the Court mandated a wooden, mechanical test that ignores context and purpose. In no area of First Amendment jurisprudence has the Court held that the only constitutionally permissible test is one that would render the underlying regulatory scheme unenforceable. It is doubtful, therefore, that the Supreme Court in *Buckley* intended to single out election regulations as requiring a mechanical, formulaic, and utterly unworkable test.

Moreover, many of those courts that have adopted the "magic words" approach have applied it uncritically to all of the various different types of possible election law restrictions, and have thereby failed to grapple with the important distinction in First Amendment jurisprudence between restrictions on speech and mere disclosure rules. In *Buckley*, the Court made it clear that the governmental interests that justify disclosure of election-related spending are broader than the governmental interests that justify prohibitions or restrictions on election-related speech. When legislation does not proscribe speech, there is less of a concern about either chilling or vagueness. Thus, even if certain advertisements cannot be prohibited because they are arguably within the ambit of "issue advocacy," it does not follow that the speaker cannot be required to disclose the funding sources for those ads. If a legislature were to pass a law requiring, for example, that the source of funds be disclosed for every communication whose cost exceeds $10,000 and mentions a specific candidate for public office within 60 days of an election, such a law might well be upheld regardless of how "express advocacy" and "issue advocacy" are defined in other contexts.

Finally, and most importantly, even if *Buckley* should be read as limiting the current

regulatory reach of FECA to advertisements using "magic words," that holding would not foreclose future legislatures, either state or federal, from adopting new legislation that regulates electioneering or defines "express advocacy" more broadly. The decision to narrowly construe a statute to save it from potential vagueness and overbreadth problems does not prevent further legislative refinements that eliminate those problems. For example, in the obscenity context, the Supreme Court in *Miller v. California*, 413 U.S. 15 (1973), provided specific examples of "hard core" sexual conduct that could be prohibited under state or federal obscenity laws. In a companion case, *United States v. 12 200-Ft. Reels of Super 8mm. Film*, 413 U.S. 123 (1973), the Court stated that, if necessary to eliminate potential vagueness and overbreadth problems in federal obscenity statutes, the Court was prepared to narrowly construe such statutes to reach only those specific examples of "hard core" sexual conduct specifically delineated in *Miller v. California*. However, the Court made it clear that Congress remained free to enlarge upon this narrowing construction and go beyond the specifically enumerated "magic acts." *12 200-Ft. Reels of Super 8mm. Film,* 413 U.S. at 130 n.7 ("Of course, Congress could always define other specific 'hard core' conduct.")

This same reasoning doubtless applies in the election law context. In *Buckley*, the Court was confronted with FECA regulations that purported to regulate all expenditures that were "relative to a clearly identified candidate" and "for the purpose of influencing" an election -- two very broad and imprecise phrases. When the Court chose to save FECA from constitutional invalidity by narrowly construing these phrases to reach only "express advocacy," it was forced to invent its own definition of "express advocacy" without any legislative language to use as a guide. Even if the Court intended to limit "express advocacy" in FECA to "magic words," future legislative attempts to regulate electioneering activity are not necessarily bound by that limitation. Future legislatures are, of course, bound by the vagueness and overbreath concerns that undergird the *Buckley* decision. But as long as the legislation is both sufficiently narrow and precise, future legislatures are free to adopt a more refined definition of "express advocacy" and regulate electioneering activity in a manner that accords with political reality. *See Miller v. California*, 413 U.S. at 25 (the function of the Court is not to propose regulatory schemes, but instead to await concrete legislative efforts while providing the general principles for acceptable constitutional definitions). ❑

Recent Attempts To Better Define "Express Advocacy"

Spurred in part by the abuses of the last election cycle, where corporations, labor unions, political parties, and advocacy groups spent hundreds of millions of dollars on advertisements that they claimed were mere "issue ads" despite a clear electioneering intent, the government and reformers inside and outside of government have attempted to codify a definition of "express advocacy" that goes beyond the "magic words" approach and better reflects real world electioneering practices. Prominent among the recent attempts to define "express advocacy" are two different general approaches: (1) a "reasonable person" approach, which has been adopted by the FEC, and (2) a delimited time-period approach, which has been proposed in the Senate. These two approaches demonstrate the tension inherent in any attempt to satisfy simultaneously the Supreme Court's dual concerns regarding vagueness and overbreadth. The "reasonable person" approach tends to tilt in favor of increased breadth of coverage, but sacrifices some clarity. The "delimited time-period" approach offers clarity, but raises issues of potential over- and under-breadth of coverage. Either of these two approaches, however, is a clear improvement over the unworkable "magic words" approach.

The FEC Adopts a "Reasonable Person" Approach

The FEC promulgated a regulation which incorporated a "reasonable person" approach into its definition of "express advocacy." Under the regulation, "express advocacy" is defined to include not only those communications which contain "magic words," but also communications that "[w]hen taken as a whole and with limited reference to external events such as the proximity to the election, could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidates(s) . . . ." The regulation further states that, under its reasonable person approach, the electoral portion of the communication must be "unmistakable, unambiguous, and suggestive of only one meaning."

The definition of "express advocacy" contained in this FEC regulation attempts to codify the expanded definition of "express advocacy" that met with the court's approval in *Furgatch*. It goes beyond "magic words" by incorporating a "reasonable person" standard that applies in only a very narrow set of circumstances. In short, if "magic words" are not used, the advertisement is "express advocacy" only if the electioneering purpose of the advertisement is unmistakable, unambiguous, and so clear that reasonable minds simply could not differ. Thus, the regulation attempts to bring within the regulatory sphere some of the most egregious instances of electioneering that occur without the use of "magic words."

Despite its narrow reach, this regulation was immediately challenged in the courts as an unconstitutional encroachment on free speech. In *Maine Right to Life Committee, Inc. v. FEC*, 914 F. Supp. 8 (D. Me. 1996), a non-profit membership corporation brought suit in federal district court in Maine, arguing that this definition of "express advocacy" was beyond the FEC's authority because it was both too broad and unconstitutionally vague. The trial court concluded that this FEC definition of "express advocacy," although derived from the appellate language in the *Furgatch* opinion,

goes further than permitted by Supreme Court precedent. In a thoughtful opinion, the trial court nevertheless showed great sympathy for the FEC's regulatory attempt:

> [T]he 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. . . . Language, moreover, is an elusive thing. The topic here is communication and it is commonplace that the meaning of words is not fixed, but depends heavily on context as well as the shared assumptions of speaker and listener. . . . One does not need to use the explicit words "vote for" or their equivalent to communicate clearly the message that a particular candidate is to be elected. [This] appears to be a very reasonable attempt to deal with these vagaries of language and, indeed, is drawn quite narrowly to deal with only the "unmistakable" and "unambiguous," cases where "reasonable minds cannot differ" on the message. "Limited reference to external events" is hardly a radical idea. It is required even by the *Buckley* terminology. After all, how does one know that "support" or "defeat" means an election rather than an athletic contest or some other event without considering the external context of a federal election with specific candidates?

Despite these words of endorsement, the court reluctantly concluded that *Buckley* and *Massachusetts Citizens for Life* required the more rigid "magic words" approach. The court believed that the Supreme Court endorsed a bright line test in order to protect free speech, regardless of the effect on enforcement of the election laws. As the court noted, "[t]he 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." Thus, although the court candidly indicated that it believed that "the FEC had the better of the argument on its regulation so far as the logic of language is concerned," it nevertheless concluded that *Buckley* had foreclosed anything other than the narrow "magic words" test.

This trial court decision was affirmed by the United States Court of Appeals for the First Circuit. Because that decision conflicts with the decision by the United States Court of Appeals for the Ninth Circuit in *Furgatch*, the government asked the Supreme Court to review the case and resolve the split among the appellate courts. The Supreme Court declined to consider the case, and thus the split remains.

Senators Propose a Delimited Time Period Approach

In response to criticism that the "reasonable person" approach and other similar tests that involve subjective criteria are too vague, some reformers have sought to define "express advocacy" through clearly delimited criteria that expand upon the "magic words" approach. Prominent among these types of reforms is a "delimited time period" approach. Under this approach, any advertisement that airs within a specified period of time prior to an election is deemed "express advocacy" if it refers to a specifically identified candidate.

In the McCain-Feingold Bill introduced in the Senate in 1997, for example, the definition of "express advocacy" included not only

communications that contain "magic words," but also communications that advocate the election or defeat of a candidate by "referring to one or more clearly identified candidates in a paid advertisement . . . within 60 calendar days preceding the date of an election. . . ." Under this delimited time period approach, a potential speaker knows with certainty which advertisements will be deemed "express advocacy," since the criteria -- explicitly referring to a candidate and the date on which the advertisement is communicated -- are clear and objectively determined.

The principal objection leveled against the delimited time period approach is that it is potentially overbroad. One can imagine an advertisement which, although its intent is to influence the debate on an issue, mentions or depicts a political candidate who is strongly identified with that issue. Thus, for example, opponents of the Vietnam War might desire to air an anti-war advertisement that depicts President Johnson, or opponents of some more recent congressional initiative might desire to produce advertisements that depict Newt Gingrich.

Despite these theoretical possibilities, the delimited time period approach is based on the common-sense recognition that, in the real world, advertisements that depict candidates and are run shortly before an election are almost invariably intended to influence the election or defeat of the depicted candidate. In fact, the public rarely sees commercials depicting a politician or political candidate except immediately before an election, and those commercials are broadcast in that time frame precisely because they are intended to influence the outcome of the imminent election.

Under McCain-Feingold's delimited time period approach, a person who desires to produce an issue advertisement is given clear notice of what is and is not permissible. Advertisements that simply discuss issues, without naming candidates are always permissible. Advertisements that are communicated more than 60 days prior to an election must simply avoid the use of "magic words." Advertisements that are communicated within 60 days of an election can discuss issues, as long as the ads do not depict a particular candidate.

The commercials listed below in the column on the left, all of which were broadcast during the 1996 election, were considered issue ads by their sponsors. Under the McCain-Feingold proposal, these advertisements would all be recharacterized as "express advocacy." However, the advocacy organizations, if their true intent is to educate the public rather than influence the outcome of a specific election, could easily reformulate these ads as shown in the column on the right, and run those advertisements any time, even within days of an election. Additionally, because the ads in the column on the left fail to use "magic words," under the McCain-Feingold proposal they can be broadcast without change as "issue ads" when an election is more than 60 days away. ❑

EXPRESS ADVOCACY

Announcer: They worked hard all their lives. They're our neighbors, our friends, our parents. They earned Social Security and Medicare. But Congressman X voted five times to cut their Medicare. Even their nursing home care. To pay for a $16,892 tax break he voted to give the wealthy. Congressman X, it's not your money to give away. Don't cut their Medicare. They earned it.

Announcer: Some things are wrong. They've always been wrong. And no matter how many politicians say they're right, they're still hateful and wrong. Stand up for the right values. Call Representative X today. Ask him why he voted against the Flag Protection Amendment. Against the values we hold dear. The Constitutional Amendment to safeguard our flag, because America's values are worth protecting.

Announcer: Election year. There'll be a lot flying through the air. But when you look through the mud, you see what Congressman X has helped to achieve: The first real cut in spending since World War II. 270 wasteful government programs eliminated. Historic welfare reform that requires recipients to work for their benefits. Why would we ever go back to the past? When you see the mud, remember the accomplishments. Call Congressman X and tell him to keep on reforming our government.

ISSUE ADVOCACY

Announcer: They worked hard all their lives. They're our neighbors, our friends, our parents. They earned Social Security and Medicare. Now *Congress* wants to cut their Medicare, even their nursing home care. Why? To pay for a $16,892 tax break for the wealthy. *Write or phone your Congressman and tell him* not to cut Medicare. They earned it.

Announcer: Some things are wrong. They've always been wrong. And no matter how many politicians say they're right, they're still hateful and wrong. Stand up for the right values. Call *your Congressman and ask him to support* the Flag Protection Amendment. *Get Congress to support* the values we hold dear. The Constitutional Amendment to safeguard our flag, because America's values are worth protecting.

Announcer: Election year. There'll be a lot flying through the air. But when you look through the mud, you see what *Congress* has achieved: The first real cut in spending since World War II. 270 wasteful government programs eliminated. Historic welfare reform that requires recipients to work for their benefits. Why would we ever go back to the past? When you see the mud, remember the accomplishments. *Call your Congressman and urge* him to keep on reforming our government.

As the above examples illustrate, it is possible to define "express advocacy" in a manner that both upholds the intent of the federal election laws (by preventing blatant electioneering with unregulated expenditures), while providing clear notice to advocacy groups concerning the limits imposed on "issue advocacy" when an election is imminent. Although the delimited time period approach has a broader sweep than some advocacy groups might ideally desire, it nevertheless provides a very wide berth for true issue-oriented campaigns, even when they are conducted in the midst of a federal election. The rule of thumb would be, if you are interested in advancing an issue, rather than a candidate, then stick to the issue being advanced, rather than the political personalities who may be associated with the issue, at least when an election is imminent.

Additional Approaches and Refinements

The "reasonable person" approach and the delimited time-period approach do not, of course, exhaust the spectrum of possible reforms that can provide the requisite level of certainty without prohibiting too much non-electioneering speech. Another model for reform is an intent-based approach, which attempts to regulate advertisements based on the speaker's actual intent. Under this approach, a statute might prohibit, for example, advertisements in which the speaker's "primary purpose" is to influence voters to elect a clearly identified candidate.

The intent-based approach raises no serious concerns in regard to overbreadth — it is narrowly-tailored to reach only those advertisements that are truly intended to be electioneering ads. Neither is it impermissibly vague, for if there is one thing that any individual speaker surely knows, it is his or her own purpose or intent. Of course, the problem arises at the enforcement stage, since although an individual speaker will know his or her own intent, that intent cannot be objectively ascertained by a fact-finder. In practice, the enforcement of an intent-based approach would likely mirror the enforcement of a "reasonable person" approach. A person is presumed to intend the normal consequences of his actions, and regulators would assume that the intent of an advertisement can be discerned from how the ad is received by the viewing public.

A regulatory solution to defining "express advocacy" and "issue advocacy" can adopt one or more of these approaches, in whole or in part. There are also a multitude of refinements that can be made to any of these approaches. For example, one could add a dollar threshold, adopt various targeting requirements, adopt higher burdens of proof, use legal presumptions, or allow limited exemptions, to name just a few possibilities.

A dollar threshold, for example, is useful for insuring that the election law does not inhibit *de minimis* electoral communications and likewise does not become a trap for small and unsophisticated groups not engaging in a significant amount of electioneering. Thus, a statute could specify that expenditures by an individual or organization during an election cycle that, in the aggregate, amount to less than perhaps $10,000 are not subject to regulation.

A separate targeting requirement is helpful in ensuring that the regulations are narrowly tailored to reach advertisements that are in fact intended to influence the outcome of a particular election. Thus, a regulation could prohibit communications that refer to a clearly identified candidate and are "targeted to or substantially distributed in the geographic area in which the

candidate is seeking election." Under this refinement, if the Sierra Club, for example, wants to educate the American public concerning the anti-environmental record of the Speaker of the House, it can do so during an election year if the ads are run nationally rather than targeted to the media market for the Speaker's district.

Another method for addressing potential overbreadth problems in the "reasonable person" or intent-based approaches is to raise the standard of proof required for an exercise of regulatory power. For example, there is a world of difference between regulating an advertisement which a reasonable person could interpret as containing an electioneering message, and regulating advertisements that no reasonable person could take as containing anything other than an electioneering message. The first approach sweeps in all ads that are arguably electioneering, while the latter approach sweeps in only those ads that are indisputably electioneering. Similarly, an intent-based approach could require a regulator to present "clear and convincing" evidence of a speaker's electioneering intent before finding an election law violation, a standard which would reduce the likelihood of government over-regulation of speech that is close to the line.

The use of presumptions provides another potential refinement that can serve to address the overbreadth issue in regard to any of these approaches. For example, an intent-based approach could incorporate a rebuttable presumption that ads which mention a candidate and are aired within a certain time frame are for an electioneering purpose. Because the presumption is rebuttable, rather than conclusive, there is less risk of overbreadth. Thus, the Vietnam War protestors discussed above could air their advertisement depicting President Johnson, although they would be on notice that, if the ad is run close to an election in which President Johnson is a candidate, the burden will be on them to demonstrate their non-electioneering intent. The use of objective presumptions, while providing speakers with a high degree of certainty concerning what type of speech will normally be subject to regulation, also provides a safety-valve that allows speakers to demonstrate that their communication, although in a format usually associated with electoral advocacy, is in fact not electioneering.

Finally, exemptions can also be provided for specific electioneering conduct that raises heightened First Amendment concerns. For example, an exemption can be provided for speech with an electioneering message that is communicated solely to an organization's own membership. Such an exemption eliminates the possibility that prohibitions on electioneering will attempt to reach regular editions of a newsletter put out by a corporation or labor union and sent only to their members. Similarly, an exemption can be tailored for non-partisan voting cards, such as those put out by the League of Women Voters.

As this short discussion indicates, reform initiatives are not limited to any single approach for defining "express advocacy." There are several different types of approaches that provide the requisite level of certainty without restricting too much speech that truly is not electioneering in nature. Likewise, there are many refinements which can, in principle, help make the major approaches more narrowly-tailored to reach only electioneering speech. ❑

Conclusion

Any attempt by campaign finance reformers to expand the definition of "express advocacy" beyond "magic words" will likely lead to a court challenge until the Supreme Court resolves the split among the appellate courts concerning this issue. While the Court in *Buckley* was properly concerned that an ambiguous test for "express advocacy" might serve to chill constitutionally protected "issue advocacy," that concern does not justify a wooden "magic words" test that elevates form over substance and eviscerates the effectiveness of the entire regulatory scheme governing electioneering. In every area of First Amendment jurisprudence, courts are required to engage in delicate line drawing between protected speech and speech that properly may be regulated. It is unlikely that the First Amendment requires, in the area of election regulations alone, a mechanical, formulaic test that readily invites evasion.

The challenge facing campaign finance reformers seeking to regulate electioneering communications is to develop a test for "express advocacy" that meets the Supreme Court's dual concerns regarding vagueness and overbreadth, which are necessarily in tension with each other. The test must be clear enough so that persons or organizations seeking to engage in political advertising will be able to determine with reasonable certainty beforehand whether an advertisement will be treated as regulated "express advocacy." Additionally, the test must be broad enough to cover situations in which an electioneering intent and message are clear, but not so broad as to sweep in true "issue advocacy." Recent proposals by the FEC and Congressional reformers are promising attempts to define "express advocacy" and "issue advocacy" in both a more realistic and a constitutionally permissible manner. ❑

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