



FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

TO: Commissioners
General Counsel Norton
Staff Director Pehrkon

FROM: Office of the Commission Secretary *VW*

DATE: January 18, 2002

SUBJECT: Supplemental Statement of Reasons for
MUR 4994

Attached is a copy of the Supplemental Statement of Reasons
for MUR 4994 signed by Commissioner Bradley A. Smith. This
was received in the Commission Secretary's Office on Thursday,
January 17, 2002 at 4:26 p.m.

cc: Vincent J. Convery, Jr.
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Attachments

22.04.405.3827



FEDERAL ELECTION COMMISSION

WASHINGTON, D.C. 20463

In the Matter of

**New York Senate 2000 and
Andrew Grossman as treasurer, *et al.***

MUR 4994

**SUPPLEMENTAL STATEMENT OF REASONS
COMMISSIONER BRADLEY A. SMITH**

I have joined Chairman Mason and Commissioner Wold in a Statement of Reasons that I believe best explains why the Commission, as a whole, chose to reject the recommendations of the then Acting General Counsel ("AGC") in this matter. *See* Statement of Reasons, January 11, 2002. I add this separate statement to further explain my own position and to address certain positions set forth in the Statements of Reasons issued separately by Vice Chairman Sandstrom and Commissioner Thomas.

The AGC recommended "Reason to Believe" findings against several state and national party committees on the theory that their spending on television advertising was coordinated with the campaigns of certain candidates, and so exceeded the contribution limits of 2 U.S.C. § 441a. There is no evidence that any of these advertisements included explicit words of advocacy of election or defeat of any candidate for political office, or "express advocacy," as that phrase has been defined by the United States Supreme Court and a host of lower courts, both state and federal.¹

In MUR 4624, I set forth at length the grounds for my conclusion that spending for speech by individuals and groups other than political committees, even when coordinated with a candidate or his committee, needed to include express advocacy before becoming subject to the Act's limitations. Statement for the Record, MUR 4624, available at www.fec.gov/members/smith/smithreason6.htm. This conclusion is based on my reading of precedents of the Supreme Court and lower courts, which suggest that regulation of coordinated "issue ads" violates the Constitution and the statute. Here I will merely summarize the reasons for my position, without repeating my lengthy Statement in MUR 4624 in detail.

¹ *See e.g.* Federal Election Commission v. Massachusetts Citizens for Life, 479 U.S. 238 (1986); Buckley v. Valeo, 424 U.S. 1 (1976); Federal Election Commission v. Christian Action Network, 92 F.3d 1178 (4th Cir. 1996); Federal Election Commission v. Furgatch, 807 F.2d 857 (9th Cir. 1987); Federal Election Commission v. Central Long Island Tax Reform Immediately Committee, 616 F.2d 45 (2d Cir. 1980).

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In *Buckley v. Valeo*, 424 U.S. 1 (1976), the Supreme Court held that the term "expenditure," as defined in 2 U.S.C. 431(9)(A)(i), was limited to expressions containing express advocacy, at least in the context of groups that are not political committees. 424 U.S. at 79-80. Similarly, in *Federal Election Commission v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986), the Supreme Court held that "an expenditure must constitute 'express advocacy' in order to be subject to the prohibition of 441b." *Id.* at 249. Thus on both occasions that the Supreme Court has considered the scope of "expenditure" under the Act, it has limited the meaning of that term to communications containing express advocacy. It may be that if the Court today were presented with a case asking for the definition of "expenditure" under Section 441a(a)(7)(B)(i) it would not so limit the term. But as I outlined in my Statement for the Record in MUR 4624, without such a narrow reading of the term, Section 441a(a)(7)(B)(i) raises many of the same vagueness and overbreadth concerns as Sections 441b and 431. Statement for the Record, MUR 4624, pp. 7-12, 15-22.

Simply put, it is inconceivable that every "coordinated" issue ad could be regulated consistent with the First Amendment. Imagine, for example, that Senator X, a candidate for re-election, is hard at work trying to pass a bill to subsidize Yak Farmers. Passage of the Yak Relief Act was a key component of the party's national platform in the last campaign. The American Yak Farmers Association meets with Senator X and, working together they plan the content, timing, and the extent of a massive public relations campaign paid for by the Association, highlighted by issue ads with the following text:

For years America's family yak farmers have been there, providing yaks whenever and wherever Americans needed them. But today, cheap foreign-bred yaks are flooding the American market, and American yak farmers are struggling. Soon there may be no yak farmers left on our shores. Yaks are vital to America's military security. Can America afford to be reliant on foreign supplies of yaks? For the safety of your family, can you afford to be reliant on unreliable foreign supplies of yaks? The Yak Relief Act promises to restore this vital sector of the American economy and keep America strong. Yet Senator [insert name of local senator from opposing party] opposes the Yak Relief Act. We need the Yak Relief Act. Our state's voters need senators who support America's family yak farmers. Call Senator [insert name], and tell him to keep America strong by supporting the Yak Relief Act.

Though the ad clearly meets any definition of coordination, I think it rather obvious that such an ad would be protected under the Constitution as interpreted by

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Buckley, *MCFL*, and numerous lower court decisions.² Clearly, then, the mere fact of coordination cannot make an ad subject to regulation. There must be something more. Commissioner Thomas would find that something more by asking if the ad was “intended to influence elections to the United States Senate.” See Statement of Reasons of Commissioner Scott E. Thomas, MUR 4994, at p. 7. But that is precisely the standard held to be unconstitutionally vague in *Buckley*. See 424 U.S. at 79-80. Rather, the something more that the Supreme Court has relied on, in both *Buckley* and *MCFL*, is express advocacy, and that is the something more we should rely on here. If spending on the fictional ad above requires something more than mere coordination to become subject to the Act, why should it be any different if Senator X worked with party leaders to create such a campaign, rather than with the American Yak Farmers? If parties have the same rights as other groups to engage in express advocacy on behalf of their candidates, see *Colorado Republican Federal Campaign Committee v. Federal Election Commission*, 518 U.S. 604 (1996), surely they have the same rights as other groups to engage in issue advocacy, which has gained greater protection from the courts than express advocacy.

It is not generally the job of a regulatory agency to declare portions of its own statute to be unconstitutional.³ But agencies certainly can, and should, look to court decisions and interpret statutes so as to assure that the Constitutional rights of the citizenry are respected. That is part of our job, and we cannot duck it. I emphatically agree with the U.S. Court of Appeals for the District of Columbia Circuit, that “[i]n this delicate first amendment area, there is no imperative to stretch the statutory language, or read into it oblique references of Congressional intent....” And that court’s warning that “[i]t is our duty in the interpretation of federal statutes to reach a conclusion which will avoid serious doubts of their constitutionality,” is at least as important for regulatory agencies as it is for the courts. *Federal Election Commission v. Machinists Non-Partisan Political League*, 655 F.2d 380, 394 (D.C. Cir. 1981)(quoting *Richmond v. United States*, 275 U.S. 331 (1928)). In light of the Supreme Court’s decisions in *Buckley* and *MCFL*, I believe that a narrow interpretation of the term “expenditure” as applied to speech in Section 441a(a)(7)(B)(i) of the Act is prudent, and quite probably required. Conversely, there is simply no requirement that this Agency interpret its statute to press constitutional issues to the limit. As I am sometimes forced to remind my colleagues in closed sessions,

² See e.g. *Federal Election Commission v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986); *Buckley v. Valeo*, 424 U.S. 1 (1976); *Maine Right to Life v. Federal Election Commission*, 98 F.3d 1 (1st Cir. 1996), *cert. denied*, 118 S. Ct. 52 (1997); *Federal Election Commission v. Christian Action Network*, 92 F.3d 1178 (4th Cir. 1996); *Federal Election Commission v. Furgatch*, 807 F.2d 857 (9th Cir. 1987); *Federal Election Commission v. Central Long Island Tax Reform Immediately Committee*, 616 F.2d 45 (2^d Cir. 1980).

³ Though it must be noted that Commissioners have taken an oath to uphold the Constitution, not merely acts of Congress. For example, in the aftermath of the attacks on the United States of September 11, 2001, were Congress to pass, and the President to sign, a measure including a blanket prohibition on all U.S. citizens of Arab or Pakistani ancestry from making political contributions, I would refuse to pass a rule enforcing the law, and refuse to enforce it in individual MURs. I would do so on the basis of the Constitution, without waiting for action from the courts. I am sure there are those who interpret their obligations to the Constitution differently.

we can pass a rule or interpret the Act in ways that are clearly within the limits of the constitution. It is not required that we perpetually seek to push those limits to the wall.⁴

But what I wish to make clear here is that even if not required by the Constitution, interpreting the definition of "expenditure" as the Supreme Court did in *Buckley* and *MCFL* is simply good policy. As I noted in the context of MUR 4624, lack of an express advocacy standard allows for great mischief in enforcement of the Act. Absent an express advocacy content standard, parties will not know what they can and cannot do in the way of working with their candidates. Even if the courts were to hold that this vagueness did not rise to the level of unconstitutionality, it will discourage parties from engaging in otherwise legal activity.⁵ Moreover, it allows groups to use the FECA and the FEC as an instrument of political harassment. See Statement of Reasons, MUR 4624 at 2-4, 22-25. This concern is even more pronounced when dealing, as here, with party committees. Parties, by definition, have significant contacts with their candidates and officeholders. It is hard to imagine a serious campaign in which various party committees will not have contacts with the candidate. Absent a content standard (express advocacy), those contacts will almost always, if not always, be enough for even a marginally skilled lawyer to draft a complaint triggering an extensive investigation, which may last several years, cost the respondents hundreds of thousands of dollars, and require much more of the respondents' time, plus the revelations of large amounts of inside information. For two recent examples of such investigations stemming from coordination charges, see e.g. MUR 4624 and MUR 4291. The fact that these investigations may lead to findings of no probable cause, as in MURs 4624 and 4291, will often be scant solace to the respondents. The express advocacy content standard not only reduces the ability of groups to use the Act as a tool of political harassment, but it provides a quick and sure defense for speakers, allowing them to quickly end investigations by presenting evidence of the text of the advertisements.

Correspondingly, lack of a content standard raises practical problems for the Commission that may detract from its core jobs of disclosure, administration of the presidential financing system, and enforcement of violations of the Act's clear limits.

⁴ Although various self-described "good government" groups have often accused the Agency of failing to pursue "aggressive" or "robust" enforcement of the Act, in fact the Commission's history is one of regularly pushing both statutory construction and judicial holdings to and beyond the constitutional limit. See Bradley A. Smith and Stephen M. Hoersting, *A Toothless Anaconda: Innovation, Impotence, and Overenforcement at the Federal Election Commission*, 1 Election L. J. __ (forthcoming 2002).

⁵ Suggesting that party committees can avoid the threat of investigation and litigation by avoiding all contact with their candidates is hardly realistic. Both parties and non-party groups have rights to lobby and contact officeholders who are often candidates. They cannot and should not be forced to choose between exercising their First Amendment right to "seek redress" and their First Amendment right to free speech. See e.g. *Clifton v. Federal Election Commission*, 114 F.3d 1309 1314 (1st Cir. 1998) cert. denied 522 U.S. 1108 (1998)(striking down an FEC "coordination" regulation limiting contact between groups producing candidate scorecards and candidates named on the cards)("we think that 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"); *Orloski v. Federal Election Commission*, 795 F.2d 156, 163 (D.C. Cir. 1986)("nowhere in the Act did Congress expressly limit an incumbent's right to communicate with his constituency").

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The numerous, lengthy investigations that will result from a vague standard will sap Commission resources and lead to less, rather than more, clarity in the law, as findings in individual cases will depend on minor differences in complicated fact patterns. See *Orloski v. Federal Election Commission*, 795 F.2d 156, 165 (D.C. Cir. 1986) (“[Lack of an objective test] would unduly burden the FEC with requests for advisory opinions ... and with complaints by disgruntled opponents who could take advantage of the totality of circumstances test to harass the sponsoring candidate and his supporters. It would further burden the agency by forcing it to direct its limited resources toward conducting a full-scale, detailed inquiry into almost every complaint. ... It would considerably delay enforcement action.”)

These problems can be avoided, it seems to me, in one of two ways. The first would be through greatly heightened pleading requirements. As it now stands, the FEC construes complaints quite liberally.⁶ It might be possible to avoid the problems I have mentioned above if the Commission were to require that solid evidence be included in a complaint before it would proceed to make a Reason to Believe finding, at least in cases involving alleged coordination. But this would dramatically curtail enforcement of the Act. For normally, the contents of discussions between party committees and candidates would not be available to complainants. Thus we would pass from a situation in which most any party committee activity would be subject to substantial investigation under the Act, to one in which many complaints about coordination, even those involving coordinated express advocacy, would wind up being dismissed without an investigation.⁷

The better and wiser alternative, where speech is implicated, is to require express advocacy before coordinated spending is subject to the limits of the Act. Commissioner Sandstrom argues against this approach, writing that “the presence or absence of express advocacy sheds no light on whether an expenditure has been coordinated.” Statement of Reasons of Commissioner Sandstrom, p. 5. But this gets the questions in the wrong order. Before we consider whether or not events were coordinated, we must first determine whether or not an “expenditure,” as a statutory term of art, has even been made. This takes us back to the original question—does spending for communications that do not include express advocacy fall under the terms of the Act at all? Commissioner Sandstrom thinks they do, claiming that “neither Congress nor the Supreme Court has restricted the definition of coordinated expenditures to only those which contain express advocacy.” Sandstrom Statement at 5-6. But while the Supreme Court has not ruled on

⁶ Although the statute provides no guidance as to what standard the FEC should use in making Reason to Believe determinations, see 2 U.S.C. 437g, most Commissioners seem to be using a standard something akin to the standard for determining motions to dismiss or motions for judgment on the pleadings under Federal Rules of Civil Procedure 12(b)(6) and 12(c). Under these standards, unless the Agency chooses to exercise its prosecutorial discretion not to pursue a case, “reason to believe” is normally found unless there is no set of circumstances under which the facts alleged in the complaint, if true, could support a violation. Indeed, in some ways the Commission goes further, since it frequently adds respondents and theories not identified in the complaint.

⁷ One possible result would be a new incentive for potential complainants to engage in political espionage and planting of operatives in opposing parties and candidate campaigns, in order to gain information on potential violations.

the definition of "expenditure" in this specific section of the Act, it has ruled on the definition in Section 431 and Section 441b, and both times held that the term "expenditure" must, as a Constitutional matter, be restricted to spending for communications containing express advocacy.

Furthermore, when Congress amended the coordination provisions of the Act after *Buckley* held that the definition of "expenditure" was limited to express advocacy, it did not see fit to change or redefine the term. The amendment was to add 2 U.S.C. § 441a(a)(7)(B)(i), the provision in the Act that treats coordinated expenditures as in-kind contributions for all persons, including party committees. That Congress made these changes post-*Buckley*, but without amending the definition of "expenditure" for these new provisions, indicates that we may reasonably believe that Congress intended only spending for communications containing express advocacy to be converted to in-kind contributions by coordination, as "the basic canon of statutory construction [is] that identical terms within an Act bear the same meaning." *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 479 (1992). Neither the Court nor Congress has, on the other hand, interpreted the term in Section 441a(a)(7)(B)(i) as applied to communications as broadly as Commissioners Sandstrom and Thomas would like. And as we have seen, if the meaning of the term "expenditure" is not also narrowly construed in Section 441a, the same vagueness problems that concerned the Court in *Buckley* and in *MCFL* remain. See Statement for the Record of Commissioner Bradley A. Smith, MUR 4624. In fact, in its post-*Buckley* amendments to the disclaimer provisions of the Act, Congress specifically noted that the disclaimer requirements, even for coordinated advertising, only applied to "an expenditure for the purpose of financing communications expressly advocating the election or defeat of a clearly identified candidate." See 2 U.S.C. § 441d(a)(2). If Congress did not want so much as a disclaimer on coordinated issue ads, it is hard to suggest that it intended for coordinated issue ads to be subject to the more burdensome provisions of the Act. Furthermore, Congress has before it legislation that would specifically make issue advocacy subject to the Act's limitations on coordinated expenditures, but has not passed such legislation. See S. 27, Section 214, 107th Congress, 1st Session.⁸ And, of course, where the statute is vague or silent, we must always presume that Congress intends for its actions to be interpreted in ways that do not infringe on the constitutional rights of citizens.

Commissioner Sandstrom claims that limiting the reach of 2 U.S.C. § 441a(d) to spending for ads containing express advocacy would amount to "a de facto repeal of Section 441a(d), noting that the statute 'states that an expenditure made 'in cooperation, consultation, or concert with, or at the request or suggestion of, a candidate' is to be treated as a 'contribution.''" What Commissioner Sandstrom does is to assume the very question that is at issue: is spending for ads that do not contain express advocacy an "expenditure" under the Act? So when Commissioner Sandstrom argues that "the

⁸ S.27 is commonly known as the "McCain-Feingold" bill and would amend the Act's definition of "contribution" to include "any coordinated expenditure or other disbursement made by any person in connection with a candidate's campaign, regardless of whether the expenditure or disbursement is a communication that contains express advocacy."

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presence or absence of express advocacy sheds no light on whether an expenditure has been coordinated,” we must note that the flip side is also true—unless we engage in circular logic and assume that coordination alone is sufficient to define spending on issue ads as “expenditures” under the Act—the presence or absence of coordination also sheds no light on whether or not something is an “expenditure” for purposes of the Act, particularly in light of the Supreme Court’s holdings in *Buckley* and *MCFL*.⁹ As we have already seen, it is all but inconceivable, absent a sudden reversal of 25 years of Supreme Court jurisprudence, that the mere fact of coordination could subject all issue ads to regulation. Thus we must place some other limiting factor on the definition. That factor is a constitutional content standard. Defining the term in Section 441a(a)(7)(B)(i) consistent with its meaning in Sections 441b and 431 does not eviscerate Section 441a(d). As independent expenditures are not limited, coordinated spending for express advocacy would still be subject to significant restrictions that independent spending for express advocacy is not.¹⁰

Finally, I wish to address another concern raised by both Vice-Chairman Sandstrom and Commissioner Thomas. Both devote substantial space in their Statements of Reasons in this matter to bemoaning the failure of the Commission to provide clear rules to politically active citizens (or what we euphemistically call “the regulated community,” as if these citizens were engaged in some type of licensed occupation). Of course, the rules they suggest would not provide such clarity even if passed, for the

⁹ It is sometimes argued that the *Buckley* opinion relieves the Commission of the need to provide an express advocacy content standard before regulating expressive coordinated expenditures as in-kind contributions. 424 U.S. at 46 n.53 (“[W]e find that the ‘authorized or requested’ standard of the Act operates to treat all expenditures placed in cooperation with or with the consent of a candidate ... as contributions”). But the *Buckley* Court had held earlier in the opinion that expenditures “relative to” a candidate are impermissibly vague, and that to save the term, “expenditures” must be limited to money spent for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office. *Buckley*, *supra* at 44. There is no reason to believe that the term “expenditure” referenced in footnote 53 is somehow different or broader than the construction the Court had just given the term. Furthermore, the example of an expenditure coordinated with a candidate cited by the Court is an express advocacy ad. *Id.* at 46, n.53 (citation omitted)(“billboard advertising endorsing a candidate”).

Many also believe that where a party committee spends for speech, the speech need not expressly advocate the election or defeat of a clearly identified candidate to be an expenditure under the Act, i.e. concerns that may inhere in regulating the coordinated speech of groups and individuals without proper content standards do not apply to party committee speech. This belief is premised on a statement in *Buckley* that “[e]xpenditures of candidates and of ‘political committees’ can be assumed to fall within the core area sought to be addressed by Congress. They are, by definition, campaign related.” *Buckley* at 79. When viewed in context, however, it is clear that the Court’s statement does not support the conclusion that everything a political committee does is an “expenditure” for the purpose of influencing a federal election. Rather, the context makes plain only that the reporting and disclosure requirements for candidates and political committees are constitutional. It does not support the conclusion that all political committee activity is “for the purpose of influencing” federal elections. See Court’s discussion of “Reporting and Disclosure Requirements” in *Buckley*, *supra* at 60-78. That party committees engage in activity outside of federal elections is bolstered by the requirement that “political committee[s] shall file reports of receipts and disbursements,” rather than report only regulable contributions and expenditures. 2 U.S.C. § 434(a)(1) (emphasis added).

¹⁰ Nothing in the Supreme Court’s recent decision in *Federal Election Commission v. Colorado Republican Federal Campaign Committee*, 121 S. Ct. 2351 (2001), affects this.

reasons just expounded. A mere conduct standard in this realm simply doesn't do the trick, as virtually all the commentators, and every one of the party committees, that commented on the Commission's recently enacted regulation at 11 C.F.R. Section 100.23 recognized.¹¹

Leaving that aside, as discussed in the Statement of Reasons signed by Chairman Mason, Commission Wold and myself, the reason that the Commission has not yet adopted a rule, or even a clear definition through enforcement actions, is due to differing opinions on the Commission. But there is one standard that is certainly constitutional, could easily be enacted with a majority of votes—indeed almost certainly with unanimity—and would not require any Commissioner to vote to make illegal activity that, as matters of law and policy, the Commissioner does not believe are or should be illegal. That standard is, of course, a rule that requires the presence of express advocacy before activity will be considered a prohibited or limited coordinated expenditure. All six Commissioners think that coordinated express advocacy is subject to the contribution limits of the Act. The reason that this standard has not been adopted is that Commissioners who desire to regulate more activity have been unwilling to compromise their principles to vote in favor of the express advocacy standard. Thus we are left with no rule at all.

Since they have raised the issue, I must say that I do not fault the Vice-Chairman or Commissioner Thomas for their refusal to compromise on matters of principle, which is often an admirable trait. But they cannot have it both ways. They cannot use their commitment to the principle of greater regulation to frustrate the Commission's ability to adopt a different standard, and then turn around and complain that the Commission has failed to provide the "regulated community" with clear rules. This lack of clarity can be resolved any time Commissioners Sandstrom and Thomas would like it to be resolved. They have simply chosen to put their desire for more regulation ahead of their desire for clarity. It is a trade-off they are entitled to make, but having made it, they have little grounds to complain about the confusion that may result.

I note that the desire for some type of content standard has broad support in both major political parties.¹² There may be alternatives to the express advocacy content standard, but I am not aware of any that have been seriously proposed that avoid the vagueness and overbreadth problems the express advocacy standard was created to address.

¹¹ See Comments on Notice of Proposed Rulemaking on General Public Communications Coordinated with Candidate, found at www.fec.gov/coordination.html: Comments of National Republican Senatorial Committee of January 28, 2000, p.7 (requesting express advocacy); Comments of Democratic Senatorial Committee, January 24, 2000, pp. 2-3 (noting the repeated rejection of Commission attempts to regulate non-express advocacy); Resubmission of Comments of Republican National Committee on Presidential Elections and National Nominating Conventions, February 1, 1999, p.10 (requesting express advocacy); Comments of Democratic National Committee, January 24, 2000, pp.3-6 (requesting the Commission to provide a content standard that will retain the legality of much coordinated issue discussion).

¹² See *supra*, note 12.

Thus, just as I indicated in MUR 4624 that coordinated spending by non-party entities is not subject to the limits of the Act unless it contains express advocacy, so I conclude that coordinated spending by party committees does not become subject to the Act's limits on contributions unless it contains express advocacy.

January 17, 2002



Bradley A. Smith, Commissioner

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