FEDERAL ELECTION COMMISSION
WASHINGTON, D.C 20463

BEFORE THE FEDERAL ELECTON COMMISSION

In the Matter of	)	
	)	
Rick Hill for Congress Committee and	)	**MUR 4568, 4633, 4634, and**
Gary F. Demaree, Treasurer	)	**4736**
	)	

STATEMENT OF REASONS
COMMISSIONER SCOTT E. THOMAS
COMMISSIONER DANNY LEE MCDONALD

In this matter, the Office of General Counsel conducted an "investigation [which] found evidence that during the 1996 general election campaign, the Rick Hill for Congress Committee and Gary Demaree, as treasurer, ("the Hill Committee"), coordinated television advertising and phone bank services with Triad Management Services, Inc. ("Triad") and Citizens for Reform ("CR") to elect Mr. Hill and defeat his opponent Bill Yellowtail, the Democratic candidate for Montana's single congressional district." General Counsel's Probable Cause Report at 1-2 (September 14, 2001). Under the Federal Election Campaign Act ("FECA" or "the Act"), expenditures are treated as contributions and subject to limitations if they are made in cooperation, consultation, or concert with a candidate, a candidate's campaign or their agents. Based upon the evidence uncovered in its investigation, the Office of General Counsel recommended that the Commission find probable cause to believe respondents violated various provisions of the Act.

We agreed with the legal analysis and recommendation of the Office of General Counsel. Commissioners Mason, Smith and Wold,[1] however, voted against the Office of General Counsel's recommendations. Because there were not four votes to proceed further, this matter was closed.

We write this Statement of Reasons to express our dissatisfaction with the conclusion of this matter. Were the case decided under the Commission's previous coordination regulations, the evidence clearly would warrant a finding of coordination, in our view. Under the Commission's current regulations (which have since been repealed

[1] Since that vote, Commissioner Michael Toner has replaced Commissioner Darryl Wold on the Commission.

by Congress), our colleagues argue that no coordination exists. We strongly disagree and believe that even under those restrictive regulations, the activity of Triad and CR amounts to an in-kind contribution to the Hill Committee.

Perhaps most disturbing, though, Commissioners Mason and Smith assert that even if coordination did exist, the campaign advertisement and phone bank would fall outside the jurisdiction of the Commission because the requisite "magic words" constituting express advocacy were not present. In their view, we gather, the Hill Committee could have written the advertisement trashing Mr. Yellowtail and specifically asked a corporation or foreign entity to use soft money to finance the ad for the campaign. Moreover, there would be no responsibility to tell the voting public who paid for the ad and whether it was authorized by any candidate. Obviously, their approach would open a huge soft money loophole in the Act and allow participants in federal elections to escape the statute's requirements simply by avoiding certain magic words. In our view, Congress did not intend the statute to be so easily evaded.

I.

At issue in this matter was a series of ads run just weeks before the 1996 general election attacking Rick Hill's Democratic opponent, Bill Yellowtail. The ads ostensibly were run by CR, a Virginia corporation. During the 1996 campaign, all of CR's activities were managed by Triad. The script of one such television ad read:

> Who is Bill Yellowtail?
>
> He preaches family values
>
> But he takes a swing at his wife
>
> Yellowtail's explanation?
>
> He only slapped her, but her nose was not broken.
>
> He talks law and order
> But is himself a convicted criminal
>
> And though he talks about protecting children
> Yellowtail failed to make his own child support payments
>
> Then voted against child support enforcement
>
> Call Bill Yellowtail and tell him you don't approve of his wrongful behavior.

Complaint at Exhibit 9.[2]

Similarly, the text of the CR phone bank script provided:

> Good evening my name is _____ and I am calling on behalf of the Citizens For Reform Committee. We are calling voters today because we believe that you should know the facts about the candidates. Bill Yellowtail is running for Congress. He tells everyone he is in favor of family values but he slapped his wife around and she had to be hospitalized. He tells us he wants to protect children but he failed to make his own child support payments. He talks about law and order but he is a convicted felon. He has opposed lowering personal property taxes, he has voted to raise taxes on income, on new cars and even on telephones. If you['re] upset give Bill Yellowtail a call at 406-443-3620 and tell him how you feel.

General Counsel's Brief at 22 (August 10, 2001). The phone bank operation sponsored by CR in Montana ran in October and November of 1996. Acting under Triad's management, CR spent $141,416 to broadcast the two television advertisements as well as sponsor the phone bank operation. *Id.* at 21.

The Montana Democratic Party filed a formal complaint with the Commission alleging that the Rick Hill Committee coordinated a third-party ad campaign, which resulted in an excessive and illegal in-kind contribution to the Committee. Complaint at 2. The Office of General Counsel prepared a report for Commission consideration that contained a factual and legal analysis of the complaint and responses. On June 2, 1998 the Commission found reason to believe the Committee violated the Act by accepting excessive in-kind contributions or alternatively, by accepting prohibited corporate contributions. The Commission also approved the General Counsel's recommendation to conduct an investigation into the matter to verify the allegations of the complaint.

After conducting a full investigation showing telephone calls between the Committee and Triad, meetings between Rick Hill and Triad representatives in the weeks leading up to the airing of the ad, and a review of the responses and materials submitted by respondents, the General Counsel prepared a report for Commission consideration analyzing the pertinent factual and legal issues. The central finding of the General Counsel was that Hill for Congress Committee "coordinated television advertising and phone bank services with Triad Management Services, Inc. and Citizens for Reform to elect Mr. Hill and defeat his opponent, Bill Yellowtail." General Counsel's Probable Cause Report at 1-2 (September 14, 2001). As a result, the General Counsel recommended the Commission find probable cause to believe that the Hill Committee violated 2 U.S.C. §§ 434(b) and 441a(f) or, alternatively, that the Hill Committee violated 2 U.S.C. §§ 434(b) and 441b.

[2] The following week, Yellowtail's ex-wife and daughter came forward to defend Yellowtail, but the damage was already done. Hill won the general election two weeks after the advertisement first aired and became Montana's sole congressional representative.

On September 20, 2001, a motion to adopt the General Counsel's recommendations failed to secure the four affirmative votes necessary to make a probable cause to believe determination. 2 U.S.C. § 437g(a)(4). More specifically, the undersigned and Commissioner Sandstrom voted to support the General Counsel's recommendations. Commissioners Mason, Smith and Wold opposed the recommendations. As a result of the deadlock, the Commission subsequently voted 6-0 to take no further action and close the file as to these respondents.

II.

In *Buckley v. Valeo*, 424 U.S. 1, 143 (1976), the Supreme Court upheld limitations on contributions to federal candidates, but held that a similar ceiling on independent expenditures was unconstitutional. In so ruling, the Court recognized the many opportunities for evasion of the contribution limits created by its holding. As a result, the Court drew a specific distinction between expenditures "made *totally independently* of the candidate and his campaign" and "prearranged or coordinated expenditures amounting to disguised contributions" that could be regulated constitutionally. 424 U.S. at 47 (emphasis added).

Based upon the results of the full investigation conducted by the Office of General Counsel, it does not appear to us that the ads and phone bank run by CR and Triad were made "totally independently" of the Hill campaign. Indeed, even under the constricted definition of the term "coordination" found in the Commission's current regulations, it appears both the ads and the phone bank were coordinated with the Hill campaign. Because these activities were coordinated, we believe that CR/Triad made, and the Hill Committee accepted, impermissible contributions.

A.

The Commission's current regulations regarding coordinated expenditures cast a blind eye toward the Court's decision in *Buckley* and are founded on a faulty district court opinion. In recognizing that "pre-arranged or coordinated" expenditures have the potential to evade contribution limits, the *Buckley* Court labeled "coordinated expenditures . . . as contributions rather than expenditures." Id. at 46-7. The Court explained this distinction by interpreting "contributions" to include "all expenditures placed in cooperation with or with the consent of the candidate, his agents, or an authorized committee of the candidate," while defining "independent expenditure" as one made "totally independent of the candidate and his campaign." *Id.*

In reaction to the *Buckley* decision, Congress amended the FECA and defined "independent expenditure" as an expenditure made without cooperation or consultation with any candidate that expressly advocates the election or defeat of a clearly identified candidate for federal office. 2 U.S.C. § 431(17). Further, it addressed the potential of coordinated expenditures to circumvent the FECA's constitutional limitations by adopting the Court's broad definition of contribution:

> Expenditures made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents, shall be considered a contribution to such candidate.

2 U.S.C. § 441a(a)(7)(B)(i).

Accordingly, the Commission adopted regulations clarifying these amendments. *See FEC v. National Conservative Political Action Committee*, 647 F.Supp. 987, 990 (S.D.N.Y. 1986) ("Expenditures made 'in cooperation, consultation, or concert, with, ... a candidate, his authorized political committees, or their agents, shall be considered to be a contribution to such candidate.' . . . *FEC regulations clarify this language.*")(emphasis added). Former section 109(b)(4)(i) explained that without "[a]ny arrangement, coordination, or direction by the candidate or his . . . agent prior to the publication, distribution, display, or broadcast of the communication," an expenditure will not be considered coordinated. 11 C.F.R. 109.1(b)(4)(i) (2000). Conversely, an expenditure would be presumed coordinated where it is:

> (A) Based on information about the candidate's plans, projects, or needs provided to the expending person by the candidate, or by the candidate's agents, with a view toward having an expenditure made; or
> (B) Made by or through any person who is, or has been, authorized to raise or expend funds, who is, or has been, an officer of an authorized committee, or is, or has been, receiving ay form of compensation or reimbursement from the candidate, the candidate's committee or agent.

Id.

Only once has the Supreme Court actually decided whether coordination existed based upon a factual record. In *Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604 (1996), the Court considered whether expenditures made by the Colorado Republican Party were actually "independent." The Court concluded that the state party's "expenditure, for constitutional purposes, [was] an 'independent' expenditure, not an indirect campaign contribution." 518 U.S. at 614. In reaching this conclusion, the Court found that the "advertising campaign was developed by the Colorado Party independently and not pursuant to *any general* or particular *understanding* with [any candidates or their agents]." *Id.* (emphasis added).

In December 2000, by a 4-2 vote, our colleagues passed new regulations which largely disregarded the *Buckley* and *Colorado Republican* decisions and the broad statutory language. Instead, the new regulations were based upon the decision of a single district court in *FEC v. Christian Coalition*, 52 F.Supp.2d 45 (D.D.C. 1999), which effectively created its own definition of coordination. This definition of coordination bears little semblance to either the "totally independent" or "general understanding"

standards articulated by the Supreme Court in *Buckley* and *Colorado Republican* or the language of the statute.

In *FEC v. Christian Coalition*, the court fashioned its own definition of coordinated expenditure, reasoning that the Supreme Court in *Buckley* did not address the First Amendment concerns of "expressive coordinated expenditures." 52 F.Supp.2d 45, 85 (D.D.C. 1999). It defined this new concept as expenditures "for communications made for the purpose of influencing a federal election in which the spender is responsible for a substantial portion of the speech and for which the spender's choice of speech has been arrived at after coordination with the campaign." 52 F.Supp.2d at 85 n. 45. The *Christian Coalition* court then adopted it's own test for coordination: "where the candidate can exercise control over, or where there has been a substantial discussion or negotiation between the campaign and the spender, over a communication's (1) contents, (2) timing; (3) location, mode, or intended audience; or (4) volume." *Id.* at 91-92.

The reasoning behind the *Christian Coalition* decision is curious. Despite the assertion that the *Buckley* decision did not contemplate "expressive coordinated expenditures," the Supreme Court made reference to "independent express advocacy" and warned about the dangers of evasion through payments for "media advertisements." *Buckley* at 46. Thus, the premise for the district court's decision is based on a fundamentally flawed interpretation of the Court's opinion in *Buckley*. Rather than challenging this decision, our colleagues voted not to appeal the matter and, instead, adopted new regulations in keeping with the *Christian Coalition* expressive communications coordination test.

The new regulations provide as follows:

> Coordination with candidates and party committees. A general public political communication is considered to be coordinated with a candidate or party committee if the communication-
>
> (1) Is paid for by any person other than the candidate, the candidate's authorized committee, or party committee, and
>
> (2) Is created, produced, or distributed-
>
> (i) At the request or suggestion of the candidate, the candidate's authorized committee, a party committee, or the agent of any of the foregoing;
>
> (ii) After the candidate or the candidate's agent, or a party committee or its agent, has exercised control or decision-making authority over the content, timing, location, mode, intended audience, volume of distribution, or frequency of placement of that communication; or
>
> (iii) After substantial discussion or negotiation between the creator, producer, or distributor of the communication, or the person paying for the communication, and the candidate's authorized committee, a party committee, or the agent of such candidate or committee, regarding the content,

> timing, location, mode, intended audience, volume of distribution or frequency of placement of that communication, the result of which is collaboration or agreement. Substantial discussion or negotiation may be evidenced by one or more meetings, conversations, or conferences regarding the value or importance of the communication for a particular election.

11 C.F.R. § 100.23(c).

These newly-promulgated regulations greatly narrow the Act's definition of contribution and open substantial loopholes diminishing its effect. By tapering the circumstances under which an expenditure is considered coordinated to only those instances in which the candidate or committee has "request[ed] or suggest[ed], "exercised control or decision-making authority," or had "substantial discussion or negotiation," it excludes those situations in which a communication is "based on" information a campaign provided "with a view toward having an expenditure made."

Recognizing the loophole created by these regulations, Congress expressly repealed them in section 214(b) of the Bipartisan Campaign Reform Act of 2002 ("BRCA"). However, because this provision does not take effect until 270 days from BCRA's effective date of March 27, 2002, this matter was resolved using the current coordination regulations.

B.

In a 28-page brief reviewing the results of its investigation into this matter, the General Counsel detailed the evidence supporting its legal conclusion that Triad and CR coordinated television advertising and phone bank services with the Hill campaign. It is not our purpose to repeat, discuss and analyze every piece of evidence contained in that report. We do, however, wish to highlight several of the more compelling pieces of evidence it presented.

Beginning in September of 1996, the Hill Committee came into contact with Triad Management Services, a political consulting firm established for the purpose of retaining and expanding the Republican congressional majority. Operating in a fashion similar to that of a brokerage company, Triad gathered information about a campaign and assessed its viability in order to educate wealthy donors as to where their contributions would best assist conservative candidates, campaigns, and issues. At that time, Triad was managing CR, a Virginia non-profit organization that aired a series of advertisements aiding Republicans across the country.

Mr. Hill visited Triad's headquarters in Washington, D.C., on September 12, 1996. During this meeting, he had a discussion with Triad's President, Carolyn Malenick regarding the services Triad could offer the Committee. Meredith O'Rourke, Triad Financial Director who was also present, testified that Mr. Hill "voluntarily brought up

Mr. Yellowtail's history of spousal abuse." Gen. Counsel's Brief at 12. Moreover, discussion of this campaign issue was such that it continued as a topic of discussion between her and Ms. Malenick after the meeting with Hill concluded.[3]

In the aftermath of the meeting between the candidate and Triad, there was a flurry of communications:

> Thereafter, phone records show short calls between the Hill Committee and Rodriquez and Company [a Triad political consultant] on September 16, September 17, and September 19, 1996. On September 20, 1996, Rodriquez and Company and the Committee had two telephone contacts, the longer of which lasted over 12 minutes. At 4:51 p.m. on that same day, the Committee sent a fax to Rodriquez of two minutes duration. Mr. Oliver [an employee of Triad political consultant Carlos Rodriquez], testified that he spoke to the Hill campaign on a couple of occasions and that, *as instructed, he had called the Hill campaign to inquire about what issues it would like to see in third-party Ads*; he could not recall the name of the individual to whom he spoke. Oliver Dep. at 130-131 (emphasis added).

General Counsel's Brief at 12-13.

Several days later, on September 23, 1996, Mr. Rodriguez traveled to the Committee's campaign headquarters in Helena, Montana to conduct a "political audit" of the campaign. Over the course of two days, Rodriguez met and spoke to the candidate and campaign staffers, including Larry Ackey, campaign manager, and Betti Hill, wife of Rick Hill. During their discussions, Rodriguez questioned Hill about a pledge he made during the campaign not to make Yellowtail's history a campaign issue, and Hill renewed his vow to Rodriguez. General Counsel's Brief at 13.

Immediately following his visit, Rodriguez produced an audit report of the Hill Committee for Triad. Section III of the report lists the "key anti-Yellowtail issues" as: "1) wife beating; 2) robbery of camera store in college; 3) dead-beat dad; and 4) Voting against elderly and families." Complaint at exhibit 2. The report also notes that the Committee needs a "third party to expose Yellowtail" along with "$15K for phone banks." Complaint at Ex. 24. Rodriguez testified that he dictated the audit report immediately after concluding a campaign visit while the interviews were still fresh on his mind. General Counsel's Report at 14, n.15.

There is little doubt that the Hill committee provided material regarding Mr. Yellowtail to Triad. For example:

> Larry Herzog, a volunteer co-chairman for the Hill Committee in Yellowstone County for the 1996 campaign, told staff of this Office [the Office of General Counsel] that the Hill press aide, Bowen

[3] In his deposition, Hill testified that only he and one other woman were present at the meeting. However, Mr. Hill could not remember the name of the woman he met with and his schedule indicated a "meeting with Meredith O'Rourke . . . Malenick will attend if possible." Hill dep. at 105, 111.

> Greenwood, conducted opposition research on Bill Yellowtail, including research concerning Mr. Yellowtail's divorce and criminal record, and *that Larry Akey [Hill's campaign manager] sent this material directly to Triad.*

General Counsel's Brief at 17 (emphasis added).

During this same time frame, the Committee hired Moore Communications, a polling firm based in Portland, Oregon, to poll voters on the issue of Yellowtail's spousal abuse. Among other questions, the poll asked, "Did you know Yellowtail beat his wife and didn't pay child support?" Other Montanans reported receiving a call from an Oregon polling firm asking: "1) Would you still vote for Bill Yellowtail if you knew he struck his first wife so hard she had to be hospitalized?; 2) Would you still vote for Bill Yellowtail if you knew he was ten years late in paying back child support payments?; and 3) Would you still vote for Bill Yellowtail if you knew he voted to reduce the penalties for senior citizen abuse?" Complaint at Ex. 24. Triad was aware of this poll, as Rodriguez noted poll numbers on the audit and remarked, "the survey work just done by Bob Moore has identified the specific points of contrast between Hill and Yellowtail and should be effective in its delivery." Complaint at Ex. 9.

Under the Commission's regulations at the time the activity in question occurred, the advertisement would have been considered coordinated for the purpose of contribution limits and reporting requirements. As detailed above, an expenditure was considered coordinated when the candidate or his committee or agents informs the spender "about the candidate's plans, projects, or needs with a view toward an expenditure being made." 11 C.F.R. § 109.1(b)(4)(i) (2000). The candidate discussed Yellowtail's history of spousal abuse with the president of Triad, and the Committee informed Rodriguez about Hill's pledge not to attack Yellowtail on personal issues and then proceeded to give Rodriguez access to press gatherings and poll numbers regarding those very topics.

In addition there is evidence that an explicit request to broadcast the ads was made by the Hill campaign. In his deposition, Mr. Rodriquez's assistant, Jason Oliver, testified "it was in Carlos' notes [made after Carlos Rodriquez's visit to Hill campaign headquarters] and in that report that Yellowtail [sic] said they wanted—or his campaign said—who I don't know—in notes asked that that [anti-Yellowtail] issue be raised." General Counsel's Brief at 15. The fact that the Hill campaign "asked that that issue be raised," combined with the other circumstances detailed above, plainly shows that Triad's expenditures were made "based on information about the candidate's plans, projects, or needs provided to the expending person by the candidate, or by the candidate's agents, with a view toward having an expenditure made." 11 C.F.R. 109.1(b)(4)(i)(A) (2000). Clearly, the Hill campaign supplied Triad with this information so that Yellowtail's indiscretions could once again be brought before the public without being tied to the Hill campaign. Under the former coordination regulations, this evidence developed by the Office of General Counsel clearly would have warranted a finding of probable cause that

the Committee participated in coordinating the advertisements, amounting to an in-kind contribution from Triad and CR.

Even under the more restrictive current regulations, the General Counsel's Brief concluded:

> Based on the *Christian Coalition* court's reasoning, Triad's use of the Hill campaign's requested or suggested advertising topics in the CR advertisement, and discussions concerning same, resulted in a coordinated expenditure of $141,416 and represented an in-kind contribution of the same amount to the Hill Committee.

General Counsel's Brief at 27. We agree.

It is clear that the candidate, his campaign manager, and other members of the campaign staff cooperated with Triad in the anti-Yellowtail ads and phone bank. The record plainly shows that the candidate himself met with Triad representatives both in Washington, D.C. and in Montana. The record also shows that at those meetings, the candidate discussed Mr. Yellowtail's personal problems with Triad and apparently brought the issue to Triad's attention at the Washington, D.C. meeting. As a follow-up to these meetings, phone records show numerous conversations between the Hill campaign and Triad in the weeks leading up to Triad's advertisements and phone banks.

Finally, and perhaps most importantly, the Rodriquez audit report, generated after nearly two days of meetings with the Hill campaign, reflects the very same anti-Yellowtail points that were ultimately used in the ads. According to Jason Oliver, Rodriquez's assistant, the Hill campaign "asked that that [anti-Yellowtail] issue be raised." Moreover, the audit report specifically stated that the Hill campaign "needs" a "3rd party to 'expose' Yellowtail."

The foregoing facts would satisfy both the "request or suggest" prong of the new coordination regulations and the "substantial discussion or negotiation... regarding the content...the result of which is collaboration" prong of those regulations. Indeed, if these circumstances do not give rise to a coordination finding, it is difficult to imagine what is needed to make such a finding short of a written confession by the participants.

III.

In a footnote to their Statement of Reasons in the this matter, Commissioners Mason and Smith indicate that even with the most clearcut evidence of coordination, a contribution does not exist unless an ad contains express advocacy. In their Statement of Reasons, they write:

> None of the activities engaged in by CR in this MUR involves express advocacy. Following the principles set forth in his Statement of Reasons in MUR 4624, Commissioner Smith would hold that for an ad to constitute a contribution because of coordination, it must contain express advocacy. For different reasons, Commissioner Mason is in agreement that an express advocacy requirement is a permissible interpretation of the statute, and that which ought to be applied here. *See* Statement of reasons of Chairman Mason and Commissioners Wold and Smith in MUR 4538.

Statement of Reasons of Chairman Mason and Commissioners Wold and Smith in MURs 4568, 4633, 4634 and 4736 at 3 n.10 (April 10, 2002). As we understand the approach of Commissioners Mason and Smith, even if the Hill campaign admitted that it had coordinated the anti-Yellowtail communication with Triad, there would have been no "in-kind" contribution because they believe the communication did not contain express advocacy. Not only is this approach wrong as a matter of law, but it also would carve out a large loophole in the Act, particularly in view of their narrow construction of the term "express advocacy."

A.

The Supreme Court has indicated clearly that an express advocacy test does *not* apply to contributions and coordinated expenditures. In *Buckley*, the Court explicitly stated that "controlled or coordinated expenditures are treated as contributions rather than expenditures under the Act." 424 U.S. at 46. The Court specifically found that the absence of prearrangement or coordination of an expenditure "alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate." 424 U.S. at 47. When analyzing former 18 U.S.C. § 608(e), the independent expenditure limit struck down in *Buckley*, the Court explained:

> The parties defending § 608(e)(1) contend that it is necessary to prevent would-be contributors from avoiding the contribution limitations by the simple expedient of *paying directly for media advertisements or for other portions of the candidate's campaign activities*. They argue that expenditures controlled by or coordinated with the candidate and his campaign might well have virtually the same value to the candidate as a contribution and would pose similar dangers of abuse. Yet *such controlled or coordinated expenditures are treated as contributions* rather than expenditures under the Act. [footnote omitted]. Section 608(b)'s contribution ceilings . . . prevent attempts to circumvent the Act through prearranged or coordinated expenditures amounting to disguised contributions. *By contrast, § 608(e)(1) limits expenditures for express advocacy of candidates made totally independently of the candidate and his campaign.*

424 U.S. at 46, 47 (emphasis added). *See also Buckley* at 78-80 (defining coordinated expenditures as "contributions" and defining non-coordinated "expenditures" covered by former 2 U.S.C. §434(e) to reach only communications containing express advocacy.).

Similarly, in *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 249 (1986)(emphasis added), the Supreme Court specified that the express advocacy construction was necessary only for the "provision that directly regulates *independent* spending." According to the Court, there is "a fundamental constitutional difference between money spent to advertise one's views independently of the candidate's campaign and money contributed to the candidate to be spent on his campaign." *FEC v. National Conservative Political Action Committee*, 470 U.S. 480, 497 (1985). Given this "fundamental difference," there is simply no constitutional basis for applying to contributions the express advocacy test used for independent expenditures.[4]

The statute reflects the constitutional analysis found in *Buckley*. There is no mention of "express advocacy" in any of the statutory provisions involving contributions. The only mentions of "express advocacy" are in the definition of "independent expenditure," *see* 2 U.S.C. § 431(17), in the disclaimer provision, *see* 2 U.S.C. § 441d, and in the provision regarding communications to a membership organization's restricted class, *see* 2 U.S.C. § 431(9)(B)(iii). In short, there is no constitutional or statutory basis for adding an express advocacy requirement to a coordinated expenditure determination.

Moreover, a requirement that coordinated expenditures must contain express advocacy to be treated as a contribution would create a gaping hole in the statute. For example, a candidate could ask a corporation or even a foreign entity to finance and run an advertisement drafted by the candidate's campaign. In addition to creating the content of the ad, the candidate could tell the corporation or foreign entity when and where the ads should run. Coordinated payments for such an advertising campaign would not be subject to the limitations, prohibitions, or reporting requirements of the Act so long as the advertising did not contain express advocacy. Corporations, labor organizations, even

[4] Interestingly, the district court in *Christian Coalition* emphatically rejected the notion that an express advocacy standard should be applied to coordinated expenditures ("[I]mporting the 'express advocacy' standard into § 441b's contribution prohibition would misread *Buckley* and collapse the distinction between contributions and independent expenditures in such a way as to give short shrift to the government's compelling interest in preventing real and perceived corruption that can flow from large campaign contributions."). 52 F.Supp.2d at 88. The district court characterized the argument espoused by our colleagues as "untenable" and "fanciful." 52 F.Supp.2d at 87 and n.50. Even though Commissioners Mason and Smith enthusiastically embraced the reasoning of *Christian Coalition* as a basis for their drafting of the Commission's new "coordination" regulations, they appear to ignore the rationale of *Christian Coalition* and its reliance on *Buckley* when it comes to the issue of express advocacy. Rather than pick-and-choose in this manner, we believe the Commission would have been far better served if we had followed normal litigation practice and appealed *Christian Coalition* in order to secure a definitive judicial determination. If we had, a Supreme Court decision resolving the key issues in that case, *e.g.*, what is coordination and what is express advocacy, may well have rendered unnecessary much of the need for the current work on the statute, the regulations and the resulting litigation.

outside foreign national interests, would be allowed to spend unlimited sums of soft money on advertisements that avoided express advocacy.

Indeed, one only need look at the instant matter to recognize the error of our colleagues' approach. Under their reasoning, it would be beyond the Commission's authority to regulate a communication that the Rick Hill Committee had full participation in coordinating as long as it did not expressly advocate the election of Rick Hill or the defeat of Bill Yellowtail. Thus, to avoid the political consequences of publicly breaking his pledge to not rehash Yellowtail's past, Hill could hand deliver a script to Triad reminding viewers of Yellowtail's history, but stopping short of advocating his defeat. A disclaimer would not be required on the communication, and Triad would not be required either to adhere to contribution limits or report its expenditure. This would undermine the fundamental purpose of the Act in making campaign finance more open to the public.

B.

Further broadening the loophole is the narrow manner in which our colleagues define express advocacy. As we understand it, our colleagues have concluded that because the advertisement carefully has avoided certain "magic words" such as "vote against" or "defeat," the advertisement should be considered mere "issue discussion."[5] Accordingly, they believe this ad could be financed, in coordination with a candidate's campaign, without regard to any of the Act's limitations, prohibitions, or reporting requirements.

Under *Buckley*, the purpose of the express advocacy standard is to limit application of the statute to spending that is *unambiguously related* to the campaign of a particular candidate. Under an express advocacy standard, the reporting requirements "shed the light of publicity on spending that is *unambiguously campaign-related.*" *Buckley*, 424 U.S. at 81 (emphasis added). The *Buckley* Court, however, provided no definition of what constitutes "spending that is unambiguously campaign related." The *Buckley* Court only indicated that express advocacy included obvious campaign related words and phrases "such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' and 'reject'." *Buckley*, 424 U.S. at 44, n. 52.

In *FEC v. MCFL*, *supra*, the Supreme Court further explained that express advocacy could be found in a communication that does not include the specific phrasing set out in *Buckley*. As such, a communication whose "essential nature goes beyond issue discussion to express electoral advocacy" is an express advocacy communication. 479 U.S. at 249.

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[5] *See, e.g.*, Statement of Reasons of Commissioners Mason and Smith in MUR 4922 at 2 ("In *Buckley v. Valeo*, 424 U.S. 1 at 44, n.52, the Supreme Court indicated that 'express words of advocacy' *would be limited to* expressions "such as 'vote for,' 'elect,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'")(emphasis added). *See also* Statement for the Record of Commissioner Smith in MUR 4624 at 21 ("A speaker seeking to discuss issues without risking investigation can avoid words such as 'vote for,' 'elect,' 'vote against,' or 'defeat.'")

As a result, the Commission's current regulations present an alternative to our colleagues' "magic words" test and recognize there is more to express advocacy than a mere list of words. The regulations incorporate the decision of the Ninth Circuit in *FEC v. Furgatch*, 807 F.2d 857, 864 (9th Cir. 1987), *cert. denied*, 484 U.S. 850 (1987) which states that for a communication "to be express advocacy under the Act. . . it must, when read as a whole, and with limited reference to external events, be susceptible of no other reasonable interpretation but as an exhortation to vote for or against a specific candidate."[6]

We believe the advertisement attacking Bill Yellowtail satisfies the definition of express advocacy communication found in the Commission's regulations. 11 C.F.R. § 100.22(b). Though the advertisement does not use any magic words, few people seriously would doubt it expressly urges the voting public to reject Mr. Yellowtail. The ad clearly identifies Bill Yellowtail - Hill's only opponent - and focuses not on Yellowtail's stance on particular issues; rather, it viciously attacks Mr. Yellowtail's character. Additionally, it was broadcast just weeks before the election in the three counties where polls showed the race to be neck-and-neck. With these considerations, reasonable minds could not differ as to whether the phrase "call Bill Yellowtail and tell him that you don't approve of his wrongful behavior" unambiguously "encourages actions to elect or defeat of [a] clearly identified candidate." Complaint at Exhibit 9, 11 C.F.R. § 100.22(b).

The current matter is not the first time our colleagues have failed to find express advocacy in an obvious advocacy communication. For example, in MUR 4922, the Suburban O'Hare Commission ("SOC") put out a communication that urged voters to vote on election day, argued it was essential to have an official in Congress who supported SOC's position on the issue of airport expansion, and then identified that official as Congressman Henry Hyde. In *FEC v. MCFL*, the United States Supreme Court made clear that a communication urging voters to support candidates who agreed with a certain position, and then identifying those candidates by name, constituted express advocacy even though the communication never expressly stated "vote for

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[6] In pertinent part, the regulations state:

> *Expressly advocating* means any communication that—
>
> ...
>
> (b) When taken as a whole and with limited reference to external events, such as the proximity to the election, could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s) because--
>
> (1) The electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning; and
>
> (2) Reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action.

11 C.F.R. § 100.22. Commissioners Mason and Smith believe § 100.22(b) is unconstitutional. Statement of Reasons of Commissioners Mason and Smith in MUR 4922 at 7.

Hyde." This is exactly what happened in MUR 4922. Yet, our colleagues voted to reject the General Counsel's recommendation and found no express advocacy present.

The approach of Commissioners Mason and Smith has far-reaching consequences. Most significantly, a candidate committee now would be allowed to use an outside group or entity to finance campaign advertisements which traditionally had been financed by candidate campaign committees. Consider, for example, several recent ads run by candidates for the United States Senate in 2002. In New Mexico, Senator Pete Domenici is running this advertisement:

> ANNOUNCER: When Curtland was threatened, this man led the effort to save it. When farming and ranching are under assault, he steps forward to save jobs and a way of life. But Pete Domenici also brings in new jobs, Rural Payday to help our small towns, increased funds for our national labs. And Pete Domenici's always helping small business, the heart of our economy, using his position in the Senate to help his neighbors here at home. Pete Domenici: he stands for New Mexico.

Hotline at 24 (September 13, 2002).

This ad contains no magic words and, presumably, would not constitute express advocacy in the view of Commissioners Mason and Smith. And without express advocacy, they believe there can be no coordinated expenditure or contribution. As a result, the Domenici campaign apparently would be able to hand over the text of this ad to a wealthy individual and ask the individual to pay for this campaign ad. In addition, the campaign could even tell this financial backer both where and when to run the campaign ad. No longer would a wealthy individual be bound by contribution limitations to help a campaign finance a campaign ad; rather, an individual could directly pay for campaign advertisements provided by the candidate's campaign itself.

Similarly, consider this campaign ad currently being run by the Bowles campaign in North Carolina:

> BOWLES:
> Everyone here at home knows that the textile industry is hurting and hurting really bad. What they don't know is that China is illegally smuggling goods through Mexico into the States, so they can avoid higher tariffs. That's costing thousands of hardworking North Carolinians their jobs, and it's just plain got to stop. In the Senate I'll vote against Fast Track, and I'll vote to break off our trade agreements with China until China stops breaking the law.
>
> ANNOUNCER:
> Erskine Bowles. He cares about people and gets results.

Hotline at 24-25 (September 13, 2002). Once again, our colleagues presumably would find no "express advocacy" since there are no words or phrases, such as "vote for" or "support" Erskine Bowles in this campaign ad. And, once again, a campaign simply could ask a wealthy individual to finance the ad since such an ad would be considered outside their definition of coordinated expenditure – even though the candidate himself would appear in the ad.

The campaign advertisements quoted above are not unusual. Indeed, it is fairly common that candidate campaign advertisements do not contain the magic words required by our colleagues. As a recent study by the Brennan Center concluded: "The magic words standard that some use to distinguish express advocacy from issue advocacy has no relation to the reality of political advertising." Buying time 2000: Television Advertising in the 2000 Federal Elections, Executive Summary at 13 (Brennan Center 2001). After an exhaustive review of political advertising during the 2000 election, the study found:

> None of the players in political advertising—candidates, parties, or groups—employ magic words such as "vote for," "vote against," "elect" or anything comparable with much frequency in their ads. Only 10% of candidates ads ever used magic words, and as few as 2% of party and groups ads used magic words.

Id.

In *Buckley*, the Supreme Court held that "controlled or coordinated expenditures are treated as contributions rather than expenditures under the Act." 424 U.S. at 46. The Court recognized that the "contribution ceilings . . . prevent attempts to circumvent the Act through prearranged or coordinated expenditures amounting to *disguised contributions*." 424 U.S. at 47. (emphasis added). Tying coordinated expenditure analysis to an express advocacy test, particularly one dependant upon the magic words required by our colleagues, would devastate the statute. Under our colleagues' approach, the vast majority of current campaign advertising automatically would fall outside the limitations, prohibitions, and reporting provisions of the Act if conducted by third parties. We cannot believe either Congress or the Supreme Court intended the statute could be so easily evaded through such "disguised contributions."

IV.

For the reasons stated above, we believe the Commission should have voted to adopt the General Counsel's recommendation finding probable cause that the Rick Hill Committee violated the Act by coordinating with Triad and CR regarding the anti-Yellowtail advertisement and phone bank. We further believe our colleagues' legal analysis widely missed the mark.

10/3/02
Date

Scott E. Thomas
Commissioner

10/03/02
Date

Danny Lee McDonald
Commissioner