




FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

MEMORANDUM

**TO: The Commissioners
Staff Director
Deputy Staff Director
General Counsel**

FROM: Office of the Commission Secretary 

DATE: April 24, 2002

SUBJECT: Statement Of Reasons for MUR 4982

**Attached is a copy of the Statement Of Reasons for MUR 4
signed by Commissioner Scott E. Thomas and Commissioner L
McDonald.**

**This was received in the Commission Secretary's Office on
Tuesday, April 23, 2002 at 3:51 p.m.**

**cc: Vincent J. Convery, Jr.
OGC Docket (5)
Information Division
Press Office
Public Disclosure**

Attachment

22 "04" 405 "3634"



FEDERAL ELECTION COMMISSION
WASHINGTON, D C. 20463

In the Matter of)

Republicans for Clean Air)

Sam Wyly)

Charles Wyly)

Lydia Meuret)

Jeb Hensarling)

Bush for President, Inc. and)

David Herndon, as treasurer)

MUR 4982

STATEMENT OF REASONS

COMMISSIONER SCOTT E. THOMAS
COMMISSIONER DANNY LEE MCDONALD

The week before the "Super Tuesday" primaries, a \$2 million advertising campaign praising presidential candidate George W. Bush and attacking his opponent, John McCain, ran in the important primary states of California, New York and Ohio. The ads stated that they were paid for by a group calling itself "Republicans for Clean Air." In actuality, the ads apparently were financed mostly by two brothers, both of whom were strong financial supporters of then Governor Bush and one of whom was an authorized fundraiser for the Bush presidential campaign. At issue in MUR 4982 was whether there should have been some disclosure to the voting public of who really paid for the ads; whether the ads were coordinated with any agent of the Bush campaign and, thus, should be viewed as an in-kind contribution to the Bush campaign; and finally, whether the advertising effort should have registered with the Federal Election Commission as a "political committee" subject to reporting requirements and funding restraints.

Commissioners Mason, Smith and Wold voted not to investigate this matter. In their view, the advertisements did not contain "express advocacy" and were not required to carry a disclaimer disclosing the true source of funding. In addition, they relied on a new, narrow definition of coordination they effectuated last year with Commissioner Sandstrom to conclude that there was no evidence of coordination between the Bush campaign and the principal financial backers of the ads. Finally, they saw no need for this \$2 million advertising campaign focused on the 2000 presidential primaries to follow the disclosure and sourcing rules for political committees.

The factual circumstances and the magnitude of the potential violations in this matter cry out for an investigation. Because there were not four votes to investigate this

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case, however, the Commission and the public will never know what actually transpired. Most important, we will never know whether there was improper coordination in the running of this carefully timed advertising campaign. The Act directs that the Commission "seek to obtain compliance with" the Act. 2 U.S.C. § 437c(b)(1). By failing to investigate this important matter, the Commission ignores this statutory mandate.

I.

In early March, 2000, less than one week before the "Super Tuesday" primaries, advertisements began running in three of the most important primary states--California, New York and Ohio. Opening with a picture of presidential candidate John McCain superimposed over smokestacks belching dirty air, the advertisement was described in a script as follows:

VISUALS/On Screen Copy

AUDIO

McCain PHOTO OVER POLLUTION
McCain Voted Against Clean Energy
Paid for by Republicans for Clean Air

Last year, John McCain voted against solar and renewable energy.¹ That means more use of coal-burning plants that pollute our air.

NY SKYLINE W/ STATUE LIB
BUSH NAME W/ SKY: BUSH

New York Republicans care about clean air.
So does Governor Bush.

SMOKESTACKS W/ CLEAR DAWN
Bush Clamped Down On Polluters

He led one of the first states in America to clamp down on old, coal-burning electric power plants.²

BUSH PHOTO OVER GREEN FIELD
Bush Signed Clean Air Laws

Bush clean air laws will reduce air pollution more than a quarter million tons a year.³

YOUNG PEOPLE W/ CANOE

That's like taking five million cars off the road.

BUSH NAME W/ KIDS: BUSH
Let Bush & McCain Know
You Back Clean Energy

Governor Bush. Leading . . . so each day dawns brighter.

¹ Vote #171, Bill #S.1186, June 16, 1999.

² Texas Senate Bill 7, signed June 18, 1999, Texas Senate Bill 766, Signed June 18, 1999.

³ State of Texas, Office of the Governor Web Site (www.governor.state.tx.us/environmental/emissions.html)

Attachment to Complaint. The ad disclosed only that it had been paid for by an organization calling itself "Republicans For Clean Air." A so-called issue ad, the advertisement nonetheless ran only during the week before the Super Tuesday primaries, and apparently has not aired since the primary elections were held.

On March 6, 2000, McCain 2000 filed a complaint regarding these political advertisements with the Federal Election Commission. Stating that the advertisements were paid for by two brothers, Charles and Sam Wyly, the complaint alleged that:

As one of the Bush campaign's "Pioneers"—the title for senior campaign fundraisers—Charles Wyly is an authorized official of the campaign, and the advertisement sponsored by the Wyls therefore is an extraordinarily large and illegal in-kind contribution to the Bush campaign that the Commission should investigate immediately.

Complaint at 1. In discussing why the name "Republicans for Clean Air" was used on the advertisements rather than the names of the Wyly brothers, the complaint explained:

The need for concealment becomes obvious when one considers the connections between the Wyls and Bush campaigns, past and present. The Wyly brothers gave more than \$200,000 to George W. Bush's two gubernatorial campaigns, and the Wyls run an investment fund that manages \$96 million for the University of Texas (whose board was appointed by Governor Bush for an annual fee, according to press reports, of \$1 million plus 20% of profits. *In the current presidential campaign, Charles Wyly is one of Governor Bush's "Pioneers"—an elite team of authorized fundraising officials for the Bush for President Committee who have each raised at least \$100,000 for the campaign.*

Id. (emphasis added).

The complaint further alleged that even if the ads were not coordinated, the Wyls should have reported the expenditures for the political advertisements to the Federal Election Commission because the advertisements constituted express advocacy. Noting the advertisements' use of the slogan "Governor Bush. Leading so each day dawns brighter" by itself constituted express advocacy, the complaint also stated that:

[T]he advertisement as a whole can be interpreted only as advocating the election of Governor Bush and the defeat of Senator McCain. The ad specifically contrasts the two candidates' records; specifically mentions New York, Ohio, and California Republicans as the target audience; and closes with the pro-Bush slogan discussed above. What purpose, other than express advocacy, could there be for presenting the environmental records of a Texas governor and an Arizona senator to

New York, Ohio, and California Republicans in the weekend before the primary in each of these states?

Id. at 3. The complaint concludes that “[b]ecause the Wyls engaged in express advocacy within 20 days prior to an election, they were required to report their expenditures to the Commission within 24 hours of making them. See 11 C.F.R. §§ 104.4; 109.2(b).” *Id.* at 4.

On December 20, 2001, the Office of General Counsel sent a report to the Commission containing an analysis of the allegations presented in the complaint. Based on an erroneous reading of the Commission express advocacy regulations and applying the Commission’s new coordination regulations, the report found “[t]he advertisement run by [Republicans for Clean Air] did not contain express advocacy, nor does the available information support a conclusion that [Republicans for Clean Air] coordinated with the Bush Committee with regard to the advertisement.” General Counsel’s Report at 26. As a result, “it appears that neither Charles nor Sam Wyly, nor Republicans for Clean Air, made an excessive contribution to the Bush Committee in connection with the advertisement, and the Bush Committee accordingly did not accept excessive contributions from Sam or Charles Wyly, or Republicans for Clean Air, or fail to report them.” *Id.* The report recommended that the Commission find no reason to believe that Charles and Sam Wyly violated 2 U.S.C. § 441a(a)(1)(A) and (a)(3), that Republicans for Clean Air violated 2 U.S.C. § 441a(a)(1)(A), or that Bush for President, Inc. and David Herndon, as treasurer, violated 2 U.S.C. §§ 434 and 441a(f). The report also recommended that the Commission find no reason to believe that Republicans for Clean Air violated 2 U.S.C. § 434(c)(1).

On January 23, 2002, a motion was made to find reason to believe that (1) Charles Wyly and Sam Wyly violated 2 U.S.C. §§ 441a(a) and 441d; (2) Republicans for Clean Air violated 2 U.S.C. §§ 433, 434, 441a(a), 441a(f), and 441d; and (3) Bush for President, Inc., and David Herndon, as treasurer, violated 2 U.S.C. § 441a(f). The motion failed to secure the four affirmative votes needed to pursue the matter. 2 U.S.C. § 437g(a)(2). Commissioners Thomas, McDonald and Sandstrom voted for the motion and Commissioners Mason, Smith and Wold voted against. Similarly, Commissioners Thomas, McDonald and Sandstrom voted against the General Counsel’s recommendations on tally vote and Commissioners Mason, Smith and Wold voted in favor. The Commission agreed, however, to find no reason to believe that Lydia Meuret or Jeb Hensarling violated the Act. The Commission then voted to close the matter.

We believe the Commission at least should have investigated the serious allegations made in this matter. In our view, there is reason to believe that (1) the advertisements were coordinated; (2) the advertisements contained express advocacy and should have disclosed to the voting public who was responsible for the advertisements; and (3) the Wyls should have registered their effort as a political committee with the Federal Election Commission.

II.

In our view, the Commission's new coordination regulations create a large loophole in the limitations, prohibitions and reporting requirements of the Act. These regulations are not sound as a matter of law or policy. As this matter demonstrates, these regulations simply provide cover for those not interested in enforcement of the Act as Congress intended. Because of these new regulations, the Commission did not ask a single question regarding the activity at issue. It is this legacy of non-enforcement which we fear will be repeated as long as these new regulations remain in effect.

Serious questions remain as to whether the advertisements were undertaken "totally independently" of the candidate and his agents. *Buckley v. Valeo*, 424 U.S. 1, 47 (1976) ("*Buckley*"). In fact, one of the independent exponents was an authorized fundraiser of the candidate's campaign and actually may have been an agent of the candidate's campaign. As the "independent administrative agency vested with exclusive jurisdiction over civil enforcement of the Act," *FEC v. National Right to Work Committee*, 459 U.S. 197, 198 n.2 (1982), the Federal Election Commission should have investigated this important matter.

A.

The definition of "coordination" found in the Commission's new regulations directly undercuts the Supreme Court's guidance in this area. In *Buckley*, the Supreme Court upheld limits on contributions to federal candidates but ruled a similar limitation on independent expenditures was unconstitutional. The Court recognized, however, that its ruling created many opportunities for evasion of the contribution limitations. If a would-be spender could pay for a television advertisement provided by a candidate, for example, this "coordination" would convert what is supposed to be an "independent" expenditure into nothing more than a disguised contribution. Indeed, the *Buckley* Court warned the contribution limitations would become meaningless if they could be evaded "by the simple expedient of paying directly for media advertisements or for other portions of the candidate's campaign activities." *Id.* at 46.

In order to "*prevent attempts to circumvent the Act through prearranged or coordinated expenditures amounting to disguised contributions,*" *id.* at 47 (emphasis added) the *Buckley* Court treated "coordinated expenditures. . . as contributions rather than expenditures." *Id.* at 46-47 (emphasis added). Thus, the *Buckley* Court drew a specific distinction between expenditures made "*totally independently of the candidate and his campaign*" and "coordinated expenditures" which could be constitutionally regulated. The Court defined "contribution" to "include not only contributions made directly or indirectly to a candidate, political party, or campaign committee . . . but also *all expenditures placed in cooperation with or with the consent of a candidate, his agents, or an authorized committee of the candidate.*" *Id.* at 78 (emphasis added).

Thus, 25 years ago, the Supreme Court assented to a broad definition of coordination – relying on mere cooperation or consent and recognizing that a person serving as a candidate's agent could be the vehicle for coordinating activity. Reacting to these judicial concerns, Congress enacted as part of the Federal Election Campaign Act Amendments of 1976 a definition of "independent expenditure" now codified at 2 U.S.C. § 431(17). Concerned that independent expenditures could be used to circumvent the contribution limitations,¹ Congress preserved the distinction drawn by the Supreme Court between those expenditures which were "totally independent" of the candidate's campaign and those which were not.²

The current language of the Act reflects the judicial and legislative concern that independent expenditures are not turned into disguised contributions through coordination with the candidate or his campaign. The Act squarely states that an expenditure made "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 to be a contribution to such candidate" and subject to the contribution limitations. 2 U.S.C. § 441a(a)(7)(B)(i). Moreover, section 431(17) of the statute defines "independent expenditure" as:

[A]n expenditure by a person expressly advocating the election or defeat of a clearly identified candidate which is made *without cooperation or consultation* with any candidate, or any authorized committee or agent of such candidate, *and which is not made in concert with, or at the request or suggestion of*, any candidate, or any authorized committee or agent of such candidate.

2 U.S.C. § 431(17)(emphasis added).

Former section 109.1(b)(4)(i) of the Commission's regulations "clarif[ied] this language," *FEC v. National Conservative Political Action Committee*, 647 F.Supp. 987, 990 (S.D.N.Y. 1986), and explained that an expenditure will not be considered independent if there is "[a]ny arrangement, coordination, or direction by the candidate or his . . . agent prior to the publication, distribution, display or broadcast of the communication." 11 C.F.R. § 109.1(b)(4)(i)(2000). The former regulations further stated an expenditure was presumed not to be independent if:

¹ See, e.g., Federal Election Campaign Act Amendments, 1976: Hearings on S.2911, et al., Subcommittee on Privileges and Elections of the Senate Committee on Rules and Administration, 94th Cong., 2d Sess. 74 (remarks of Sen. Kennedy); 77 (remarks of Sen. Cannon); 77 (remarks of Sen. Scott); 85 (statement of Sen. Mondale); 89 (remarks of Sen. Griffin); 98 (remarks of Sen. Buckley); 107-08, 130 (remarks of then Assistant Attorney General Scalia).

² H.R. Conf. Rep. 94-1057 at 38 (1976). Specifically, the Conference Report states: "The definition of the term 'independent expenditure' in the conference substitute is intended to be consistent with the discussion of independent political expenditures which was included in *Buckley v. Valeo*." *Id.*

- (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 who is, or has been, receiving any 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).

The Commission's new regulations, however, cast a blind eye toward the *Buckley* and *Colorado Republican* decisions and the broad statutory language. Instead, these new regulations are 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 its lawsuit, the Commission charged the Christian Coalition repeatedly spent its corporate treasury funds to influence federal elections in violation of the FECA. Based on the record evidence, the Commission alleged the Christian Coalition's leadership and its staff repeatedly cooperated and consulted about campaign strategy and activities with several different Republican candidates, their campaigns, and the National Republican Senatorial Committee.

With respect to coordination, the district court ruled against the Commission on five of the six coordinated expenditure allegations and found a contested issue of fact on the sixth. In the opinion of the district court, the Supreme Court in *Buckley* did not address "the First Amendment concerns that arise with respect 'to expressive coordinated expenditures.'" 52 F.Supp.2d at 85. The district court speculated: "It can only be surmised that the *Buckley* majority purposely left this issue for another case. In many respects this is that case." *Id.* As a result, the district court felt free to ignore the § 441a(a)(7)(B)(i) standard of coordination as well as the Commission's regulations.

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Instead, the district court created its own standard of coordination and applied it to a new concept, which it also developed, known as "expressive coordinated expenditures." The district court concluded "the First Amendment requires different treatment for 'expressive,' 'communicative' or 'speech-laden' coordinated expenditures, which feature the speech of the spender, from coordinated expenditures on non-communicative materials, such as hamburgers or travel expenses for campaign staff." *Id.* at 85 n.45. The district court then defined an "expressive coordinated expenditure" as an expenditure "for a communication 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." *Id.* The court then developed its own test for coordination:

In the absence of a request or suggestion from the campaign, an expressive expenditure becomes "coordinated[]" where the candidate or her agents can exercise control over, or where there has been substantial discussion or negotiation between the campaign and the spender over, a communication's: (1) contents; (2) timing; (3) location, mode, or intended audience (e.g., choice between newspaper or radio advertisement); or (4) 'volume' (e.g., number of copies of printed materials or frequency of media spots). Substantial discussion or negotiation is such that the candidate and spender emerge as partners or joint venturers in the expressive expenditure, but the candidate and the spender need not be equal partners. This standard limits §441b's contribution prohibition on expressive coordinated expenditures to those in which the candidate has taken a sufficient interest to demonstrate that the expenditure is perceived as valuable for meeting the campaign's needs or wants.

Id. at 92. Based upon this analysis, and neither the statute nor the Commission's regulations, the district court found no improper coordination between the Christian Coalition and Bush-Quayle '92, Helms for Senate, Inglis for Congress, Hayworth for Congress, or the National Republican Senatorial Committee.

The district court's view that the Supreme Court did not address the First Amendment concerns involving "expressive" communications is odd at best. The whole analysis in *Buckley* was about expressive communications! Indeed, given the Court's reference to independent express advocacy and the dangers of evasion through payment for "media advertisements," 424 U.S. at 46, the district court's premise is wholly unfounded.

The new Commission definition of "coordination" draws heavily from the badly flawed *Christian Coalition* decision. The new rule provides:

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 a 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, 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). Importantly, the new revisions also deleted the presumptions of coordination regarding information provided by a campaign "with a view toward having an expenditure made" and regarding spending by someone authorized to raise or expend money for the campaign. *Supra*, p.7.

The Commission's new test for coordination weakens important provisions of the Act. For example, suppose that Candidate Smith is slightly behind in the polls, low on money, and needs help. It is the week before the election and he knows a corporation is planning to run an "issue" advertisement to assist the Smith campaign. Smith contacts the president of the corporation and complains that nobody has focused on an important matter in the campaign: various problems in the personal life of his opponent, Congressman Jones. Because of this oversight, candidate Smith explains, Congressman Jones is viewed in a better light by the electorate.

During his meeting with candidate Smith, the wealthy supporter says, "Thanks for the information." After the meeting, the wealthy supporter changes the advertisement to say: "Congressman Jones is a liar, tax cheat and a wife-beater—keep that in mind on Tuesday." The advertisement runs on the weekend before the election. Is this a coordinated expenditure? As we understand the Commission's new regulations, there arguably would be no coordination between the candidate and the spender since there was no "request or suggestion" for a communication to be made, no "control or decision-

making authority," and no "substantial discussion or negotiation" resulting in "collaboration or agreement." 11 C.F.R. § 100.23(c)(2).

Obviously, it is almost impossible to secure such evidence or meet such a high standard to establish coordination. Moreover, if a finding of coordination under the "substantial discussion or negotiation" test requires some sort of "collaboration or agreement" between a candidate and a spender regarding some particular aspect of a communication, a candidate could set up a meeting with an organization known to be planning campaign ads, and could discuss campaign strategy and the development of issues crucial to the campaign. The organization then could make "independent" expenditures based on this crucial knowledge and information. The only apparent restriction would be that a campaign could not "collaborate" or "agree" on the details of campaign ads. Such a limited approach renders the coordination standard—and thus, the contribution limits—meaningless.

The Commission's earlier definition of coordination, however, would have produced a much different result. Under the Commission's former regulations, this hypothetical expenditure would be treated as a disguised contribution and coordinated activity because it was "based on information about the candidate's plans, projects, or needs provided to the expending person by the candidate's agents, with a view toward having an expenditure made." 11 C.F.R. § 109.1(b)(4)(i) (2000).³ This would appear to be the more appropriate result especially given the ease with which "coordination," and thus, the contribution limits, can be evaded so easily under the Commission's new definition of coordination.

To its credit, the district court in *Christian Coalition* recognized the difficulty as well as the importance of its task and virtually invited the Commission to file an interlocutory appeal on the matter to the United States Court of Appeals for the District of Columbia Circuit: "This Court is of the opinion that this Order in relation to Counts I, II, and III involves controlling questions of law as to which *there is substantial ground for difference of opinion and that an intermediate appeal from the order may materially advance the ultimate termination of the litigation.*" 52 F.Supp.2d at 98 (emphasis added). Commissioners Elliott, Mason, Sandstrom, and Wold, however, voted to end the Commission's enforcement litigation against the Christian Coalition and not appeal the matter.

³ It has been suggested that the Commission's previous coordination regulations were drafted too broadly and that the Commission somehow has been too aggressive in applying these regulations to the regulated community. Yet, the record paints a far different picture. If any conclusion can be reached, it is that the Commission has been reluctant to proceed on a coordination theory in even the most obvious cases. See, e.g., MUR 2272 (American Medical Association Political Action Committee and Williams for Congress Committee); MUR 2766 (Auto Dealers and Drivers for Free Trade PAC and Friends of Connie Mack); MUR 3069 (National Security Political Action Committee and Bush-Quayle '88); MUR 4204 (Americans for Tax Reform and Lewis for Congress); MUR 4282 (Archdiocese of Philadelphia and Santorum '94); and MUR 4378 (NRSC and Montanans for Rehberg). Having failed to go forward in so many matters based upon the "broadly drafted" regulations of old, it is difficult to imagine the Commission garnering four votes to proceed upon its new coordination regulations.

Our colleagues should not have dropped a significant enforcement action such as the *Christian Coalition* case and wrested resolution of these important issues away from the Article III courts.⁴ As the recent decision of the Supreme Court in *FEC v. Colorado Republican Federal Campaign Committee*, 531 U.S. 923 (2001), illustrates, it is not unusual for erroneous lower court decisions to be overturned on appeal.⁵ Would the Commission similarly have prevailed on appeal in the *Christian Coalition* case? Would the appellate courts have upheld the Commission's original regulations defining coordination? By refusing to follow normal litigation practice and appeal this important matter, it appears that our colleagues did not want to take that chance.

On April 2, 2001, the United States Senate passed S. 27, the Bipartisan Campaign Reform Act of 2001, also known as the "McCain-Feingold bill." During debate, Senator Feingold voiced his opposition to the Commission's new coordination regulations and pointed out that "many observers of campaigns who are concerned about evasions of the law think [it] is far too narrow to cover what really goes on in campaigns." 147 Cong. Rec. S3184 (daily ed. March 30, 2001)(remarks of Sen. Feingold). Reflecting this concern, section 214 of the bill as passed by the Senate repealed the Commission's new coordination regulations and directed the Commission to promulgate new coordination rules within 90 days to take their place.

Despite the plain rejection of its coordination regulations by the United States Senate, the Commission nevertheless went ahead and approved final promulgation of the new coordination regulations. On May 3, 2001, Commissioners Mason, Sandstrom, Smith, and Wold voted to make the new coordination regulations immediately effective upon publication in the Federal Register. The undersigned opposed. We agreed with Senator Feingold that the new regulations are far too narrowly drafted and will make evasion of the Act commonplace. At the very least, we believe our colleagues should

⁴ The decision of a single district court certainly cannot resolve these important issues. Indeed, the decision of the district court in *Christian Coalition* is not binding precedent on any other federal court, even in the same district. See, e.g., *In re Korean Air Line Disaster*, 829 F.2d 1171, 1176 (D.C.Cir. 1987)("Binding precedent for all [circuits] is set only by the Supreme Court, and for the district courts within a circuit, only by the court of appeals for that circuit"), *aff'd*, 490 U.S. 122 (1989).

⁵ Through the years, there have been a number of important cases the Commission has lost in the lower courts, but has won on appeal. See, e.g., *Bread Political Action Committee v. FEC*, 635 F.2d 621 (7th Cir. 1980)(en banc), *rev'd*, 455 U.S. 577 (1982)(reversing lower court's decision allowing expedited consideration of an action under 2 U.S.C. § 437h); *FEC v. National Right to Work Committee*, 665 F.2d 371 (D.C.Cir. 1981), *rev'd* 459 U.S. 197 (1982)(rejecting lower court construction of the term "member" to include certain individuals described by the NRWC as active members); *Democratic Senatorial Campaign Committee v. FEC*, 660 F.2d 773 (D.C.Cir. 1980), *rev'd* 454 U.S. 27 (1981)(overturning decision that FEC acted contrary to law in dismissing complaint); *FEC v. Ted Haley Congressional Committee*, 654 F.Supp. 1120 (W.D. Wash. 1987), *rev'd* 852 F.2d 1111 (9th Cir. 1988)(rejecting lower court decision holding loan guarantees were not contributions under FECA); *FEC v. Furgatch*, No. 83-0596-GT-M)(S.D. Cal. Nov. 20, 1984), *rev'd*, 807 F.2d 857 (9th Cir.), *cert. denied*, 484 U.S. 850 (1987)(reversing lower court's grant of a motion for dismissal); see also *United States v. Kanchanalak*, 41 F.Supp. 2d 1 (D.D.C. 1999), *rev'd*, 192 F.3d 1037 (D.C.Cir. 1999)(reversing the district court and concluding that 2 U.S.C. § 441e prohibits foreign contributions for non-federal as well as federal elections).

have waited until the conclusion of the legislative process and not rushed to promulgate new rules that are in such obvious conflict with the will of the United States Senate.

Subsequently, on February 14, 2002, the House of Representatives also approved legislation which specifically repealed our colleagues' new coordination regulations. See section 214(b) of H.R. 2356. Eventually, such a repeal was included in section 214(b) of the Bipartisan Campaign Reform Act of 2002, but it takes effect 270 days from the enactment date of March 27, 2002. Thus, our colleagues' coordination regulations are in effect today and were applied in the Commission deliberations on MUR 4982.

B.

Under the Commission regulations in effect at the time of the activity at issue, there certainly was reason to believe that coordination existed in this matter such that an investigation would have been warranted. The Commission's regulations stated that an expenditure would be presumed to be coordinated if it was "[m]ade by or through any person who is . . . authorized to raise or expend funds." 11 C.F.R. § 109.1(b)(4)(i)(B) (2000). The Bush for President Committee acknowledged that "Mr. Charles Wyly is a 'Pioneer' for BFP [Bush for President] and, as such, is a contributor and an authorized fundraiser for the campaign." Bush for President Response at 3 (May 4, 2000). Accordingly, under the prior regulations, there would have been a presumption that Charles Wyly coordinated the Republicans for Clean Air advertisements with the Bush campaign.⁶

Commissioners Mason, Sandstrom, Smith and Wold, however, eliminated the "authorized fundraiser" language from the Commission's regulations. In its place, as we detailed above, they incorporated much of the analysis from the district court judge in *Christian Coalition, supra*. The *Christian Coalition* decision and the Commission-approved regulation require that there be something akin to a joint venture, with respect to "the expressive expenditure" or "general public political communication." *Christian Coalition*, 52 F.Supp. at 92; 11 C.F.R. § 100.23(c). This requires substantial discussion or negotiation over an expressive communication's content, timing, location, volume etc. Applying these new regulations, the General Counsel's Report concluded, "under the reasoning of the *Christian Coalition* court, there is insufficient evidence that Charles Wyly played any role in coordinating the broadcast of the advertisement in question with the Bush Committee." Report at 25.

Even operating under the strictures of the Commission's new regulations, however, there is a strong legal predicate for investigating whether there was coordination in this matter. Under the Act, if you coordinate with a candidate's agent, that makes it a coordinated expenditure—an in-kind contribution. The statute provides that

⁶ Oddly, the General Counsel's Report stated the "presumption could be overcome by evidence to the contrary, which is here provided by the Wylys' affidavits." Report at 23. As we discuss *infra*, however, there are serious problems with these affidavits and they certainly do not rebut a presumption of coordination.

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"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 to be a contribution to such candidate." 2 U.S.C. § 441a(a)(7)(B)(i) (emphasis added). The Commission's new coordination regulations use the term "agent" as well, and define it as:

[A]ny person who has actual oral or written authority, either express or implied, to make or authorize the making of expenditures on behalf of a candidate, or any person who has been placed in a position within the campaign organization where it would reasonably appear that in the ordinary course of campaign-related activities he or she may authorize expenditures.

11 C.F.R. § 109.1(b)(5).

It is clear there was cooperation with Charles Wyly in this endeavor. He paid for the ads in part after discussion with other participants. The question then becomes whether Charles Wyly was an agent of the Bush campaign. We know that Charles Wyly was an "authorized fundraiser" for the Bush campaign. Bush Campaign Response at 3, *supra*. We also know that Charles Wyly is a "Pioneer." *Id.* According to the complaint,

The Bush campaign proudly lists the Pioneers on its website as a Bush fundraising group and works closely with the Pioneers in their fundraising efforts. The *Washington Post* reports that the Pioneers "have been extensively briefed on the campaign's spending plans." According to the *St. Petersburg Times*, these fundraisers attend "special Bush campaign meetings," and the *New York Times* reports that Pioneers attended a two-day meeting in Austin in November 1999 where they were to be "instructed" to raise funds both for the Bush campaign and state party candidates.

Complaint at 2. Thus, the complaint alleges "Charles Wyly is more than a mere Bush campaign contributor—he is an authorized fundraiser whose ongoing knowledge and involvement make him an official of the campaign." *Id.*

The responses filed by the Bush campaign and the Wyly brothers do not refute the allegations made in the complaint. Indeed, the responses provide more questions than answers. For example, the Bush campaign response states "Mr. Charles Wyly is a 'Pioneer' for BFP and, as such, is a contributor and an authorized fundraiser for the campaign." Bush Campaign Response at 3. But what is a Pioneer? Are there any restrictions or constraints on the fundraising authority? Is a Pioneer authorized to spend money on behalf of the campaign? Were there any reimbursements to Charles Wyly from the campaign for carrying out his fundraising duties or conducting fundraising services? Did Mr. Wyly have any other titles in the campaign?

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The campaign's response also provided a general assertion that "in this capacity, Mr. Wyly did not and does not exercise any decisionmaking authority over any of BFP's political, strategic or spending decisions." *Id.* This simply raises the question of whether Mr. Wyly nonetheless was placed in a position where it would appear that he had such authority, and whether there is some special meaning for the terms "decisionmaking authority" and "BFP. . .spending decisions." The response goes on to state "there is no evidence that any person with any involvement in BFP's political, strategic, or spending decisions was privy to or had any involvement with the RCA [Republicans for Clean Air] issue advertisements." *Id.* Once again, the response is subject to interpretation. It does not flatly deny BFP involvement—it only states that "there is no evidence" of BFP involvement. Moreover, it could be read to simply claim that persons other than Mr. Wyly, who had more formalized authority in the campaign, were not involved with the ads at issue.

Similarly, the response of the Wyls is uninformative on some crucial points. Was Sam Wyly a Pioneer? Was Sam Wyly authorized to raise money for the Bush campaign? Did the designer of the advertisements or the media buyer have any prior (as opposed to current) connection to the Bush campaign? While a Mr. Hensarling broadly denied any coordination, why were the vendors used not asked to provide similar statements?

The responses in this important matter leave factual holes which should have been investigated to determine whether there was coordination. We would not ask these questions simply because the Wyls made huge outlays for ads comparing opposing presidential candidates. A truly independent expenditure involves "core First Amendment expression." *Buckley*, 424 U.S. at 48. We would have asked these questions because this matter involves an authorized fundraiser for a campaign who made an expenditure in support of that campaign and there are partly unrefuted allegations as to whether those expenditures were truly independent. We believe the Commission should have found reason to believe and investigated this matter, as our colleagues have insisted upon in other matters with far less evidence.

III.

The Act and Commission regulations provide that whenever any person makes an expenditure to finance communications expressly advocating the election or defeat of a clearly identified candidate, and does so through various types of mass media (*e.g.*, a broadcasting station) or through "any other type of general public political advertising," the communication is required to include a statement of sponsorship or disclaimer. 2 U.S.C. § 441d, 11 C.F.R. § 110.11. The disclaimer must state clearly whether the communication has been paid for by a candidate, or the candidate's authorized political committee. If the communication is paid for by other persons but authorized by a candidate (including the candidate's committee or its agents), the disclaimer shall clearly state that the communication is paid for by those other persons and authorized by the

candidate or the candidate's committee. On the other hand, if the communication is not authorized by a candidate (including the candidate's committee or its agents), the disclaimer shall clearly state the name of the person who paid for the communication and state that it is not authorized by any candidate or candidate's committee. 2 U.S.C. § 441d; see 11 C.F.R. §§ 110.11(a)(1) and 110.11(a)(5).

After reviewing the applicable case law, the Commission's regulations, the text of the advertisement, and the circumstances surrounding its broadcast, we believe the advertisement asks the general public to support and vote for a specific federal candidate. As a result, the advertisement should have informed the voting public who paid for the ad and whether it was authorized by any federal candidate. By not including such a disclaimer on the advertisement, we believe there is reason to believe respondents violated § 441d.

A.

In creating the express advocacy standard in the context of independent communications, the Supreme Court in *Buckley* sought to draw a distinction between issue advocacy and partisan advocacy focused on a clearly identified candidate. The *Buckley* Court upheld as constitutional certain reporting requirements on expenditures made by individuals and groups that were "not candidates or political committees," 424 U.S. at 80, but expressed concern these reporting provisions might be applied broadly to communications discussing public issues which also happened to be campaign issues. To ensure expenditures made for pure issue discussion would not be reportable under the Act, the *Buckley* Court construed these reporting requirements "to reach only funds used for communications that *expressly advocate* the election or defeat of a clearly identified candidate." *Id.* (emphasis added).

As a result, the *Buckley* Court explained the purpose of the express advocacy standard was to limit application of the pertinent reporting provision to "spending that is *unambiguously related* to the campaign of a particular federal candidate." 424 U.S. at 80 (emphasis added); see also 424 U.S. at 81 (Under an express advocacy standard, the reporting requirements would "shed the light of publicity on spending that is *unambiguously campaign related*. . . .") (emphasis added). The Court, however, provided no definition of what constituted "spending that is unambiguously related to the campaign of a particular federal candidate" or "unambiguously campaign related." The *Buckley* Court only indicated that express advocacy would include communications containing such obvious campaign-related words or phrases as "'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'" 424 U.S. at 44 n.52 and at 80 n.108.

In *FEC v. MCFL*, 479 U.S. 238 (1986), the Supreme Court clarified the scope of the express advocacy standard. The Court indicated a communication could be considered express advocacy even though it lacked the specific buzzwords or catch phrases listed as examples in *Buckley*. The Court explained that express advocacy could

be "less direct" than the examples listed in *Buckley* so long as the "essential nature" of the communication "goes beyond issue discussion to express electoral advocacy." 479 U.S. at 249.

Similarly, in *FEC v. Furgatch*, 807 F.2d 857, 863 (9th Cir.), *cert. denied*, 484 U.S. 850 (1987) ("*Furgatch*"), the Ninth Circuit concluded a communication could constitute express advocacy even though it did not contain any of the catch phrases listed in *Buckley*. The court noted the list in *Buckley* "does not exhaust the capacity of the English language to expressly advocate the election or defeat of a candidate." 807 F.2d at 863. The court found that "speech need not include any of the words listed in *Buckley* to be express advocacy under the Act," 807 F.2d at 864, and that "'express advocacy' is not strictly limited to communications using certain key phrases." 807 F.2d at 862. The court indicated such a wooden and mechanical construction would invite and allow easy circumvention of the Act. *Id.*

Rather than rely on the inclusion or exclusion of certain "magic words" to determine whether a particular communication contained express advocacy, the *Furgatch* court concluded 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." 807 F.2d at 864 (emphasis added). In defining "express advocacy" under this standard, the court considered the following factors:

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

Id.

On October 5, 1995, the Federal Election Commission promulgated a regulation designed "to provide further guidance on what types of communications constitute express advocacy of clearly identified candidates."⁷ The Commission promulgated this regulation only after a lengthy rulemaking proceeding in which the Commission received literally thousands of comments.⁸ The new regulation, which has been codified at 11 C.F.R. § 100.22, provides:

⁷ 60 Fed. Reg. 52,069 (1995).

⁸ 60 Fed. Reg. 35,292 (1995).

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Expressly advocating means any communication that—

(a) Uses phrases such as “vote for the President,” “re-elect your Congressman,” “support the Democratic nominee,” “cast your ballot for the Republican challenger for U.S. Senate in Georgia,” “Smith for Congress,” “Bill McKay in '94,” “vote Pro-Life” or “vote Pro-Choice” accompanied by a listing of clearly identified candidates described as Pro-Life or Pro-Choice, “vote against Old Hickory,” “defeat” accompanied by a picture of one or more candidate(s), “reject the incumbent,” or *communications of campaign slogan(s) or individual word(s) which in context can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidate(s)*, such as posters, bumper stickers, advertisements, etc. which say “Nixon’s the One,” “Carter ’76,” “Reagan/Bush” or “Mondale!”; or

(b) When taken as a whole and with limited reference to external events, such as the proximity to the election, *could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s)* because—

- (1) The electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning; and
- (2) Reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action.

11 C.F.R. § 100.22 (emphasis added). In the Explanation and Justification to the regulation, the Commission stated that subsection (b) of the regulation reflected the analysis of *Buckley’s* express advocacy requirement articulated by the Ninth Circuit in *FEC v. Furgatch*.⁹ The Commission transmitted these regulations to Congress,¹⁰ and after thirty days passed without any resolution disapproving the express advocacy rules, the Commission implemented the regulation.

B.

We have no doubt the advertisements at issue here satisfy the tests for express advocacy laid out at *both* 11 C.F.R. § 100.22(a) and 100.22(b). With respect to § 100.22(a), the advertisements quite clearly state a campaign slogan: “Governor Bush. Leading . . . so each day dawns brighter.” Obviously, this constitutes the “communication of campaign slogan(s) . . . which in context can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidates.” 11 C.F.R. § 100.22(a). We can see little difference between this slogan and other slogans described as express advocacy in the regulation such as “Nixon’s the One,” “Carter’76,”

⁹ See 60 Fed. Reg. 35,292, 35,295 (1995) discussing 807 F.2d 857, cert. denied, 484 U.S. 850 (1987).

¹⁰ See 2 U.S.C. §438(d).

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"Reagan/Bush" or "Mondale!". *Id.* Because the advertisements contain a campaign slogan, we believe they constitute express advocacy.

The Office of General Counsel Report disagrees and maintains that "[t]he Commission's references to 'Nixon's the One' and 'Mondale!' are examples of slogans that may appear on 'posters, bumper stickers, advertisements, etc.'—situations where the phrase stands alone." General Counsel's Report at 21. Significantly, the Report does not dispute that the slogan "Governor Bush. Leading. . . so each day dawns brighter." *would* constitute express advocacy if it were on "posters, bumper stickers, advertisements, etc." Rather, the Report only contends that because the slogan was part of a larger message, and not on "posters, bumper stickers, advertisements, etc.," it cannot constitute express advocacy.

We do not think a finding of express advocacy should be changed simply because it is part of a larger advertisement that does contain some issue discussion. In *FEC v. MCFL, supra*, the Supreme Court recognized a communication might well contain both issue discussion and express advocacy. The Court found, however, the MCFL newsletter "cannot be regarded as a mere discussion of public issues that by their nature raise the names of certain politicians" and that it went "beyond issue discussion to express advocacy." 479 U.S. at 249. Similarly, even though the Bush/McCain advertisements contained both issue discussion and express advocacy, the advertisements went "beyond issue discussion to express advocacy." *Id.*

In light of *FEC v. MCFL, supra*, we think the Report reads the regulation far too narrowly. In our view, the regulation does not say that express advocacy language on a poster becomes issue discussion if found in a television advertisement. Indeed, the regulation itself broadly contemplates the use of a slogan "which *in context* could have no other meaning than to urge the election or defeat of one or more clearly identified candidate(s)" using "posters, bumper stickers, *advertisements*, etc." 11 C.F.R. § 100.22(a)(emphasis added). This language envisions the use of a slogan in "the context" of a larger communication. In fact, the regulation specifically refers to "advertisements" which would include the television advertisements at issue here.

This reading of the regulation is consistent with the Act which does not draw the poster/media advertisement distinction claimed by the Report. Indeed, the § 441d disclaimer provision itself speaks broadly in terms of:

financing communications expressly advocating the election or defeat of a clearly identified candidate, or solicits any contribution through any *broadcasting station, newspaper, magazine, outdoor advertising facility, direct mailing, or any other type of general public political advertising...*

2 U.S.C. § 441d (emphasis added). There is no distinction in § 441d between express advocacy on a poster as opposed to express advocacy through a broadcast station. Nor

should there be. It makes no sense to say, for example, that a television advertisement praising Richard Nixon the week of the election and concluding with the words "Nixon's the One" is not express advocacy. If express advocacy is present in a communication, it cannot somehow be magically diluted and lose its express advocacy identity simply because it is part of a larger message shown on a television station. Accordingly, we would find that the advertisements constituted express advocacy under § 100.22(a).

Not only do the advertisements at issue satisfy §100.22(a), but we also believe that the advertisements, "[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 candidate(s)." 11 C.F.R. § 100.22(b). In particular, "[t]he electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning." *Id.* First, the advertisements are addressed only to "Republicans" who were about to vote in three primary states, e.g., "New York Republicans care about clean air." Attachment to Complaint. The ads were not addressed to the general public, e.g., "New Yorkers care about clean air." Nor were the ads run in states that were not about to have a party primary; rather, they were run only in the Republican primary states of California, New York, and Ohio. In addition, the only two individuals mentioned in the advertisements just so happened to be the two leading candidates for President in the Republican primary—Senator John McCain and Governor George W. Bush. No other officeholders or political leaders were mentioned.

Against this election related backdrop, the advertisements provided a head-to-head comparison of the opposing candidates and clearly indicated which candidate was favored and which candidate was not. For example, the picture of Senator McCain superimposed over smokestacks belching dirty air with the words "McCain voted against clean energy" stands in stark contrast to the picture of Governor Bush superimposed over verdant, green fields with the words "Bush signed clean air laws." After having bashed Senator McCain and praised Governor Bush, the advertisements urged "New York Republicans" to "[l]et Bush & McCain know you back clean energy." Just as the *Furgatch* court found that the phrase "Don't let him do it" in a newspaper ad criticizing President Carter referred to action at the ballot box, so too it's clear that "New York Republicans" were being urged to let Governor Bush and Senator McCain "know you back clean energy" in the voting booth. Interestingly, the advertisements did not provide an address and urge, for example, that viewers "write Senator McCain and Governor Bush today;" nor did the advertisements provide a phone number and say "please call Senator McCain and Governor Bush today;" nor, for that matter, did the advertisements urge the passage or defeat of any specific piece of legislation at either the state or federal level. In view of these considerations, we believe "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(b)(2); *cf. United States v. Lewis Food Co.*, 366 F.2d 710, 712 (9th Cir. 1966) ("The 'Notice to Voters' was not intended to give an objective report on the voting record of public office

holders . . . [but] makes it plain that, in [the spender's] opinion, *those office holders who are given low ratings on their votes . . . should not be reelected.*")

As in *Furgatch*, "our conclusion is reinforced by consideration of the timing" of the advertisement. 807 F.2d at 865. In *Furgatch*, the court noted the newspaper ad criticizing President Carter failed "to state expressly the precise action called for, leaving an obvious blank that the reader is compelled to fill in." *Id.* The court went on to find, however, the advertisement constituted express advocacy partly because "[t]iming the appearance of the advertisement *less than a week before the election* left no doubt of the action proposed." *Id.* (emphasis added).

As in *Furgatch*, the Wyly brothers started running their advertisement *less than one week* before the election. Moreover, apparently as soon as the election was over, they stopped running the advertisements. We believe that here, as in *Furgatch*, the timing of the advertisements leaves "*no doubt of the action proposed.*" *Id.* (emphasis added). In view of their "proximity to the election" 11 C.F.R. § 100.22(b) and content, the advertisements conveyed a message to the voting public that unmistakably urged the election or defeat of clearly identified candidates. Accordingly, we concluded that the advertisement constituted express advocacy and that the Wyly brothers failed to include a disclaimer disclosing who paid for the ad and whether it was authorized by any candidate.

When Congress enacted the § 441d disclaimer provision only months after *Buckley* was decided, Congress explained that § 441d was "designed to provide additional information to the voting public." H. R. Rep. No. 94-917, at 5 (1976). Similarly, Representative Brademas summarized § 441d this way: "I believe these 'truth in advertising' requirements for independent expenditures will help both prevent sharp practices and further reduce the corrupting influences of big money in federal elections." 122 Cong. Rec. H3782 (daily ed. May 3, 1976)(statement of Rep. Brademas). In MUR 4982, however, our colleagues tossed aside these compelling governmental interests thereby encouraging the anonymity of those pushing sham issue ads on the voting public the week before an important election. We disagree and believe Congress intended § 441d to prevent exactly the sort of "sharp practices" apparently at issue in this matter.

Our concerns with the result here, however, lie not only with this matter, but also with future cases. For example, under the Act, corporations and labor organizations may not make contributions or expenditures from their treasury funds in connection with federal campaigns. 2 U.S.C. § 441b. In *FEC v. MCFL*, *supra*, the Supreme Court interpreted § 441b to mean expenditures for communications not coordinated with a candidate's campaign must constitute "express advocacy" to be subject to the § 441b prohibition. As a result of *FEC v. MCFL*, independent corporate or labor union communications that do not contain express advocacy are allowed under the Act.

To find there is no express advocacy in ads such as those at issue here would create a huge loophole in the Act. Corporations, labor organizations, even outside foreign national interests, would be allowed to spend unlimited sums of soft money on

advertisements that unambiguously advocate the election or defeat of federal candidates. By finding these ads did not constitute express advocacy, our colleagues would have to conclude the Wylys could have used corporate or foreign money to pay for ads the week before Super Tuesday. We cannot believe Congress ever intended to allow such an unusual result.

Unfortunately, the current matter is not the first time our colleagues have voted against finding express advocacy in even the most obvious advocacy communications. For example, in MUR 4922, the Suburban O'Hare Commission ("SOC") put out a communication urging voters to vote on election day, argued it was essential to have an official who supported SOC's position on the issue of airport expansion, and then identified that official as 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. This is exactly what happened in MUR 4922.

Indeed, our colleagues apparently have concluded that so long as an advertisement avoids certain "magic words" such as "vote against" or "defeat," the advertisement should be considered mere "issue discussion." Yet, 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. Obviously, the "magic words" test places the vast majority of campaign advertising outside the reporting provisions and prohibitions of the Act.

To make matters worse, some now argue that even with the most clear-cut evidence of coordination (for example, a "smoking gun" memorandum establishing the Bush campaign prepared the Wyly brothers ads and asked the brothers to run the ads the week before "Super Tuesday"), a contribution does not exist unless the ad contains express advocacy. See Statement for the Record of Commissioner Bradley A. Smith, MUR 4624 at 5 (November 6, 2001) ("I believe that the Act, the Constitution, judicial precedent, and sound public policy require us to limit our enforcement to cases in which communications, whether or not coordinated with a candidate, expressly advocate the

election or defeat of candidates for federal office.”)¹¹ Under this approach, the Wylys could have fully coordinated the ads with the Bush campaign and paid for them with corporate or even foreign national money because they did not contain express advocacy. Such a far-fetched view of coordinated expenditures would foster the very worst abuses Congress has tried to prevent.

IV.

This matter also raises the issue of whether the Republicans for Clean Air failed to register and report as a “political committee.” The Act defines a “political committee” as “any committee, club, association, or other group of persons which receives contributions aggregating in excess of \$1,000 during a calendar year or which makes expenditures aggregating in excess of \$1,000 during a calendar year.” 2 U.S.C. § 431(4). In construing this statutory term, the Supreme Court has held that an organization is not a political committee unless, in addition to crossing the \$1,000 statutory threshold of federal contributions or expenditures, the organization is under the control of a candidate or its *major purpose* is the nomination or election of candidates or campaign activity.¹² Thus, once an organization has received more than \$1,000 in contributions or made more than \$1,000 in expenditures and has met the major purpose test, it becomes a political committee pursuant to § 431. Any organization that qualifies as a political committee must register with the Commission and file periodic reports of all its federal election

¹¹ This approach is wrong. The Supreme Court in *Buckley* could not have been any clearer that its “express advocacy” test did not apply to coordinated expenditures. When analyzing former 18 U.S.C. § 608(e), the independent expenditure limit struck down in *Buckley*, the Court plainly stated:

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.).

¹² In *Buckley v. Valeo*, 424 U.S. 1, 79 (1976)(emphasis added), the Court stated: “To fulfill the purposes of the Act [the term ‘political committee’] need only encompass organizations that are under the control of a candidate or the *major purpose* of which is the nomination or election of a candidate.” The Court reaffirmed this approach in *FEC v. MCFL*, 479 U.S. at 252, n.6: “[A]n entity subject to regulation as a ‘political committee’ under the Act is one that is either ‘under the control of a candidate or the major purpose of which is the nomination or election of a candidate.’” The Court observed that “should [an organization's] independent spending become so extensive that the organization's *major purpose* may be regarded as *campaign activity*, the [organization] would be classified as a political committee.” 479 U.S. at 262 (emphasis added).

receipts and disbursements for disclosure to the public. 2 U.S.C. §§ 433 and 434. A political committee is subject to limits when making expenditures in coordination with a candidate, but may make unlimited expenditures on behalf of a candidate if no coordination is involved. 2 U.S.C. §§ 441a(a)(1)(A), (2)(A) and (7)(B). Persons contributing to a political committee are subject to the limits and prohibitions of the Act. 2 U.S.C. §§ 441a(a)(1)(C), (2)(C); 441b.

We voted to find reason to believe that Republicans for Clean Air violated 2 U.S.C. §§ 433 and 434 by failing to register as a political committee. There is no indication that Republicans for Clean Air was formed for any purpose other than to support or oppose certain candidates. For example, there is nothing to suggest that Republicans for Clean Air engaged in lobbying members of Congress or issue discussion outside the context of the Republican "Super Tuesday" primaries. Since Republicans for Clean Air apparently spent all of its money on advertisements designed to influence elections, there is evidence that the organization's sole purpose, let alone "major purpose," was the election or defeat of candidates or campaign activity. As noted, Republicans for Clean Air spent well in excess of \$1,000 on expenditures that may have constituted contributions.

On the basis of the available facts, the Commission *at least* should have been willing to investigate this aspect of the case. If Republicans for Clean Air was a "political committee," it should have been playing by the applicable rules. Our colleagues' vote will leave this wholly unresolved.

V.

We believe Congress intended the Federal Election Commission to act as an enforcement-minded agency, ready to investigate serious allegations of statutory violations. In its final report, the Senate Watergate Committee recommended that "the Congress enact legislation to establish an independent, nonpartisan Federal Election Commission." S. Rep. No. 981, 93d Cong., 2d Sess. 564 (1974). As the Committee explained:

Probably the most significant reform that could emerge from the Watergate scandal is the creation of an independent nonpartisan agency to supervise the enforcement of the laws relating to the conduct of elections. Such a body—given substantial investigatory and enforcement powers—could not only help insure that misconduct would be prevented in the future, but *the investigations of alleged wrongdoing would be vigorous and conducted with the confidence of the public.*

Id. (emphasis added). In response, Congress in 1974 amended the Federal Election Campaign Act and created the Federal Election Commission.

House comments on the conference bill creating the Commission revealed a consensus that the legislation provided for a "strong independent commission to enforce provisions of this act." 120 Cong. Rec. 35,135 (1974)(remarks of Rep. Armstrong). As summarized by Representative Frenzel, "[t]he establishment of an independent Commission is the key provision in the bill. It will assure judicious, expeditious enforcement of the law, while reversing the long history of nonenforcement." *Id.* (remarks of Rep. Frenzel). Similarly, the Senate sought to create a Commission which would vigorously enforce federal election laws. In the words of Senate Minority Leader Hugh Scott, "[W]e urge the committee to resist efforts that would reconstitute the Commission but would strip it of some or all of its investigative and enforcement powers. *The restoration of public confidence in the election process requires an active watchdog in this area, not a toothless lapdog.*" Federal Election Campaign Act Amendments, 1976: Hearings on S. 2911, et al., Subcommittee on Privileges and Elections of the Senate Committee on Rules and Administration, 94th Cong., 2d Sess. 69 (Statement of Sen. Scott)(emphasis added).

The Commission ignores its congressional mandate when it fails to investigate serious allegations such as those presented in MUR 4982. Because there were not four votes to proceed with an investigation, there remain a number of unanswered questions and allegations regarding the expenditures made by the Wyly brothers just prior to the Super Tuesday primaries. While some of the allegations, such as coordination with the Bush campaign, might not have proven to be violations, the potential for a serious breach was evident. It is important for FEC commissioners to enforce the law and not undermine it. We believe our colleagues should have investigated and not summarily dismissed this important matter.

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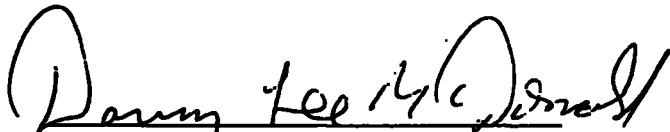
Date



Scott E. Thomas
Commissioner

4/23/02

Date



Danny Lee McDonald
Commissioner