Essay

Campaign Finance Issues in Election Communications: An Explanation of the Current Legal Standard and Modern Trends

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INTRODUCTION

The increasing prominence of Facebook and other social media space as the new frontier in election communication and advertising has inspired a renewed discussion of campaign finance regulations in the American electoral process. Supreme Court jurisprudence in the realm of election-related regulation has often highlighted the U.S. government's special, heightened interest in structuring and protecting the integrity of the "electoral process."[1] Defining the bounds of what constitutes the electoral process has important legal implications in discerning the reach of laws designed to protect it. Clearly, voting is an example of a pure political process activity, plainly falling within the arena of heightened regulatory interest.[2] Yet, the line is less clear with regard to campaign finance regulations. The distinction between campaign spending and other political expression is important because while political expression is protected speech, spending activities that constitute express advocacy are subject to a series

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1. *See* Citizens United v. FEC, 558 U.S. 310, 396, 422 (2010) (Stevens, J., concurring in part and dissenting in part).

2. Daniel I. Weiner & Benjamin T. Brickner, *Electoral Integrity in Campaign Finance Law*, 20 NYU J. LEGIS. & PUB. POL'Y 101, 139 (2017).

of regulations including disclosure requirements, source restrictions, and contribution limits.[3] Yet, while express advocacy has been the subject of historic regulation, other speech—known as issue advocacy—has been found to be constitutionally protected and therefore, not subject to such rigorous regulation.[4] As the 2020 election cycle heats up, campaign finance topics are sure to be a subject of public discourse. However, while campaign finance is often cited as top-ranking concern for the American electorate, few understand the distinction between express advocacy, issue advocacy, independent expenditures, and the related implications for disclosure, reporting, and source limitations.[5] This article seeks to: (1) provide an accessible explanation of these distinctions; (2) discuss the legal implications of these distinctions; and (3) highlight trends and issues related to the increasingly prevalent role of modern media platforms in election communications.

II. ISSUE ADVOCACY VS. EXPRESS ADVOCACY

Election law distinguishes between two types of speech—issue advocacy and express advocacy. While the terms "issue advocacy" and "express advocacy" are commonly used to describe political advertisements, the terms do not appear in the main federal statute that regulates campaign finance issues, the Federal Election Campaign Act ("FECA").[6] Instead, the terms were first coined by the United States Supreme Court in an effort to provide guidance on whether a particular type of communication would be subject to regulation under the FECA.[7] In its landmark ruling *Buckley v. Valeo*, the Court determined that communications deemed to be "express advocacy" are subject to the disclosure requirements, source restrictions, and contribution limits set forth in FECA, while communications deemed "issue advocacy" are constitutionally protected under the First Amendment

3. *See* 52 U.S.C. § 30104 (disclosure); 52 U.S.C. § 30118 (source restrictions); 52 U.S.C. § 30116 (contribution limits).

4. Buckley v. Valeo, 424 U.S. 1, 45–48 (1976).

5. *Most Americans Want to Limit Campaign Spending, Say Big Donors Have Greater Political Influence*, PEWRESEARCH.ORG, https://www.pewresearch.org/fact-tank/2018/05/08/most-americans-want-to-limit-campaign-spending-say-big-donors-have-greater-political-influence (last visited Dec. 8, 2019) (74% of the American public view campaign finance issues as "very important" and 16% view the topic as "somewhat important").

6. 2 U.S.C. § 431 *et seq*.

7. Buckley v. Valeo, 424 U.S. 1 (1976).

and therefore, not subject to these regulations.[8] Of note, the *Buckley* decision premised this distinction on the ground that the FECA, as written at the time, was unconstitutionally vague unless applied only to election communications constituting express advocacy.[9] Part A of this Section discusses *Buckley* and its "magic words" standard in determining whether a communication constitute express advocacy subject to FECA regulation. Part B discusses recent changes to the language of disclosure and reporting requirements, suggesting a broader ability by the federal government to regulate certain communications that would be considered issue advocacy under the magic words test.

A. *BUCKLEY V. VALEO* AND THE "MAGIC WORDS" STANDARD

In the context of spending on election communications, the text of the FECA regulates expenditures "relative to a clearly identified candidate" and "for the purpose of influencing an election."[10] Namely, the FECA requires spending on such communications to be reported in statements identifying, among other things, the amount of money spent and disclosure of any donors who have contributed more than two hundred dollars to the group that is responsible for the communication.[11] The reach of these reporting and disclosure requirements is important because only those communications falling within the regulation of the FECA are reported and publicly available. Spending on election communications that fall outside of the bounds of the statute go unreported and is, as a result, largely untraceable.

In 1976, the Supreme Court evaluated the constitutionality of the FECA's regulatory scheme following a judicial challenge to the constitutionality of the law.[12] The Court held that the FECA should be construed to regulate only those funds spent for communication that "include[s] *express words of advocacy* of the election or defeat" of a clearly identifiable candidate, noting that such communication should be contrasted with communications that advocated a position on an issue but that failed to identify a particular candidate.[13] Specifically, the Court opined that expenditures for the purpose of express advocacy may be regulated

8. *Id.*; *see also* 52 U.S.C. § 30104 (disclosure); 52 U.S.C. § 30118 (source restrictions); 52 U.S.C. § 30116 (contribution limits).

9. 424 U.S. 1, 43.

10. 52 U.S.C. § 30101.

11. 52 U.S.C. § 30104.

12. Buckley v. Valeo, 424 U.S. 1 (1976).

13. *Id.* at 40–44 (emphasis added).

under the FECA, while communications advocating a position on an issue (i.e., issue advocacy) are constitutionally protected and would remain free from regulation.[14] In a now infamous footnote, the Court laid out specific words that, when used in a communication, would constitute express advocacy.[15] These words include: "vote for," "elect," "support," "cast your ballot for," "Smith for Congress," "vote against," "defeat," and "reject."[16] This standard has become known as the "magic words" standard.[17] Simply stated, if election communications refer to a clearly identifiable candidate and includes any of the magic words, they will be deemed to be express advocacy.

Following *Buckley*, there were several attempts to impose a broader, context-based standard to evaluate campaign speech. This standard was often referred to as the "reasonable person" standard—if a reasonable person interpreted the speech to be advocating for the election or defeat of a clearly identifiable candidate, the speech was deemed to be express advocacy and not issue advocacy.[18] In the 1986 decision *Federal Election Commission v. Massachusetts Citizens For Life, Inc.*, the Supreme Court ruled that a publication urging voters to "vote for" pro-life candidates, while also identifying and providing photographs of certain candidates who fit that description, could not be regarded as a "mere discussion of public issues that by their nature raised

14. *Id.*

15. *Id.* at 44, n.52.

16. *Id.*

17. Scott E. Thomas & Jeffrey H. Bowman, *Is Soft Money Here to Stay Under the "Magic Words" Doctrine?*, 10 STAN. L. & POL'Y REV. 33, 33 (1998).

18. *Compare.*, 11 CFR § 100.22 (defining express advocacy to mean any communication that includes either the magic words enumerated in *Buckley*, or a communication that,"[w]hen taken as a whole and with limited reference to external events, such as the proximity to the election, could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified 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."); *with* FEC v. Furgatch, 807 F.2d 857 (9th Cir. 1987) (holding that express advocacy may be determined by looking at the communication "as a whole" and by giving some consideration to context, although the consideration of context remains an ancillary consideration to the words themselves). While some circuits formally adopted the reasonable person standard, the Eighth Circuit held that the reasonable person test was unconstitutional and instead held strong to the "magic words" test articulated in *Buckley*. *See* Iowa Right to Life Committee, Inc., 187 F.3d 963 (8th Cir. 1999).

the name of certain politicians."[19] Instead the Court looked at the "essential nature" of the publication and found that it "in effect" provided an "explicated directive" to the reader to vote for the identified candidates and therefore satisfied the magic words test.[20] Consequently, the Court held that the publication constituted express advocacy.[21]

The trend of implementing a broader definition of express advocacy, and therefore, imposing restrictions on a greater cross section of election communications, extended beyond the federal level. Going even further than the federal context-based evaluation method, the Minnesota Campaign Finance and Public Disclosure Board (the "Board") released advisory opinions in the early 2000s which advised that *mere intent* could cause a communication to qualify as express advocacy.[22] Specifically, these opinions advised that if context suggested a communication's purpose was to influence the nomination or election of a candidate for office, the costs of the communication must be reported to the Board as campaign expenditures under Minnesota's version of reporting requirements.[23] Minnesota's approach therefore implicated almost all election communications in the definition of express advocacy subject to regulation.

The Minnesota intent-based standard was short lived. In June, 2007, the United States Supreme Court issued a ruling in *Wisconsin Right to Life, Inc. v. FEC* and clarified that neither the "reasonable person" standard nor an intent based analysis can be used to evaluate speech.[24] In writing for the majority, Chief Justice Roberts noted that express advocacy occurs when the communication is "susceptible of no other interpretation than as an appeal to vote for or against a specific candidate."[25] Stated differently, the Court advised that communications that could reasonably be interpreted as something *other than* an ap-

19. 479 U.S. 238, 249.

20. *Id.* at 249–50 ("The fact that this message is marginally less direct than "Vote for Smith" does not change its essential nature.").

21. *Id.*

22. *See* Minn. Campaign Fin. & Pub. Disclosure Bd. Op. 334 (Dec. 11, 2001); *see also* Minn. Campaign Fin. & Pub. Disclosure Bd. Op. 336 (Jan. 25, 2002) (advising that campaign expenditures are defined by their purpose and do not require the presence of specific words).

23. *Id.*

24. 551 U.S. 449 (2007).

25. *Id.* at 454.

peal to vote for or against a specific candidate should not be considered electioneering communications. In response, the Minnesota Campaign Finance and Public Disclosure Board clarified its position on the standard for distinguishing types of speech and declared that "[e]xpress advocacy requires the use of specific words such as 'vote for', 'elect', [or] defeat."[26] The end result is that the holding in *Wisconsin Right to Life* re-established *Buckley*'s magic words standard as the law of the land in determining whether communications constitute express advocacy.

B. POST-*WISCONSIN RIGHT TO LIFE* CASE LAW REGARDING DISCLOSURE AND REPORTING REQUIREMENTS

Wisconsin Right to Life made it clear that creative definitions of express advocacy would not be tolerated. Therefore, advocates of tighter campaign finance restrictions had to find a different approach. One effort stemmed from language in *Buckley* that disclosure requirements could be justified based on a governmental interest in "provid[ing] the electorate with information" about the sources of election-related spending.[27] As such, instead of attempting to re-define express advocacy in a broader, context based manner, recent cases considering the scope of the FECA have opined that disclosure and reporting requirements, if sufficiently definite in scope, are constitutional even as applied to election communications that would be considered "issue advocacy" under the magic words test.[28]

In 2012, a district court ruling in the D.C. Circuit Court of Appeals upheld the FECA's requirement that corporations, unions, and nonprofits engaged in issue advocacy that qualifies as an "electioneering communication" must disclose donors who provide more than $1,000.[29] Specifically, the statutory language in question defined "electioneering communication" to mean:

> any broadcast, cable, or satellite communication which--
>
> (i) refers to a clearly identified candidate for Federal office;
>
> (ii) is made within--
>
> (a) 60 days before a general, special, or runoff election for the office sought by the candidate; or
>
> (b) 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate,

26. Findings and Order in the matter of the Complaint of Richard v. Novack regarding Minnesota Majority, 7 (Dec. 2, 2008).

27. 424 U.S. at 66.

28. *See* Citizens United v. FEC, 558 U.S. 310, 367–70 (2010).

29. Van Hollen v. FEC, 851 F. Supp. 2d 69 (D.D.C. 2012).

> for the office sought by the candidate; and
>
> (iii) in the case of a communication which refers to a candidate for an office other than President or Vice President, is targeted to the relevant electorate.[30]

Therefore, while the definition encompasses the "clearly identified candidate" of the *Buckley* standard, it does not include the requirement of magic words for the reporting and disclosure requirement to apply. However, because the definition requires reporting only for those communications that, in addition to referring to a clearly identified candidate, are made within a specified, limited time period prior to the election and targeting the relevant electorate, and requires disclosure only of donor contributions more than $1,000, the court upheld the regulation.[31]

While the Federal Election Commission ("FEC") representatives were split on whether to appeal, two nonprofit groups (the Hispanic Leadership Fund and the Center for Individual Freedom) intervened and filed an appeal. In a 2-to-1 decision, the Court of Appeals for the D.C. Circuit refused to stay the lower-court ruling, determining that a full hearing before the appellate court would be required.[32] The Court of Appeals reversed the judgment of the district court, finding that the FECA's disclosure requirements were ambiguous and remanded the case to the district court for further consideration.[33] On remand, the district court concluded that the FECA disclosure regulation was arbitrary, capricious, and contrary to law because it required disclosure of only those donations made for the purpose of furthering electioneering communications.[34] This decision was again appealed, and, in January 2016, the Court of Appeals reversed the 2014 district court decision that invalidated the FECA disclosure regulation.[35] This action effectively upheld the original FECA disclosure regulation as constitutional.[36]

In 2017, the Supreme Court summarily affirmed a three-judge federal district court ruling upholding the constitutional-

30. 52 U.S.C. § 30104(f)(3).

31. Van Hollen v. FEC, 851 F. Supp. 2d at 89.

32. Van Hollen v. FEC, Nos. 12-5117 & 12-5118, 2012 WL 1758569, *1 (D.D.C. May 14, 2012).

33. *Id.*

34. Van Hollen v. FEC, 74 F. Supp. 3d 407, 410 (D.D.C. 2014).

35. Van Hollen v. FEC, 811 F.3d 486, 489 (D.D.C. 2016).

36. *Id.*

ity of the FECA's disclosure requirements for electioneering communications.[37] Like *Van Hollen*, the district court ruling upheld in 2017 emphasized that "the First Amendment is not so tight-fisted as to permit large-donor disclosure only when the speaker invokes magic words of explicit endorsement."[38] Given that additional appeals on these cases have been unsuccessful, coupled with explicit language present in these opinions, the Supreme Court has signaled that should Congress enact additional disclosure and reporting requirements, such requirements are likely to be upheld to the extent they further the informational interests of the electorate.[39]

III. INDEPENDENT EXPENDITURES: *CITIZENS UNITED* AND CORPORATE SPENDING ON ELECTION COMMUNICATIONS

Beyond its applicability to disclosure and reporting requirements, the distinction between express advocacy and issue advocacy was historically significant because, while corporations were prohibited from using general treasury dollars to expressly advocate for or against a particular candidate, general treasury dollars could be used for election-related advertisements that focused solely on issues of concern to the corporation (i.e., corporations could spend money on issue advocacy, but not on express advocacy). In the wake of the *Citizens United* decision in 2010, changes in state and federal law have provided corporations with greater flexibility in their ability to use general treasury dollars for election related communications. Corporations may now use general treasury dollars for express advocacy as long as the expenditure is "independent" and not coordinated with any candidate.[40] An independent expenditure is an expenditure on a communication that: (i) expressly advocates the election or defeat of a clearly identified candidate; and (ii) is not made in consultation

37. *See* Indep. Inst. v. FEC, 216 F. Supp. 3d 176 (D.D.C. 2016), *sumn. aff'd*, Indep. Inst. V. FEC, 137 S.Ct. 1204 (2017).

38. 216 F. Supp. 3d at 189.

39. *See e.g.*, Daniel I. Weiner and Benjamin T. Brickner, *Electoral Integrity in Campaign Finance Law*, 20 N.Y.U. J. LEGIS. & PUB. POL'Y 101, 105–06 (2017). However, disclaimer requirements that become so burdensome that they impinge on the ability to speak—for example, a requirement that a disclaimer comprise an unreasonable period of time in an ad—could be invalidated as a violation of guarantees under the First Amendment. *See Citizens United*, 558 U.S. at 366.

40. *See Citizens United*, 558 U.S. at 367–70; *Minnesota Chamber of Commerce v. Gaertner*, 2010 WL 1838362 (D. Minn. May 7, 2010).

or cooperation with, or at the request or suggestion of any candidate, or his or her authorized committees or agents, or a political party committee or its agents.[41] Therefore, corporations may now engage in both issue advocacy and express advocacy, in the form of an independent expenditure, in the funding of election advertisements meeting the statutory requirements of the same.

While corporations are now free to expressly advocate for or against the election of a specific candidate, expenditures on such communications are subject to federal and state reporting, disclosure, disclaimer, and source restrictions. Importantly, an independent expenditure is not considered a contribution to the candidate.[42] Under both federal and state law in many states, campaigns may not accept contributions from the treasury funds of corporations, labor organizations, or national banks.[43] This source restriction applies to any incorporated organization, including a nonstock corporation, a trade association, an incorporated membership organization and an incorporated cooperative.[44] Because an independent expenditure is not considered a contribution, corporations may engage in independent expenditures without running afoul of source restrictions on the federal or state level. Finally, because independent expenditures necessarily are express forms of advocacy, reporting, disclosure, and disclaimer requirements applicable to express advocacy, as described in Section II above, apply to independent expenditures.[45]

Corporate spending on issue advocacy raises important implications that differ between state and federal law. Under recent precedent holding that reporting and disclosure requirements apply to spending on "electioneering communications," federal law now requires corporations engaged in issue advocacy meeting the definition of an electioneering communication to

41. 11 C.F.R. § 100.06; *Making Independent Expenditures*, FED. ELECTION COMMISSION, https://www.fec.gov/help-candidates-and-committees/making-independent-expenditures (last visited Dec. 8, 2019).

42. Direct contributions from corporations to candidates are prohibited by both federal and state law and penalties for corporate contributions to candidates are quite severe. *See* Minn. Stat. 211B.15; *Who Can and Can't Contribute*, FED. ELECTION COMMISSION, https://www.fec.gov/help-candidates-and-committees/candidate-taking-receipts/who-can-and-cant-contribute (last visited Dec. 8, 2019).

43. *Who Can and Can't Contribute*, FED. ELECTION COMMISSION, https://www.fec.gov/help-candidates-and-committees/candidate-taking-receipts/who-can-and-cant-contribute (last visited Dec. 8, 2019).

44. *Id.*

45. *See supra* Part II.

comply with applicable regulations.[46] In contrast, the distinction between express advocacy and issue advocacy still remains relevant in many states in defining the bounds of disclosure and other related campaign finance requirements. For example, under Minnesota law, a corporation is *not* required to register and provide disclosure of communications naming candidates unless those communications use words of express advocacy.[47] Therefore, under state laws like the one in Minnesota, corporate spending on issue advocacy evades registration and reporting requirements, going wholly untracked.

A discussion of corporate spending and campaign finance law would be incomplete without mentioning that spending on both issue advocacy and express advocacy (by way of independent expenditures) are still protected from spending limits.[48] Under the constitutional framework espoused in *Buckley*, corporations may spend as much as they want on campaign communications constituting either issue advocacy or an independent expenditure, as neither type of spending constitutes a "contribution."[49] Thus, neither is subject to contribution limits under the *Buckley* standard.[50]

IV. ELECTION SPENDING AND DISCLOSURE ON SOCIAL MEDIA

The law on express versus issue advocacy, taken together with the law on independent expenditures results in the following framework: while corporations are allowed to expend corporate funds on communications constituting independent expenditures or issue advocacy, this spending, to the extent it meets the definition of an "electioneering communication," must be reported and large donors are to be disclosed.[51] Importantly, the definition of "electioneering communication" under the FECA includes only "broadcast, cable, or satellite communication."[52] This definition does not encompass campaign communications published on modern internet-based media platforms such as Facebook or Instagram so, unless and until this definition in the FECA is updated, social media advertising will remain outside

46. *Id.*
47. Campaign Fin. & Pub. Disclosure Bd., Op. 428 (2012).
48. 424 U.S. at 22–23.
49. *Id.*; *see also supra* note 42.
50. *Id.*
51. *See* 52 U.S.C. § 30104(f)(3) (definition of electioneering communication).
52. *Id.*

of the realm of FEC regulation. Therefore, to the extent corporations engage in independent expenditures or issue advocacy promulgated on internet based social media platforms, such communications escape the reporting and disclosure requirements of the FECA and remain outside of FEC regulation. While states are taking steps to monitor social media spending through the imposition of disclosure requirements, imposing a state-based regulation on a medium that clearly transcends state boundaries is challenging to say the least.

Minnesota law requires candidates to include a disclaimer on all campaign materials that prominently states "prepared and paid for by the . . . committee . . . (address)."[53] Campaign material is defined broadly to include "any literature, publication, or material that is disseminated for the purpose of influencing voting at a primary or other election, except for news items or editorial comments by the news media."[54] Therefore, Minnesota law does impose disclaimer requirements for campaign communications promulgated on social media platforms such as Facebook. Minnesota disclosure law includes a similar disclaimer requirement for independent expenditures.[55] The Minnesota Campaign Finance and Public Disclosure Board, through published guidance, notes that for social media pages, appropriate disclaimers should be included on the homepage of the website or social media page and that "[o]n a Facebook page, the disclaimer should be in the banner picture for the site or in the About section."[56] Therefore, Minnesota has established a framework for disclaimers pertaining to campaign material on social media, even those funded by independent expenditures. It is important to note that while a disclaimer requirement lets the public know which organization paid for an add, the disclaimer does not disclose who specifically funded the organization that paid for the advertisement and it does not disclose how much was spent on the communication.

53. Minn. Stat. § 211B.04 (2018).

54. Minn. Stat. § 211B.01, subd. 2 (2018).

55. Minn. Stat. § 211B.04 (2018) ("This is an independent expenditure prepared and paid for by . . . (name of entity participating in the expenditure), . . . (address). It is not coordinated with or approved by any candidate nor is any candidate responsible for it.").

56. *See* Minn. Campaign Fin. & Pub. Disclosure Bd., *Disclaimer Requirements for Independent Expenditures*, https://cfb.mn.gov/pdf/issues/disclaimers_IE.pdf (last visited Dec. 15 2019).

Social media platforms are free to track and disclose campaign and election ad spending on their platform but are not required to do so under federal law. Following social pressure, Facebook began tracking and publicly disclosing spending on advertisements related to social issues, campaign advertisements, and politics in May of 2018. In its most recent report in November of 2019, Facebook disclosed that political-related advertisement spending on its platform since May of 2018 totaled $887 million.[57] Facebook also provides a breakdown of top spenders and how much each individual or organization purchasing the ad space has spent on the platform.[58] Given the current climate of pressure placed on advertising platforms such as Facebook, coupled with the constitutional limits of campaign finance laws, perhaps private tracking and disclosure of ad spend information will see a surge in the 2020 election cycle. However, the current legal framework surrounding campaign finance laws leave that choice to the advertising platforms.

CONCLUSION

The distinction between issue advocacy and express advocacy, as well as constitutional protections for corporate spending and independent expenditures are critical components establishing the legal framework surrounding campaign finance law in the United States. Regardless of personal opinion on campaign finance matters, an understanding of these distinctions and related legal implications in reporting, disclosure, and source limitations can empower a more knowledgeable electorate. As the 2020 election nears and campaign finance topics enjoy a resurgence in public discourse, understanding this legal framework can help inform discussion.

57. *Facebook Ad Library Report*, FACEBOOK, https://facebook.com/ads/library/report (last visited Dec. 8, 2019).

58. *Id.*