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LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

(907) 465-3867 or 465-2450
FAX (907) 465-2029
Mail Stop 3101


State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM

May 11, 2002

SUBJECT: HCS CSSB 363(JUD)

TO: Representative Norm Rokeberg, Chair
Attn: House Judiciary Committee

FROM: Pam Finley 
Revisor of Statutes

Enclosed is the referenced CS. Please note that at secs. 1, 3, 4, 5 and 9 we have added references to ch. 1, SLA 2002 (which took effect April 16) and in secs. 1, 3 and 5 we have added a reference to nongroup entity in the statutory language. (The reference to nongroup entity in sec. 4 was already in the bill.) Normally I wait until the end of the session to reconcile bills that amend the same statute, but in this case reconciling the repeal and reenactment of AS 15.13.040(d) in sec. 1 of HCS CSSB 363(JUD) with the amendment of the same subsection in ch. 1, SLA 2002 could be done in two different ways. To avoid any questions about the legislature's intent on this point, I have simply added nongroup entities to the list in sec. 1. This assumes that the legislature intends to have the nongroup entities report expenditures in the same manner as the other groups. Please let us know if this is not your intention.

Also, I would like to bring to your attention one more oddity regarding this bill and ch. 1, SLA 2002. Section 6 of ch. 1, SLA 2002 adds AS 15.13.040(j), which requires nongroup entities to report certain contributions to and by the nongroup entity. Section 4 of HCS CSSB 363(JUD) also requires individuals, persons, nongroup entities and groups to report certain contributions made by the individual, person, nongroup entity or group. There is some duplication, but in general the ch. 1 provision imposes more onerous reporting requirements on the nongroup entities than the sec. 4 provision imposes on others. I do not know whether the difference is significant enough to violate the First Amendment or the Equal Protection Clause, but that is always a possibility. Please let us know if you think AS 15.13.040(j), as added by sec. 6, ch. 1, SLA 2002 needs to be amended.

I am enclosing a copy of ch. 1, SLA 2002 for your information. Please let me know if you have questions about this memo.

PF:pjc
02-062.pjc

Enclosure

HOUSE COMMITTEE REPORT

(11)

Date Referred to Committee: May 9, 2002

FURTHER REFERRALS:

Date of Committee Action: 5.10.02

The JUDICIARY Committee considered:

CSSB 363(STA) am

CS FOR SENATE BILL NO. 363(STA) am

CAMPAIGN COMMUNICATIONS & DISCLOSURES

"An Act relating to communications and elections, to reporting of contributions and expenditures, and to campaign misconduct in the second degree; relating to disclosure by individuals of contributions to candidates; and providing for an effective date."

Recommends it be replaced with H CS FOR CSSB 363 (JUD) Same Title New Title
 For Senate Bills with new title: Technical Title New Title: HCR _____

- attach amendments
- add new referral to _____ Committee
- Letter of Intent _____ Committee

List of
Abbrev.
for
Depts.:

- ADM
- CED
- COR
- CRT
- EED
- DEC
- DFG
- GOV
- HSS
- LAA
- LAW
- LWF
- MVA
- DNR
- DPS
- REV
- DOT
- UA

<u>NEW FISCAL NOTES</u>				
*For Chief Clerk's Office Use Only				
List by Dept(s):	*FN#	Fiscal	Indet.	Zero
JUD/ADM				✓

<u>PREVIOUS FISCAL NOTES</u>				
List by Dept(s):	FN#	Fiscal	Indet.	Zero
GOV	2			✓

<u>Signing with recommendations</u>	Printed Last Name	DP	DNP	NR	AM
	Berkowitz			✓	
	Meyer	✓			
	Loughlin			✓	
	JAMES	✓			
	Koolen			✓	
Chair:	Rokberg				✓
Chair:					

Amended

CS FOR SENATE BILL NO. 363(STA) am

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SECOND LEGISLATURE - SECOND SESSION

BY THE SENATE STATE AFFAIRS COMMITTEE

Amended: 5/8/02

Offered: 5/6/02

Sponsor(s): SENATE RULES COMMITTEE

A BILL

FOR AN ACT ENTITLED

1 **"An Act relating to communications and elections, to reporting of contributions and**
2 **expenditures, and to campaign misconduct in the second degree; relating to disclosure**
3 **by individuals of contributions to candidates; and providing for an effective date."**

4 **BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:**

5 *** Section 1.** AS 15.13.040(d) is repealed and reenacted to read:

6 (d) Every individual, person, or group making an expenditure shall make a full
7 report of expenditures, upon a form prescribed by the commission, unless exempt
8 from reporting.

9 *** Sec. 2.** AS 15.13.040(e) is amended to read:

10 (e) The report required under (d) of this section must contain the name,
11 address, principal occupation, and employer of the individual filing the report, and an
12 itemized list of expenditures. The report shall be filed with the commission [BY THE
13 CONTRIBUTOR] no later than 10 days after the [CONTRIBUTION OR] expenditure
14 is made. [A COPY OF THE REPORT SHALL BE FURNISHED TO THE

CANDIDATE, CAMPAIGN TREASURER, OR DEPUTY CAMPAIGN TREASURER AT THE TIME THE CONTRIBUTION IS MADE.]

* Sec. 3. AS 15.13.040(h) is amended to read:

(h) The provisions of (d) [(d)(2)] of this section do not apply to one or more expenditures made by an individual acting independently of any group and independently of any other individual if the expenditures

(1) cumulatively do not exceed \$250 during a calendar year; and

(2) are made only for billboards, signs, or printed material concerning a ballot proposition as that term is defined by AS 15.13.065(c).

* Sec. 4. AS 15.13.040 is amended by adding a new subsection to read:

(j) Every individual, person, nongroup entity, or group contributing ~~more than~~ *or more, calculated on a cumulative basis is* \$500 to a group organized for the principal purpose of influencing the outcome of a proposition shall report the contribution or contributions on a form prescribed by the commission not later than 30 days after the contribution that requires the contributor to report under this subsection is made. The report must include the name, address, principal occupation, and employer of the individual filing the report and the amount of the contribution, as well as the total amount of contributions made to that group by that individual, person, nongroup entity, or group during the calendar year.

delete

* Sec. 5. AS 15.13.090 is amended to read:

Sec. 15.13.090. Identification of communication. (a) All [ADVERTISEMENTS, BILLBOARDS, HANDBILLS, PAID-FOR TELEVISION AND RADIO ANNOUNCEMENTS, AND OTHER] communications [INTENDED TO INFLUENCE THE ELECTION OF A CANDIDATE OR OUTCOME OF A BALLOT PROPOSITION OR QUESTION] shall be clearly identified by the words "paid for by" followed by the name and address of the candidate, group, or individual paying for the communication [ADVERTISING]. In addition, candidates and groups ~~must~~ *may* identify the name of their campaign chairperson.

(b) The provisions of (a) of this section do not apply when the communication [ADVERTISEMENT]

(1) is paid for by an individual acting independently of any group and independently of any other individual;

Concept. Amend #3 Adopted

Concept. Amend #2 Adopted

1 (2) is made to influence the outcome of a ballot proposition as that
2 term is defined by AS 15.13.065(c); and

3 (3) is made for

4 (A) a billboard or sign; or

5 (B) printed material other than an advertisement made in a
6 newspaper or other periodical.

7 * Sec. 6. AS 15.13.380(c) is amended to read:

8 (c) Promptly after the final date for filing statements and reports, the
9 commission shall notify all persons who have become delinquent in filing them [,
10 INCLUDING CONTRIBUTORS WHO FAILED TO FILE A STATEMENT IN
11 ACCORDANCE WITH AS 15.13.040,] and shall make available a list of these
12 delinquents for public inspection. The commission shall also report to the attorney
13 general the names of all candidates in an election whose campaign treasurers have
14 failed to file the reports required by this chapter.

15 * Sec. 7. AS 15.13.390(a) is amended to read:

16 (a) A person who fails to register when required by AS 15.13.050(a) or who
17 fails to file a properly completed and certified report within the time required by
18 AS 15.13.040 [AS 15.13.040(d) - (f)], 15.13.060(b) - (d), [15.13.080(c),]
19 15.13.110(a)(1), (3), or (4), (e), or (f) is subject to a civil penalty of not more than \$50
20 a day for each day the delinquency continues as determined by the commission subject
21 to right of appeal to the superior court. A person who fails to file a properly
22 completed and certified report within the time required by AS 15.13.110(a)(?) or
23 15.13.110(b) is subject to a civil penalty of not more than \$500 a day for each day the
24 delinquency continues as determined by the commission subject to right of appeal to
25 the superior court. A person who violates a provision of this chapter, except a
26 provision requiring registration or filing of a report within a time required as otherwise
27 specified in this section, is subject to a civil penalty of not more than \$50 a day for
28 each day the violation continues as determined by the commission, subject to right of
29 appeal to the superior court. An affidavit stating facts in mitigation may be submitted
30 to the commission by a person against whom a civil penalty is assessed. However, the
31 imposition of the penalties prescribed in this section or in AS 15.13.380 does not

1 excuse that person from registering or filing reports required by this chapter.

2 * Sec. 8. AS 15.13.400(4) is amended to read:

3 (4) "expenditure"

4 (A) means a purchase or a transfer of money or anything of
5 value, or promise or agreement to purchase or transfer money or anything of
6 value, incurred or made for the purpose of

7 (i) influencing the nomination or election of a candidate
8 or of any individual who files for nomination at a later date and
9 becomes a candidate;

10 (ii) use by a political party;

11 (iii) the payment by a person other than a candidate or
12 political party of compensation for the personal services of another
13 person that are rendered to a candidate or political party; or

14 (iv) influencing the outcome of a ballot proposition or
15 question;

16 (B) does not include a candidate's filing fee or the cost of
17 preparing reports and statements required by this chapter;

18 (C) includes an express communication and an
19 electioneering communication, but does not include an issues
20 communication;

21 * Sec. 9. AS 15.13.400 is amended by adding new paragraphs to read:

22 (13) "communication" means an announcement or advertisement
23 disseminated through print or broadcast media, including radio, television, cable, and
24 satellite, the Internet, or through a mass mailing, excluding those placed by an
25 individual or nongroup entity and costing \$500 or less and those that do not directly or
26 indirectly identify a candidate or proposition, as that term is defined in AS
27 15.13.065(c);

28 (14) "electioneering communication" means a communication that

29 (A) directly or indirectly identifies a candidate;

30 (B) addresses an issue of national, state, or local political
31 importance and attributes a position on that issue to the candidate identified;

*Concept.
Amended
Adopted
include
direct, automatic
telemarketing*

1 and

2 (C) occurs within the 30 days preceding a primary election or a
3 municipal election, or within the 60 days preceding a general election;

4 (15) "express communication" means a communication that, when
5 read as a whole, and with limited reference to external events, is susceptible of no
6 other reasonable interpretation but as an exhortation to vote for or against a specific
7 candidate;

8 (16) "issues communication" means a communication that

9 (A) directly or indirectly identifies a candidate; and

10 (B) addresses an issue of national, state, or local political
11 importance.

12 * **Sec. 16.** AS 15.56.014(a) is amended to read:

13 (a) A person commits the crime of campaign misconduct in the second degree
14 if the person

15 (1) knowingly circulates or has written, printed or circulated a letter,
16 circular, or publication relating to an election, to a candidate at an election, or an
17 election proposition or question without the name and address of the author appearing
18 on its face;

19 (2) except as provided by AS 15.13.090(b), knowingly prints or
20 publishes an advertisement, billboard, placard, poster, handbill, paid-for television or
21 radio announcement, or [OTHER] communication, as that term is defined in
22 AS 15.13.400, intended to influence the election of a candidate or outcome of a ballot
23 proposition or question without the words "paid for by" followed by the name and
24 address of the candidate, group, or individual paying for the advertising or
25 communication and, if a candidate or group, with the name of the campaign chair;

26 (3) knowingly makes a communication, as that term is defined in
27 AS 15.13.400, [WRITES OR PRINTS AND CIRCULATES, OR HAS WRITTEN,
28 PRINTED AND CIRCULATED, A LETTER, CIRCULAR, BILL, PLACARD,
29 POSTER, OR ADVERTISEMENT IN A NEWSPAPER, ON RADIO OR
30 TELEVISION]

31 (A) containing false factual information relating to a candidate

1 for an election;
2 (B) that the person knows to be false; and
3 (C) that would provoke a reasonable person under the
4 circumstances to a breach of the peace or that a reasonable person would
5 construe as damaging to the candidate's reputation for honesty or [,] integrity,
6 or to the candidate's qualifications to serve if elected to office.

7 * **Sec. 11.** AS 15.13.080 is repealed.

8 * **Sec. 12.** This Act takes effect immediately under AS 01.10.070(c).

Alaska State Legislature

Session Office:
State Capitol, Room 103
Juneau, AK 99801-1182
Phone: (907) 465-4949
Fax: (907) 465-4979



District Office:
P.O. Box 142
Eagle River, AK 99577
Phone: (907) 694-4949
Fax: (907) 694-4948

Senate Rules Committee

Senator Randy Phillips, Chair

SB 363, "An Act relating to electioneering communications and communications intended to influence the outcome of an election and to campaign misconduct in the second degree; and providing for an effective date."

Sponsor Statement

SB 363, "Electioneering Communications", seeks to require parties, groups, and non-group entities making "electioneering communications" to disclose the source of funds used to pay for the communications.

SB 363 defines "electioneering communications" as a communication that is intended to influence the election of a candidate and that clearly identifies one or more candidates or political parties 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.

Senator John Cowdery, Vice-Chair
Senator Rick Halford, Senator Gene Therriault, Senator Johnny Ellis
Senator_Randy_Phillips@legis.state.ak.us

FISCAL NOTE

STATE OF ALASKA
2002 LEGISLATIVE SESSION

Fiscal Note Number: 3
 Bill Version: CSSB 363 (STA)
 (S) Publish Date: 5/7/02

Revision Date/Time (Note if correction): _____ Dept. Affected: Admin
 Title An act relating to communications... BRU AK Public Offices Commission
 Component _____
 Sponsor Senate Rules
 Requester Senate Finance Component No. 70

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008
Personal Services	0.0	0.0	0.0	0.0	0.0	0.0
Travel	0.0	0.0	0.0	0.0	0.0	0.0
Contractual	0.0	0.0	0.0	0.0	0.0	0.0
Supplies	5.0	0.0	0.0	0.0	0.0	0.0
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	5.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES						
-----------------------------	--	--	--	--	--	--

CHANGE IN REVENUES ()						
-------------------------------	--	--	--	--	--	--

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	5.0	0.0	0.0	0.0	0.0	0.0
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	5.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2002) cost: 0.0

Check this box (X) if funding for this bill is included in the Governor's FY 2003 budget proposal:

POSITIONS

Full-time	0	0	0	0	0	0
Part-time	0	0	0	0	0	0
Temporary	0	0	0	0	0	0

ANALYSIS: (Attach a separate page if necessary)

This bill deletes the requirement that contributors report their maximum contributions to candidates or groups. It also creates new definitions for "communication," "electioneering communication," "express communication," and "issues communication." This new language provides a bright line for the Commission to evaluate when issue communications are subject to the contribution limits and reporting requirements of the campaign disclosure law (AS 15.13). One time funding is requested for paper, postage, printing and training outreach.

Prepared by: Brooke Miles Phone 907-276-4176
 Division: APOC Date/Time 5/6/02 4:25 PM
 Approved by: Jim Duncan, Commissioner Date 5/6/2002
 Agency: Department of Administration

FISCAL NOTE

STATE OF ALASKA
2002 LEGISLATIVE SESSION

Fiscal Note Number: 2
 Bill Version: SB 363
 (S) Publish Date: 5/6/02

Revision Date/Time (Note if correction): _____ Dept. Affected: OOG
 Title An Act relating to electioneering BRU Elections
communications Component Elections
 Sponsor Senate Rules
 Requester Senate State Affairs Component No. 21

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008
Personal Services						
Travel						
Contractual	0.0					
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES						
-----------------------------	--	--	--	--	--	--

CHANGE IN REVENUES ()						
-------------------------------	--	--	--	--	--	--

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	0.0					
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2002) cost: 0.0

Check this box (X) if funding for th's bill is included in the Governor's FY 2003 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

Prepared by: Gail Fenumiai, Election Administrative Supervisor Phone 465-3935
 Division Division of Elections Date/Time 4/22/02 2:31 PM
 Approved by: Lieutenant Governor Fran Ulmer Date 04/22/2002
 Agency Office of the Lieutenant Governor



Senate Majority News

Ron Irwin, Senate Majority Press Secretary
State Capitol, Room 107
Juneau, AK 99801
Phone: (907) 465-3803

For Broadcast Actualities: (800) 478-6540
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For Immediate Release: May 8, 2002

Contact: Ron Irwin, Press Secretary: 465-3803

Senate Republicans Get Unanimous Vote on Campaign Finance Reform Legislation

(JUNEAU) – Recognizing that the people of Alaska have a right to be informed about groups or individuals who try to influence the outcome of public elections, the Senate unanimously passed Senate Bill 363 on Wednesday.

Sponsored by the Senate Rules Committee, SB 363 establishes guidelines individuals must follow prior to promulgating a mass message to the public, which is designed to effect the outcome of an election, whether that message is delivered by, radio, television, print ads or direct mailing.

“During the 2000 election year roughly \$375,000 was spent in Alaska by people and entities trying to influence the electoral process of the state, by use of mass communication,” said Sen. Gene Therriault (R-North Pole), who carried the bill for the Senate Rules Committee. “Many of these people and groups who anonymously finance these politically charged ads, actually represent out of state special interest groups. I believe the people of Alaska have a right to know who is trying to influence their voting decision process.”

SB 363 addresses specifically “electioneering communications,” which are communications that:

1. Directly or indirectly identifies a candidate;
2. Addresses an issue of national, state or local political importance and attributes a position on that issue to an identified candidate;
3. Occur 30 days preceding a primary or municipal election or 60 days prior to a general election.

SB 363 establishes guidelines, which must be followed when producing or running mass advertisements that qualify as “electioneering communications,” as defined above.

First money for mass advertisements cannot come from prohibited entities, which include: corporations, unions or 501 (c) (3) non-profit corporations.

Secondly, all financing of “electioneering communications,” as previously defined, must be reported to the Alaska Public Offices Commission and no more than 10 percent of the ad’s financing can come from sources outside the state of Alaska.

Finally, funding for mass electioneering communications may not exceed current statutory limitations already in place. The law currently caps political contributions at: \$5,000 per year for political parties, \$1,000 a year for groups and \$500 a year for individuals and non-group entities.

SB 363 now goes to the House of Representatives for their consideration and passage.

###

CAMPAIGN FINANCE REFORM SERIES

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

BY GLENN MORAMARCO



BRENNAN CENTER FOR JUSTICE

AT NYU SCHOOL OF LAW

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About the Campaign Finance Reform Series

This paper is one of a series of papers issued by the Brennan Center exploring issues of money and politics. The following titles are part of the series:

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By Burt Neuborne

The Values of Campaign Finance Reform

By Burt Neuborne

A Survey of Existing Efforts to Reform the Campaign Finance System

By Burt Neuborne

The Flow of Money in Congressional Elections

By Kenneth Weine

Regulating Electioneering: Distinguishing Between "Express Advocacy" & "Issue Advocacy"

By Glenn Moramarco

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(212) 998-6730

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About the Author

Glenn J. Moramarco is a Senior Attorney at the Brennan Center for Justice at NYU School of Law. He graduated from Yale Law School (1986), where he served as an editor of the *Yale Law Journal*, after receiving a B. Phil. in Philosophy, Politics, and Economics from Oxford (1983) and a B.A. from Harvard (1981). Upon graduating from law school, he clerked for Judge Leonard I. Garth on the U.S. Court of Appeals for the Third Circuit (1986-87). He has spent equal amounts of time in civil and criminal litigation, working for Wilmer, Cutler & Pickering in Washington, D.C. (1987-89) and Fine, Kaplan & Black in Philadelphia (1994-97), with a distinguished five-year tenure as an Assistant U.S. Attorney in New Jersey (1989-94).

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Introduction

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

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

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

The following is an example of an advertisement, run during the 1996 campaign, which the sponsor claimed was an unregulated "issue ad" rather than a regulated electioneering ad:

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

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

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

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

scheme of federal and state campaign finance regulation.

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

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

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

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

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

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

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

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

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

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

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

The majority of political advertisements that appear during an electoral season fall in between these paradigms. The decision to classify an advertisement as either "express advocacy" or "issue advocacy" has enormous practical

implications. If the communication is deemed to be "express advocacy," then three consequences follow under federal election law. First, the communication is subject to disclosure rules. FECA requires that speakers engaging in "express advocacy" disclose the sources of their money and the nature of their expenditures. Second, the communication is subject to source restrictions. FECA bars certain speakers, such as corporations and unions, from spending money to engage in "express advocacy." Third, the communication is subject to fund-raising restrictions. FECA limits not only the sources from which speakers may raise their money, but also the size of contributions they may receive.

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

The Supreme Court Invents "Issue Advocacy"

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

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

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

regulations presented potential problems both of vagueness and overbreadth.

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

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

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

The "Magic Words" Test

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

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

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

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

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

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

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

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

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

country will be burdened with four more years of incoherencies, ineptness and illusion, as he leaves a legacy of low-level campaigning. DON'T LET HIM DO IT."

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

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

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

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

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

The Real World Practices

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

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

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

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

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

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

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

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

The "magic words" approach is a loophole that threatens to swallow the entirety of federal campaign financing law. The bans on corporate and labor union expenditures are rendered meaningless when corporations and labor unions run multi-million dollar advertising

campaigns that target individual legislators for defeat under the banner of "issue advocacy." Similarly, the \$5,000 limit on contributions to PACs, which was upheld by the Supreme Court, is rendered meaningless when individuals contribute sums substantially in excess of that amount in order to fund multi-million dollar advertising campaigns that attempt to influence the outcome of specific electoral races. And the expenditure limits which the presidential candidates voluntarily agreed to abide by as a condition for receiving public matching funds are rendered meaningless when the national party committees run unregulated advertising campaigns that mirror those of their nominees.

□

"Magic Words" and First Amendment Jurisprudence

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

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

In no area of First Amendment jurisprudence has the Court mandated a wooden, mechanical test that ignores context and

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

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

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

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

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

Recent Attempts To Better Define "Express Advocacy"

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

The FEC Adopts a "Reasonable Person" Approach

The FEC promulgated a regulation which incorporated a "reasonable person" approach into its definition of "express advocacy." Under the regulation, "express advocacy" is defined to include not only those communications which contain "magic words," but also communications that "[w]hen taken as a whole and with limited reference to external events such

as the proximity to the election, could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidates(s)" The regulation further states that, under its reasonable person approach, the electoral portion of the communication must be "unmistakable, unambiguous, and suggestive of only one meaning."

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

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

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

[T]he Federal Election Campaign Act is designed to avoid excessive corporate financial interference in elections and the FEC presumably has some expertise on the question what form that interference may take based on its history of complaints, investigations and enforcement actions. . . . Language, moreover, is an elusive thing. The topic here is communication and it is commonplace that the meaning of words is not fixed, but depends heavily on context as well as the shared assumptions of speaker and listener. . . . One does not need to use the explicit words "vote for" or their equivalent to communicate clearly the message that a particular candidate is to be elected. [This] appears to be a very reasonable attempt to deal with these vagaries of language and, indeed, is drawn quite narrowly to deal with only the "unmistakable" and "unambiguous," cases where "reasonable minds cannot differ" on the message. "Limited reference to external events" is hardly a radical idea. It is required even by the *Buckley* terminology. After all, how does one know that "support" or "defeat" means an election rather than an athletic contest or some other event without considering the external context of a federal election with specific candidates?

Despite these words of endorsement, the court reluctantly concluded that *Buckley* and *Massachusetts Citizens for Life* required the more rigid "magic words" approach. The court

believed that the Supreme Court endorsed a bright line test in order to protect free speech, regardless of the effect on enforcement of the election laws. As the court noted, "[t]he result is not very satisfying from a realistic communications point of view and does not give much recognition to the policy of the election statute to keep corporate money from influencing elections in this way." Thus, although the court candidly indicated that it believed that "the FEC had the better of the argument on its regulation so far as the logic of language is concerned," it nevertheless concluded that *Buckley* had foreclosed anything other than the narrow "magic words" test.

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

Senators Propose a Delimited Time Period Approach

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

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

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

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

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

politician or political candidate except immediately before an election, and those commercials are broadcast in that time frame precisely because they are intended to influence the outcome of the imminent election.

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

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

EXPRESS ADVOCACY

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

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

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

ISSUE ADVOCACY

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

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

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

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

Additional Approaches and Refinements

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

The intent-based approach raises no serious concerns in regard to overbreadth — it is narrowly-tailored to reach only those advertisements that are truly intended to be electioneering ads. Neither is it impermissibly vague, for if there is one thing that any

individual speaker surely knows, it is his or her own purpose or intent. Of course, the problem arises at the enforcement stage, since although an individual speaker will know his or her own intent, that intent cannot be objectively ascertained by a fact-finder. In practice, the enforcement of an intent-based approach would likely mirror the enforcement of a "reasonable person" approach. A person is presumed to intend the normal consequences of his actions, and regulators would assume that the intent of an advertisement can be discerned from how the ad is received by the viewing public.

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

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

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

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

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

The use of presumptions provides another potential refinement that can serve to address the overbreadth issue in regard to any of these approaches. For example, an intent-based approach could incorporate a rebuttable presumption that ads which mention a candidate and are aired within a certain time frame are for an electioneering purpose. Because the presumption is rebuttable, rather than

conclusive, there is less risk of overbreadth. Thus, the Vietnam War protestors discussed above could air their advertisement depicting President Johnson, although they would be on notice that, if the ad is run close to an election in which President Johnson is a candidate, the burden will be on them to demonstrate their non-electioneering intent. The use of objective presumptions, while providing speakers with a high degree of certainty concerning what type of speech will normally be subject to regulation, also provides a safety-valve that allows speakers to demonstrate that their communication, although in a format usually associated with electoral advocacy, is in fact not electioneering.

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

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

Conclusion

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

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



BRENNAN CENTER FOR JUSTICE

AT NYU SCHOOL OF LAW

161 Avenue of the Americas, 5th Floor, New York, NY 10013 (212) 998-6730 / Fax (212) 995-4550

FISCAL NOTE

STATE OF ALASKA
2002 LEGISLATIVE SESSION

Fiscal Note Number: _____
 Bill Version: CSSB 363 (STA) am
 () Publish Date: _____

Revision Date/Time (Note if correction): _____ Dept. Affected: Admin
 Title Campaign Comm. & Disclosures BRU AK Public Offices Commission
 Component _____
 Sponsor Senate Rules
 Requester House Judiciary Component No. 70

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES						
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CHANGE IN REVENUES ()						
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FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2002) cost: 0.0
 Check this box (X) if funding for this bill is included in the Governor's FY 2003 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

Prepared by: Heather Nobrega, Counsel Phone 907-465-4990
 Division: House Judiciary Committee Date/Time 5/10/02 9:33 AM
 Approved by: Norman Fokeberg, Chairman Date 5/10/2002
 Agency: House Judiciary Committee

Sec. 15.13.040. Contributions, expenditures, and supplying of services to be reported.

(a) Except as provided in (g) of this section, each candidate shall make a full report, upon a form prescribed by the commission, listing the date and amount of all expenditures made by the candidate, the total amount of all contributions, including all funds contributed by the candidate, and for all contributions in excess of \$100 in the aggregate a year, the name, address, principal occupation, and employer of the contributor and the date and amount contributed by each contributor. The report shall be filed in accordance with AS 15.13.110 and shall be certified correct by the candidate or campaign treasurer.

(b) Each group shall make a full report upon a form prescribed by the commission, listing

(1) the name and address of each officer and director:

(2) the aggregate amount of all contributions made to it; and, for all contributions in excess of \$100 in the aggregate a year, the name, address, principal occupation, and employer of the contributor, and the date and amount contributed by each contributor; and

(3) the date and amount of all contributions made by it and all expenditures made, incurred or authorized by it.

(c) The report required under (b) of this section shall be filed in accordance with AS 15.13.110 and shall be certified as correct by the group's treasurer.

(d) Every individual, person, or group making a contribution or expenditure shall make a full report, upon a form prescribed by the commission, of

(1) contributions made to a candidate or group and expenditures made on behalf of a candidate or group

(A) as soon as the total contributions and expenditures to that candidate or group reaches \$500 in a year; and

(B) for all subsequent contributions and expenditures to that candidate or group in a year whenever the total contributions and expenditures to that candidate or group that have not been reported under this paragraph reaches \$500;

(2) unless exempted from reporting by (h) of this section, any expenditure whatsoever for advertising in newspapers or other periodicals, on radio, or on television; or, for the publication, distribution, or circulation of brochures, flyers, or other campaign material for any candidate or ballot proposition or question.

(e) The report required under (d) of this section must contain the name, address, principal occupation, and employer of the individual filing the report, and an itemized list of expenditures. The report shall be filed with the commission by the contributor no later than 10 days after the

contribution or expenditure is made. A copy of the report shall be furnished to the candidate, campaign treasurer, or deputy campaign treasurer at the time the contribution is made.

(f) During each year in which an election occurs, all businesses, persons, or groups that furnish any of the following services, facilities, or supplies to a candidate or group shall maintain a record of each transaction: newspapers, radio, television, advertising, advertising agency services, accounting, billboards, printing, secretarial, public opinion polls, or research and professional campaign consultation or management, media production or preparation, or computer services. Records of provision of services, facilities, or supplies shall be available for inspection by the commission.

(g) The provisions of (a) of this section do not apply if a candidate

(1) indicates, on a form prescribed by the commission, an intent not to raise and not to expend more than \$2,500 in seeking election to office, including both the primary and general elections;

(2) accepts contributions totaling not more than \$2,500 in seeking election to office, including both the primary and general elections; and

(3) makes expenditures totaling not more than \$2,500 in seeking election to office, including both the primary and general elections.

(h) The provisions of (d)(2) of this section do not apply to one or more expenditures made by an individual acting independently of any group and independently of any other individual if the expenditures

(1) cumulatively do not exceed \$250 during a calendar year; and

(2) are made only for billboards, signs, or printed material concerning a ballot proposition as that term is defined by AS 15.13.065(c).

(i) The permission of the owner of real or personal property to post political signs, including bumper stickers, or to use space for an event or to store campaign-related materials is not considered to be a contribution to a candidate under this chapter unless the owner customarily charges a fee or receives payment for that activity. The fact that the owner customarily charges a fee or receives payment for posting signs that are not political signs is not determinative of whether the owner customarily does so for political signs.

(§ 1 ch 76 SLA 1974; am § 13 ch 189 SLA 1975; am § 33 ch 50 SLA 1989; am § 4 ch 126 SLA 1994; am §§ 5 - 7 ch 48 SLA 1996; am §§ 6, 7 ch 6 SLA 1998; am § 1 ch 74 SLA 1998)

Administrative Code. - For campaign disclosure, see 2 AAC 50, art. 2.

Effect of amendments. The 1996 amendment, effective January 1, 1997, in subsection (a), added the exception at the beginning of the first sentence and made a related stylistic change; in subsection (d), in paragraph (2), added "unless exempted from reporting by (h) of this section," and inserted "or other

periodicals" and made minor stylistic changes and added subsections (g) and (h).

The first 1998 amendment, effective June 28, 1998, rewrote paragraph (d)(1) and the second and third sentences in subsection (f).

The second 1998 amendment, effective June 4, 1998, added subsection (i).

NOTES TO DECISIONS

Constitutionality. - In the case of *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 98 S. Ct. 1407, 55 L. Ed. 2d 707, rehearing denied, 438 U.S. 907, 98 S. Ct. 3126, 57 L. Ed. 2d 1150 (1978), the supreme court of the United States has indicated in unmistakable terms that state disclosure laws pertaining to ballot issues are constitutional. *Messerli v. State*, 626 P.2d 81 (Alaska 1980).

When there is no showing that an individual must remain anonymous with respect to advertising as to ballot propositions because of the possibility of being subject to reprisals, economic or otherwise, the state campaign disclosure laws are not unconstitutional as applied to a contributor hoping to influence the outcome of a ballot issue, because the objective of an informed electorate is sufficiently compelling to overcome an interest in anonymous political expression. *Messerli v. State*, 626 P.2d 81 (Alaska 1980).

The disclosure requirements of this chapter are not unconstitutionally vague or overbroad, nor do they violate the constitutional right of the people to privacy. *VECO Int'l, Inc. v. Alaska Pub. Offices Comm'n*, 753 P.2d 703 (Alaska 1988), appeal dismissed, 488 U.S. 919, 109 S. Ct. 298, 102 L. Ed. 2d 317 (1988).

Sec. 15.13.080. Statement by contributor.

(a) An individual who contributes \$500, or goods or services with a value of \$500, to a candidate shall file a contributor's statement as required by this section.

(b) An individual required to file a contributor's statement under (a) of this section shall file on a form made available by the commission. The statement must

- (1) identify the contributor and the candidate and all groups receiving contributions;
- (2) itemize the contributions and goods; and

(3) state that the contributor is not prohibited by law from contributing and that the contribution consists of funds or property belonging to the contributor and has not been given or furnished by another person or group.

(c) The contributor's statement shall be filed with the commission by the contributor no later than 30 days after the contribution that requires the contributor to report under AS 15.13.040(d) is made.

(§ 1 ch 76 SLA 1974; am § 29 ch 189 SLA 1975; am § 13 ch 48 SLA 1996; am §§ 8, 9 ch 6 SLA 1998)

Administrative Code. - For campaign disclosure, see 2 AAC 50, art. 2.

Effect of amendments. The 1996 amendment, effective January 1, 1997, rewrote this section.

The 1998 amendment, effective June 28, 1998, rewrote subsection (a) and, in subsection (c) substituted "30 days" for "10 days" and inserted "that requires the contributor to report under AS 15.13.040(d)."