The Frequently Mischaracterized Impact of the Courts on the FEC and Campaign Finance Law

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Federal Election Commission ("FEC" or "Commission") apologists frequently blame the courts for imposing an unyielding legal structure on the FEC's ability to enforce campaign finance laws and regulations. One of these critics of the federal judiciary's approach has gone so far as to argue that the FEC has become a "toothless tiger" not because of its own shortcomings, but because the courts, case by case, have painstakingly pulled out every last tooth.¹

This Article will demonstrate that while the courts may well have limited the FEC's ability to enforce spending restrictions and disclosure requirements regarding so-called "express advocacy," the Commission's other failures cannot fairly be laid at the courthouse doors. Likewise, the Supreme Court is not likely to invalidate key provisions of the Bipartisan Campaign Reform Act of 2002. Contrary to popular belief, courts have been largely accommodating to campaign finance legislation and enforcement. The more serious problem facing current and potential campaign finance laws is the FEC's poor record of enforcing existing law, and the likelihood that it will fail just as poorly at implementing recent reforms.

I. THE FEC HAS A WINNING RECORD IN THE SUPREME COURT

The FEC constantly loses. I have never seen a record like this outside of the old Chicago Cubs. I mean every time, it is like they march up the hill like Pickett's charge, and they get slaughtered at the district court level.²

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The FEC often fails in its attempts to enforce the campaign finance laws. This perception is largely drawn from its usually-futile battles over express advocacy. In fact, however, in the six most relevant Supreme Court battles since the Federal Election Campaign Act ("FECA" or the "Act") was passed, the Court has upheld most, if not all, of the challenged law.

A. Buckley v. Valeo: Mixed Result

In 1971 and 1974, Congress wrote its first comprehensive federal campaign finance law broadly to cover all money spent "in connection with" or "for the purpose of influencing" federal elections. Less than two years after FECA was passed and before the law even took effect, the Supreme Court upheld parts of the statute, while narrowing its scope, in Buckley v. Valeo.

In Buckley, the Court struck down several FECA provisions as unconstitutional restraints of protected free speech rights. Specifically, the Court held invalid the Act's limits on individual, candidate, and political action committee (PAC) expenditures because they did not serve a government interest strong enough to justify abridging First Amendment rights.

What is sometimes ignored, however, is that the Buckley Court also upheld substantial portions of the law. Moreover, those portions worked reasonably well for almost two decades and remain valid today. The justices held that FECA's contribution limits to candidates, PACs, and political parties were constitutional because they served the "weighty" government interests of preventing both the appearance and reality of government corruption.

Also, in order to avoid striking down the source restrictions and disclosure requirements for independent campaign expenditures in the Act, the Court supplied its own narrowing, "saving" definition. The

3. See id.
8. Id. at 45, 51, 55, 58.
9. Id.
10. Id. at 25-29, 58.
justices held that only independent expenditures that constituted “express advocacy” could be regulated.\(^\text{11}\) \(^\text{11}\) The Court then gave additional content to this definition by listing several “magic words” and phrases — “vote for,” “vote against” and “support,” for example — that definitively constituted express advocacy.\(^\text{12}\) \(^\text{12}\) The *Buckley* Court made clear that independent expenditures, as redefined by the Court, could be regulated without unduly burdening First Amendment values.\(^\text{13}\) \(^\text{13}\)

**B. Massachusetts Citizens For Life: A Victory**

Ten years after the Supreme Court enunciated the express advocacy test in *Buckley*, the Court applied it to an actual campaign communication in *FEC v. Massachusetts Citizens For Life, Inc.* (MCFL).\(^\text{14}\) \(^\text{14}\) MCFL was a non-profit, non-stock corporation organized to advance anti-abortion goals,\(^\text{15}\) \(^\text{15}\) which published a special edition of its standard newsletter weeks before the primary election.\(^\text{16}\) \(^\text{16}\) While prior newsletters had been sent to two or three thousand people, MCFL published more than 100 thousand copies of this special edition.\(^\text{17}\) \(^\text{17}\) The front page of the publication featured the headline “EVERYTHING YOU NEED TO KNOW TO VOTE PRO-LIFE.”\(^\text{18}\) \(^\text{18}\) Readers were reminded that “[n]o pro-life candidate can win in November without your vote in September.”\(^\text{19}\) \(^\text{19}\) “VOTE PRO-LIFE” appeared in large black letters on the back page,\(^\text{20}\) \(^\text{20}\) and the publication also provided a coupon that readers could take to the polls to remind them of the names of pro-life candidates.\(^\text{21}\) \(^\text{21}\)

The FEC alleged that MCFL’s expenditures in financing the special election newsletter were express advocacy and therefore constituted an illegal corporate contribution.\(^\text{22}\) \(^\text{22}\) The Court agreed, reasoning that the MCFL newsletter was express advocacy because it urged readers to “vote for ‘pro-life’ candidates,”\(^\text{23}\) \(^\text{23}\) and provided the names and

\(^{11}\) *Id.* at 44.

\(^{12}\) *Id.* at 44 n.52.

\(^{13}\) *Id.*

\(^{14}\) 479 U.S. 238 (1986).

\(^{15}\) *Id.* at 241-42.

\(^{16}\) *Id.* at 243.

\(^{17}\) *Id.*

\(^{18}\) *Id.*

\(^{19}\) *Id.*

\(^{20}\) *Id.*

\(^{21}\) *Id.*

\(^{22}\) *Id.* at 244.

\(^{23}\) *Id.* at 249.
photographs of candidates who met that description. Thus, the newsletter "provides, in effect an explicit directive: vote for these (named) candidates. The fact that this message is marginally less direct than 'Vote for Smith' does not change its essential nature."

Accordingly, the Court upheld the FEC contention that these expenditures could be regulated as express advocacy.

C. Austin: A Victory

In *Austin v. Michigan State Chamber of Commerce*, the Court affirmed the constitutionality of a ban on campaign spending by business corporations and corporations other than purely non-profit corporations. The Court considered a Michigan statute that prevented corporations from using corporate treasury funds for independent expenditures in support of, or in opposition to, any candidate in an election for state office. An "independent" expenditure was defined as one not made at the direction or under the control of another person, or to a committee working for or against a particular candidate. The statute only allowed corporations to make such independent expenditures from segregated funds used solely for political purposes.

The statute was challenged by the Michigan Chamber of Commerce, a...
non-profit corporation with 8,000 members, seventy-five percent of whom were for-profit corporations. The Chamber maintained a segregated political fund, but sought to use funds from its general treasury, which was funded through annual dues required of all of its members, to promote the election or defeat of state candidates. Because many of the group's members were themselves for-profit corporations, it was clear that the Chamber's contributions and expenditures were coming from corporations, albeit indirectly.

The Court held that Michigan could restrict political contributions and expenditures from non-profit corporate treasuries, at least under certain circumstances. It did so on the grounds that permitting such a group to participate in candidate elections would invite evasion of the ban on spending by business corporations in such elections, allowing non-profit groups to "serve as conduits for the type of direct spending that creates a threat to the political marketplace."

D. Colorado Republicans I: A Loss

In Colorado Republican Federal Campaign Committee v. FEC (Colorado Republicans I), the Court rejected the FEC's position that the government could constitutionally limit independent expenditures by political parties for their candidates. However, the Court was split over the question of whether party coordinated expenditures could be constitutionally limited. Four justices decided that the limits were unconstitutional, while two justices approved of the limits. Justices Breyer, Souter, and O'Connor, however, sought further information and the case was accordingly remanded to the lower court for further fact-finding on the coordinated spending issue in Colorado Republican II.
E. Shrink Missouri: A Victory

In *Nixon v. Shrink Missouri Government PAC* \(^{43}\) (*Shrink PAC*), the Supreme Court upheld a Missouri law limiting contributions ranging from $275 to $1,075. \(^{44}\) The Court reaffirmed that a lower standard of scrutiny applies to *contribution* limits than to restrictions on independent *expenditure* limits. \(^{45}\) In an opinion reviving the "anti-corruption" language used in the *Buckley* decision twenty-five years earlier, Justice Souter's majority opinion discussed the "threat from politicians too compliant with the wishes of large contributors." \(^{46}\) Justice Souter referred to Buckley's reasoning, insisting that to "[l]eave the perception of impropriety unanswered, and the cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance." \(^{47}\) Democracy, the Court reasoned, works "only if the people have faith in those who govern, and that faith is bound to be shattered when high officials and their appointees engage in activities which arouse suspicion of malfeasance and corruption." \(^{48}\)

F. Colorado II: A Victory

In *FEC v. Colorado Republican Federal Campaign Committee* \(^{49}\) (*Colorado Republicans II*), the FEC prevailed when the Supreme Court upheld FECA's party spending limit, which limits how much political parties can spend on behalf of and in tandem with their congressional candidates. \(^{50}\) The Court found the limits to be fully justified and constitutional under the anti-corruption rationale of *Buckley* because they served to combat circumvention of the limits on contributions that donors can make directly to candidates. \(^{51}\)

II. WINNING IN COURT? DEPENDS ON THE ISSUE AND EFFORT

In striking down expenditure limits, \(^{52}\) upholding contribution limits, \(^{53}\) and reinterpreting the reporting and disclosure requirements, \(^{54}\) *Buckley*
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presented a paradigmatic example of the problem that would vex efforts to enforce campaign finance laws for decades. That problem is the interplay of the overbreadth and vagueness doctrines, two modes of analysis courts employ when considering whether speech regulations in general, and campaign finance laws in particular, have the requisite specificity to avoid constitutional problems. For a campaign finance reform measure to survive vagueness and overbreadth challenges, it must provide a clear, bright-line standard – one that is sufficiently narrow to avoid regulating too much speech or political activity, and sufficiently precise to give proper notice of what activity is regulated. As a concrete example, courts have been reluctant to allow regulation of election ads that do not meet the magic words because such regulatory attempts have the potential to chill constitutionally protected speech. Accordingly, lower courts have routinely thwarted the FEC’s and reformers’ efforts to combat “sham” issue advocacy. On the other hand, courts have been overwhelmingly deferential to laws governing disclosure and contribution limits because they clearly and specifically target the conduct to be regulated – an easier goal to achieve than in the area of advocacy.

A. Express Advocacy

The Supreme Court has historically treated regulations of “pure” political speech with extreme skepticism. The justices made note of the myriad decisions manifesting this skepticism in Eu v. San Francisco County Democratic Central Committee, when it addressed a state’s

53. Id. at 24-35.
54. Id. at 60-84.
55. Id. at 61, 76-79, 82.
56. See, e.g., Buckley, 424 U.S. at 22-23.
57. See, e.g., Me. Right to Life Comm., Inc. v. FEC, 914 F. Supp. 8, 12 (D. Me. 1996) (stating how the Supreme Court “err[ed] on the side of permitting things that affect the election process, but at all costs avoid[ed] restricting, in any way, discussion of public issues”), aff’d, 98 F.2d 1 (1st Cir. 1996)
prohibition on primary endorsements by political parties. The Court maintained that:


Likewise, Buckley reminded us that the discussion of public issues is integral to the functioning of a healthy democratic government. The Court further proclaimed that "[t]he First Amendment affords the broadest protection to such political expression in order 'to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'" The reluctance of the federal courts to restrict campaign speech is thus unclear absent a compelling countervailing governmental interest to the nation's political health.


Buckley began its analysis with the finding that all regulations impinging upon political expression burden "core First Amendment rights of political expression." Any restriction of such core speech must, therefore, satisfy the highly demanding standard applicable to statutes that transgress fundamental Constitutional values. To
withstand this so-called "strict scrutiny," a law must be narrowly tailored to achieve a compelling governmental interest.\textsuperscript{66}

Despite this rigorous standard, Buckley permitted regulation of campaign-related communications and expenditures involving express advocacy, but granted independent issue advocacy full freedom from government regulation.\textsuperscript{67} The Buckley opinion essentially established a three-tiered structure for regulating campaign expenditures. First, limits and prohibitions may constitutionally be placed on coordinated expenditures and contributions.\textsuperscript{68} Second, disclosure and reporting requirements may be imposed on independent expenditures.\textsuperscript{69} But third, the attempted regulation of all speech that was "in connection with" or "for the purpose of influencing" a federal election, is unconstitutionally broad and vague.\textsuperscript{70}

Buckley drew a bright line limiting government regulation of political speech to express advocacy of "the election or defeat of a clearly identified candidate for federal office."\textsuperscript{71} The Court theorized (without reference to any particular ad, and without a record in the case of the standards as applied) that a strict approach was necessary because "the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application."\textsuperscript{72}

The Buckley Court then discussed express advocacy in two different contexts. First, the Court struck down FECA's $1,000 individual expenditure limit,\textsuperscript{73} reasoning that because the discussion of political issues is so closely linked to the discussion of political candidates, the Act's expenditure limits that related to "clearly identified candidates" were unconstitutionally vague.\textsuperscript{74} The Court feared that the expenditure limits would be applied to constrain constitutionally protected political issue discussions.\textsuperscript{75} The Court held that in order to avoid fatal vagueness, the Act "must be construed to apply only to expenditures for

\begin{itemize}
\item \textsuperscript{66} Id.
\item \textsuperscript{67} Buckley, 424 U.S. at 22-23.
\item \textsuperscript{68} Id. at 13.
\item \textsuperscript{69} Id. at 64.
\item \textsuperscript{70} Id. at 39-60.
\item \textsuperscript{71} Id. at 44.
\item \textsuperscript{72} Id. at 42.
\item \textsuperscript{73} Id. at 51.
\item \textsuperscript{74} Id. at 39-43.
\item \textsuperscript{75} Id. at 41-42 (noting that the court of appeals erred by thinking that the statute's construction completely eliminated vagueness).
\end{itemize}
Communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office.\textsuperscript{76}

Second, the \textit{Buckley} Court discussed express advocacy in the context of FECA's reporting and disclosure provisions.\textsuperscript{77} The Court found these requirements vague, predicting that they could unconstitutionally chill issue discussion when applied to every person who made a contribution or "expenditure for the purpose of influencing a federal election."\textsuperscript{78} The Court remedied this problem by again limiting FECA's reporting and disclosure requirements to communications "that expressly advocate the election or defeat of a clearly identified candidate."\textsuperscript{79}

2. The Legacy of Buckley's Express Advocacy Standard

The Supreme Court reaffirmed the utility of the express advocacy requirement in \textit{MCFL}.\textsuperscript{80} There, the justices declared that \textit{Buckley} "adopted the 'express advocacy' requirement to distinguish discussion of issues and candidates from more pointed exhortations to vote for particular persons."\textsuperscript{81} The Court then held that the statute at issue in \textit{MCFL} could only be constitutional if its reach was limited to express advocacy.\textsuperscript{82} However, the Court broadened -- if only slightly -- the \textit{Buckley} definition of express advocacy to include words which are "in effect" an explicit directive "marginally less direct" than the \textit{Buckley} language.\textsuperscript{83} As a result, the FEC has successfully deployed \textit{MCFL} in court pleadings to justify a definition of express advocacy based, at least in part, on the implied electoral meanings of phrases in ads.\textsuperscript{84}

In \textit{FEC v. Furgatch},\textsuperscript{85} the Ninth Circuit took a different — and more expansive — approach to express advocacy.\textsuperscript{86} The panel held that an

\textsuperscript{76} Id. at 44.
\textsuperscript{77} Id. at 75-84.
\textsuperscript{78} Id. at 76-82 (discussing and recognizing the statute's serious problems of vagueness).
\textsuperscript{79} Id. at 80.
\textsuperscript{80} 479 U.S. 238 (1986).
\textsuperscript{81} Id. at 249.
\textsuperscript{82} Id. at 251; see also West Virginians for Life, Inc. v. Smith, 960 F. Supp. 1036, 1039 (S.D.W. Va. 1996) ("It is clear from the holdings in Buckley and its progeny that the Supreme Court has made a definite distinction between express advocacy, which generally can be regulated, and issue advocacy, which generally cannot be regulated.").
\textsuperscript{83} \textit{MCFL}, 479 U.S. at 249 (concluding that the MCFL publication provides "in effect an explicit directive: vote for these (named) candidates"); see also id. (acknowledging that the electoral message in \textit{MCFL} is "marginally less direct than 'Vote for Smith' [and the other terms identified in Buckley]").
\textsuperscript{84} \textit{FEC v. Furgatch}, 807 F.2d 857 (9th Cir. 1987).
\textsuperscript{85} 807 F.2d 857 (9th Cir. 1987).
advertisement lacking “magic words” may be express advocacy and therefore could be regulated under the Act.\textsuperscript{87} To reach that conclusion, the court interpreted Buckley’s express advocacy test as \textit{not} requiring “a bright and unambiguous line,”\textsuperscript{88} and expressly rejected the notion that express advocacy is limited to communications containing the specific terms identified by Buckley.\textsuperscript{89} The Supreme Court denied a certiorari petition in \textit{Furgatch}.\textsuperscript{90}

The FEC’s apparent victory in \textit{Furgatch}, however, was short-lived. Other federal appeals courts that have since considered the question – including the First, Second, Fourth, Eight, Tenth and Eleventh Circuits – have held that the Buckley express advocacy test can only be met by communications that contain \textit{explicit} and unambiguous words urging readers to elect or defeat a clearly identified candidate.\textsuperscript{90} These courts

\begin{itemize}
  \item \textsuperscript{86} Id. at 861-63.
  \item \textsuperscript{87} Id. at 862-63.
  \item \textsuperscript{88} Id. at 861.
  \item \textsuperscript{89} Id. at 862-63.
  \item \textsuperscript{90} MCFL, 479 U.S. at 249 (citing Buckley v. Valeo, 424 U.S. 1, 44 n.52 (1976)); see, e.g., Faucher v. FEC, 928 F.2d 468 (1st Cir. 1991); Vt. Right to Life, Inc. v. Sorrell, 221 F.3d 376, 379-80, 386-89 (2d Cir. 2000) (reversing a lower court decision which upheld a Vermont law that required individuals and organizations who run advertisements “expressly or implicitly advocat[ing] the success or defeat of a candidate” to identify the name and address of the buyer of the advertisement because it unconstitutionally limited issue advocacy in violation of Buckley’s bright-line test); Perry v. Bartlett, 231 F.3d 155, 161-62 (4th Cir. 2000) (finding a disclosure statute requiring the sponsors of political advertisements that intended to advocate the election or defeat of a candidate to be unconstitutionally overbroad because the statute would allow regulation beyond the bright-line rule of express advocacy established by Buckley); N.C. Right to Life, Inc. v. Bartlett, 168 F.3d 705, 713, 718 (4th Cir. 1999) (finding a statute unconstitutionally vague and overbroad because it encompassed entities engaging in issue advocacy and did not limit its coverage to entities engaging in express advocacy); FEC v. Christian Action Network, 110 F.3d 1049 (4th Cir. 1997); Iowa Right to Life Comm. v. Williams, 187 F.3d 963, 969 (8th Cir. 1999) (finding a state disclosure statute modeled on the Furgatch standard to be in violation of the Buckley bright-line test); Citizens for Responsible Gov’t v. Davidson, 236 F.3d 1174, 1194 (10th Cir. 2000) (applying a bright-line view of what constitutes express advocacy and then finding the Colorado law’s definitions of independent expenditure, political committee, and political message to be unconstitutional because they extended the reach of the Act’s “substantive provisions ‘to advocacy with respect to public issues, which is a violation of the rule enunciated in Buckley and its progeny’”); Fla. Right to Life v. Lamar, 238 F.3d 1288, 1289 (11th Cir. 2001) (striking down Florida’s definition of “political committee” as unconstitutionally overbroad because it swept within its regulatory ambit groups whose primary purpose is to engage in issue advocacy); see also FEC v. Cent. Long Island Tax Reform Immediately Comm., 616 F.2d 45, 53 (2d Cir. 1980) (stating that section 441d of the FECA “clearly establish[es] that, contrary to the position of the FEC, the words ‘expressly advocating’ mean[] exactly what they say”); Me. Right to Life Comm., Inc. v. FEC, 914 F. Supp. 8, 12 (D. Me.), aff’d, 98 F.2d 1 (1st Cir. 1996) (stating that “[t]he [Supreme] Court seems to have been quite serious in limiting FEC enforcement to express advocacy with examples of words that
have rejected attempts to find express advocacy based on implied electoral meanings, even if the implicit electoral message is clear and, arguably, unmistakable.91 In several cases, courts have done so even as they directly acknowledged that the implied advocacy standard would effectively exempt much candidate-related political speech intended to affect the outcome of federal elections from the disclosure requirements and restrictions on corporate and labor funding of the federal election laws.92

Nevertheless, these courts have indicated that they do not believe that Buckley provides any leeway for lower courts to regulate such speech, and so they feel compelled to “err on the side of permitting things that affect the election process, but at all costs avoid[] restricting, in any way, discussion of public issues.”93 While federal district and state courts that have addressed state laws regulating issue advocacy have not been nearly as uniform in their approach, they have nevertheless been fairly unyielding.94

91. See supra note 83.
93. Id.
94. Compare Kansans for Life, Inc. v. Gaede, 38 F. Supp. 2d 928, 936-37 (D. Kan. 1999) (finding that the Kansas Governmental Ethics Commission’s definition of express advocacy — “[a] communication which, when viewed as a whole, leads an ordinary person to believe that he or she is being urged to vote for or against a particular candidate for office” — was unconstitutionally vague), and Planned Parenthood Affiliates of Mich., Inc. v. Miller, 21 F. Supp. 2d 740, 741, 746 (E.D. Mich. 1998) (finding a state rule “prohibiting the use of a candidate’s name or likeness in communications made by a corporation forty-five days prior to an election” as “overbroad and [likely to] chill the exercise of constitutionally protected ‘issue advocacy’”), and Right to Life of Mich., Inc. v. Miller, 23 F. Supp. 2d 766, 771 (W.D. Mich. 1998) (same), and Stenson v. McLaughlin, No. 00-514-JD, 2001 WL 1033614 (D.N.H. Aug. 24, 2001) (striking part of a statute regulating “implicit advocacy” because it was too vague and went “beyond the express advocacy limitations of Buckley”), and Va. Soc’y for Human Life, Inc. v. Caldwell, 500 S.E.2d 814, 817 (Va. 1998) (narrowing “the broad sweep of the phrase ‘for the purpose of influencing’ . . . so as to have no application to individuals or groups that engage solely in issue advocacy”), and Vt. Right to Life Comm., Inc. v. Sorrell, 19 F. Supp. 2d 204, 214 (D. Vt. 1998) (narrowly construing the term “political advertisements,” as used in statutes, to mean express advocacy communications because “[i]f the Vermont legislature intended to regulate communications that impliedly advocate for or against a candidate, it has flouted the United States Supreme Court’s holdings in Buckley and MCFL . . . .”), with Chamber of Commerce v. Moore, 191 F.Supp. 2d 747 (S.D. Miss. 2000) (rejecting the Chamber’s request that the court declare that it could broadcast certain issue ads without being subject to contribution limits and disclosure and reporting requirements), and Oregon ex
3. The FEC's Response

In the wake of these Supreme Court and lower federal court rulings, in 1995, the FEC promulgated two new provisions to define what kinds of communications constitute express advocacy.\(^9\) The first provision — part (a) — includes all of the express advocacy terms the Supreme Court identified in *Buckley* and thereby incorporates the Court's definition into the FEC's regulations, while broadening that definition somewhat.\(^6\) The second provision — part (b) — has become known as the "reasonable person" definition, and is a clear attempt to incorporate an expansive reading of the more flexible Ninth Circuit express advocacy standard from *Furgatch*\(^7\) into the FEC's regulations (which are, of course, in effect throughout the country).

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\(^9\) 11 C.F.R. § 100.22 (2000). The regulation states:
Expressly advocating means any communication that —
(a) Uses phrases such as "vote for the President," "re-elect your Congressman," "support the Democratic nominee," "cast your ballot for the Republican challenger for U.S. Senate in Georgia," "Smith for Congress," "Bill McKay in '94," "vote Pro-Life," or "vote Pro-Choice" accompanied by a listing of clearly identified candidates described as Pro-Life or Pro-Choice, "vote against Old Hickory," "defeat" accompanied by a picture of one or more candidate(s), "reject the incumbent," or communications of campaign slogan(s) or individual word(s), which in context can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidate(s), such as posters, bumper stickers, advertisements, etc. which say "Nixon's the One," "Carter '76," "Reagan/Bush," or "Mondale!"; or
(b) When taken as a whole and with limited reference to external events, such as the proximity to the election, could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s) because —
(1) The electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning; and
(2) Reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action.

\(^6\) Id.

\(^7\) Id.
Part (b) was promptly and successfully challenged in the First Circuit. In *Maine Right to Life Committee, Inc. v. FEC*, the district court found the provision unconstitutional on its face, regardless of how it might be applied. The First Circuit summarily affirmed the district court’s decision on appeal. Since then, the FEC has been enjoined from enforcing this part of its regulations in the First Circuit. The Second and Fourth Circuits’ precedents indicate that they would deem part (b) of the FEC’s express advocacy regulations unconstitutional as well.

*Maine Right to Life* made clear that the FEC is not the only entity restricted by the *Buckley* express advocacy standard. While the district court judge acknowledged that the ruling restricted the scope of the federal election laws and left much election-related speech unregulated, the court stressed that its decision was controlled by Supreme Court precedent:

> If the Supreme Court had not decided *Buckley* and [*MCFL*] and if the First Circuit had not decided *Faucher*, I might well uphold the FEC’s subpart (b) definition of what should be covered. After all, the Federal Election Campaign Act is designed to avoid excessive corporate financial interference in elections and the FEC presumably has some expertise on the question of what form that interference may take based on its history of complaints, investigations and enforcement actions.

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98. 914 F. Supp. 8 (D. Me. 1996), aff’d, 98 F.2d 1 (1st Cir. 1996).
99. *Id.* at 13.
100. 98 F.3d 1 (1st Cir. 1996).
101. *See* *Right to Life of Dutchess County, Inc. v. FEC*, 6 F. Supp. 2d 248, 254 (S.D.N.Y. 1998). Subsection (b) was enjoined nationwide in *Va. Society for Human Life, Inc. v. FEC*, 83 F. Supp. 2d 668, 677 (E.D. Va. 2000), rev’d, 263 F.3d 379 (4th Cir. 2001). The Fourth Circuit recently overturned the district court’s nationwide injunction on the FEC’s express advocacy rule, however, finding that the district court abused its authority by issuing a nationwide injunction and noting that such an “injunction . . . encroaches on the ability of other circuits to consider the constitutionality of” the FEC’s express advocacy regulations. *Va. Soc’y for Human Life, Inc. v. FEC*, 263 F.3d 379, 393 (4th Cir. 2001). The court upheld the injunction, however, as applied to the pro-life organization that brought the law suit and concluded that the regulation violated the First Amendment because it is not limited to communications that contain express words of advocacy as required by *Buckley* v. *Valeo*. *Id.* at 392. The court explained that the regulation violates *Buckley’s* and *MCFL’s* prohibition that the government may not define “express advocacy with reference to the reasonable listener’s or reader’s overall impression of the communication.” *Id.* Thus, “[t]he regulation goes too far because it shifts the determination of what is ‘express advocacy’ away from the words ‘in and of themselves’ to ‘the unpredictability of audience interpretation.’” *Id.*
But there is another policy at issue here and it is one that I believe the Supreme Court and the First Circuit have used to trump all the arguments suggested above. Specifically, the Supreme Court has been most concerned not to permit intrusion upon “issue” advocacy – discussion of the issues on the public’s mind from time to time or of the candidate’s positions on such issues – that the Supreme Court has considered a special concern of the First Amendment. What the Supreme Court did was draw a bright line that may err on the side of permitting things that affect the election process, but at all costs avoids restricting, in any way, discussion of public issues. The Court seems to have been quite serious in limiting FEC enforcement to express advocacy.  

The district court also highlighted the tensions between the purposes of the election laws – which had been repeatedly sanctioned by the Supreme Court – and the Court’s demanding express advocacy test:

The advantage of this . . . [strict] approach, from a First Amendment point of view, is that it permits a speaker or writer to know from the outset exactly what is permitted and what is prohibited. In the stressful context of public discussions with deadlines, bright lights and cameras, the speaker need not pause to debate the shades of meaning in language. The 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, but it does recognize the First Amendment interest as the Court has defined it.

As recently as April of 2002, courts were rejecting challenges to express advocacy communications despite compelling facts because they felt constrained by Buckley. Thus, in Chamber of Commerce v. Moore, the Fifth Circuit explicitly acknowledged “that the result we reach in this

104. Id.
105. Id. at 12. The court stated:
The advantage of this rigid approach, from a First Amendment point of view, is that it permits a speaker or writer to know from the outset exactly what is permitted and what is prohibited. In the stressful context of public discussions with deadlines, bright lights and cameras, the speaker need not pause to debate the shades of meaning in language. The 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, but it does recognize the First Amendment interest as the Court has defined it.

106. No. 00-60779, 2002 WL 518638 (5th Cir. Apr. 5, 2002).
case may be counterintuitive to a common sense understanding of the message conveyed by the television political advertisements at issue.\textsuperscript{107} The FEC has never withdrawn the “reasonable person” express advocacy definition contained in its part (b) reform, despite court decisions proclaiming it unenforceable.\textsuperscript{108} However, the Commission has become extremely passive in its defense of that definition after the pounding the agency took in the 1997 case \textit{FEC v. Christian Action Network}.\textsuperscript{109}

In \textit{Christian Action Network}, the district court adopted,\textsuperscript{110} and the Fourth Circuit summarily affirmed,\textsuperscript{111} a strict definition of “express advocacy.” The basis of the case occurred during the weeks immediately prior to the 1992 presidential election. The Christian Action Network (CAN) aired television advertisements criticizing the alleged “militant homosexual agenda” of the Clinton/Gore ticket.\textsuperscript{112}

The FEC argued that any viewer would understand that the advertisement advocated Clinton’s defeat, and that the use of images and music made communication a classic negative advertisement.\textsuperscript{113} For

\textsuperscript{107} \textit{Id.} at *9.
\textsuperscript{108} Id. at 1049-50 (4th Cir. 1997).
\textsuperscript{110} 92 F.3d 1178 (4th Cir. 1996).
\textsuperscript{111} \textit{Christian Action Network}, 894 F. Supp. at 948. The district court’s opinion describes the advertisement as opening:

\textit{[W]ith a full-color picture of candidate Bill Clinton’s face superimposed upon an American flag, which is blowing in the wind. Clinton is shown smiling and the ad appears to be complimentary. However, as the narrator begins to describe Clinton’s alleged support for “radical” homosexual causes, Clinton’s image dissolves into a black and white photographic negative. The negative darkens Clinton’s eyes and mouth, giving the candidate a sinister and threatening appearance . . . . Simultaneously, the music accompanying the commercial changes from a single high pitched tone to a lower octave. The commercial then presents a series of pictures depicting advocates of homosexual rights, apparently gay men and lesbians, demonstrating at a political march . . . . As the scenes from the march continue, the narrator asks in rhetorical fashion, “Is this your vision for a better America?” Thereafter, the image of the American flag reappears on the screen, but without the superimposed image of candidate Clinton. At the same time, the music changes back to the single high pitched tone. The narrator then states, “[f]or more information on traditional family values, contact the Christian Action Network.”}

\textit{Id.} at 948-49 (internal citations omitted).
\textsuperscript{112} Id. at 956.
instance, the agency contended that the commercial sent an explicit anti-
Clinton message: "By graphically removing Clinton's superimposed
image from the presidential setting of the American flag, the
advertisement visually conveys the message that Clinton should not
become President. [It] is a powerful visual image telling voters to defeat
Clinton."\textsuperscript{114} The FEC also addressed other aspects of the commercial,
including:

(1) the visual degrading of candidate Clinton's picture into a
black and white negative; (2) the use of visual text and audio
voice-overs; (3) ominous music; (4) unfavorable coloring; (5)
codewords such as "vision" and "quota;" (6) issues raised that
are relevant only if candidate Clinton became president; (7) the
airing of the commercial in close proximity to the national
election; and (8) abrupt editing linking Clinton to the images of
the gay rights marchers.\textsuperscript{115}

In striking down the FEC's arguments, the district and circuit courts
were not content to merely rule that the CAN advertisement was
constitutionally protected issue advocacy that could not be regulated.\textsuperscript{116}
Rather, after summarily affirming the district court's ruling,\textsuperscript{117} the Fourth
Circuit awarded attorneys' fees and costs to CAN under the Equal
Access to Justice Act.\textsuperscript{118} In a blistering opinion highly critical of the
FEC's arguments, the Fourth Circuit found that the Commission's legal
position was, "if not assumed in bad faith, at least not 'substantially
justified.'"\textsuperscript{119} The court ridiculed the FEC's contention that CAN's
advertisement could be express advocacy without specific "magic words":

\begin{flushleft}
\textsuperscript{114} Id. (internal quotations and citations omitted).
\textsuperscript{115} Id. (citation omitted).
\textsuperscript{116} Id. at 953. The court stated:
Concededly, the advertisements "clearly identified" the 1992 Democratic
presidential and vice presidential candidates . . . . Similarly, it is beyond dispute
that the advertisements were openly hostile to the proposals believed to have
been endorsed by the two candidates. Nevertheless, the advertisements were
devoid of any language that directly exhorted the public to vote. Without a frank
admonition to take electoral action, even admittedly negative advertisements
such as these, do not constitute "express advocacy" as that term is defined in
Buckley and its progeny . . . . "It is clear from the cases that expressions of
hostility to the positions of an official, implying that [the] official should not be
reelected - even when that implication is quite clear - do not constitute express
advocacy . . . ."
\textsuperscript{117} FEC v. Christian Action Network, 92 F.3d 1178 (4th Cir. 1996).
\textsuperscript{118} FEC v. Christian Action Network, 110 F.3d 1049, 1050 (4th Cir. 1997); see also 28
\textsuperscript{119} CAN, 110 F.3d at 1050.
\end{flushleft}
In the face of unequivocal Supreme Court and other authority discussed, an argument such as that made by the FEC in this case, that "no words of advocacy are necessary to expressly advocate the election of a candidate," simply cannot be advanced in good faith ... much less with "substantial justification." ... It may be that "[i]mages and symbols without words can also convey unequivocal meaning synonymous with literal text." It may well be that "[m]etaphorical and figurative speech can be more pointed and compelling, and can thus more successfully express advocacy, than a plain, literal recommendation to 'vote' for a particular person[.]" and that "it would indeed be perverse to require FECA regulation to turn on the degree to which speech is literal or figurative, rather than on the clarity of its message," "[g]iven that banal, literal language often carries less force." It may even be, as the FEC contends in this particular case, that "the combined message of words and dramatic moving images, sounds, and other non-verbal cues such as film editing, photographic techniques, and music, involving highly charged rhetoric and provocative images ... taken as a whole[,] sent an unmistakable message to oppose [Governor Clinton]." But the Supreme Court has unambiguously held that the First Amendment forbids the regulation of our political speech under such indeterminate standards. "Explicit words of advocacy of election or defeat of a candidate," "express words of advocacy," the Court has held, are the constitutional minima. To allow the government's power to be brought to bear on less, would effectively be to dispossess corporate citizens of their fundamental right to engage in the very kind of political issue advocacy the First Amendment was intended to protect - as this case well confirms.¹²

An infamous example of the sham ads produced in the 1996 election cycle is an advertisement broadcast in Montana a few days before a federal election by an out of state non-profit corporation. The corporation appeared to be a shell entity used to funnel funds anonymously into election campaigns in their closing days. The ad, about a congressional candidate named Bill Yellowtail, said in its entirety:

Who is Bill Yellowtail? He preaches family values, but he took a swing at his wife. And Yellowtail's response? He only slapped her. But "her nose was broken." He talks law and order ... but is himself a convicted felon. And though he talks

¹². Id. at 1064 (internal citations omitted).
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about protecting children, Yellowtail failed to make his own child support payments – then voted against child support enforcement. Call Bill Yellowtail. Tell him to support family values.121

The protection these and other courts have provided to issue advocacy communications by independent advocacy groups has also led political parties and candidates to become more dependent on issue-oriented advertisements that they argue can be paid for by a mixture of federal and not-federal funds.122

The use of these sham “issue ads” reached their apogee in the elections of 1996, and presented a particularly crucial test for the FEC.123

Beginning in the fall of 1995, President Clinton directed the Democratic National Committee (DNC) to launch a $34 million dollar issue-ad campaign designed to showcase the President’s achievements in office.124

The rationale for these ads was to provide a critical boost to the President’s relatively low public opinion numbers in advance of the coming elections.125 As eventually became clear, Clinton’s media advisors understood not just the politics of the matter, but also the law. A staffer later commented that he knew that he needed “to get around the law . . . . If you changed a few words, then you could produce them as D.N.C. ads and not as Clinton-Gore ads.”126 Bob Dole and the GOP


122. DEBORAH BECK ET AL., ISSUE ADVOCACY ADVERTISING DURING THE 1996 CAMPAIGN 3 (1997). According to a study conducted by the Annenberg Public Policy Center, “more than two dozen organizations engaged in issue advocacy during the 1995-1996 election cycle, at an estimated total expense of $135 million to $150 million.” Id. A study of the 1999-2000 election cycle by the Annenberg Public Policy Center estimates that more than $509 million was spent on issue advocacy. KATHLEEN HALL JAMISON ET AL., ISSUE ADVOCACY ADVERTISING IN THE 1999-2000 ELECTION CYCLE 4 (2001). Also, “[t]he Republican and Democratic parties accounted for almost $162 million (32%) of this spending.” Id.

123. Letter from Ann McBride, President, Common Cause, to Janet Reno, Attorney General 36 (Oct. 9, 1996). The presidential campaigns’ pervasive use of candidate-centered issue advocacy during the 1996 campaign was not the only potential campaign finance violation. Id. That election also witnessed the emergence of open, direct, and continuous cooperation between the parties and the candidates in designing, targeting, and funding the issue advertisements. Id.


125. Id. at 51-52.

were quick to catch on and immediately began their own sham “issue-ad” campaign, called, rather tellingly, the “Victory ’96” program.\(^{127}\)

Despite these apparent abuses, the FEC rejected recommendations by its legal staff and voted unanimously against regulating the Clinton and Dole advertisements, noting that no obvious standard existed under current court precedent to define permissible legal standards for such party advertisements.\(^{128}\) Likewise, U.S. Attorney General Janet Reno, after much resistance, ultimately relented and conducted a preliminary investigation based on the FEC’s recommendation that the DNC ads should be viewed as excessive, and therefore illegal, campaign activity.\(^{129}\) After the preliminary investigation, Reno decided not to proceed further with the matter.\(^{130}\)

Reno and the FEC were roundly criticized for caving in and not taking on the parties for their 1996 abuses.\(^{131}\) Regardless of whether they acted in bad faith or good, however, both the Attorney General and the Commission relied on the confusion in this area of law concerning party funding issues. This confusion, which the FEC has done absolutely nothing to alleviate since 1996, enabled the FEC and the Department of Justice to avoid politically difficult decisions relating to 1996 party activities.

\(^{127}\) Corrado, \textit{supra} note 124, at 53. Senator Bob Dole, in commenting on a sixty-second Republican National Committee (RNC) issue ad that never mentioned the presidential election but devoted fifty-six seconds to his biography quipped that the ad “never says that I’m running for President though I hope that’s fairly obvious, since I’m the only one in the picture.” Adam Clymer, \textit{System Governing Election Spending Found in Shambles}, \textit{N.Y. TIMES}, June 16, 1996, at A1.

\(^{128}\) Roberto Suro, \textit{FEC Lets ’96 Campaigns Off on “Issue Ads,”} \textit{WASH. POST}, Dec. 11, 1998, at A21. Other organizations, such as the unions, industry groups, and other advocacy groups seemed to cross over the issue advocacy line and into express advocacy territory without incurring the FEC’s wrath. \textit{Id.}


\(^{130}\) Suro, \textit{supra} note 128.

\(^{131}\) See, \textit{e.g.}, Opinion, \textit{KANSAS CITY STAR}, Dec. 12, 1998, at B6 (stating that “[t]he FEC’s misguided rejection of the recommendations of its staff carries serious ramifications. It excuses flagrant misbehavior by the presidential campaigns . . . . [I]t has shown again that it cannot be relied upon to enforce the rules that are in place”); Editorial, \textit{Making a Mockery of Campaign Spending Limits}, \textit{NEWSDAY}, Dec. 17, 1998, at A54 (stating that “Washington has quietly dropped even the pretense of spending limits in presidential campaigns . . . . Both recent decisions grew out of spurious issue advertisements that actually promoted the candidacies of President Bill Clinton or Republican challenger Bob Dole”).
B. Disclosure

Disclosure laws fall into two major categories: campaign finance disclosure and campaign communication disclosure. Campaign finance disclosure refers to reporting campaign contributions and spending; campaign communication disclosure involves identifying communication sponsors, often called source identification disclosure, or disclaimers. In 1971, Congress updated FECA and expanded the contribution and expenditure disclosure requirements, giving the newly created FEC the responsibility for collecting the data. The 1974 Amendments to FECA further strengthened the disclosure requirements and increased the FEC’s responsibilities.

The Supreme Court’s disclosure jurisprudence is complex and sometimes contradictory. This complexity arises because political disclosure laws implicate core rights protected by the Constitution, including free speech and association, but are necessary to facilitate an informed electorate and a transparent and corruption-free government. Thus, the Supreme Court has recognized that while disclosure laws may infringe on First Amendment freedoms, they also promote First Amendment interests.

In short, disclosure laws governing campaign contributions and spending have generally been held constitutional. In a few specific instances, however, certain disclosure requirements have been struck...
down. Those instances have typically arisen in situations involving "anonymous speech" and ballot initiatives,\textsuperscript{138} where disclosure results in severe administrative burdens,\textsuperscript{139} or where disclosure exposes persons to politically motivated threats, harassment, and reprisals.\textsuperscript{143}

1. Buckley v. Valeo

Like all courts considering First Amendment matters, the Buckley Court began the disclosure analysis by determining what level of constitutional "scrutiny" should apply to the FECA's disclosure provisions.\textsuperscript{141} Noting that "compelled disclosure, in itself can seriously infringe on privacy of association and belief guaranteed by the First Amendment,"\textsuperscript{142} the Court applied what it termed "exacting scrutiny."\textsuperscript{143} The justices then held that the disclosure provisions would (1) have to be justified by important public interests, and (2) have a "relevant correlation" or "substantial relation" to the public interest being served.\textsuperscript{144} Thus, the Buckley Court applied an intermediate level of scrutiny to the FECA's disclosure provisions, as opposed to the higher standard of strict scrutiny, which requires a statute to be narrowly tailored to promote a compelling state interest.\textsuperscript{145}

In applying this standard, the Buckley Court found that mandatory campaign finance disclosure deters both actual and apparent corruption.\textsuperscript{146} The Court also noted that disclosure serves a related interest by helping the FEC detect and prosecute contribution violations under FECA.\textsuperscript{147} Further, the justices recognized that beyond their anti-corruption function, laws requiring disclosure provide valuable information to voters and therefore strengthen the democratic process itself.\textsuperscript{148} Disclosure information, reasoned the Court, permits voters to predict future performance in office by identifying the interests to which

\textsuperscript{139} See FEC v. MCFL, 479 U.S. 238, 255 (1986).
\textsuperscript{141} Buckley v. Valeo, 424 U.S. 1 (1976).
\textsuperscript{142} See id.
\textsuperscript{143} Id.
\textsuperscript{144} Id. (emphasis added).
\textsuperscript{145} Zablocki v. Redhail, 434 U.S. 374, 388 (1978). Recent cases are inconsistent in establishing the level of scrutiny for analyzing disclosure statutes. In the most recent case, Buckley v. American Constitutional Law Foundation, 525 U.S. 182 (1999), the Court applied intermediate scrutiny. Id. at 204-05. In contrast, the Court applied exacting scrutiny in McIntyre v. Ohio Elections Board, 573 U.S. 347, 357 (1995).
\textsuperscript{146} Buckley, 424 U.S. at 67.
\textsuperscript{147} Id. at 67-68.
\textsuperscript{148} Id. at 81.
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A candidate is most likely to be responsive\textsuperscript{149} and "place more precisely each candidate along the political spectrum."\textsuperscript{150} "Significantly, the Buckley Court held that this informational interest" could be just as strong as the anti-corruption interest, and that disclosure statutes could be justified by the informational interest when the anti-corruption interest alone is insufficient.\textsuperscript{151}

In addition to serving a compelling public interest, First Amendment scrutiny requires that a disclosure statute be narrowly tailored to the public interest it serves.\textsuperscript{152} Accordingly, the Buckley Court carefully analyzed whether FECA's disclosure provisions were tailored to avoid unconstitutional vagueness or overbreadth.\textsuperscript{153}

FECA's original disclosure provisions were, in fact, very broad – and, in places, very vague. As written, FECA required disclosure of all independent spending "for the purpose of influencing a federal election."\textsuperscript{154} This definition potentially reached an extremely broad range of political spending – while using the subjective terms "purpose" and "influence" – some of which might have little or no direct connection to elections.

To avoid declaring the statute unconstitutionally vague, the Court applied two "saving" constructions. First, the Court narrowed the application of the term "political committees" (subject to disclosure responsibilities) to "organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate."\textsuperscript{155} Second, the Court narrowed the disclosure provisions to cover only express advocacy independent expenditures.\textsuperscript{156}

\textsuperscript{149} Id. at 67.
\textsuperscript{150} Id.
\textsuperscript{151} Id.
\textsuperscript{153} Buckley, 424 U.S. at 76-80.
\textsuperscript{154} 2 U.S.C. 434(e) (1994).
\textsuperscript{155} Buckley, 424 U.S. at 79. In FEC v. GOPAC, 917 F. Supp. 851 (D.D.C. 1996), the FEC asked the court of appeals to declare that GOPAC, a political action committee run by former U.S. House Speaker Newt Gingrich, was subject to the FECA's disclosure requirements. Id. at 852. GOPAC argued that it did not fall under the FEC's purview because its major purpose was to support state and local candidates, not federal candidates. Id. at 853. The Court of Appeals for the District of Columbia agreed with GOPAC, finding that, while GOPAC's ultimate and indirect purpose may have been to help bring about the eventual election of Republicans to Congress, its operational function was to elect Republicans at the state and local level. Id. at 864. GOPAC wanted to use these state and local officials as a "farm team" from which to later recruit candidates to run for Congress, however, that purpose was too indirect and remote to trigger disclosure obligations FECA. Id. Consequently, the court found that GOPAC was not a federal
The justices also suggested ways to ensure that a statute was not overbroad. First, it created small donor and small spender exceptions. Second, the Court said disclosure could be unconstitutional if it would expose groups or their contributors to threats, harassment, or reprisals. To address this concern, the Court – rather than striking down the disclosure provisions – created a “hardship exemption” under which minors and certain others would not have to comply with the disclosure provisions if they demonstrated a reasonable probability that their compliance would result in adverse consequences.

2. The Legacy of Buckley’s Disclosure Framework

The Supreme Court’s disclosure jurisprudence since Buckley has moved in seemingly contradictory directions in recent years. While several cases subsequent to Buckley have emphasized and expanded the Court’s notion of an “informational interest” favoring disclosure, other decisions have carved out concrete exemptions from disclosure requirements. Another recent case, McIntyre v. Ohio Board of Elections, suggested that the “informational interest” may not be as compelling as the Buckley Court indicated, at least in certain circumstances. In First National Bank v. Belloti, the justices suggested that disclosures enable voters to better evaluate the credibility of political speakers, and the reliability of their statements. Expanding the scope of their previous “informational interest” rationale, the Court stated:

The people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments. They may consider, in making their...
judgment, the source and credibility of the advocate . . . .
Identification of the source of advertising may be required as a
means of disclosure, so that the people will be able to evaluate the
arguments to which they are being subjected.\textsuperscript{162}

Despite this reaffirmation of its respect for broad disclosure, the Court
has been willing to carve out exemptions. Recall that in \textit{Buckley}, while
the Court upheld FECA's disclosure requirements,\textsuperscript{163} the justices said
that parties could get an exemption from the rules if they demonstrated a
reasonable probability that disclosure would result in threats,
harassment, and reprisals against members or the organization itself.\textsuperscript{164}
No plaintiff in \textit{Buckley} had made such a showing.\textsuperscript{165}

Six years after \textit{Buckley}, however, the Court granted a disclosure
Committee}.\textsuperscript{166} In \textit{Brown}, the Court found that the plaintiff Workers Party
met the \textit{Buckley} hardship test by showing that they had suffered the sort
of threats, harassment, and reprisals \textit{Buckley} anticipated.\textsuperscript{167} Specifically,
the Court noted that disclosure of the party's identity in their
advertisements had subjected party members to threatening phone calls,
hate mail, police harassment, FBI surveillance, the firing of gunshots at a
party office, and the dismissal of several party members from their jobs
because of membership.\textsuperscript{168} Consequently, the Court ordered that they
should be exempted from FECA's disclosure requirements.\textsuperscript{169}

In \textit{MCFL},\textsuperscript{170} a non-profit corporation challenged the FEC's
requirement that corporations, including non-profits, must form a PAC
to engage in campaign-related activity.\textsuperscript{171} A grassroots pro-life group
contended that the strict accounting, disclosure, and reporting
requirements imposed on PACs were prohibitive for small

\begin{itemize}
  \item[162.] \textit{Id.} at 791-92.
  \item[163.] \textit{Buckley}, 424 U.S. at 84.
  \item[164.] \textit{Id.} at 74.
  \item[165.] \textit{Id.} at 72, n.88.
  \item[166.] 459 U.S. 87 (1982).
  \item[167.] \textit{Id.} at 102.
  \item[168.] \textit{Id.} at 99.
  \item[169.] \textit{Id.} at 102. Lower courts have likewise ruled certain organizations exempt from
disclosure requirements by reason of harassment, threats, or reprisals. \textit{See, e.g.}, \textit{FEC v.
Hall-Tyner Election Campaign Comm.}, 678 F.2d 416 (1982).
  \item[170.] 479 U.S. 238 (1986). The MCFL opinion, in addition to its relevance to disclosure
issues discussed here, also upheld the corporate contribution ban. \textit{Id.} at 259. However,
the opinion also created an exception to that ban for certain non-profit corporations. \textit{Id.}
It also reaffirmed the \textit{Buckley} express advocacy ruling, although it broadened that
standard beyond mere "magic words" analysis. \textit{Id.} at 249.
  \item[171.] \textit{Id.} at 252.
\end{itemize}
organizations. The Supreme Court agreed with MCFL, ruling that some non-profits, such as MCFL, could engage in campaign activity, even express advocacy, without having to comply with all PAC disclosure requirements. The Court emphasized how burdensome the requirements were when applied to “small groups” whose activities consist predominantly of grassroots activities such as “garage sales, bake sales, and raffles.” The Court created a special, narrow exception under which certain non-profits need only report specific, independent expenditures, and do not have to comply with FECA’s other disclosure and organizational requirements. In the lower courts, however, actions to invalidate disclosure on the basis of regulatory burden have failed where the party challenging disclosure is a large political organization such as a national political party or a coalition of television broadcasters.

However, after two decades of tipping the scale in favor of disclosure provisions, the Supreme Court showed a new skepticism toward some disclosure requirements when it decided the 1996 case McIntyre v. Ohio Elections Commission. In McIntyre, the Court asserted that disclosure laws were subject to strict scrutiny, and particularly to overbreadth analysis. The Court stressed, however, that its holding was limited to disclosures of the type of independent activity pursued by Mrs. McIntyre. “Required disclosures about the level of financial support a candidate has received from various sources are supported by an interest in avoiding the appearance of corruption that has no application to this case.”

172. Id. at 241. 
173. Id. at 255. 
174. Id. 
175. Id. at 265-66. The FEC has codified the MCFL exemption into its regulations. 11 CFR § 114.10 (2000). The Texas Supreme Court recently ruled that a husband and wife do not have to register and form a political committee in order to make an independent expenditure, but that they did have to file independent expenditure reports. Osterberg v. Peca, 12 S.W.3d 31, 47-48 (Tex., 2000).
176. See, e.g., Republican Nat’l Comm. v. FEC, 76 F.3d 400 (D.C. Cir. 1996). The Court of Appeals for the District of Columbia rejected the RNC claims that the FEC’s “best efforts” regulations constituted an undue administrative burden on the RNC. Id. at 409. Analyzing whether compliance with the requirement imposed a severe burden on the RNC, the court found that the burden was slight and rejected the claim of undue burden. Id. at 410; see also Adventure Communications v. Ky. Registry of Election Fin., 191 F.3d 429 (4th Cir. 1999).
178. Id. at 347. 
179. Id. at 354. 
180. Id.
In *McIntyre*, the Ohio disclosure law at issue required all materials relating to ballot initiatives or referenda pamphlets to include source identification disclaimers disclosing the name of the person producing the literature.\(^\text{181}\) The defendant distributed leaflets opposing a school tax levy, which was an initiative election subject.\(^\text{182}\) Some leaflets had no source identification disclaimer while others included the pseudonymous disclaimer “CONCERNED PARENTS AND TAXPAYERS.”\(^\text{183}\) The Ohio Elections Commission fined the defendant $100 for violating the source identification disclaimer law.\(^\text{184}\)

To defend the statute’s constitutionality, Ohio asserted public interests analogous to those approved in *Buckley*: providing the electorate with relevant information and preventing fraud and libelous statements.\(^\text{185}\) This time, however, the Court dismissed the informational interest, stating that few members of the public would know the defendant, and thus disclosure of her name revealed little.\(^\text{186}\) The Court also rejected the anti-fraud/misinformation interest, saying it was duplicative of several more specific prohibitions in Ohio’s Election Code against making or disseminating false statements during political campaigns.\(^\text{187}\) Thus, the Court found the purpose redundant and the statute overbroad and unconstitutional.\(^\text{188}\)

The *McIntyre* Court also appeared to enunciate a new, and important, consideration in disclosure cases: an interest in “anonymous speech,” at least in non-candidate elections. In *McIntyre*, the Court applied strict scrutiny and required Ohio to show that the law promoted a compelling state interest, and that the law was narrowly tailored to suit those interests.\(^\text{189}\) The Court weighed two considerations most heavily: the historical importance of “anonymous speech,” as it extolled the role of such speech in American history,\(^\text{190}\) and the overbreadth of the Ohio statute.\(^\text{191}\) Justice Scalia, joined by Chief Justice Rehnquist, dissented

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181. Id. at 388 n.3 (reciting OHIO REV. CODE ANN. § 3599.09(A) (1998)).
182. Id. at 337.
183. Id. at 337 n.2.
184. Id. at 338.
185. Id. at 348.
186. Id. at 348-49.
187. Id. at 349-51.
188. Id.
189. Id. at 346.
190. Id. at 342 (citing famous anonymous works such as the Federalist Papers).
191. Id. at 351-53. Regarding overbreadth, the Court said:

[Ohio’s disclosure law] applies not only to the activities of candidates and their organized supporters, but also to individuals acting independently and using only
from the opinion, contesting the majority’s analysis.\textsuperscript{192} Specifically, Justice Scalia noted that the anonymous works cited by the majority were not election-related speech, and that source disclaimer laws have been presumed constitutional since the nineteenth century.\textsuperscript{193}

The lower courts are split on the reach of \textit{McIntyre}. Several courts have taken a broad reading of \textit{McIntyre},\textsuperscript{194} asserting that the Supreme Court established a constitutional right to anonymous speech in the case.\textsuperscript{195} In \textit{Stewart v. Taylor},\textsuperscript{196} one federal district court went even farther, interpreting \textit{McIntyre} as recognizing a right to engage in anonymous political speech that extended to candidates engaging in express advocacy on their own behalf.\textsuperscript{197}

Several other courts have held that \textit{McIntyre} did not establish a right to anonymous speech.\textsuperscript{198} Instead, these courts argue that it represents a simple application of the overbreadth analysis to disclosure statutes. In addition, these courts argue that \textit{McIntyre} did not fundamentally change \textit{Buckley}’s disclosure framework and suggest that narrowly-crafted

\textsuperscript{192} Id. at 353.
\textsuperscript{193} Id. at 371-85 (Scalia, J., dissenting).
\textsuperscript{195} \textit{West Virginians}, 919 F. Supp. at 959-60; \textit{Webster}, 74 F. Supp. 2d at 39-40.
\textsuperscript{196} 953 F. Supp. 1047 (S.D. Ind. 1997).
\textsuperscript{197} Id. at 1054-55.
\textsuperscript{198} See, e.g., \textit{FEC v. Survival Educ. Fund}, 65 F.3d 285, 397-98 (2d Cir. 1995); Ky. Right to Life v. Terry, 108 F.3d 637, 648 (6th Cir. 1997); see also \textit{Richey v. Tyson}, 120 F. Supp. 2d 1298, 1310 (S.D. Ala. 2000) (finding that the McIntyre court did not treat issue advocacy as “automatically beyond the reach of government regulation”); \textit{Griset v. Fair Political Practices Comm’n}, 23 P.3d 43 (Cal. 2001); \textit{Seymour v. Elections Enforcement Comm’n}, 762 A.2d 880 (Conn. 2000), \textit{cert. denied}, 121 S. Ct. 2594 (2001) (finding that McIntyre’s reach was limited to ballot elections and therefore inapplicable to candidate elections); \textit{Osterberg v. Peca}, 12 S.2.3d 31, 42 (Tex.), \textit{cert. denied}, 530 U.S. 1244 (2000) (analyzing McIntyre as ruling not that issue advocacy disclosure is per se unconstitutional, but simply that disclosure requirements in general may be unconstitutional to the extent they are overbroad).
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disclosure statutes, including source disclosure laws, could withstand constitutional scrutiny.\footnote{199}

In \textit{FEC v. Akins},\footnote{200} the Supreme Court analyzed \textit{Buckley} and ruled that private citizens have legal standing to sue the FEC to enforce FECA's disclosure provisions.\footnote{201} \textit{Akins} held that citizens suffer an informational injury when political groups fail to make disclosures – a holding which suggests that disclosure's informational interest, seemingly diminished in \textit{McIntyre}, still has constitutional merit.\footnote{202}

\section*{3. The FEC's Response}

Enforcing the FECA's disclosure provisions is a multi-faceted process. First, the FEC may begin an investigation or enforcement action if it has probable cause, or if a third party files a complaint alleging that a violation has occurred.\footnote{203} The FEC's conventional investigation and enforcement process is time consuming and, historically, disclosure violations have not been given high priority.\footnote{204} FEC disclosure violations are prosecuted either by the FEC, pursuant to its civil enforcement authority,\footnote{205} or, where the violation has the criminal elements of a

\begin{itemize}
  \item \footnote{199}{See supra note 196 and accompanying text.}
  \item \footnote{200}{524 U.S. 11 (1998).}
  \item \footnote{201}{\textit{Id.} at 19-26.}
  \item \footnote{202}{\textit{Id.} at 20. The Court stated that: [The citizens'] failure to obtain relevant information . . . is injury of a kind that FECA seeks to address . . . . The "injury in fact" that respondents have suffered consists of their inability to obtain information – lists of donors . . . . and campaign-related contributions and expenditures – that, on respondents' view of the law, the statute requires that [PACs] make public. There is no reason to doubt their claim that the information would help them (and others to whom they would communicate it) to evaluate candidates for public office, especially candidates who received assistance from [PACs], and to evaluate the role that [PACs]' financial assistance might play in a specific election . . . . [The] informational injury at issue here, directly related to voting, the most basic of political rights, is sufficient . . . to authorize its vindication in the federal courts. \textit{Id.} at 20-25.}
  \item \footnote{203}{2 U.S.C. § 437(g). FEC enforcement actions often result from press reports and scrutiny of disclosure records. The 1996 foreign contributions scandal, for instance, began not with FEC enforcement action, but because of investigations into FEC reports by the DNC regarding funds raised from U.S. subsidiaries of foreign companies. See Alan C. Miller, Democrats Return Illegal Contribution; South Korean Subsidiary's $250,000 Donation Violated Ban on Money From Foreign Nationals, \textit{L.A. TIMES}, Sept. 21, 1996, at A16.}
  \item \footnote{204}{FEC Annual Report 2000.}
  \item \footnote{205}{2 U.S.C. § 437g (2000).}
\end{itemize}
knowing and willful violation, by the Justice Department’s Public Integrity Section or United States Attorneys.\textsuperscript{206}

In addition to bringing actions against knowing and willful violations of FECA provisions, the Justice Department and U.S. Attorneys may prosecute FECA’s disclosure violations under the False Statements Statute.\textsuperscript{207} The False Statements Act applies to persons with a legal responsibility to file reports with the government – in the FECA context, campaign or other political committee treasurers.\textsuperscript{208} Campaign treasurers are often not the “bad actors” where a disclosure violation is concerned; rather, the “bad actors” are other campaign officials or contributors. Prosecutions are often based not only on the False Statement Act, but also on vicarious culpability, as well as the federal conspiracy statute,\textsuperscript{209} to reach persons who conspire with straw donors or others to carry out schemes that violate disclosure requirements.\textsuperscript{210}

In 2000, Congress established an administrative fine system to provide an alternative to enforcement of disclosure violations.\textsuperscript{211} Under the new administrative fine program, filers who fail to file or who file late are automatically fined and given forty days to either pay the penalty or submit a written response, which would begin a conventional dispute resolution procedure.\textsuperscript{212}

\textsuperscript{206} Craig C. DonSanto et al., Federal Prosecution of Election Offenses 106 (6th ed. 1995).

\textsuperscript{207} 18 U.S.C. § 2 (2000) (providing that any person who causes another to commit an act “which if directly performed by him or another would be an offense . . . is punishable as a principal”). Key cases concerning the False Statements Act as it relates to FECA are United States v. Hopkins, 916 F.2d 207 (5th Cir. 1990), and United States v. Hansen, 772 F.2d 940 (D.C. Cir. 1985).


\textsuperscript{209} Id. § 371.

\textsuperscript{210} See, e.g., United States v. Hsia, 24 F. Supp. 2d 33, 36 (D.D.C. 1998). Many of the prosecutions arising out of the 1996 fundraising scandals were based in part on sections 1001 and 371. Id.

\textsuperscript{211} From FEC Press Release: “Congress in 1999 authorized the administrative fine program amendments to the Federal Election Campaign Act, sec. 309(a)(4), 2 U.S.C. 437g(a)(4). The amendments were enacted as part of the Treasury and General Government Appropriations Act, 2000, Public Law 106-58, 106th Congress, Sec. 640, 113 Stat. 430, 476-77 (1999),” FEC, FEC Issues Final Rules on Administrative Fine Procedure (May 31, 2000), available at http://www.fec.gov/press/AdminFinesFinal.htm. Until recently, reporting violations such as late filers and failure to file were enforced with the same enforcement procedures employed for campaign finance violations – i.e. through a time-consuming investigation or litigation. For an overview of the complaint process, see http://www.fec.gov/pages/complain.htm (last visited May 9, 2002).

\textsuperscript{212} 2 U.S.C. § 434(a) (2000); 11 C.F.R. § 111.32-35 (2001). Although random audits were included among the original FECA, Congress repealed the provision. 26 U.S.C. § 9007 (1994). Congress did, however, leave the presidential audits in place. Id. § 9038.
C. Campaign Contributions

FECA limited political contributions by providing that “no person shall make contributions to any candidate with respect to any election for Federal office which, in the aggregate, exceed $1,000.” FECA further provided for a $5,000 limit on campaign contributions by political committees and an “overall $25,000 limitation on total contributions” an individual could make during a calendar year. FECA also restricted a candidate’s ability to finance his or her own campaign personally and created a cap on permissible expenditures by candidates during primary and general elections. The Act also prohibits foreign nationals from directly or indirectly contributing in any way to state, local, or federal elections. The FECA defines a foreign national as “an individual who is not a citizen of the United States and who is not lawfully admitted for permanent residence...”

1. Buckley v. Valeo: Upholding FECA’s Contribution Limits

In Buckley, the Court found that political expenditures and contributions qualified as political speech governed by the First Amendment. The Court concluded that although both acts were forms of political speech, they were not entitled to the same degree of protection. Thus, the Court struck down limitations on expenditures, finding that these limits were a substantial restraint on speech. The Court however, upheld FECA’s campaign contribution restrictions, finding that contributions are an indirect expression of support for a candidate. Moreover, the Court found no evidence that contribution restrictions had significant, negative implications on First Amendment concerns prevalent in areas such as issue advocacy and expenditure limitations. Therefore, the Court upheld efforts to restrict campaign contributions because such efforts only marginally restrict First Amendment rights.

214. Id. at 35-36, 38.
215. Id. at 51, 54.
218. Id. at 23.
219. Id. at 19.
220. Id. at 21 (noting that “the transformation of contributions into political debate involves speech by someone other than the contributor”). The contributions limits upheld in Buckley remain in effect today.
221. Id. at 21, 143.
222. Id. at 143.
Furthermore, the Court held that the campaign contribution limitation was a narrowly-tailored means to maintain the integrity of the electoral process, regardless of other laws that aimed to prevent corruption in campaign funding.\(^\text{223}\)

2. The Legacy of Buckley’s Campaign Contribution Standard

In *California Medical Ass’n v. FEC*,\(^\text{224}\) the Court determined the validity of a FECA provision that prohibited individuals from contributing more than $5,000 to a multi-candidate political committee.\(^\text{225}\) In *California Medical*, the Court maintained that the restriction was an unconstitutional expenditure limitation — and thus not merely a contribution limitation — because it prevented the medical association from expressing its views through its PAC.\(^\text{226}\) California Medical Association (CMA) also argued that even if a PAC donation was properly classified as a contribution, FECA was still unconstitutional because the donation was internal and not directed outside the organization.\(^\text{227}\) Thus, under this reasoning, there was no risk of “actual or apparent corruption of the political process” because CMA employees were giving money to their own PAC, not to a candidate for public office.\(^\text{228}\) The Court rejected CMA’s characterization of PAC donations as expenditures rather than contributions, and held that the contribution limitations were valid.\(^\text{229}\) Accordingly, as in *Buckley*, the Court found the restrictions marginal in scope and appropriate to further the government’s substantial interest.\(^\text{230}\)

Within months of deciding *California Medical*, the Court considered the constitutionality of a city ordinance that placed a $250 limit on individual contributions to “committee[s] formed to support or oppose

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\(^{223}\) *Id.* at 28.


\(^{225}\) *Id.* at 185 (referring to 2 U.S.C. § 441a(a)(1)(C)).

\(^{226}\) *Id.* at 195. In the California Medical Association’s view, the PAC was not an independent organization but rather an integral and invaluable arm of the medical association through “which CMA has chosen to engage in political speech.” *Id.* at 196.

\(^{227}\) *Id.* at 196 (noting that funds were not being directed to an entity wholly independent of CMA, but instead to the PAC formed to pursue its political interests).

\(^{228}\) *Id.* at 197.

\(^{229}\) *Id.* at 195-97 (holding that nothing “limits the amount CMA or any of its members may independently expend in order to advocate political views; rather, the statute restrain[s] only the amount that CMA may contribute”).

\(^{230}\) *Id.* at 198-99 (reasoning that limitations upon contributions made to PACs are necessary to prevent individuals and groups from evading other statutory caps on contributions).
Employing an "exacting judicial review," the Court weighed the contributor's constitutional right to free speech against the government's compelling interest in enacting the ordinance. Unlike California Medical and Buckley, in Citizens Against Rent Control, the Court concluded that the city's interest was "insubstantial" and that it did not warrant a restraint on speech. The Court stated that contributions to support or oppose an initiative were much less likely to lead to corruption than contributions to an individual candidate.

The Court then considered the constitutionality of the party expenditure provision. Under this provision, political parties were exempt from the $5,000 limit on contributions to political candidates. However, political parties were subject to a limit based on the state's voting age population. The Colorado Republican Party sought to have this provision declared unconstitutional. A divided Court held that, as applied, the provision violated the Constitution. The Court determined that the provision was not applicable to an independent expenditure. The impact of the Court's decision was limited because the Court merely confirmed that political parties were entitled to the same protection afforded individuals or private groups making independent expenditures.

Justice Thomas dissented in the opinion. He argued that the Buckley framework was deeply flawed, because it failed to recognize that "[c]ontributions and expenditures are two sides of the same First Amendment coin." Thomas contended that the difference between expenditures and contributions is in the form, not the substance, as they serve to further political debate, discussion, and speech. As a result,

232. Id. at 294.
233. Id. at 295-98.
234. Id. at 298-99.
235. Id. at 296-98.
237. Id. at 610-11.
238. Id. at 611.
239. Id. at 612 (arguing a violation of the First Amendment).
240. Id. at 613.
241. Id. at 614-15.
242. Id. at 618.
243. Id. at 636 (Thomas, J., concurring in part and dissenting in part).
244. Id. (citing Buckley v. Valeo, 424 U.S. 1, 241 (1976) (Burger, C.J., concurring in part and dissenting in part)).
245. Id.
the distinction lacks constitutional significance because both forms of campaign spending involve "core First Amendment expression."\textsuperscript{246}

Four years later, in \textit{Nixon v. Shrink Missouri Government PAC}, the Supreme Court considered the constitutionality of campaign contribution limits and again upheld the restrictions.\textsuperscript{247} A PAC and an individual seeking state office initiated the suit.\textsuperscript{248} They challenged the constitutionality of a Missouri statute that imposed campaign contribution limitations ranging from $250 to $1,000.\textsuperscript{249} Although the district court upheld the statute, finding that the limitations served the government's interest in preventing voter suspicion and distrust of large campaign contributions,\textsuperscript{250} the Eighth Circuit reversed, holding that the state failed to prove a compelling state interest.\textsuperscript{251} Finally, the Supreme Court granted certiorari to consider the "congruence of the Eighth Circuit's decision with \textit{Buckley}."\textsuperscript{252}

3. The FEC's Response

The Federal Election Commission's enforcement of contribution limits is not dissimilar to enforcement of disclosure provisions involving a lengthy investigation process and the opportunity for civil action on matters found to be willful violations of the law.\textsuperscript{253} Unfortunately, as is the case with matters regarding disclosure and issue advocacy, the FEC is limited by a structure that makes it ineffectual in the enforcement of law.

The 1996 election cycle saw the broadest-based corruption in politics since Watergate. President Clinton hosted coffees with large party donors and opened the Lincoln Bedroom to high bidders in exchange for soft money donations to the DNC. Political parties held soft-money fundraisers and shattered all previous fund-raising records. Issue advocacy campaigns exploded onto the political scene en masse, spending hundreds of millions of dollars in political advertising. The public witnessed these fundraising excesses involving foreign money scandals, fundraisers at Buddhists temples, money laundering, and the like. The Congress, the FEC, and the Department of Justice all reacted.

\textsuperscript{246} \textit{Id.}
\textsuperscript{248} \textit{Id.} at 383. The individual seeking office was Zev David Fredman. \textit{Id.} He was the Republican nominee for state auditor in 1998. \textit{Id.}
\textsuperscript{249} \textit{Id.} at 382.
\textsuperscript{251} \textit{Shrink Mo. Gov't PAC v. Adams}, 161 F.3d 519, 521-22 (8th Cir. 1998).
\textsuperscript{252} \textit{Nixon}, 528 U.S. at 385.
\textsuperscript{253} FEC Annual Report 2000, at 10-11.
A special Senatorial Governmental Affairs Committee chaired by Senator Fred Thompson (D-TN) reported the abuses of the election cycle; then-Attorney General Janet Reno established a Campaign Financing Task Force at the Department of Justice to investigate allegations of campaign finance abuses. More than twenty-two individuals have been charged to date, including Charlie Huang and Maria Hsia, where there were significant findings against them for illegal activity. In contrast to these relatively aggressive governmental responses to the abuses of the 1996 election cycle, the FEC was, to put it charitably, passive.

Two examples not yet discussed in this article bare note on the FEC's failure to react to the activities of the time. Thomas Kramer was a foreign national barred from making political contributions. In 1994, he wrote a letter to the FEC vis-à-vis legal counsel voluntarily divulging that he had contributed hundreds of thousands of dollars that were presumably illegal during a time when he did not know that the FECA prohibits contributions by foreign nationals. A few weeks later, Kramer's counsel sent the FEC a detailed list of the contributions in question. The FEC ignored the case for nearly two years before deciding to take action. The FEC finally contacted Kramer in July 1996, and reached a conciliation agreement soon thereafter. Kramer paid a civil penalty of $323,000. Twelve months after the FEC reached an agreement with Kramer, during the 1996 election cycle in the height of foreign national contributions to the parties, the FEC slowly broadened its look at this case and began to investigate Howard Glicken, a fundraiser for Democratic causes who had solicited some of Kramer's contributions. It was not until June 1997, three years after Kramer's initial letter, that the FEC subpoenaed the Democratic Senatorial Campaign Committee to obtain further information on Glicken and his activities for the party. There was strong reason to believe that Glicken intentionally violated the FECA — in fact, he later pleaded guilty to this allegation in a case brought by the DOJ Campaign Financing Task Force, but in December 1997, the FEC dismissed the case. The FEC observed that it was only a few months away from the termination of the five-year statute that limits the FEC's investigative powers and noted dryly that the foreign contributions in question were made in old election cycles.

Other investigations ended in like fashion. The second example comes from a complaint that was issued against the RNC and an affiliated not-

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for-profit, National Policy Forum (NPF). The charge was filed by the 
DNC and claimed that the NPF was not separate, but a wing of the RNC 
and was used to launder foreign money into the RNC. The general 
counsel recommended that the Commission pursue the case and find 
probable cause that the RNC and Haley Barbour, its chairman, solicited 
and received $1.6 million from foreign national sources. The three 
Republican commissioners voted against the general counsel’s 
recommendation and the three Democratic commissioners voted for it. 
The matter died in deadlock and was closed without action.

In March 2000, the FEC released its annual legislative 
recommendations to Congress. The Commission included a 
recommendation that the statute regarding foreign nationals be clarified 
to ban foreign contributions and expenditures being made in relation to 
any federal state or local election. The Washington Post and others 
argued that this was the first time the law was being made a priority by 
the FEC.255

III. CONCLUSION

Neither Congress nor the FEC should be unnecessarily reticent about 
enacting, implementing, and enforcing campaign finance laws and 
regulations out of a fear that the Supreme Court ultimately will strike 
down their efforts. Rather, the Supreme Court has sustained most such 
endeavors by concluding that campaign finance laws serve compelling 
government interests sufficient to justify any constitutional concerns. In 
the rare event that a law or regulation is found to improperly infringe on 
the First Amendment, the Court has demonstrated a willingness to 
narrowly construe the offending provisions in order to uphold as much of 
the law as possible. Accordingly, modest campaign finance reforms — 
such as the Bipartisan Campaign Reform Act of 2002, which was built 
upon existing constitutional precedents and recent Supreme Court 
opinions as outlined above — should be upheld in any constitutional 
challenges as serving the “weighty” government interests of preventing 
both the appearance and reality of government corruption.

255. Washington in Brief: FEC Urges Tougher Law Banning Foreign Donations, 