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COORDINATED EXPENDITURE LIMITS: CAN THEY BE SAVED?

Scott E. Thomas & Jeffrey H. Bowman[*]

In *Buckley v. Valeo*,[1] the Supreme Court upheld the Watergate-inspired limits on contributions to federal candidates, but ruled that a similar ceiling on independent expenditures was unconstitutional.[2] In so ruling, the Court recognized the many opportunities for evasion of the contribution limits created by its holding. Thus, the *Buckley* Court drew a specific distinction between expenditures "made *totally independently* of the candidate and his campaign" and "prearranged or *coordinated* expenditures amounting to disguised contributions" that could be constitutionally regulated.[3]

Fueled in large part by the Supreme Court's decisions in *Colorado Republican Federal Campaign Committee v. Federal Election Commission (Colorado Republican)*[4] and *Federal Election Commission v. Massachusetts Citizens for Life, Inc. (MCFL)*,[5] new and important questions have arisen about the coordination issue. Must the Federal Election Commission prove, in effect, a narrow "meeting of the minds" quasi-contractual arrangement before it may make a finding of coordination, or are the provisions of the Federal Election Campaign Act (FECA or the Act)[6] and the "general understanding" language of *Colorado Republican*[7] adequate? Even if coordination is found, does *MCFL* dictate that there must be "express advocacy" present in order for a disbursement to be considered a contribution?[8] How these questions on coordination are re-

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1. 424 U.S. 1 (1976).
2. *See id.* at 143.
3. *Id.* at 47 (emphasis added).
4. 518 U.S. 604 (1996).
5. 479 U.S. 238 (1986).
6. Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1971) (codified as amended at 2 U.S.C. §§ 431-55 (1994 & Supp. IV 1998)).
7. *See Colorado Republican*, 518 U.S. at 614.
8. *See Massachusetts Citizens for Life*, 479 U.S. at 249.

solved will have a dramatic impact on the current campaign finance system and the role of "soft money"[9] in that system.

This article will show that a narrow, limited test for coordination, particularly if combined with an "express advocacy" component, will create not only a major loophole in the current contribution limits, but also fresh opportunities for the infusion of soft money into the federal election process. Part I discusses the origins of the current contribution limits and the judicial and congressional concern that those limits not be easily evaded. Part II analyzes the "meeting of the minds" test and the *Colorado Republican* decision by reviewing two recent Commission enforcement actions involving the coordination issue. Part III considers *MCFL* and whether express advocacy is necessary for a finding of a coordinated expenditure. Finally, this article concludes that for effective contribution limitations, reporting provisions, and statute prohibitions, narrow concepts of coordination and express advocacy cannot be applied.

I. CONGRESSIONAL AND JUDICIAL CONCERN OVER CONTRIBUTION LIMITS

Memories of the Watergate scandal and allegations of "Government for Sale" on both sides of the political aisle were very fresh when Congress passed the Federal Election Campaign Act Amendments of 1974[10] a quarter of a century ago. In fact, legislative debates on campaign finance proposals were often interspersed with discussions on impeachment proceedings. Not surprisingly, the legislative record before Congress when it passed the 1974 Amendments "was replete with specific examples of improper attempts to obtain governmental favor in return for large campaign contributions."[11] Indeed, "[r]evelations of huge contributions from the dairy industry, a number of corporations (illegally) and ambassadors and potential ambassadors . . . dramatize[d] . . . the widespread concerns over the problem of undue influence."[12]

In response to this perception of undue influence, the 1974 Amend-

9. The phrase "soft money" commonly refers to funds that cannot be contributed to a federal candidate or political committee under the Act. These include: contributions in excess of statutorily prescribed limits (2 U.S.C. § 441a (1994)), corporate and labor contributions (2 U.S.C. § 441b (1994)), and contributions by foreign nationals in federal, state, and local elections (2 U.S.C. § 441e (1994)).

10. Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263.

11. Buckley v. Valeo, 519 F.2d 821, 839 n.37 (D.C. Cir. 1975) (per curiam), *aff'd in part, rev'd in part*, 424 U.S. 1 (1976).

12. *Id.* at 839-40 (footnotes omitted).

ments contained two key provisions. One of these provisions stated that "no person shall make contributions to any candidate with respect to any election for Federal office which, in the aggregate, exceed $1,000."[13] Another provision states that "no person may make any expenditure . . . relative to a clearly identified candidate during a calendar year which, when added to all other expenditures made by such person during the year advocating the election or defeat of such candidate, exceeds $1,000."[14]

In *Buckley v. Valeo*, the Supreme Court upheld all of the challenged contribution ceilings against First Amendment attack.[15] The Court found that "the Act's primary purpose—to limit the actuality and appearance of corruption resulting from large individual financial contributions-[provides] . . . a constitutionally sufficient justification for the $1,000 contribution limitation."[16] The Court explained:

> To the extent that large contributions are given to secure a political *quid pro quo* from current and potential office holders, the integrity of our system of representative democracy is undermined. Although the scope of such pernicious practices can never be reliably ascertained, the deeply disturbing examples surfacing after the 1972 election demonstrate that the problem is not an illusory one.[17]
>
> Of almost equal concern as the danger of actual *quid pro quo* arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions . . . . Congress could legitimately conclude that the avoidance of the appearance of improper influence "is also critical . . . if confidence in the system of representative Government is not to be eroded to a disastrous extent."[18]

13. 18 U.S.C. § 608(b)(1) (Supp. IV 1970).

14. *Id.* § 608(e)(1).

15. *See Buckley*, 424 U.S. at 35-36, 38, 58. In particular, the *Buckley* Court upheld the $1000 limit on the amount a person could contribute to a candidate or the candidate's principal campaign committee; the $5000 limit on the contributions by a multicandidate political committee to a candidate or the candidate's principal campaign committee; and the overall $25,000 yearly limit on individual contributions. *See id. California Medical Ass'n v. Federal Election Commission* also upheld these provisions. *See* 453 U.S. 182, 194 n.15 (1981).

16. *Buckley*, 424 U.S. at 26.

17. *Id.* at 26-27. In mentioning the "deeply disturbing examples" of impropriety surfacing after the 1972 elections, the Court dropped a footnote and referred to the D.C. Circuit's opinion in *Buckley* "discuss[ing] a number of the abuses uncovered after the 1972 elections." *Id.* at 27 n.28.

18. *Id.* at 27 (quoting United States Civil Serv. Comm'n v. National Ass'n of Letter

The Court found that "Congress was surely entitled to conclude . . . that contribution ceilings were a necessary legislative concomitant to deal with the reality or appearance of corruption inherent in a system permitting unlimited financial contributions."[19]

By contrast, the *Buckley* Court held unconstitutional the ceiling on *independent* expenditures contained in section 608(e)(1) of the 1974 Amendments.[20] It found that "there was a fundamental constitutional difference between money spent to advertise one's views *independently* of the candidate's campaign and money contributed to the candidate to be spent on his campaign."[21] It was crucial, in the Court's view, that "§ 608(e)(1) limits expenditures for express advocacy of candidates made *totally independently* of the candidate and his campaign."[22] The Court explained:

> Unlike contributions, such independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive. The *absence of prearrangement and coordination* of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate.[23]

In response to the Supreme Court decision in *Buckley*, Congress enacted a definition of "independent expenditure" as part of the Federal

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Carriers, 413 U.S. 548, 565 (1973)); *see also* Federal Election Comm'n v. National Right to Work Comm., 459 U.S. 197, 208 (1982) ("[I]n *Buckley*[,] . . . we specifically affirmed the importance of preventing both the actual corruption threatened by large financial contributions and the eroding of public confidence in the electoral process through the appearance of corruption."); *California Med. Ass'n*, 453 U.S. at 194-95:

> [In *Buckley*, . . . we] reasoned that such contribution restrictions did not directly infringe on the ability of contributors to express their own political views, and that such limitations served the important governmental interests in preventing the corruption or appearance of corruption of the political process that might result if such contributions were not restrained.

Id.

19. *Buckley*, 424 U.S. at 28. The Court went on to state that "Congress was justified in concluding that the interest in safeguarding against the appearance of impropriety requires that the opportunity for abuse inherent in the process of raising large monetary contributions be eliminated." *Id.* at 30.

20. *See id.* at 51.

21. Federal Election Comm'n v. National Conservative Political Action Comm., 470 U.S. 480, 497 (1985) (emphasis added).

22. *Buckley*, 424 U.S. at 47 (emphasis added).

23. *Id.* at 47 (emphasis added). The *Buckley* Court held the independent expenditure limits to be unconstitutional "because [it] found no tendency in such expenditures, *uncoordinated* with the candidate or his campaign, to corrupt or to give the appearance of corruption." *Political Action Comm.*, 470 U.S. at 497 (emphasis added).

Election Campaign Act Amendments of 1976, now codified at 2 U.S.C. § 431(17).[24] The legislative history indicates that the purpose behind 2 U.S.C. § 431(17) was to preserve the distinction drawn by the Supreme Court between those expenditures that were "totally independent" of the candidate's campaign and those that were not.[25] In fact, the concern with total independence was so complete that the Conference Report discussing 2 U.S.C. § 431(17) takes great pains specifically to allow for just one type of candidate communication: "[A] general request for assistance in a speech to a group of persons by itself should not be considered to be a 'suggestion' that such persons make an expenditure to further such election or defeat."[26] Apparently, any candidate or campaign request for assistance beyond such general remarks to a group should be construed as a "suggestion" and improper coordination.

The current language of the Act reflects this judicial and congressional concern that independent expenditures be "totally independent." The FECA at 2 U.S.C. § 431(17) defines "independent expenditure" as

> an expenditure by a person expressly advocating the election or defeat of a clearly identified candidate which is made *without cooperation or consultation* with any candidate, or any authorized committee or agent of such candidate, *and which is not made in concert with, or at the request or suggestion of,* any candidate, or any authorized committee or agent of such candidate.[27]

11 C.F.R. § 109.1(b)(4)(i) "clarif[ies] this language"[28] and explains that an expenditure will not be deemed independent if there is "*any* arrangement, coordination or direction by the candidate or his . . . agent prior to the publication, distribution, display, or broadcast of the communica-

24. Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, 90 Stat. 475 (1976) (codified at 2 U.S.C. § 431(17) (1994)).

25. *See* H.R. CONF. REP. NO. 94-1057, at 38 (1976). Specifically, the Conference Report states: "The definition of the term 'independent expenditure' in the conference substitute is intended to be consistent with the discussion of independent political expenditures which was included in *Buckley v. Valeo.*" *Id.*

26. *Id.* The legislative history of 2 U.S.C. § 431(17) reflects real congressional concern over the possibility that independent expenditures could be used to circumvent the contribution limitations. *See, e.g., Federal Election Campaign Act Amendments, 1976: Hearing on S. 2911 et al., Before the Subcomm. on Privileges and Elections of the Senate Comm. on Rules and Admin.*, 94th Cong. 77 (1976) (remarks of Senators Cannon, Scott, and Kennedy); *id.* at 85 (statement of Senator Mondale); *id.* at 89 (remarks of Senator Griffin); *id.* at 98 (remarks of Senator Buckley); *id.* at 107-08, 130 (remarks of then Assistant Attorney General Scalia).

27. 2 U.S.C. § 431(17) (1994) (emphasis added).

28. Federal Election Comm'n v. National Conservative Political Action Comm., 647 F. Supp. 987, 990 (S.D.N.Y. 1986).

tion."[29] The regulations further state that an expenditure is presumed not independent if it is:

(A) Based on information about the candidate's plans, projects, or needs provided to the expending person by the candidate, or by the candidate's agents, with a view toward having an expenditure made; or

(B) Made by or through any person who is, or has been, authorized to raise or expend funds, who is, or has been, an officer of an authorized committee, or who is, or has been, receiving any form of compensation or reimbursement from the candidate, the candidate's committee or agent.[30]

The Act also provides that expenditures made "in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents, shall be considered to be a contribution to such candidate"[31] and subject to the statute's contribution limitations.[32] In *Buckley*, the Court cited this concept with ap-

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29. 11 C.F.R. § 109.1(b)(4)(i) (1999) (emphasis added).

30. *Id.* In *Political Action Committee*, the Court indicated that coordination may have been established when a multicandidate political action committee and a candidate developed and implemented nearly identical advertising campaigns. *See* Federal Election Comm'n v. Political Action Comm., 470 U.S. 480, 498 (1985). In reviewing the Commission's dismissal of an administrative complaint presenting independent expenditure activity, a court noted the significant fact that the consultants had provided services to the candidate committee *in Florida* and to the multicandidate committee *outside Florida*. *See* Democratic Senatorial Campaign Comm. v. Federal Election Comm'n, 745 F. Supp. 742, 743 (D.D.C. 1990); *see also* Fed. Election Camp. Fin. Guide (CCH) ¶ 5469, at 10,529 (March 12, 1980) ("[T]he time-buyer's continued work for NCPAC would compromise NCPAC's ability to make independent expenditures in opposition to the Democratic candidate.").

31. 2 U.S.C. § 441a(a)(7)(B)(i) (1994). An exception to this rule is found with respect to party-building activities. For example, state and local party committees may spend unlimited amounts for activities such as preparing and distributing slate cards, sample ballots, and campaign materials such as pins, bumper stickers, and yard signs. All of this activity may be coordinated with candidates. *See, e.g.*, 2 U.S.C. §§ 431(8)(B)(v), (x); 431(9)(B)(iv), (viii) (1994). Similarly, the costs of generic voter drives "that urge the general public to register, vote or support candidates of a particular party . . . without mentioning a specific candidate," 11 C.F.R. § 106.5(a)(2)(iv) (1999), are not considered to be a contribution to a particular candidate even though they may be coordinated with a candidate. *See id.* § 106.1(c)(2) (1999).

32. *See* 2 U.S.C. §§ 441a(a)(1)(A)-(C), (a)(3). Under the Act, individuals may contribute no more than $1000 to a candidate per election, no more than $20,000 per year to a national political party, and no more than $5000 per year to any other political committee. *See id.* § 441a(a)(1)(A)-(C). An individual's total aggregate annual contributions may not exceed $25,000. *See id.* § 441a(a)(3).

Multicandidate political committees may contribute $5000 to a candidate per election, $15,000 per year to a national political party's political committees, and $5000 per year to any other political committee. *See id.* § 441a(a)(2)(A)-(C).

proval when it stated that "controlled or coordinated expenditures are treated as contributions rather than expenditures under the Act."[33] The *Buckley* Court construed the term "contribution" to "include not only contributions made directly or indirectly to a candidate, political party, or campaign committee . . . but also *all expenditures* placed in cooperation with or with the consent of a candidate, his agents, or an authorized committee of the candidate."[34] The Court ruled that, "[s]o defined, 'contributions' have a sufficiently close relationship to the goals of the Act, for they are connected with a candidate or his campaign."[35] Recognizing the potential for evading contribution limits "by the simple expedient of paying directly for media advertisements or for other portions of the candidate's campaign activities," the Court found it was necessary to treat "coordinated expenditures . . . as contributions rather than expenditures . . . [to] prevent attempts to circumvent the Act through prearranged or coordinated expenditures amounting to disguised contributions."[36]

II. THE COORDINATION ISSUE

Only once has the Supreme Court applied the above-listed principles to decide whether "coordination" existed based upon a factual record. In *Colorado Republican*, the Court determined that political parties were capable of making independent expenditures on behalf of their candidates running for federal office and that such expenditures were not subject to the coordinated expenditure limits found at 2 U.S.C. § 441a(d).[37] The Court rejected a Federal Election Commission regulation that presumes coordination between political parties and their candidates. Based upon this presumption of coordination, the regulation stated that party committees shall "not make independent expenditures . . . in connection with the general election campaign of a candidate" for federal office.[38]

National party committees and state party committees may make coordinated expenditures in connection with the general election campaigns of their party's congressional candidates in amounts calculated on the basis of the relevant state's voting age population. *See id.* § 441a(d). Each of the senatorial campaign committees of the two major parties and the national committee of their party may jointly contribute a total of $17,500 to each candidate for the Senate. *See id.* § 441a(h).

33. Buckley v. Valeo, 424 U.S. 1, 46 (1976).

34. *Id.* at 78 (emphasis added).

35. *Id.*

36. *Id.* at 46-47.

37. *See* Colorado Republican Fed. Campaign Comm. v. Federal Election Comm'n, 518 U.S. 604, 614-16 (1996).

38. 11 C.F.R. § 110.7(a)(5) (1999); *cf.* Federal Election Comm'n v. Democratic Sena-

Having concluded that political party committees could make independent expenditures, the Court faced the issue of whether the expenditures made by the Colorado Republican Party were actually "independent." Little information was developed in the record below to prove a presumption of coordination between the political party and its candidates. To the contrary, evidence pointed to a lack of coordination. For example, the Colorado Republican State Party Chairman testified in a deposition that "he arranged for the development of the script *at his own initiative*" and "he, and *no one else*, approved it."[39] Moreover, he further testified that "the only other politically relevant individuals who might have read it were the Party's executive director and political director and that all relevant discussions took place at meetings *attended only by Party staff*."[40] In short, not even a hint of involvement existed on the part of a specific candidate.

The strongest argument for finding coordination came as a general proposition from the State Chairman who admitted, "it was the practice of the Party to 'coordinat[e] with the candidate' 'campaign strategy.'"[41] The State Chairman also acknowledged that he tried to be "'as involved as [he] could be' with the individuals seeking the Republican nomination by making available to them 'all of the assets of the party.'"[42] There was, however, no mention of state party involvement with respect to any specific or particular candidate.

These latter statements were dismissed by the Court as "general descriptions of Party practice," and as "not refer[ring] to the advertising campaign at issue here or to its preparation."[43] Moreover, the Court found that they did not "conflict with, or cast significant doubt upon, the uncontroverted direct evidence that this advertising campaign was developed by the Colorado Party independently and not pursuant to *any general or particular understanding* with [the candidates and their agents]."[44] As a result, the Court treated the state party's "expenditure, for constitutional purposes, as an 'independent' expenditure, not an indirect campaign contribution."[45]

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torial Campaign Comm., 454 U.S. 27, 28 n.1 (1981) ("Party committees are considered incapable of making 'independent' expenditures in connection with the campaigns of their party's candidates.").

39. *Colorado Republican*, 518 U.S. at 614 (1996) (emphasis added).

40. *Id.* (emphasis added) (citation omitted).

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.* (emphasis added).

45. *Id.*

The Supreme Court in *Colorado Republican* found the fact that the advertising campaign had been developed "independently and not pursuant to *any general* or particular *understanding* with a candidate" significant.[46] To read the words "any general . . . understanding" out of the opinion would create an unnecessarily narrow definition of coordination and open a large loophole in the statute. Under such a limited reading, an organization would be allowed to meet with a candidate's campaign team, discuss the candidate's campaign strategy and the development of issues crucial to the campaign, and then make "independent" expenditures based on this detailed knowledge and information. The only apparent restriction would be that an organization could not reach a "particular understanding" with the candidate's campaign team. In other words, the candidate could not himself approve the final, finished advertisement or authorize a buy for the timing and placement of the advertisement. Obviously, such a narrow, limited approach would render the coordination standard meaningless and allow "prearranged or coordinated expenditures amounting to disguised contributions."[47]

Two recent enforcement cases, closed by the Commission, raise the coordination issue. Under Supreme Court precedent and statute, the Commission should have made findings of coordination in both. In the first case, however, the Commission split on whether to pursue the matter, with the declining Commissioners essentially arguing the lack of a "meeting of the minds" on whether an expenditure should be made. In the second case, the Commission found coordination based on a "general understanding" theory.

A. FEC Matter Under Review (MUR) 4282

On November 20, 1995, Catholics for a Free Choice filed a complaint with the Federal Election Commission alleging that the Roman Catholic Archdiocese of Philadelphia (Archdiocese) had made an impermissible

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46. *Id.* (emphasis added).

47. Buckley v. Valeo, 424 U.S. 1, 47 (1976). For "prudential" reasons, the *Colorado Republican* Court declined to decide the Colorado Party's constitutional challenge to the coordinated party expenditure limits of 2 U.S.C. § 441a(d). *See Colorado Republican*, 518 U.S. at 630-31 (Rehniquist, C.J., Kennedy, J., and Scalia, J., concurring). Rather, the Court remanded the case to the lower courts for further proceedings. *See id.* at 626. On February 18, 1999, the district court issued an opinion finding 2 U.S.C. § 441a(d) unconstitutional. *See* Federal Election Comm'n v. Colorado Republican Election Comm., 41 F. Supp. 2d 1197 (D. Colo. 1999), *appeal docketed*, No. 99-1211 (10th Cir. 1999). The district court found that party committees lack "the ability to exact a *quid pro quo* from a candidate who needs assistance from the party during his or her campaign." *Id.* at 1210-11 (emphasis added).

expenditure as a result of coordination with a federal candidate's campaign. Specifically, the complaint stated that in September, 1994, the Archdiocese planned to distribute to Catholic churches in the diocese a document detailing certain congressional votes made by selected candidates for federal office in Pennsylvania. The complaint charged that "this document was substantially modified based at least in part on contacts with the Senate campaign of then U.S. Representative Rick Santorum."[48] According to the complaint, the number of votes reviewed in the document was lowered in such a way that the number of "correct" votes cast by Senator Harris Wofford was reduced. Moreover, any reference to possible "incorrect" votes cast by candidate Santorum was eliminated.[49]

According to internal letters and documents from the Archdiocese, which were included with the complaint, a special project consultant within the Archdiocese's Office of Public Affairs, prepared for the Archdiocese a draft scorecard of how Pennsylvania's incumbent members of Congress voted on legislation of interest to the Archdiocese. At the request of her supervisor at the Archdiocese, the project consultant faxed the draft scorecard to the Christian Coalition on September 13, 1994 for comments.[50] Negative reaction to the draft scorecard was swift and emphatic. On September 15, 1994, representatives from the Pro-Life Federation and the Pennsylvania Catholic Conference called the Project Consultant and "expressed their great concern that distribution of the scorecard would be disastrous because it makes Sen. Wofford look better or just as good as Rick Santorum" on legislative votes in the scorecard regarding abortion.[51]

At this time, the Archdiocese project consultant indicated that she also received a call from the Santorum campaign. There was no indication in the record that Senator Wofford had ever received a copy of the draft statement or had been afforded an opportunity to comment on the draft

48. Letter from Frances Kissling, President, Catholics for a Free Choice, to Lawrence M. Noble, General Counsel, Federal Election Commission 1 (Oct. 26, 1995) (Federal Election Commission Matter Under Review (MUR) 4282).

49. *See* Federal Election Commission, First General Counsel's Report, 4 (Aug. 15, 1996) (MUR 4282); Letter from Frances Kissling, President, Catholics for a Free Choice, to Lawrence M. Noble, General Counsel, Federal Election Commission 1 (Oct. 26, 1995) (MUR 4282).

50. *See* Federal Election Commission, First General Counsel's Report, 10 (Aug. 15, 1996) (MUR 4282); Facsimile Letter from Karen Keller, Archdiocese of Philadelphia, to Gail Pedrick, Christian Coalition (Sept. 13, 1994) (MUR 4282).

51. Federal Election Commission, First General Counsel's Report, 10 (Aug. 15, 1996) (MUR 4282).

and its impact on the campaign for United States Senate. The Santorum Committee, however, had been afforded such an opportunity and had also concluded that the scorecard made Senator Wofford look better or just as good as Rick Santorum.[52] In fact, counsel for the Santorum campaign admitted as much in the campaign's response to the complaint filed with the Commission:

> Our review of the facts on behalf of our clients indicates that *a representative of the Santorum committee*, in reaction to a complaint received from a voter in Central Pennsylvania called a representative of the Roman Catholic Archdiocese of Philadelphia, *complained that a "scorecard" prepared in the Archdiocese portrayed Senator Wofford in a better light* than then Congressman Santorum and asked how this was done. The Archdiocese representative explained the process which was followed in arriving at the "scorecard." *The representative of the Santorum committee expressed his disagreement*, and that was the end of the conversation.[53]

Apparently reacting to the complaints and criticisms from the Santorum campaign and others, the project consultant's supervisor at the Archdiocese directed her to make a number of changes. First, the supervisor instructed the project consultant to "destroy and I mean really destroy" 150,000 printed copies of the draft scorecard.[54] Then, according to the project consultant, the Archdiocese changed its original selection of roll call votes to produce a lower number of positions where Senator Wofford supported the Archdiocese's position. Under the new version, Senator Wofford was shown to support the Archdiocese's positions on only two out of five Senate votes, whereas the scorecard as originally drafted had accorded the Senator three out of five votes. The new version also removed any reference to Representative Santorum, who originally was shown to support the Archdiocese's positions on only three out of six House votes. After the 150,000 copies of the original scorecard were destroyed, the Archdiocese printed a new scorecard incorporating these changes at a cost of $9000.[55]

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52. *See* Letter from H. Woodruff Turner, Kirkpatrick & Lockhart LLP, to Mary L. Taksar, Federal Election Commission (Dec. 18, 1995) (MUR 4282).

53. *Id.* (emphasis added).

54. *See* Federal Election Commission, First General Counsel's Report, 12 (Aug. 15, 1996) (MUR 4282); *see also* Letter from Frances Kissling, President, Catholics for a Free Choice, to Lawrence M. Noble, General Counsel, Federal Election Commission 2 (Nov. 20, 1995) (MUR 4282).

55. *See* Federal Election Commission, First General Counsel's Report, 12 (Aug. 15, 1996) (MUR 4282).

The FEC's Office of General Counsel found that although there was no express advocacy in the new scorecards, they should be treated as in-kind contributions to the campaign because the Archdiocese had consulted with campaign personnel regarding changes. Accordingly, the report recommended that the Commission find "reason to believe" the Archdiocese had violated 2 U.S.C. § 441a through making an excessive contribution, and that the Santorum Committee had received an excessive contribution in violation of 2 U.S.C. § 441a(f).[56] A motion to adopt the General Counsel's recommendations was supported by three Commissioners but opposed by two Commissioners (with one vacancy), and thus failed to secure the four affirmative votes necessary to make a "reason to believe" determination and pursue the violation.[57]

This acknowledged consultation between the Santorum Committee and the Archdiocese, and the plain suggestion from the campaign committee to the Archdiocese that the scorecard be changed, lies at the heart of 2 U.S.C. § 441a(a)(7)(B)(i); expenditures made "in cooperation, *consultation*, or concert with, or at the request *or suggestion of*, a candidate, his authorized political committees, or their agents, *shall be considered to be a contribution* to such candidate."[58] Where a candidate's campaign committee contacts an organization concerning a proposed advertisement, comments on and critiques the advertisement, and ultimately expresses disagreement with it for portraying an opposing candidate "in a better light," the advertisement should "be considered to be a contribution to such candidate."[59] This is particularly true where, as here, the Archdiocese had responded to urgings by the Santorum campaign by making changes in the scorecard. Changing the votes in the scorecard to worsen the record of Santorum's opponent in the final brochure was the

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56. *See id.* at 15. The General Counsel's Report also recommended that the Santorum Committee had failed to report its receipt of that contribution in violation of 2 U.S.C. § 434(b)(3)(A) and (5)(A). *See id.*

57. *See* 2 U.S.C. § 437g(a)(2) (1994). The FEC is composed of six members. *See* 2 U.S.C. § 437c(a)(1). No more than three members of the Commission may be of the same political party. A majority of at least four votes is required for the Commission to exercise any of its central powers. *See* 2 U.S.C. § 437c(c). For a description of the FEC, its creation, and its early history, see Charles N. Steele & Jeffrey H. Bowman, *The Constitutionality of Independent Regulatory Agencies Under the Necessary and Proper Clause: The Case of the Federal Election Commission*, 4 YALE J. ON REG. 363 (1987).

58. 2 U.S.C. § 441a(a)(7)(B)(i) (emphasis added).

59. *See infra* Part III (discussing the issue of whether an expenditure must "expressly advocate" a particular candidate to constitute coordination subject to contribution limitations). An advertisement would not have to reflect the expressions of a contracting campaign to constitute a contribution. *See infra* note 95 and accompanying text.

contribution.[60] After these changes, it was clear that Senator Wofford no longer was portrayed "in a better light."

In disagreeing with this analysis, Commissioners Aikens and Elliott stated that "we would not agree that mere inquiries, *without a meeting of the minds* of two or more persons on a course of action resulting in expenditures is sufficient for coordination."[61] They concluded that "the Santorum Committee representative's telephone call *was a mere inquiry* to complain about an inaccurate and unfair portrayal of then-Rep. Santorum's voting record."[62] They explained:

> According to a memorandum made by the Archdiocese employee who took the call, the Santorum committee representative *complained* about the portrayal of then Rep. Santorum's voting record *but did not ask for changes* to be made to the scorecard. There was *no* indication that the Santorum Committee had *control* over, or *even knowledge of*, the Archdiocese decision to eliminate Rep. Santorum from the final version.[63]

Nor are Commissioners Aikens and Elliott alone in urging a "meeting of the minds" standard. A representative of the National Republican Senatorial Committee (NRSC) similarly argued that "proof of 'coordination' requires evidence showing a *meeting of the minds* between the candidate's authorized representatives and the spender that such an expenditure will be made in support of the candidate's campaign, or in opposition to his opponent."[64] He emphasized that "[t]he evil of coordinated expenditures is that they allow the candidate to *control* resources that he would otherwise be legally precluded from controlling."[65]

What exactly, however, does a "meeting of the minds" test mean or entail? Is a legal contract required? Hornbook law states that a "meeting of the minds" conveys the idea of "mutual assent"[66] on a bargain between

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60. *Cf. infra* note 103 and accompanying text (noting that Commissioner Elliott did not consider the new scorecard to "expressly advocate" Santorum).

61. Federal Election Commission, Statement of Reasons of Commissioners Aikens and Elliott, 3 (June 8, 1998) (MUR 4116) (emphasis added). It was in their Statement of Reasons on MUR 4116 that Commissioners Aikens and Elliott elucidated their "meeting of the minds" test and discussed its application to the Santorum matter of MUR 4282. *See id.*

62. *Id.* (emphasis added).

63. *Id.* (emphasis added); *see also* Federal Election Commission, Statement of Reasons of Commissioners Aikens and Elliott, 3 (Feb. 4, 1997) (MUR 4282).

64. Comments of the National Republican Senatorial Committee to the Federal Election Commission, 6 (May 30, 1997) (submitted to the FEC for rule-making; original on file with authors) (emphasis added).

65. *Id.* at 15.

66. *See* ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 107 (1952).

two parties; "[a] contract, after all, is a meeting of the minds."[67] Thus, based on a hoary principle of contract law, does a "meeting of the minds" test require *actual assent* to a specific expenditure on the part of both the spender *and* the candidate in order to establish coordination? If so, without these mutual expressions of assent, there can be no coordination. Under this theory, in MUR 4282 there was no coordination under a "meeting of the minds" test because the Santorum Committee only made inquiries and comments regarding the expenditure. The Santorum campaign representative complained that the scorecard portrayed the opponent "in a better light" and "expressed his disagreement,"[68] but did not actually "assent" or agree to the finished product. In effect, it appears that there has to be some sort of offer and acceptance in order to find coordination under the Act.

The central problem with the "meeting of the minds" approach is that it runs counter to the statute. Under the Act, an expenditure loses its independence with much less than a "meeting of the minds": "[E]xpenditures made by any person *in cooperation, consultation, or concert, with, or at the request or suggestion of*, a candidate, his authorized political committees, or their agents, shall be considered to be a contribution to such candidate."[69]

There is no language in the statute providing an even remote basis for a "meeting of the minds" requirement. There certainly is no language stating, "[i]n order for an expenditure to be coordinated there must be evidence of a candidate's agreement to the expenditure or evidence of candidate control." Rather, the Act states broadly that "cooperation" or "consultation" between a candidate and a spender will result in an expenditure being considered a contribution. Likewise, the statute generally states that an expenditure made in response to a "request" or "suggestion" by a candidate will result in a contribution.[70]

A "meeting of the minds" requirement would effectively ignore the broad language of the statute as written by Congress and create, in its stead, a narrow and limited definition of coordination. For example, under the statute an expenditure made by any person after a candidate re-

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67. Bowsher v. Merck & Co., 460 U.S. 824, 864 (1983) (Blackmun, J., concurring in part, dissenting in part).

68. Federal Election Commission, First General Counsel's Report, 5 (Aug. 15, 1996) (MUR 4282) (quoting Letter from H. Woodruff Turner, Kirkpatrick & Lockhart LLP, to Mary L. Taksar, Federal Election Commission (Dec. 18, 1995) (MUR 4282)).

69. 2 U.S.C. § 441a(a)(7)(B)(i) (1994) (emphasis added); *see also* 2 U.S.C. § 431(17) (defining the term "independent expenditure").

70. *See* 2 U.S.C. § 441a(a)(7)(B)(i).

quest or suggestion would lose its independence; under a "meeting of the minds" test, actual agreement between the candidate and the spender on the specific text of a specific advertisement would have to be proven. Moreover, some might go even further and argue that under a "meeting of the minds" test, agreement on the placement and timing of the specific advertisement also would have to be proven in order to establish coordination. Thus, a candidate could make specific comments, requests, or suggestions regarding an entire advertising campaign—including the production and distribution of specific advertisements—so long as the candidate did not actually sign off and approve the final or finished product.[71]

Such a result is not only contrary to the statute, but it also undercuts the rationale of the Supreme Court in *Buckley*. In striking down the Act's limitations on independent expenditures, the Court reasoned that "[t]he absence of prearrangement and coordination of an [independent] expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger *that expenditures will be given as a quid pro quo* for improper commitments from the candidate."[72] Clearly, if a candidate is able to provide comments and suggestions on an advertisement, there is an increase in "the danger that expenditures will be given as a *quid pro quo*."[73]

It is this "danger" that the *Buckley* Court sought to protect against in upholding candidate contribution limits. The Court never required evidence of actual corruption, i.e., an actual *quid pro quo* by contributors, however, as justification for the contribution limits. Rather, the Court found that the *mere opportunity* or potential for a *quid pro quo* creates the appearance of corruption: "of almost equal concern as the danger of actual *quid pro quo* arrangements is the impact of the *appearance of corruption stemming from public awareness of the opportunities for abuse* inherent in a regime of large individual financial contributions."[74] The Court determined that "Congress was justified in concluding that the in-

71. It is interesting to note that in other contexts, express agreements are not required in order to demonstrate a statutory violation. For example, in antitrust law, where an actual "conspiracy to restrain trade" must be proven to demonstrate a statutory violation, "it has long been settled that explicit agreement is not a necessary part of a Sherman Act conspiracy." United States v. General Motors Corp., 384 U.S. 127, 141, 142-43 (1966). Similarly, in the context of insider trading, "when an insider trades while in possession of material nonpublic information, a strong inference arises that such information was used by the insider in trading." SEC v. Adler, 137 F.3d 1325, 1337 (11th Cir. 1998).

72. Buckley v. Valeo, 424 U.S. 1, 47 (1976) (emphasis added).

73. *Id.*

74. *Id.* at 27 (emphasis added).

terest in safeguarding against the *appearance of impropriety* requires that the *opportunity for abuse* inherent in the process of raising large monetary contributions be eliminated."[75]

Similarly, candidate comments and suggestions on an advertisement create in the public mind an "opportunity for abuse."[76] There is no need for evidence that an actual *quid pro quo* has taken place or that an actual agreement has been reached over the text of an advertisement or its distribution. The mere opportunity or potential for a *quid pro quo* is sufficient. Under *Buckley*, it is only when expenditures are made "*totally independently* of the candidate and his campaign" that they may be considered of "little assistance to the candidate's campaign"[77] and therefore need no ceiling imposed upon them. This total independence "alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate."[78]

In MUR 4282, the public was aware that the scorecard expenditure was not made "totally independently" of the Santorum campaign. Only days before the Senate election, a newspaper article headlined, *Political Scorecard Becomes an Issue: Conservatives Press Philly Archdiocese*, appeared.[79] After noting that the Archdiocese had destroyed the original communication because it made Senator Wofford "'look just as good or better than Rick Santorum,'" the article states that the matter "raises questions about whether the archdiocese bowed to pressure from conservative groups and Santorum's campaign."[80]

The original Archdiocese scorecard in MUR 4282 was of "little assistance" to the Santorum campaign. It made the candidate look bad and

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75. *Id.* at 30 (emphasis added). Similarly, in *Federal Election Commission v. National Right to Work Committee*, 459 U.S. 197 (1982), the Supreme Court indicated that Congress only has to show a compelling interest in stopping actual or apparent corruption and does not have to show a specific harm. *See id.* at 209-11. The Court further stated that

> While § 441b restricts . . . corporations and labor unions without great financial resources, as well as those more fortunately situated, we accept Congress' judgment that it *is the potential for such influence that demands regulation.* Nor will we second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared.

Id. at 210 (emphasis added); *see also* United States v. National Treasury Employees Union, 513 U.S. 454, 473 (1995) ("Congress reasonably *could assume* that payments of honoraria to judges or high-ranking officials in the Executive Branch might generate a[n] . . . appearance of improper influence.") (emphasis added).

76. *Buckley*, 424 U.S. at 27.

77. *Id.* at 47 (emphasis added).

78. *Id.*

79. *See* Brett Lieberman, *Political Scorecard Becomes an Issue: Conservatives Press Philly Archdiocese*, PATRIOT-NEWS (Harrisburg, Pa.), Nov. 4, 1994, at A1.

80. *Id.*

placed his opponent in a "better light." Only after the Santorum campaign intervened and commented on the advertisement did the advertisement become something "of value"[81] to the Santorum campaign. Whether there was a formalized agreement or not, the comments and suggestions made by the candidate committee to the Archdiocese may have created "the danger' that [the] expenditures" could result in "a *quid pro quo*."[82] By contrast, a "totally independent" expenditure—one devoid of any consultation between a candidate and a third-party spender—eliminates such opportunity for a *quid pro quo* and resulting public suspicion.

B. FEC Matter Under Review (MUR) 4116

Charles Robb and Oliver North were opponents in Virginia's 1994 election for the United States Senate. Late in the campaign, Mr. North made certain public remarks regarding his views on social security. Within days of these remarks, the campaign manager for the Robb campaign contacted the political director for the National Council of Senior Citizens (NCSC) and suggested that the North campaign was against senior citizens while the Robb campaign was for seniors. The Robb campaign asked the NCSC for its endorsement and requested that NCSC representatives appear at a press conference to be held at Robb campaign headquarters on October 27, 1994.

In preparation for the press conference, communications between the Robb campaign and the NCSC resulted in the sharing of information regarding the social security issue. For example, it appears the Robb campaign supplied NCSC with "talking points" to be used at the press conference.[83] Additionally, the Robb campaign prepared a press release the day before the press conference that contained statements attributed to the Executive Director of NCSC, Mr. Smedley. At the press conference itself, both Mr. Robb and Mr. Smedley strongly criticized Mr. North's views on the social security issue. In fact, the NCSC Executive Director announced that because of Mr. North's recent comments on social security, NCSC was endorsing the Robb campaign. The day after the press conference, the National Council of Senior Citizens Political Action Committee (NCSC-PAC) purchased a radio advertisement criticizing Mr. North for his views on social security and advocating his defeat.

81. *Cf.* 2 U.S.C. § 431(8)(A)(i) (1994) (defining the term "contribution" to include "anything of value").

82. *Buckley*, 424 U.S. at 47 (emphasis added).

83. *See* Federal Election Commission, General Counsel's Probable Cause Brief, 14 (Aug. 11, 1997) (MUR 4116).

NCSC-PAC spent a total of $18,800 on the radio advertisement.[84]

The Commission in MUR 4116 unanimously found probable cause to believe that coordination existed between the Robb campaign and NCSC. It did so even though there was no concrete evidence the Robb campaign specifically authorized or approved the NCSC advertisements, let alone their timing or placement. In fact, the Robb campaign broadly denied any coordination with NCSC regarding the advertisements. For example, the Robb campaign's press secretary, who arranged the joint press conference with NCSC, was asked in deposition: "Following the press conference, did you have any further contacts with anyone from NCSC?" In response, he testified, "Not that I recall and there would have been no reason to."[85]

Even though there is no specific evidence of coordination regarding specific advertisements, it appears that the Robb campaign and the NCSC had a "general understanding" regarding development of NCSC-PAC's advertising campaign in the last weeks of the Senate campaign. The request for endorsement, *coupled with* cooperation regarding message content and joint participation in a publicity-seeking press conference held at Robb campaign headquarters, provided clear evidence that there was at least an exchange of campaign strategy and tactics with a view toward having an expenditure made. As a result, the NCSC-PAC advertisement expenditures, begun a day later, were not made independently from the campaign, and thus, constituted an excessive contribution.

The Commission's finding of coordination in MUR 4116 was based on the Supreme Court's decisions in *Buckley* and *Colorado Republican*. In *Buckley*, the Supreme Court drew a specific distinction between expenditures made "*totally independently* of the candidate and his campaign" and "prearranged or *coordinated* expenditures amounting to disguised contributions" which could be constitutionally regulated.[86] In *Colorado Republican*, the Supreme Court helped explain the phrase "totally independently" in finding that an "advertising campaign was developed by

84. *Id.* at 15-16. At the same time, the Robb campaign released television advertisements, radio advertisements, and flyers that also criticized the North campaign for its position on social security and cited the NCSC endorsement. It appears the Robb campaign advertisements used statements contained in the NCSC press release distributed at the press conference. Namely, NCSC's declaration that the North plan could "plunge millions of elderly people into poverty" and was capable of "wreaking havoc on the pocketbooks and lives of older Americans" was redistributed. *See id.* at 16. Thus, not only did the Robb campaign persuade NCSC to take a stand on the social security issue, NCSC in return provided fodder for Robb campaign advertisements.

85. Deposition of Bert L. Rohrer, 144-45 (Apr. 22, 1997) (MUR 4116).

86. *Buckley*, 424 U.S. at 47 (emphasis added).

the Colorado Party independently and not pursuant to *any general* or particular *understanding* with a candidate."[87] Unlike the result reached in *Colorado Republican*, however, NCSC-PAC's advertising program was developed pursuant to a "general understanding" with Robb campaign personnel. Given the general understanding that existed between the Robb campaign and NCSC regarding the requested endorsement at the press conference and the parallel treatment of the social security issue, the Commission found unanimously that the NCSC-PAC's advertisements were not made "totally independently" of the Robb campaign.[88]

The expenditures at issue in MUR 4282 involving the Santorum campaign also appeared to be clear examples of expenditures made "in cooperation, *consultation*, or concert, with, or at the request or *suggestion* of, a candidate [or] his authorized political committee."[89] Indeed, unlike MUR 4116 where there appeared to be only a "general understanding" between the Robb campaign and NCSC, the Santorum MUR involved specific consultations between the Santorum Committee and the Archdiocese regarding a specific communication. Oddly, certain Commissioners were reluctant to make even a preliminary "reason to believe"[90] finding to investigate the Santorum campaign, but were willing to investigate and then find "probable cause"[91] against the Robb campaign. Although the Santorum decision was incorrect,[92] the Commission reached the correct decision a year and a half later in MUR 4116.

87. Colorado Republican Fed. Campaign Comm. v. Federal Election Comm'n, 518 U.S. 604, 614 (1996) (emphasis added).

88. When probable cause conciliation with the Robb respondents in MUR 4116, under 2 U.S.C. § 437g(a)(4)(A)(i), failed, the Office of General Counsel recommended that the Commission file a civil suit against respondents in United States district court. The Commission ultimately decided, however, to exercise its prosecutorial discretion and not pursue the matter in litigation due to a lack of litigative resources.

89. 2 U.S.C. § 441a(a)(7)(B)(i) (1994) (emphasis added).

90. *Id.* § 437g(a)(2).

91. *Id.* § 437g(a)(4)(A)(i).

92. Through the years, litigation instituted under 2 U.S.C. § 437g(a)(8) has generally left undisturbed divisions among the Commissioners on whether to pursue matters on a coordination theory. *See, e.g.*, Democratic Senatorial Campaign Comm. v. Federal Election Comm'n, 745 F. Supp. 742 (D.D.C. 1990); Stark v. Federal Election Comm'n, 683 F. Supp. 836 (D.D.C. 1988); Branstool v. Federal Election Comm'n, No. 92-0284 (D.D.C. Apr. 4, 1995). There are two common threads running through these cases: (1) courts show deference even to Commissioners who block a four-vote majority, *see Democratic Senatorial Campaign Comm.*, 745 F. Supp. at 745 ("[The Court] need only determine that [its] decision 'was "sufficiently reasonable" to be accepted by a reviewing court.'") (quoting Federal Election Comm'n v. Democratic Senatorial Campaign Comm., 454 U.S. 27, 39 (1981)), and (2) factually, the evidence of coordination must be strong to overcome broad denials made by respondents under oath. *See id.* at 744-46.

The foregoing cases illustrate the danger of a "meeting of the minds" test. In essence, a "meeting of the minds" approach would transfer the "totally independently" test of *Buckley* into a "totally controlled by the candidate" test. Only by applying the more encompassing definitions of coordination found in the statute, the Commission's regulations, and the "general understanding" approach of the *Colorado Republican* Court, will the public be protected from the appearance of corruption which the contribution limits are designed to arrest.

III. THE ROLE OF EXPRESS ADVOCACY IN THE CONTRIBUTION ISSUE

A second major issue in the "coordination" debate involves "express advocacy." Even if coordination is found, must there be express advocacy in order for a disbursement to be considered a contribution subject to the contribution limitations and prohibitions of the Act? This section reviews the origins of the express advocacy issue, the arguments of its proponents in the area of coordination, and the reasons why the FEC has never adopted an express advocacy requirement when it considers coordination.

Express advocacy is an outgrowth of *Buckley v. Valeo*. In addressing one of the many issues which confronted it, the *Buckley* Court sought to draw a distinction between issue advocacy and partisan advocacy focused on a clearly identified candidate. The *Buckley* Court upheld as constitutional certain reporting requirements on expenditures made by individuals and groups that were "not candidates or political committees."[93] The Court, however, did express its concern that these reporting provisions might be applied broadly to communications discussing public issues that also happen to be campaign issues. In order to ensure that expenditures made for pure issue discussion would not be reportable under the Act, the *Buckley* Court construed these reporting requirements "to reach only funds used for communications that *expressly advocate* the election or defeat of a clearly identified candidate."[94]

Ten years after *Buckley*, the Supreme Court returned to the express advocacy standard in *MCFL*. Under the Act, corporations and labor organizations may not make contributions or expenditures from their treasury funds "*in connection with*" federal campaigns, and candidates and their campaign committees may not accept such prohibited contributions or expenditures.[95] In *MCFL*, the Supreme Court interpreted

93. *Buckley v. Valeo*, 424 U.S. 1, 80 (1976).
94. *Id.* (emphasis added) (footnote omitted).
95. *See* 2 U.S.C. § 441b(a) (emphasis added).

2 U.S.C. § 441b to mean that expenditures for communications *not coordinated* with a candidate's campaign must expressly advocate a candidate in order to be subject to the 2 U.S.C. § 441b prohibition. As a result of *MCFL*, independent corporate or labor union communications that do not contain express advocacy are allowed under the Act.

Relying on *MCFL*, the district court in *Federal Election Commission v. Colorado Republican Federal Campaign Committee*[96] concluded that a *coordinated* party expenditure must also contain express advocacy in order to be subject to the limitations set forth in the Act.[97] Finding that "'identical words used in different parts of the same act are intended to have the same meaning,'"[98] the district court determined that 2 U.S.C. § 441a(d)(3) and its "expenditures in connection with" language should be interpreted in the same manner as the *MCFL* Court interpreted the "in connection with" language of 2 U.S.C. § 441b.[99] Applying the "express advocacy" test to the radio advertisement at issue in *Colorado Republican*,[100] the district court found that an advertisement run against Senate candidate Tim Wirth did not constitute express advocacy and was not subject to the 2 U.S.C. § 441a(d)(3) coordinated party limitations.[101] The Tenth Circuit reversed, holding that express advocacy is not required for party coordinated expenditures to be subject to the limits in

96. 839 F. Supp. 1448 (D. Colo. 1993), *rev'd and remanded*, 59 F.3d 1015 (10th Cir. 1995), *vacated on other grounds and remanded*, 518 U.S. 604 (1996) (plurality opinion).

97. *See Colorado Republican*, 839 F. Supp. at 1457; *see also* 2 U.S.C. § 441(a)(d).

98. *Colorado Republican*, 839 F. Supp at 1453 (quoting Sullivan v. Stroop, 496 U.S. 478, 484 (1990)).

99. *See id.* at 1453. The district court also suggested that "the Commission itself advocated the adoption of the 'express advocacy' interpretation of 'in connection with' in the context of section 441b(a)." *Id.* at 1454 (quoting Orloski v. Federal Election Comm'n, 795 F.2d 156 (D.C. Cir. 1986)). *Orloski* involved the Commission's approach to an issue that "applies *only* to corporate funding of legislative events sponsored by a congressman." *Orloski*, 795 F.2d at 165 (emphasis added). Moreover, as the D.C. Circuit recognized, the *Buckley* Court "limited [the express advocacy definition] to those provisions curtailing or prohibiting independent expenditures." *Id.* at 167. "This definition is not constitutionally required for those statutory provisions limiting contributions." *Id.*

100. The text of the radio advertisement stated:

> Paid for by the Colorado Republican State Central Committee
>
> Here in Colorado we're used to politicians who let you know where they stand, and I thought we could count on Tim Wirth to do the same. But the last few weeks have been a real eye-opener. I just saw some ads where Tim Wirth said he's for a strong defense and a balanced budget. But according to his record, Tim Wirth voted against every major new weapon system in the last five years. And he voted against the balanced budget amendment.
>
> Tim Wirth has a right to run for the Senate, but he doesn't have a right to change the facts.

Colorado Republican, 839 F. Supp. at 1451 (quoting Defendant's Statement at ¶ 7).

101. *See id.* at 1456-57.

2 U.S.C. § 441a(d)(3).[102]

Even though the Tenth Circuit rejected the district court's express advocacy requirement, the argument remains alive and well. In MUR 4282, for example, Commissioner Elliott argues that even if there was coordination between the Archdiocese and the Santorum campaign, there was no violation of the statute because there was no express advocacy. In discussing the matter at the Commission table, Commissioner Elliott stated:

> To my way of thinking, the whole discussion of coordination is moot because there is no express advocacy in the guide, and if you don't have that you've got issue discussion and you don't have to do that independently. You can do that with all the coordination you want if there is no express advocacy.[103]

The FEC, however, has stated directly that express advocacy is not required for coordinated expenditures. In Advisory Opinion 1988-22, issued just two years after *MCFL*, the Commission addressed the issue specifically.[104] The Commission found that if public communications about candidates "are made with the cooperation, consultation or prior consent of, or at the request or suggestion of, the candidates or their agents, *regardless of whether such references contain 'express advocacy'* or solicitations for contributions, then the payment . . . will constitute . . . 'in-kind contributions' to the identified candidates."[105]

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102. *See Colorado Republican*, 59 F.3d 1015, 1022 (10th Cir. 1995). The Tenth Circuit rejected the canon of statutory construction relied upon by the district court, believing: "'[T]he presumption readily yields to the controlling force of the circumstance that words, though in the same act, are found in such dissimilar connections as to warrant the conclusion that they were employed in the different parts of the act with different intent.'" *Id.* at 1020 (quoting Helvering v. Stockholms Enskilda Bank, 293 U.S. 84, 87 (1934)). This was particularly true with regard to the distinction between 2 U.S.C. § 441b and the "independent expenditures" at issue in *MCFL*, 479 U.S. 238 (1986), and the coordinated party expenditures considered to be contributions in *Colorado Republican*, 839 F. Supp. 1448. *See Colorado Republican*, 59 F.3d at 1020-21. Of course, the Tenth Circuit was reversed on other grounds in *Colorado Republican* when the Supreme Court rejected the presumption that political parties were incapable of making independent expenditures and found, instead, that the anti-Wirth radio advertisement was an "'independent' expenditure." *See Colorado Republican*, 518 U.S. 604, 614 (1996).

103. Federal Election Commission, Statement of Commissioner Elliott, Commission Executive Session (Sep. 10, 1996) (MUR 4282); *see also* Comments of the National Republican Senatorial Committee to the Federal Election Commission, 12 (May 30, 1997) (submitted to the FEC for rule-making; on file with authors).

104. *See* [1976-1990 Transfer Binder] Fed. Election Camp. Fin. Guide (CCH) ¶ 5932 (1988).

105. *Id.* (emphasis added); *see also* [1976-1990 Transfer Binder] Fed. Election Camp. Fin. Guide (CCH) ¶ 5934 (1988); [1976-1990 Transfer Binder] Fed. Election Camp. Fin. Guide (CCH) ¶ 5875 (1986); [1976-90 Transfer Binder] Fed. Election Camp. Fin. Guide

More recently, in MUR 3918, the Commission found that certain radio advertisements run by Hyatt Legal Services (the Firm) constituted excessive contributions to the 1994 United States Senate campaign of Joel Hyatt.[106] The basis for the Commission's finding was that the Firm's advertisements were coordinated with the candidate and referred to issues raised in the campaign.[107] There was no express advocacy in the Firm's advertisements. In fact, the name "Joel Hyatt" and the candidate's picture were not even seen in the advertisements.[108] Nonetheless, the Commission approved unanimously a conciliation agreement in which the Hyatt campaign and the Firm admitted a violation of the statute and agreed to pay a civil penalty.[109]

The conciliation agreement in MUR 3918 relied, in part, on Commission Advisory Opinion 1990-5.[110] In that opinion, the Commission emphasized that any communication coordinated with a candidate is "for the purpose of influencing" the candidate's election if any of three factors are met: (1) the communication makes direct or indirect reference to the candidacy, campaign, or qualifications for public office of the candidate or the candidate's opponent(s), (2) *the communication makes reference to the candidate's views on public policy issues, or those of the candidate's opponent*, or, (3) if distribution of the communication is expanded significantly beyond its usual audience, or in any other manner that indicates utilization of the communication as a campaign communication.[111]

The Commission concluded unanimously that the Firm's radio advertisements were, in part, for the purpose of influencing Mr. Hyatt's election campaign.[112] There were a number of reasons for this decision. Primarily, the content of the Firm's radio advertisements was drafted by a campaign consultant. Moreover, the advertisements made reference to issues likely to be raised in the campaign.[113] These radio advertisements continued to be broadcast even after those issues had been raised in the

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(CCH) ¶ 5866 (1986).

106. *See* Conciliation Agreement, In the Matter of Hyatt et al., 8-9 (May 23, 1997) (MUR 3918).

107. *See id.*

108. *See id.* at 5.

109. *See id.* at 1, 9.

110. *Cf.* Conciliation Agreement, In the Matter of Hyatt et al., 8-9 (May 23, 1997) (MUR 3918), *with* [1976-1990 Transfer Binder] Fed. Election Camp. Fin. Guide (CCH) ¶ 5982 (1990) (Advisory Opinion 1990-5).

111. *See* [1976-1990 Transfer Binder] Fed. Election Camp. Fin. Guide (CCH) ¶ 5982 (emphasis added).

112. *See* Conciliation Agreement, In the Matter of Hyatt et al., 5, 7, 9 (May 23, 1997) (MUR 3918).

113. *See id.* at 5-6.

campaign. The Commission found that because the Firm's radio advertisements were coordinated with the candidate's campaign and were aired, in part, for the purpose of influencing the candidate's election, part of their value constituted an in-kind contribution from the Firm to the campaign committee even though there was no express advocacy present.[114]

The Commission's current approach is sound not only from a constitutional and statutory viewpoint, but also as a matter of policy. The Supreme Court has indicated clearly that an express advocacy test does *not* apply to contributions and coordinated expenditures. In *Buckley*, the Court stated flatly that "controlled or coordinated expenditures are treated as contributions rather than expenditures under the Act."[115] The Court defined "contribution" to "include not only contributions made directly or indirectly to a candidate, political party, or campaign committee . . . but also *all* expenditures placed in cooperation with or with the consent of a candidate, his agents, or an authorized committee of the candidate."[116] The Court concluded that "[s]o defined, 'contributions' have a sufficiently close relationship to the goals of the Act, for they are connected with a candidate or his campaign."[117] It was *only* when the *Buckley* Court considered the statutory provisions as they applied to *independent* expenditures that it found the express advocacy test necessary to avoid vagueness.[118] Likewise, in *MCFL*, the Supreme Court specified that the express advocacy construction was necessary only for the "provision that directly regulates *independent* spending."[119] According to the Court, there is "a fundamental constitutional difference between money spent to advertise one's views independently of the candidate's campaign and money contributed to the candidate to be spent on his campaign."[120] Given this "fundamental difference," there is simply no constitutional basis for applying to contributions the express advocacy test used for independent expenditures.

The statute reflects this constitutional analysis. There is no mention of

114. *See id.* at 4-7; *see also* 2 U.S.C. § 441a(a)(7)(B)(i) (1994).

115. Buckley v. Valeo, 424 U.S. 1, 46 (1976).

116. *Id.* at 78 (emphasis added).

117. *Id.*; *see also* Federal Election Comm'n v. National Conservative Political Action Comm., 470 U.S. 480, 492 (1985) ("[Coordinated expenditures] are considered 'contributions' under the FECA and as such are already subject to FECA's $1000 and $5000 limitations in §§ 441a(a)(1), (2).") (citations omitted).

118. *See Buckley*, 424 U.S. at 78-79.

119. Federal Election Comm'n v. Massachusetts Citizens for Life, Inc., 479 U.S. 238, 249 (1986) (emphasis added).

120. *Political Action Comm.*, 470 U.S. at 497.

"express advocacy" in any of the statutory provisions involving contributions. The only mentions of "express advocacy" are in the definition of "independent expenditure,"[121] in the disclaimer provision,[122] and in the provision regarding communications to a membership organization's restricted class.[123] As with the "meeting of the minds" test, there is no statutory basis for adding an express advocacy requirement to a coordinated expenditure determination.

Finally, as a policy matter, a requirement that coordinated expenditures must contain express advocacy to be treated as a contribution makes little sense and creates a potentially large loophole in the statute. Suppose, for example, that a candidate solicits a third party to pay the electric bill or rent for the candidate's campaign. Is that a contribution to the campaign? Could a foreign government or a corporation provide a campaign committee with the free use of an airplane? Under an express advocacy requirement, no problem. No express advocacy is present.

Under current Commission analysis, a third party payment of campaign operating expenditures would be considered an in-kind contribution to the campaign. Rather than giving a contribution to the campaign so it can pay its office rent, a third party pays the rent directly. Under an express advocacy requirement, however, a third party payment of campaign operating expenditures would be acceptable and proper. There would be coordination, i.e., the candidate's asking the third party to pay the rent, but there would be no express advocacy, and thus no contribution, to the candidate. The contribution limitations mean very little if a third party can underwrite all of a campaign's operating expenditures.

Not only would payment of a campaign's operating expenditures apparently fall outside of the contribution limitations under an express advocacy requirement, but payment of many candidate advertisements would as well. For example, a recent detailed study of the 1996 Senate race in Minnesota found that less than one-fifth of the candidate advertisements contained express advocacy, less than one-fourth of them featured the candidate addressing the voters, and only twenty-one percent of the candidate advertisements made any reference to the upcoming election.[124] Yet, to argue that candidate communications discussing "is-

121. *See* 2 U.S.C. § 431(17) (1994).

122. *See* 2 U.S.C. § 441d (1994). The 2 U.S.C. § 441d disclaimer provision requires, *inter alia*, the name of the person who paid for a communication and a notice as to whether the communication was authorized by a candidate on "communications expressly advocating the election or defeat of a clearly identified candidate." *Id.* § 441d(a).

123. *See id.* § 431(9)(B)(iii).

124. *See* Paul S. Herrnson and Diana Dwyre, *Party Issue Advocacy in Congressional*

sues" do not constitute legitimate campaign activity is odd, to say the least. "Issues," after all, are what candidates promise to campaign upon and what, presumably, voters are most interested in having discussed. "I intend to campaign on the issue" or "I pledge an issue-oriented campaign" are oft-repeated candidate assurances made during the course of the campaign.[125]

If a third party payment of candidate issue discussion falls outside of the contribution limitations under an express advocacy requirement—and it appears that it does—a very large loophole is opened under the statute. Could a candidate solicit unlimited and unreported contributions from an individual to discuss "issues" on local radio and television the week before a primary or general election? Could a foreign or domestic corporation provide unlimited soft money to underwrite these "issue advertisements"? According to the express advocacy requirement, coordinated payments for such an advertising campaign would *not* be subject to the limitations, prohibitions, or reporting requirements of the Act so long as the advertising did not contain express advocacy.

Further broadening the loophole is the problem of how to define "express advocacy." Under *Buckley*, the purpose of the express advocacy standard is to limit application of the pertinent reporting provision to spending that is *unambiguously related* to the campaign of a particular federal candidate.[126] Under an express advocacy standard, the reporting requirements "shed the light of publicity on spending that is *unambiguously campaign-related*."[127] Unfortunately, the Court provides no definition of what constitutes "spending that is unambiguously related to the campaign of a particular federal candidate" or "unambiguously campaign related." The *Buckley* Court only indicated that express advocacy in-

Election Campaigns, *in* THE STATE OF THE PARTIES: THE CHANGING ROLE OF CONTEMPORARY AMERICAN PARTIES 86, 94-95 (John C. Green & Daniel M. Shea eds., 3d ed. 1999).

125. *See, e.g.*, *Inside Politics* (CNN television broadcast, Mar. 16, 1999) (interviewing Steve Forbes: "I never made any personal attacks. I've always discussed issues, principles, in the same way that Ronald Reagan did . . . . We're going to run an issues-oriented campaign."); Kate Thompson, *Campaign Chief Says Forbes Will Hit Peak At Right Time*, SIOUX CITY JOURNAL, June 12, 1999 ("[A]dvice has centered around continuing to hammer Forbes' messages on the issues that Americans care about such as creating opportunity, tax reform, Social Security, education, and health care." (reporting on an interview with Forbes National Campaign Manager Kenneth Blackwell)); G. Robert Hillman, *GOP Rivals Welcome Governor's Decision: They Urge Him to Start Debating Issues*, DALLAS MORNING NEWS, Mar. 3, 1999, at 12A; Paul West, *Gore Campaign Goes into High Gear*, BALTIMORE SUN, Mar. 16, 1999, at 1A ("Polls don't win elections, ideas do. This is going to be about a vision of America." (quoting Vice President Al Gore)).

126. *See* Buckley v. Valeo, 424 U.S. 1, 81 (1976).

127. *Id.* (emphasis added).

cludes communications containing such obvious campaign related words or phrases as "'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject'."[128]

We have written elsewhere of the ongoing campaign finance debate over deciding what constitutes express advocacy.[129] In essence, there are two schools of thought. One school relies on the inclusion or exclusion of the words and phrases listed above for determining whether a particular communication contains express advocacy. Under this "magic words" test, express advocacy—the reach of the Act—is avoided so long as the communication does not contain certain key phrases. The Commission's current regulations present an alternative to the "magic words" test and recognize that there is more to express advocacy than a mere list of words.[130] In addition to using the "magic words" test, the regulations incorporate the decision of the Ninth Circuit in *Federal Election Commission v. Furgatch*[131] which states that for a communication "to be express advocacy under the Act . . . it must, *when read as a whole*, and with limited reference to external events, be susceptible of no other reasonable interpretation but as an exhortation to vote for or against a specific candidate."[132]

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128. *Id.* at 44 n.52; *see also id.* at 80. In *Colorado Republican*, the Tenth Circuit concluded that the anti-Wirth advertisement "would not constitute express advocacy within the narrow definition of *Buckley*," *Federal Election Commission v. Colorado Republican Fed. Campaign Committee*, 59 F.3d 1015, 1023 n.10 (1995), despite the fact that it "would leave the . . . (listener) with the impression that the Republican Party sought to 'diminish' public support for Wirth and 'garner support' for the unnamed Republican nominee." *Id.* at 1023. Interestingly, the Supreme Court in *Colorado Republican* characterized the anti-Wirth advertisement as an "independent expenditure." *See* 518 U.S. 604, 614 (1996). As defined by 2 U.S.C. § 431(17), an independent expenditure contains express advocacy. Thus, did the Supreme Court find that the anti-Wirth advertisement constituted express advocacy even though it did not contain any "magic words"?

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

130. *See* 11 C.F.R. § 100.22 (1999).

131. 807 F.2d 857 (9th Cir. 1987), *cert. denied*, 484 U.S. 850 (1987); *see also* Express Advocacy, Independent Expenditures, Corporate and Labor Organization Expenditures, 60 Fed. Reg. 35,292, 35,295 (1995) (codified at 11 C.F.R. § 100.22(a)).

132. *Furgatch*, 807 F.2d at 864 (emphasis added). In pertinent part, the regulation states:

> *Expressly advocating* means any communication that—
>
> . . .
>
> (b) When taken as a whole and with limited reference to external events, such as the proximity to the election, could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s) because—
>
> (1) The electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning; and

To date, the circuits are split over how to interpret express advocacy. The First Circuit in *Maine Right to Life Committee v. Federal Election Commission*[133] and the Fourth Circuit in *Federal Election Commission v. Christian Action Network, Inc.*[134] have embraced the rigid "magic words" test.[135] On the other hand, the Ninth Circuit in *Furgatch* concluded that a communication could constitute express advocacy even though it did not contain any of the specific buzzwords or catch phrases listed in *Buckley*.[136] Until the issue of what constitutes express advocacy has been decided by the Supreme Court, the uncertainty will continue.

One outcome, however, is certain. A requirement that specific phrases or words must be present in order to find express advocacy will create a gaping loophole in the Act. As the *Furgatch* court warned:

> A test requiring the magic words "elect," "support," etc., or their nearly perfect synonyms for a finding of express advocacy would preserve the First Amendment right of unfettered expression *only at the expense of eviscerating the [Act].* "Independent" campaign spenders working on behalf of candidates *could remain just beyond the reach of the Act by avoiding certain key words* while conveying a message that is unmistakably directed to the election or defeat of a named candidate.[137]

To permit a "magic words" test to infect the analysis of coordinated expenditures would be the worst of all worlds. In situations that present the danger of *quid pro quo* consequences, a candidate easily could orchestrate a very helpful advertisement campaign paid for by an interested party that simply avoids a few obvious phrases.

IV. CONCLUSION

Suppose candidate Smith is slightly behind in the polls, low on money, and needs help. It is the week before the election and he knows that a wealthy contributor is planning to run an independent expenditure advertisement. Smith contacts the contributor and complains that nobody has focused on an important matter in the campaign: various problems in

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> (2) Reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action.

11 C.F.R. § 100.22(b) (1999).

133. 914 F. Supp. 8 (D. Me. 1996), *aff'd per curiam*, 98 F.3d 1 (1st Cir. 1996), *cert. denied*, 118 S. Ct. 52 (1997) (mem.).

134. 110 F.3d 1049 (4th Cir. 1997).

135. *Id.* at 1050, 1060.

136. *Furgatch*, 807 F.2d at 862-63.

137. *Id.* at 863 (emphasis added).

Congressman Jones' personal life. Because of this oversight, candidate Smith believes that Congressman Jones is viewed in a better light. Candidate Jones, however, does not want to run such an ad himself for fear of being accused of negative advertising. After changing the advertisement to reflect these suggestions, the wealthy contributor runs it on radio and television the weekend before the election. The advertisement says, "Congressman Jones is a liar, a tax cheat, wife-beater, and absentee legislator—keep that in mind on Tuesday." Is this a coordinated expenditure?

Under the Act, this expenditure to influence the election is made obviously "in cooperation, consultation, or concert, with, or at the request or suggestion of a candidate."[138] In the words of *Buckley*, this expenditure is not made "*totally independently* of the candidate and his campaign."[139] Nor can it be said under the test laid out in *Colorado Republican*, that the expenditure is made without "*any general* or particular *understanding* with a candidate."[140] Because the expenditure has plainly lost its independence, it must be considered for what it is—a contribution to the candidate's campaign.

A "meeting of the minds" approach, however, would conclude that there is no coordination present. Although campaign strategy has been provided to the spender, there is no evidence that the candidate has actually asked that an (independent expenditure) advertisement be run, or that the spender, in turn, has agreed to run an advertisement. Moreover, there is no evidence that the candidate has any control over the text, placement, and distribution of the advertisements. Absent evidence of a particularized agreement between the candidate and the spender, there was no coordination and, consequently, no contribution to the campaign.

Even if there had been a "meeting of the minds" resulting in coordination, the expenditure would remain outside the jurisdiction of the FECA under the "magic words"/express advocacy requirement. So long as an advertisement avoids certain words or phrases such as "vote against" or "defeat," the "magic words" test requires that such an advertisement be considered mere issue discussion. For example, even if candidate Smith actually prepared the above advertisement, described precisely where it should run, and asked the wealthy friend to pay for the advertisement and run it the day before the election, a contribution would not exist because the advertisement does not contain express advocacy. For that

138. 2 U.S.C. § 441a(a)(7)(B)(i) (1994).

139. Buckley v. Valeo, 424 U.S. 1, 47 (1976) (emphasis added).

140. Colorado Republican Fed. Campaign Comm. v. Federal Election Comm'n, 518 U.S. 604, 614 (1996) (emphasis added).

matter, the advertisement could be paid for by a foreign dictator or drug cartel. Moreover, because this activity would fall outside the jurisdiction of the Act, it would not need to be reported.

This article concludes that a narrow, limited definition of coordination, along with an express advocacy test, would threaten the integrity of the current campaign finance system. We find that under a "meeting of the minds" test, the amount of allowable cooperation, consultation, and communication between the candidate and the spender would effectively convert what is supposed to be an "independent" expenditure into nothing more than a "disguised contribution."[141] As *Buckley* recognizes, the contribution limitations become meaningless when they are evaded "by the simple expedient of paying directly for media advertisements or for other portions of the candidate's campaign activities."[142]

We also conclude that an express advocacy requirement would give the green light for corporations, labor organizations, or even foreign entities to coordinate with candidates and create advertisements that influence elections, but do not contain "magic words" of express advocacy. These coordinated media campaigns could be funded with unlimited soft money raised from prohibited domestic and foreign sources. In addition, none of the soft money used to finance this coordinated candidate activity would be reported to the Federal Election Commission and disclosed to the voting public. As a result, these communications would be completely outside the prohibitions, limitations, and reporting provisions of the Act.

Placing the above activity outside the FECA would ignore the many

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141. *Cf. Buckley*, 424 U.S. at 47.

142. *Id.* at 46. The Supreme Court has consistently upheld measures designed to prevent the evasion of the contribution limitations. In *Buckley*, the Court upheld the $5000 contribution limitation on what political committees can give to candidates because the limitation serves "the permissible purpose of preventing individuals from *evading the applicable contribution limitations*." *Id.* at 35-36 (emphasis added). The *Buckley* Court also upheld the $25,000 annual contribution limitation because the provision "serves to *prevent evasion of the $1,000 contribution limitation* by a person who might otherwise contribute massive amounts of money to a particular candidate through the use of unearmarked contributions to political committees likely to contribute to that candidate, or huge contributions to the candidate's political party." *Id.* at 38 (emphasis added). Similarly, in *California Medical Ass'n v. Federal Election Commission*, the Court upheld the $5000 limitation on contributions to political action committees because otherwise "an individual or association seeking to *evade the $1,000 limit on contributions* to candidates could do so by channeling funds through a multicandidate political committee." 453 U.S. 182, 198 (1981). More recently, in *Colorado Republican*, the Court observed that it "could understand how Congress, were it to conclude that the potential for *evasion of the individual contribution limits* was a serious matter, might decide to change the statute's limitations on contributions to political parties." 518 U.S. at 617 (emphasis added).

compelling governmental interests advanced by the Act. With respect to contribution limitations alone,[143] the *Buckley* Court found that "the Act's primary purpose—to limit the actuality and appearance of corruption . . .—[provides] a constitutionally sufficient justification for the $1,000 contribution limitation."[144] The Court explained that "[t]o the extent that large contributions are given to secure a political *quid pro quo* from current and potential office holders, the *integrity of our system of representative democracy is undermined.*"[145] Moreover, the Court found that "[o]f almost equal concern as the danger of actual *quid pro quo* arrangements is the impact of the *appearance* of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions."[146] The Court determined that "Congress could legitimately conclude that the avoidance of the appearance of improper influence 'is also critical . . . if confidence in the system of representative Government is not to be *eroded to a disastrous extent.*'"[147] Thus, the Court found that "Congress was surely entitled to conclude that . . . contribution ceilings were a *necessary* legislative concomitant to deal with the reality or appearance of corruption inherent in a system permitting unlimited financial contributions."[148]

As the "independent administrative agency vested with exclusive jurisdiction over civil enforcement of the Act,"[149] the Federal Election Com-

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143. Other interests advanced by the Act include the governmental interests behind 2 U.S.C. § 441b prohibitions, *see* Federal Election Comm'n v. Massachusetts Citizens for Life, Inc., 479 U.S. 238, 257 (1986) ("[T]he corrosive influence of concentrated corporate wealth reflects the conviction that it is important to protect the integrity of the marketplace of political ideas."), and the reporting provisions, *see Buckley*, 424 U.S. at 68, 76 ("The disclosure requirements, as a general matter, directly serve substantial governmental interests"; moreover, disclosure serves to "insure that the voters are fully informed and to achieve through publicity the maximum deterrence to corruption and undue influence possible.").

144. *Buckley*, 424 U.S. at 26.

145. *Id.* at 26-27 (emphasis added).

146. *Id.* at 27.

147. *Id.* (quoting United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548, 565 (1973)) (emphasis added).

148. *Id.* at 28 (emphasis added). Elsewhere, the Supreme Court has reaffirmed the important governmental interest served by the Act's contribution limitations. *See supra* note 16 and accompanying text.

149. Federal Election Comm'n v. National Right to Work Comm., 459 U.S. 197, 198 n.2 (1982); *see also* 2 U.S.C. §§ 437c(b)(1), 437d(a), (e) (1994); *Buckley*, 424 U.S. at 109 (noting that Congress vested the Commission with "primary and substantial responsibility for administering and enforcing the Act").

We believe that Congress intended the FEC to act as an enforcement-minded agency. House comments on the conference bill creating the Commission reveal a consensus that the legislation provided for a "strong independent commission to enforce provisions of

mission must decide what constitutes a coordinated expenditure subject to the contribution limits. In making this determination, the Commission must be mindful that independent expenditures involve "core First Amendment expression."[150] At the same time, the Commission must also be mindful that the Act's contribution limitations, according to *Buckley*, are necessary to insure that our system of government's integrity is not weakened and that citizen "confidence in the system of representative Government is not . . . eroded to a disastrous extent."[151]

In *Furgatch*, the Ninth Circuit rejected an interpretation of the statute which "would preserve the First Amendment right of unfettered expression only at the expense of eviscerating the . . . Act."[152] So too, the courts and the Commission must not define coordination in limited manner and allow unreported soft money to influence federal elections in the guise of "issue advertisements."[153] To do so would render meaningless the limita-

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

150. *Buckley*, 424 U.S. at 48.

151. *Id.* at 26-27 (citing United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548, 565 (1973)).

152. Federal Election Comm'n v. Furgatch, 807 F.2d 857, 863 (9th Cir. 1987).

153. After this article went to press, three district court opinions were issued, which discussed the concept of coordination. In *Federal Election Commission v. Christian Coalition (Christian Coalition)*, 52 F. Supp. 45 (D.D.C. 1999), the district court ruled against the Commission on five of its six coordinated expenditure allegations and found that there was a contested issue of fact on the six. In its decision, the district court ignored the §441a(a)(7)(B)(i) standard of coordination as well as the Commission's regulations, created its own standard of coordination, and applied it to a new concept known as "expressive coordinated expenditures." 52 F. Supp. at 85. Under the district court's approach, the Commission must show there had been "substantial discussion or negotiation" about a communication so the "candidate and spender emerge as partners or joint venturers." 52 F. Supp. at 92.

In *Federal Election Commission v. Public Citizen Inc. (Public Citizen)*, No. 1:97-CV-358 (N.D. Ga. Sept. 15, 1999), another district court found that discussions between a spender and a campaign did "not rise to the level of consultation or coordination." *Id.* at 15. Once again, the district court ignored the Commission's regulations and created its own standard: "Coordination . . . implie[s] 'some measure of collaboration beyond a mere inquiry as to the position taken by a candidate on an issue.'" *Id.* (citing Clifton v. Federal Election Comm'n, 114 F.3d 1309, 1311 (1st Cir.), *cert. denied*, 118 S. Ct. 1036 (1998)).

tions, prohibitions, and reporting requirements of the Federal Election Campaign Act.

Finally, in *Federal Election Commission v. Freedom Heritage Forum (Freedom Heritage Council),* No. 3:98-CV-549 (W.D. Ky. Sept. 29, 1999), the district court rejected the argument "that actual coordination of a specific disbursement must be shown in order for a disbursement to be characterized as a coordinated expenditure." *Id.* at 3. The district court concluded, however, that the Commission had failed to establish coordination based upon the facts of this case.

It is important to note the decisions of the district courts in *Christian Coalition, Public Citizen* and *Freedom Heritage Council,* are not binding precedent on any other federal court, even in the same district. *See, e.g.,* In re Korean Air Line Disaster, 829 F.2d 1171, 1176 (D.C.Cir. 1987) ("Binding precedent for all [circuits] is set only by the Supreme Court, and for the district courts within a circuit, only by the court of appeals for that circuit."), *aff'd,* 490 U.S. 122 (1989); *see also* Richardson v. Selsky, 5 F.3d 616, 623 (2d Cir. 1993); Fox v. Acadia State Bank, 937 F.2d 1516, 1570 (11th Cir. 1991); United States v. Articles of Drug Consisting of 203 Paper Bags, 818 F.2d 569, 572 (7th Cir. 1987).