



How express does ‘express advocacy’ have to be?

Please note: This analysis was updated at 4:15 p.m.

By Reid Alan Cox

The latest campaign finance dust-up over an independent group running television ads hit the headlines in the *Politico* today. Ben Smith reports that “Obama’s campaign has written the Department of Justice demanding a criminal investigation of the ‘American Issues Project,’” a not-for-profit organization that is running spots in “Ohio, Pennsylvania, Virginia and Michigan.”

In that letter, the general counsel for the Obama campaign, Robert F. Bauer, described the American Issues Project advertising as “a knowing and willful attempt to evade the strictures of federal election law.” And why? Well, among other reasons, Bauer claims “the ad uses a so-called ‘magic word,’ the word ‘elect,’ and its avowed purpose is to question the personal qualifications and merits of Senator Obama as a candidate for President.” In other words, according to Bauer, the ad meets “any standard for the determination of ‘express advocacy,’” because “the group is expressly advocating the defeat of Barack Obama for the position of President of the United States.”

But wait a minute, does the ad actually “expressly advocate” Obama’s defeat?

The spot in question—titled “Know Enough”—opens by asking: “Beyond the speeches, how much do you know Barack Obama? What does he really believe?” The spot then links Obama with Weather Underground co-founder (and current education professor) William Ayers, noting that “Obama is friends with Ayers” and has “defend[ed]” him. The ad concludes by asking viewers: “Why would Barack Obama be friends with someone who bombed the Capitol ... and is proud of it? Do you know enough to elect Barack Obama?”

No doubt, Bauer is correct that the ad places Obama in a negative light by associating the presidential candidate with a man, Ayers, who many regard at best as founding a radical leftist group and at worst as having supported violent criminal acts. Bauer is also right that the ad uses the word “elect” in asking viewers whether they know “enough” about Obama. But, while Bauer claims “[t]his is not a close case” as to whether the ad constitutes “express advocacy,” that conclusion may not be quite so clear.

As the name suggests, “express advocacy” means—and has meant since the U.S. Supreme Court decided *Buckley v. Valeo*—“communications that in express terms advocate the election or

defeat of a clearly identified candidate.” And, if that definition wasn’t clear enough, the Supreme Court included a specific footnote providing examples, all of which amounted to specifically instructing citizens to “vote for” or “vote against” the featured candidate. So the rule, at least from the highest court in the land, seems to be that an ad is “express advocacy” only if it is a specific instruction to vote for or vote against a candidate.

Admittedly, in their zest to restrict independent speech, campaign finance “reformers” tried to blur the “express advocacy” line by regulating what they said was its “functional equivalent”—“electioneering communications”—in the Bipartisan Campaign Reform Act (a.k.a McCain-Feingold). And, the Supreme Court started to take some of that bait in *McConnell v. FEC*. But, four years later, even that “functional equivalent” line—which only applies to “electioneering communications” that run 30 days before a primary, caucus or convention and 60 days before a general election—got pushed back after the High Court’s 2007 decision in *Wisconsin Right to Life v. FEC II*.

Specifically, in *WRTL II*, the controlling opinion held that “an ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.” Moreover, the Supreme Court made it clear that applying this standard “must give the benefit of any doubt to protecting rather than stifling speech.” Indeed, the lead opinion went so far as to instruct that the “[d]iscussion of issues cannot be suppressed simply because the issues may also be pertinent in an election. Where the First Amendment is implicated, the tie goes to the speaker, not the censor.”

Getting back to the American Issues Project ad, while the ad comes pretty close to that “express advocacy” line, it doesn’t necessarily cross it. Bauer points to the use of the word “elect” as a fatal flaw. But the ad uses the so-called “magic word” in the context of a question: “Do you know enough to elect Barack Obama?” Literally, such a question, even if rhetorical, is not an exhortation to “vote against” Obama. Instead, if we are true to what the ad actually says, as the High Court has instructed, then the ad advocates further investigation and exploration.

As for the rest of the ad, which Bauer characterizes as “question[ing] the personal qualifications and merits of Senator Obama as a candidate for President,” it certainly could, and probably has or will, raise such doubts. It may have even been intended to do so. But that is not the sole way to read or hear the script, and in any event such implication does not expressly instruct citizens to vote for or against a candidate. Indeed, the Supreme Court has cautioned against dooming speech as “express advocacy” based on the inferred intent of the speaker or the subjective effect on the listener. Presumably Bauer would point to the context of the ad appearing in hotly contested states as the presidential election nears as proof positive that the ad must be “express advocacy.” However, the High Court has ruled that such context should not really play a role in evaluating whether an ad fails the “express advocacy” test. That’s because such context could

point to an election-related motive, or it could also point to the simple fact that Americans pay more attention to public issues as elections get close in time and race.

For all of these same reasons, the ad is not obviously regulated as an “electioneering communication,” even though it is running within 30 days of the Democratic National Convention, which will officially nominate Obama. After all, as pointed out above, the ad is susceptible to another reasonable interpretation other than as an appeal to vote against a specific candidate—that of further investigation or exploration.

In short, as close to the “express advocacy” line as the American Issues Project ad gets, this is no slam dunk case of an ad directly telling voters to elect or defeat a candidate. That’s what the Supreme Court has said “express advocacy” is—indeed, what it must be to pass constitutional muster. And, as the Center for Competitive Politics has cautioned before, blurring that line comes with tremendous constitutional costs—those of the free speech and association rights that we all enjoy. Thus, it would be nice if the Obama campaign invested all of its time in exercising their free speech rights to respond to these ads, rather than taking the time to try to get the “regulators” to pursue actions that will chill and deter other Americans from exercising their own First Amendment freedoms to the fullest extent.

Indeed, the fact that the Obama campaign should be focused on its own free speech response, rather than regulatory tip-offs against would be detractors, was made even more clear today when the American Issues Project released their response letter to the Department of Justice. In that letter, counsel for the American Issues Project, Cleta Mitchell, explained that, as a “qualified nonprofit corporation” under Federal Election Commission regulations, the organization “would be permitted to make independent expenditures” so long as it follows specified “reporting and compliance responsibilities.” In other words, since the American Issues Project does not take corporate or labor union contributions, has no shareholders and cannot engage in business activities, it falls into a specific election law exception that specifically permits these ads—even if they do constitute “express advocacy.” The response from the American Issues Project neither explicitly admitted nor denied whether the ad constituted “express advocacy,” but the group has signaled it is covered even if this is “express advocacy” by following specific regulatory requirements.

So whether the American Issues Project’s ad is or is not “express advocacy” could be quite a question—but maybe an academic one. Nevertheless, this episode highlights just how politicians and campaign finance “reformers” use election law and regulation as tools in attempts to shut down or scare off everyone else’s speech—even when their desired outcome is far from clear.

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