

Express Advocacy and Issue Advocacy: Historical and Legal Evolution of Political Advertising

This chapter provides historical and legal background for the analysis of express advocacy and issue advocacy in the 2000 federal elections. However, a brief detour is needed to clarify the distinction between those terms and to introduce other terminology that will appear throughout this book. This terminology is generally accepted among political scientists and legal analysts who closely follow political advertising trends and their implications for the federal campaign finance system. The subsequent historical and legal analyses flesh out the origins of the current controversy over just what advertising should be regulated.

THE DISTINCTION BETWEEN “EXPRESS ADVOCACY” AND “ISSUE ADVOCACY”

In the current federal campaign finance system, the extent to which political advertising is regulated depends upon the identity of the ad’s sponsor and, in some cases, the ad’s content. Campaign finance requirements can be justified constitutionally only when advertising is intended to influence the outcome of elections. Since it is sometimes difficult to know the intent of the sponsor, the sponsor’s identity and ad’s content can be used as objective indicia of intent. This study shows, however, just how infrequently those characteristics capture the relevant intent and demonstrates that other factors incorporated into current reform proposals do a better job.

The existing regulatory scheme based on sponsor identity and advertising content is complex. For example, all ads sponsored by candidates are deemed to be electioneering ads—ads meant to affect electoral outcomes. Contributions for such ads must be raised under specified limits, and an array of record-keeping and reporting requirements govern both contributions and expenditures. At the other end of the spectrum are ads that genuinely discuss issues of public policy (as opposed to the election or defeat of candidates). Such ads are altogether exempt from campaign finance regulation. Other advertising falls in the middle: the fundraising and disclosure requirements that govern “groups” – the term used in this study to refer to individuals and entities other than candidates and political parties – vary with the identity of the group and the language of the group’s advertisement. Political parties must disclose all contributions and spending for ads, but whether parties finance advertising with funds raised under contribution limits (known as “hard money”) or with unregulated contributions (known as “soft money”) depends on the language used in the ads.

Under current law, hard money must be used to pay for party ads that expressly advocate the election or defeat of a clearly identified candidate—that is, if the ads fall under the category of “express advocacy.” Express advocacy is often interpreted to include only ads that contain specific terms urging the election or defeat of a candidate, such as “vote for,” “vote against,” “support,” or “defeat” – what have come to be known as “magic words.” The term that is generally used to convey the opposite of “express advocacy,” and that constitutes the primary focus of this study, is “issue advocacy.”

Issue advocacy, properly understood, includes communications by parties or groups intended to further or to derail a political issue, legislative proposal, or public policy—not to advocate the election or defeat of candidates. But issue advocacy has recently acquired a broader meaning. When express advocacy is interpreted to require magic words, any advertising that avoids using such words passes as issue advocacy. “Issue advocacy” as commonly used includes both genuine issue ads (ads discussing issues) and electioneering issue ads, sometimes called sham issue ads (ads that are intended to influence the outcome of an election but avoid using magic words). Under this broad definition, issue advocacy has become a major loophole in campaign finance law, because electioneering issue ads are typically treated as genuine issue ads for regulatory purposes.

EARLY REGULATORY HISTORY AND THE ISSUE ADVOCACY DEBATE

Campaign advertising in the United States can be dated back to 1791, when print media was first used for campaign purposes. The anti-federalists financed the *National Gazette* to denounce Alexander Hamilton’s supporters as “monarchists.” The federalists responded with their own partisan propaganda with publication of the *Gazette of the United States*. The costs of campaign advertising first raised eyebrows in the presidential election of 1800, when Thomas Jefferson spent \$50 of his own money for the publication and distribution of campaign newsletters. But campaign costs generally remained minimal for several more decades because of popular hostility to what John Quincy Adams called “electioneering.”¹

Following the Civil War and the onslaught of industrial capitalism, monied interests became increasingly concerned about government regulation of the economy. To advance their interests, corporations began providing candidates and political parties with ever-larger sums to pay for campaign expenses, including advertisements. Frequent allegations of corruption in federal and state elections eventually led to public pressure for limits on corporate money in campaigns.

In 1907, the federal government adopted its first serious campaign finance regulation, the Tillman Act, which prohibited direct corporate contributions to federal candidates. The Publicity Acts of 1910 and 1911 soon fol-

1. Alfred Thayer, *Who Shakes the Money Tree? American Campaign Finance Practices from 1789 to the Present* (New York: Simon and Schuster, 1974), at 26-27.

lowed, requiring disclosure of campaign financial activity of all candidates and political committees involved in House and Senate elections.²

Just what counted as electoral activity subject to disclosure requirements emerged as an important question early in the efforts to reform campaign financing. In 1926, the U.S. Senate launched an investigation into the campaign activities of the Anti-Saloon League, an organization formed in the late-1800s to promote Prohibition. The League had become an effective political force in American politics, lobbying officeholders on Capitol Hill, publishing leaflets, and campaigning for and against congressional candidates.³ The League responded to the investigation by claiming that its activities did not fall under federal campaign finance disclosure laws because they were “educational, scientific, and charitable rather than political as intended by law.”⁴ In the end, the Senate investigative committee declined to take any action against the Anti-Saloon League.

Labor unions used the Anti-Saloon League’s argument to combat a similar investigation in the 1950s, conducted by the Senate Subcommittee on Privileges and Elections under the Taft-Hartley Act of 1947. The Act barred direct contributions from union treasuries to federal candidates (making permanent a similar ban in the War Labor Disputes Act of 1943—also known as the Smith-Connally Act—enacted as a temporary wartime measure over President Roosevelt’s veto). The unions sought to evade the ban on union contributions and to avoid disclosing their financing of political activities by claiming that their advertisements were educational rather than electioneering in nature. Other organizations, such as the Americans for Democratic Action, also took advantage of the distinction between educational and political activities to evade dis-

closure laws in the same period.⁵ Campaign financing thus continued for decades to be unregulated for all practical purposes.

THE FEDERAL ELECTION CAMPAIGN ACT AND *BUCKLEY V. VALEO*

After decades of at best sporadic enforcement of federal campaign financing laws, Congress renewed its determination to regulate money in politics in the early 1970s. Suspicions of financial abuses, exacerbated by criminal allegations against President Richard Nixon in connection with the Watergate scandal, prompted Congress to pass in 1971, and to amend in 1974, the Federal Election Campaign Act (FECA). The law, as amended, imposed a variety of disclosure requirements, contribution limits, and mandatory spending ceilings on all candidates, parties, and groups.

Opponents of campaign finance regulation immediately challenged FECA and its amendments in the landmark case, *Buckley v. Valeo*.⁶ Among other provisions that the Supreme Court found to be constitutionally flawed was a disclosure requirement for independent expenditures made “for the purpose of . . . influencing” federal elections. The Court worried that the ambiguity of that phrase posed First Amendment problems.

To salvage the reporting rule, the Court narrowly construed the statute to reach only funds used for communications that “expressly advocate” the election or defeat of a candidate. According to the Court, its interpretation ensured that the regulations would apply only to “spending that is unambiguously related to the campaign of a particular federal candidate”—including communications

2. Demands for public disclosure of campaign finances were voiced by an influential citizens’ lobbying group known as the National Publicity Law Association. This organization was largely responsible for New York’s adoption of a disclosure law for state elections and for persuading Congress to adopt the Federal Corrupt Practices Act of 1910, which was a post-election disclosure law for committees involved in House races. The Federal Corrupt Practices Act was amended in 1911, to add three important features. First, candidates and committees in Senate as well as House elections had to report their finances. Second, the amendments required candidates and committees to report their finances before as well as after each election, including primary elections. And third, spending ceilings were imposed on candidates. Candidates for the House were not to spend more than \$5,000 in total and candidates for the Senate were not to spend more than \$10,000 or an amount established by state law, whichever was less. Both the disclosure laws and the mandatory spending ceilings were generally ignored with impunity.

For a fuller discussion of the history of money in politics, see George Thayer, *Who Shakes the Money Tree?* (New York: Simon and Schuster, 1973); and Craig Holman, “The History of Campaign Finance Reform: Probably More Than You Ever Wanted to Know” (2000) (unpublished paper on file at the Brennan Center for Justice at NYU School of Law).

3. Peter Odegard, *Pressure Politics: The Story of the Anti-Saloon League* (New York: Columbia University, 1928), at 88.

4. David Parker and John Coleman, *Cycles, Trends, and One Damn Thing After Another: Parties, Interests and Campaign Finance*, paper presented at the University of Wisconsin/Brennan Center Roundtable on Issue Advocacy (Chicago, Apr. 18, 2001).

5. *Id.*

6. 424 U.S. 1 (1976) (*per curiam*).

that contain “express words of advocacy of election or defeat, such as ‘vote for,’ ‘elect,’ ‘support,’ ‘cast your ballot for,’ ‘Smith for Congress,’ ‘vote against,’ ‘defeat,’ ‘reject.’”⁷ So interpreted, the Court concluded, the disputed requirement was neither “void for vagueness” (insufficiently explicit about the scope of spending subject to regulation) nor substantially “overbroad” (applicable to political speech that does not constitute electioneering). The distinction between educational and electioneering communications, established in practice since the Anti-Saloon League resisted disclosure of its activities in the 1920s, was now firmly ensconced in campaign finance jurisprudence.

But the narrowing construction created its own problems. For example, consider the following advertisement, which was aired just days before one of the 2000 presidential primary elections:

“Last year, John McCain voted against solar and renewable energy. That means more use of coal-burning plants that pollute our air. Ohio Republicans care about clean air. So does Governor Bush. He led one of the first states in America to clamp down on old coal-burning electric power plants. Bush’s clean air laws will reduce air pollution more than a quarter million tons a year. That’s like taking 5 million cars off the road. Governor Bush, leading, for each day dawns brighter.”

Because the ad never used any of the magic words of express advocacy identified in *Buckley*, its sponsor was treated as exempt from disclosure laws. The viewing public saw only a tag line reading “paid for by Republicans for Clean Air.” No campaign finance reports were filed with the Federal Election Commission (FEC), and many voters probably assumed that the ad was sponsored by an environmental group. It took reporting by the news media to reveal that the ad was paid for by Charles and Sam Wyly, two Texas billionaires and long-time friends and contributors to then-candidate George W. Bush.⁸ The Wyly commercial is now a classic example of an electioneering issue ad—an electioneering advertisement that exploits the magic words test to avoid campaign finance regulation.

Usually, electioneering issue ads have been sponsored by groups that want to avoid the legal constraints imposed on entities that engage in electioneering. For example, PACs are subject to reporting requirements and limits on the contributions they may accept. But avoiding magic words allows organizations to escape those rules. In 1992, the Christian Action Network spent \$63,000 on advertising attacking candidates Clinton and Gore for supporting a gay rights agenda.⁹ Though the ads aired in close proximity to the election and featured clearly identified presidential and vice-presidential candidates, the group eluded disclosure requirements by not using magic words. Similarly, in 1994, Americans for Limited Terms avoided regulation when it successfully used electioneering issue ads to attack then-House Speaker Tom Foley of Washington.

Unions and corporations have also used electioneering issue ads to sidestep prohibitions against using their treasury monies in connection with candidate campaigns. In 1996, the AFL-CIO declared that it would spend \$20.7 million on issue advocacy (*i.e.*, ads not using magic words) in an effort to win Democratic Party control of Congress.¹⁰ The AFL-CIO’s major innovation was to put real financial strength behind electioneering issue ads. Unsurprisingly, their opponents responded in kind. That same year, 33 business organizations including the National Association of Manufacturers and the U.S. Chamber of Commerce formed an organization called “The Coalition: Americans Working for Real Change” to counter the AFL-CIO’s advertising campaign with thousands of electioneering issue ads of their own.¹¹ In the 1996 election cycle, more than 24 groups aired electioneering issue ads. By 2000, groups were familiar enough with the magic words test to understand how to air electioneering ads under the guise of issue advocacy. But such ads really took off as a means of evading federal source limitations on union and corporate campaign spending when the political parties combined electioneering issue ads with a second campaign finance loophole—soft money.

7. *Id.* at 42, 44, n.52, 79-80.

8. The Wylys might well have avoided disclosure, but one brother called a news conference essentially to boast about their role in the advertisement. John Mintz, “Texan Aired Clean Air Ad,” *Washington Post* (Mar. 4, 2000), at 6.

9. Eliza Newlin Carney, “Airstrikes,” *The National Journal* (June 15, 1996), at 1313.

10. *Id.*

11. Peter Stone, “Business Strikes Back,” *The National Journal* (Oct. 25, 1997), at 2130-33.

LYING IN WAIT— THE SOFT MONEY LOOPHOLE

In the late 1970s, the Federal Election Commission determined that certain political party activities not directly related to federal elections were exempt from the Federal Election Campaign Act's fundraising restrictions. The decision was supposed to promote traditional party-building activities, such as voter registration and get-out-the-vote programs, by allowing parties to finance such activities with the federally unregulated funds now known as "soft money." But, as explained in Chapter Seven, little soft money is actually used for those purposes.

In the 1996 presidential election, party consultants to the Democratic National Committee (DNC) realized that a potential financial bonanza for campaign advertising lay dormant.¹² By using soft money for electioneering issue ads that avoided magic words (and thus were ostensibly not related to federal elections), unlimited funds from corporations, unions, and individuals could be employed to help Clinton defeat Dole. The DNC spent feverishly on anti-Dole issue ads, which aired throughout the summer of 1996 after Dole had spent most of his campaign funds. The other national party committees learned from the DNC's example. In July 1996, the National Republican Congressional Committee announced an \$8 million dollar electioneering issue ad campaign that would complement

the \$23 million pledged by the Republican National Committee for electioneering issue ads.¹³ Parties often used electioneering issue ads in this way, supporting their candidate with harsh, negative ads attacking the opponent. Parties also began attempting to equalize resources between congressional candidates by paying for electioneering issue ads that were indistinguishable from candidate ads.¹⁴

CANDIDATES JOIN THE SPOILS SYSTEM TOO

Candidates also began to notice the potential advantages of combining unregulated money with issue ads. Although FECA strictly regulates all activity by a candidate's campaign committee, candidates began circumventing the regulation by establishing separate committees or other entities that were ostensibly unrelated to their federal campaigns. Since the mid-1990s, these entities have included state campaign committees, ballot measure committees, and leadership PACs, as well as non-profit corporations or political organizations formed under sections 501(c)(3), 501(c)(4), or 527 of the Internal Revenue Code.¹⁵ These organizations, which allow candidates to exploit the magic words test articulated in *Buckley*, are sometimes chaired by the candidates themselves but are frequently directed by former or current campaign consultants or staff of the candidate. Candidates

12. Dick Morris, *Behind the Oval Office: Winning the Presidency in the Nineties* (New York: Random House, 1997), at 141.

13. Eliza Newlin Carney, "Party Time," *The National Journal* (Oct. 19, 1996), at 2214.

14. See generally, Jonathan Krasno & Daniel Seltz, *Buying Time: Television Advertising in the 1998 Congressional Elections* (Brennan Center 2000).

15. Each of these different types of committees employed by federal candidates to solicit contributions in excess of contribution and source limitations has its own benefits and disadvantages in tax law and campaign finance law. For example, state campaign committees offer federal candidates an opportunity to solicit funds according to state campaign finance laws, which often are more lenient than federal laws or non-existent altogether. For example, states such as Colorado, Idaho, Illinois, New Mexico, Utah and Virginia have absolutely no limits on amounts or sources of contributions to state candidates. A federal candidate may establish a state committee so long as all funds expended by the committee go to promoting state candidates or ballot issues. These funds may not be used to promote federal candidates directly (although these funds are often used to promote the federal candidates indirectly through issue advertising or to finance other political projects of the candidate), and an FEC regulation bars transfers of these funds into federal candidate accounts.

The use of non-profit committees generally fall into three distinct categories: charities [501(c)(3)]; social welfare organizations [501(c)(4)]; and political organizations [Section 527]. Charities offer the benefit of providing contributors with tax deductions for their donations, but may not participate in a candidate campaign or dedicate a "substantial part" of its proceeds for promoting issues and legislation. Due to their limited political opportunities, candidates and groups generally prefer to use the soft money and issue advocacy loopholes through social welfare organizations, instead. Contributions to social welfare organizations are not deductible, but such groups need only be "primarily engaged in promoting in some way the common good" and thus have much greater leeway in their political activities. Though such committees are not supposed to get involved in candidate campaigns, their primary mission may be to lobby for political causes (i.e. issue advocacy). Both 501(c)(3) and 501(c)(4) committees must file financial records with the IRS, but the "political" expenditures of these committees are frequently reported as "educational" expenditures. Section 527 is a special tax provision originally designed by the IRS to shelter political parties from paying taxes on contributions as income. These political organizations must be primarily established to promote the election or defeat of candidates. Donations to political organizations are not tax deductible, but the funds may be used for any political purpose, including contributions and expenditures for candidates. Originally, Section 527 committees did not need to disclose their financial activities, and thus became a popular conduit for persons wishing to cloak their financial activities while getting involved in campaign activity (first exploited by the Sierra Club). The Internal Revenue Code has since been changed to require such organizations to file regular financial reports with the Internal Revenue Service, although not with the FEC.

have learned from parties and groups that the issue ad loophole can be used to shield campaign activity from federal rules and regulations.

Federal candidates at all levels began earnestly making use of such entities in 1996 to bolster the campaign efforts of their official candidate committees. New York Republican Senator Alfonse D'Amato used a state ballot measure committee for this purpose. When D'Amato's popularity ratings dropped to nearly 30 percent, the Senator took charge of an environmental bond measure committee and solicited contributions that would have violated FECA had he raised them for his official campaign. The contributors to D'Amato's campaign and to the bond measure committee included many of the same individuals: more than 90% of those who contributed to the bond measure committee had also contributed to D'Amato's official campaign committee. The donations included corporate contributions and a donation of \$100,000 from Computer Associates International Chairman Charles Wang and his wife. The bond measure committee then used these funds to pay for television ads across the state of New York featuring D'Amato and his family strolling on a beach, playing in a water fountain, and hugging. His daughter explained to the television audience that her dad was a real "fighter" for the environment.¹⁶

Several presidential candidates in 1996 and in 2000 also established entities unregulated by the FEC to increase their public visibility. Steve Forbes' non-profit organization, "Americans for Hope, Growth, and Opportunity," could receive undisclosed contributions of unlimited amounts. While in theory Forbes' organization was

promoting an issue, most of its funds paid for television advertisements featuring Forbes in key primary states. Forbes' tactic was copied by Bob Dole and his "Better America" foundation and Lamar Alexander and his "We the Parents" organization.¹⁷ Senator Bob Kerry, among other Democrats, also joined the fray with his non-profit committee, Building America's Conscience & Kids PAC (BACKPAC). In 1999, while contemplating a run for the Republican presidential nomination, John Ashcroft utilized a leadership PAC to run issue ads promoting himself in Iowa and New Hampshire, accepting a \$400,000 check from the House of Lloyd, a Missouri direct sales marketing firm.¹⁸

LOOKING AHEAD

The use of issue advocacy as a means of evading federal campaign laws may have occurred on occasion in America's distant history, but it finally took hold as a persistent and recurring problem in the 1990s. *Buying Time 2000* explores the use and abuse of issue advocacy in modern times, and documents its nature and frequency in the last election cycle. This study also assesses pending congressional reforms of FECA designed to address these problems for their likelihood of finding an appropriate balance between protecting the precious right of freedom of political expression and ensuring that the money financing campaigns does not undermine the integrity and fairness of our democratic government.

16. John Riley, "D'Amato Backers Aided Bond Act," *The Times Union* (Dec. 24, 1996), at A1; Raymond Hernandez, "Democrat Attacks Ad for Bond Act as Illegal Plug for D'Amato," *New York Times* (Oct. 25, 1996), at B1.

17. Luke McLoughlin, "Shakedown Washington-Style: Non-Profits as the Latest Way to Skirt Finance Laws," *Harvard Political Review* (Apr. 1999), at 24.

18. Susan Glasser & Juliet Eilperin, "Don't Ask, They Don't Have to Tell," *Washington Post National Weekly* (May 24, 1999), at 10.