

WHY IS IT IMPORTANT TO RESTRICT (OR NOT TO RESTRICT) THE RIGHT OF CHARITIES TO CAMPAIGN?

Norman J. Ornstein
The American Enterprise Institute

Campaign finance reform has been a serious agenda item in American politics for about the last ten years. In the early reform years, reformers and journalists focused their wrath on political action committees, or PACs. But over the past five years or so, the emphasis shifted; reformers succeeded in making soft money their singular bete noir, and the core necessary element of campaign finance reform. Soft money was the conduit for virtually all the of the allegations of campaign finance scandals in the 1996 campaign that were highlighted in congressional hearings in 1997; it was the designated villain for virtually all the reform proposals considered on Capitol Hill. Reformers succeeded in making soft money a pariah, the political equivalent of big tobacco.

But as reformers succeeded at keeping the spotlight on the abuses and corruption of soft money, they failed to get any comparable focus on another pernicious development. Both during the 1996 campaign and in the two-year congressional cycle that followed, “issue advocacy” was barely noticed by the press, or mentioned in the Senate hearings. In 1997, “soft money” showed a mind-boggling 10,334 citations in Lexis/Nexis; “issue advocacy received barely *one-tenth* the mentions!

The political parties spent \$262 million dollars in soft money in 1996, most of it on broadcast ads promoting their candidates or attacking their opponent’s candidates.¹ Outside groups spent an estimated \$135 to \$150 million on “issue advocacy,” most of it spent

on thinly disguised attack ads designed to elect or defeat congressional candidates.² Party soft money, we have learned, can be contributed in unlimited amounts from almost any source, including corporate coffers and union dues. So can issue advocacy money-- but unlike party soft money, issue advocacy money is not even disclosed.

“Who is Bill Yellowtail? He preaches family values, but he took a swing at his wife. And Yellowtail’s explanation? He only ‘slapped’ her, but ‘her nose was broken.’”

Bill Yellowtail was the Democratic candidate for Congress in Montana, in one of the most hotly contested House seats in 1996. He was leading that race as it approached its final weeks. Then, as the Los Angeles Times recounted, the television commercial above began to run on Montana’s television stations-- \$200,000 worth, a small fortune in Montana time-buying terms. Yellowtail’s lead evaporated, and he lost the seat.³

This take-no-prisoners ad was not run by Yellowtail’s Republican opponent, Rick Hill, who had pledged to avoid personal attacks. Instead, it was produced, financed and aired by “Citizens for Reform,” a non-profit, tax-exempt group with no connection to Montana, not readily identifiable in any real way to Montana voters, and with no prior interest in issues of domestic violence. If there was any connection to Montana, it apparently came from contact between the group’s funders and the Republican candidate before the ads were run.

¹ *FEC Reports Major Increase in Party Activity for 1995-1996*, FEC Press Release, March 19, 1997.

² Deborah Beck, Paul Taylor, Jeffrey D. Stanger, Douglas G. Rivlin, and Kathleen Hall Jamieson 1997. *Issue Advocacy Advertising During the 1996 Campaign: A Catalog*, The Annenberg Public Policy Center.

³ “Nonprofits Behind Attack Ad Prompt Senate Probe,” by Glenn F. Bunting, Ralph Frammolino and Mark Gladstone, *Los Angeles Times*, May 5, 1997.

In fact, Citizens for Reform was a conservative operation founded in 1996 by activist Peter Flaherty, which, funded in substantial part by the Triad Group, ran approximately \$2 million in attack ads late in the 1996 campaign to influence about 15 House races in 10 states. It was incorporated to “promote social welfare” on a “non-partisan basis.” Most of its ads focused on the balanced budget amendment or on term limits; the Montana spots were the only ones it ran that dealt with spousal abuse. When Los Angeles Times reporters asked Flaherty if he would run comparable ads in districts where Republican candidates had been accused of wife-beating, he replied, “It’s not up to us to do the job of people who have a liberal ideology.”⁴

Citizens for Reform, like its dozens of counterparts across the ideological spectrum, was able to raise undisclosed money from any source in any amount because “issue advocacy,” unlike advocacy for or against candidates for office, has special Constitutional protection. But only a naif could look at the commercials run in Montana and view their primary, or even secondary purpose, as advocacy on issues—they were clearly and blatantly designed to defeat Bill Yellowtail.

What happened in Montana was replicated all over the country. A systematic study of issue ads in the 1996 campaign by the Annenberg Public Policy Center found that the ads had more pure attack content than any other type of political ad and less comparison of issue positions. Nearly ninety percent of the ads referred to a candidate for office. One especially striking finding about ads supposed to advocate a group’s views on issues: *fewer than one in five of the ads directly advocated the sponsor’s own positions!*⁵

⁴ Ibid.

⁵ Deborah Beck, et. al., op. cit.

Like the explosion of soft money in the nineties, the widespread use of “issue advocacy” as a pretext for electioneering took some time to develop. But by 1996, it was clear that the special treatment given to “issue advocacy” as opposed to candidate advocacy had been turned into a gaping loophole for a huge and growing category of campaigning that does not have to operate under the rules that apply to candidates, parties or open and honest interest groups. Tanya Metaksa, chair of the National Rifle Association’s Political Victory Fund, reflected the attitude of many of the groups that have jumped onto issue advocacy as a prime route to influencing election outcomes: “It is foolish to believe there is any difference between issue advocacy and advocacy of a politician.” The difference between issue advocacy and candidate endorsement, she said to a roomful of consultants, is “a line drawn in the sand on a windy day.”⁶

The genesis of this problem came in the Supreme Court’s 1976 Buckley v. Valeo decision. In its 1974 reform statute, Congress had drawn an unacceptably vague distinction between campaign speech and other speech. The Court stepped in to fill the vacuum and differentiated between speech designed to advocate the election or defeat of a candidate and speech designed to advocate on issues—the former could be regulated through disclosure and contribution limits; the latter could not. And the Court drew a “bright line” to define candidate advocacy, saying it must be in the form of messages that expressly called for the election or defeat of a candidate—since called “express advocacy.”⁷

⁶ Amy Keller, “Political Consultants Envision Gold Mine Making ‘Issue Advocacy’ Advertisements,” Roll Call, January 23, 1997.

⁷ For a discussion of Buckley and of the bright line, See Anthony Corrado, Thomas E. Mann, Daniel R. Ortiz, Trevor Potter and Frank J. Sorauf, eds. Campaign Finance Reform: A Sourcebook, Washington, D.C.: Brookings Institution Press, 1997.

Drawing a distinction between political speech and issue speech makes sense. There were many ways to define political speech or candidate advocacy. If the sharp one the Court drew twenty years ago in Buckley seemed risky, the process did not break down for some time. If clear and obvious attempts to get around the rule popped up here and there in the years that followed, they were neither systematic nor overwhelming.

That changed in 1996. The catalyst was the AFL-CIO, which pledged to spend \$35 million in “issue ads” in 70 or so congressional districts, mostly held by junior Republicans. The ads included themes and phrases like the following ones, run in Spokane Washington right up to the election, which targeted freshman Republican George Nethercutt:

Announcer: “Last year Congressman George Nethercutt voted with Newt Gingrich to cut Medicare and give new tax breaks to the wealthy.”

Subtitle: ‘George Nethercutt voted \$270 Billion in Medicare cuts’

Announcer: “Now comes another vote, they’re after Medicare again.”

Subtitle: ‘Call Congressman Nethercutt 1-800-765-4440’

Newt Gingrich: “We believe it’s going to wither on the vine.’

The AFL-CIO campaign triggered a business campaign in response, led by a group called “The Coalition: Americans Working for Real Change” and by Lyn Nofziger’s Citizens for the Republic Education Fund. They in turn were joined in the “issue advocacy” arena by at least thirty other groups, ideological and substantive, ranging from the well-

known (the Sierra Club, the National Rifle Association) to the lesser-known (Citizens for a Sound Economy, Citizen Action) to the unknown (Citizens for Reform, Coalition for Change, Women for Tax Reform.)

The Nofziger group targeted Ohio Democrat Ted Strickland with a TV ad based on a prison riot at Ohio's Lucasville prison in 1993 where Strickland had been a prison psychologist. The ad quoted Strickland as saying, "I'm concerned about guard hostages, but I'm really concerned about the inmates," and asked, "Is Ted Strickland more concerned about coddling prisoners than helping victims?" Nofziger subsequently said that it is "outrageous" that groups like his can "go and run political ads and call them educational" --but they were forced to do it by the AFL-CIO attacks on Republicans.⁸

Of course, it was not just the AFL-CIO, Citizens for Reform and the other groups mentioned above which employed massive "issue advocacy" campaigns. The Clinton and Dole campaigns both relied heavily on issue advocacy for advertising. The Clinton campaign, of course, unleashed a major barrage of ads early in the election cycle, financed largely through soft money raised for the Democratic National Committee (DNC) by the President and Vice President; that fundraising eventually became the subject of Senate hearings on campaign finance abuses. Moreover, the legal theory that the Clinton campaign employed issue advocacy as a subterfuge to evade campaign finance laws and engage in electioneering was the major rationale used by those who demanded an independent counsel to investigate campaign finance wrongdoing by the President and Vice President.

⁸ Charles R. Babcock and Ruth Marcus, "For Their Targets, Mystery Groups Ads Hit Like Attacks From Nowhere," Washington Post, March 9, 1997.

Charges of illegality or impropriety in the use of so-called issue advocacy for electioneering seems to have had no deterrent effect whatsoever on the strategy. If issue advocacy became a major force in the 1996 election cycle, it showed every sign of expanding for the 1998 cycle. In the 1997 special House election in Staten Island, New York to replace Susan Molinari, the Republican Party spent over \$800,000 in “issue advocacy” attack ads against the Democratic candidate Eric Vitaliano—ads for which the Republican candidate Vito Fossella disclaimed any responsibility.⁹ Issue ads dominated the subsequent 1998 special election in Santa Barbara, California to replace Rep. Walter Capps. Stories early in 1998 suggested that a wave of groups planned to play active roles via issue ads in the 1998 campaign, including The American Small Business Alliance, the American Civil Rights Coalition, The Foundation for Responsible Government, Americans for Clean Energy, Americans for Job Security, and many others whose names reveal virtually nothing about the groups or interests behind them.¹⁰

In July 1998, House Majority Leader Dick Armey unveiled a plan to raise \$13 million from Republican House members to finance an issue ad blitz before the November elections, to be run by the National Republican Congressional Committee.¹¹ In September 1998, the Republican Party and People for the American Way began “issue advocacy” campaigns in selected congressional districts and nationwide about the impeachment in

⁹ Alan Greenblatt, “North and South, Voters Look in Same Direction—Taxes,” Congressional Quarterly Weekly Report, Nov. 1, 1997.

¹⁰ Wall Street Journal, “‘Issue Advocacy’ Groups to Play Bigger Role,” by Jeanne Cummings, March 6, 1988, p. A16.

¹¹ Roll Call, Monday July 13, 1998, p. 1, “Armey Wants Millions for Ads,” by Jim VandeHei.

quiry against President Clinton, with an eye directly on influencing the outcomes of congressional elections. The GOP campaign involved 57 districts in 30 states, with expenditures totaling \$7 million. One of the ads touted the accomplishments of the 105th Congress; 13 others were designed to praise Republican lawmakers and/or to attack Democrats. The People for the American Way ad involved \$1 million in airtime for a spot saying “It’s time to move on” from the Clinton scandal.¹² Referring to the \$7 million buy, Rep. John Linder (R-GA,) chairman of the National Republican Congressional Committee said in early October, “And that’s only the beginning.” He predicted that spending on the ad campaign would soar by the Nov. 3 elections. He added, “If we were to stop today, we would already have put more money into issue ads in specific media markets and in general advertising than has ever been done before by either party.”¹³ Of course, some of these party ads are straightforward issue advocacy. But the bulk of them are clearly designed to influence directly the election or defeat of specific candidates—what is commonly called electioneering. Is that legal—or is it another instance of a conspiracy to evade campaign finance laws?

In one important respect I agree with the ardent supporters of the current issue advocacy standard: as the Supreme Court has defined it, and most lower courts have upheld it, the standard allows almost anything to go as long as communications do not use magic words” like “vote for” or “defeat” particular candidates. That means, as lawyers like

¹² “Liberals, GOP break out new issue ads,” by Robert Schlesinger, *The Hill*, Wednesday, Oct. 7, 1998.

¹³ “TV ad blitz touts accomplishments of GOP Congress,” by Ralph Z. Hallow, *The Washington Times*, Wednesday, October 7, 1998, p. A1.

James Bopp, counsel both for the National Right-to-Life Committee and the new advocacy group created by Senator McConnell, and Jan Baran, long-time GOP counsel, have said, President Clinton could sit in the Oval Office and draw up the DNC ads without violating any law, as long as the ads were technically “issue advocacy.” It means that the Republican National Committee could work hand-in-glove with their candidate for Congress in Staten Island, Vito Fossella, to plan the \$800,000 in attack ads against Democratic candidate Eric Vitaliano that had no direct link of accountability to Fossella—just as, allegedly, 1996 Montana congressional candidate Rick Hill could legally suggest to the Triad Group and Citizens for Reform they run a blizzard of “issue ads” attacking Hill’s Democratic opponent Bill Yellowtail as a wifebeater even as Hill was decrying them and as voters were wondering who was behind these vicious attack ads.

Of course, not all supporters of the current issue advocacy standard have taken this principled position. Even as it defended the sacred character of issue advocacy messages in editorials during the debate over campaign finance reform, the Wall Street Journal was simultaneously calling President Clinton’s involvement in the DNC issue ads an illegal conspiracy. On the same day that Wall Street Journal columnist Paul Gigot said that President Clinton stole the election because he illegally coordinated the issue ads, Wall Street Journal reporter Phil Kuntz was dutifully quoting GOP lawyer Baran about the clear legality of those actions.

Legal, however, does not mean appropriate. What has happened with issue advocacy is simply appalling. After the Senate hearings, we know a lot about the White House/DNC issue ad offensive. We have also learned some of the details about the ex

traordinary lengths to which the Republican National Committee and congressional campaign committees worked in 1996 with outside groups like Triad, Citizens for the Republic Education Fund, Citizens for Reform and Americans for Tax Reform to channel money to ads to defeat their candidates' opponents—in ways deliberately designed to deceive voters about the sources of funds and of attacks. In some cases, it appears the strategy was designed to insulate the GOP candidates from accountability for negative attacks they helped to plan but publicly decried. In other cases, the issue ads were a way to permit donors to circumvent the annual limits on contributions to candidates.

For years, the Federal Election Commission has tried to change the standards to make all groups trying to elect or defeat candidates play by the same rules. In every court case but one, they have been rebuffed. Why? Because the courts have not accepted the notion that a standard set by the Supreme Court, in the absence of a change made by Congress, could be altered by an unelected independent regulatory body. McConnell, Bopp, the ACLU and their allies notwithstanding, that does not mean that the standard set in Buckley is sacred and inviolate. It only means that a vacuum left by Congress was filled twenty years ago by the Court, which is awaiting further action by Congress.

Congress, in light of twenty years experience under the Buckley issue advocacy standard, can and should make a change. It is impossible to believe that the deception and chicanery that characterized the misuse of issue advocacy in 1996 fits the Court's vision of speech in a campaign and election context. What kind of change would pass Constitutional muster remains open for debate. But reasonable lawmakers from both parties should see clearly that this embarrassment—this *legal* embarrassment—desperately needs reform.

What can be done here? The first answer is that we need to tread delicately. Several principles apply. The First Amendment does matter. Nothing should be done that damages genuine issue advocacy, as opposed to electioneering masking as issue advocacy. Nothing should be done that would prove burdensome to small groups without the resources to comply with onerous election laws and rules. Nothing should be done that would cast a pall on non-profit groups and their members.

Just after the 1996 elections, I convened a small working group of scholars and others to craft a sensible, targeted and realistic campaign reform proposal. Our product subsequently was packaged as “Five Practical Ideas for Campaign Reform,” and endorsed and promoted by the League of Women Voters; major elements of it were incorporated into the revised version of the McCain/Feingold bill in the Senate, the Shays/Meehan bill in the House and the Hutchinson/Allen freshman proposal in the House. One of the five elements dealt with electioneering masquerading as issue advocacy.

Subsequently, I convened another small working group to revisit the electioneering/issue advocacy issue, in light both of the attacks on our original plan from critics, the strategic issue of what approach would be most likely to pass muster with the contemporary Supreme Court, and which approach would reduce the likelihood of violating or brushing against any of the principles laid out above. After considerable effort and give-and-take, we adopted a different approach, which became the Snowe/Jeffords Amendment to McCain/Feingold, and was eventually adopted by the Senate (although the entire bill, of course, died with the 105th Congress.)

In very simple terms, the new approach to electioneering reform would do the following:

*Define electioneering communications as those broadcast messages that contain a reference to a clearly identified candidate for federal office; are made within sixty days of a general election or thirty days of a primary; are substantially targeted or distributed to the electorate for that election; amount in aggregate in any calendar year to \$10,000 or more. Non-broadcast communications, news stories, and communications by a corporation to its stockholders or a union to its members would not be covered.

*require for such communications disclosure to the Federal Election Commission of the amounts spent and contributors of \$500 or more, with the group making the communication given a choice: maintain a separate fund for these electioneering communications and list the \$500 contributors to that fund; or keep the funds fungible, but list all \$500 contributors to the organization during that calendar year.

*prohibit the direct or indirect use of labor union or corporation funds for such electioneering communications.

*make clear that, like other electioneering expenses, coordinating such communications with a candidate counts as a contribution to the candidate.

Under this provision, there would be no restrictions whatsoever on what individuals or advocacy groups could spend on these or other ads—only limited disclosure requirements and a ban on the use of corporate and labor funds for this kind of electioneering. Individuals or small groups wanting to get a message across would not be affected at all—only those groups spending \$10,000 or more on broadcast ads during a calendar year.

If a group decided to maintain a separate fund for these electioneering ads, it would require little more than a keystroke on the computer accounting program.

Is this constitutional? In different ways, disclosure requirements, source restrictions, fundraising restrictions and different treatment for coordinated and non-coordinated expenditures have all been allowed by the Supreme Court. Corporations have been banned from direct electioneering since 1907; labor unions, since 1947. Congress can require the sponsor, whether a PAC, corporation, party, individual or candidate, to disclose the sources of the money and the nature of the spending for electioneering messages. Congress can restrict the sources of funds and the size of contributions to a collective fund. As working group member Joshua Rosenkranz of the Brennan Center has said, “This is black letter constitutional law about which there can be no serious dispute.”¹⁴

By creating a new, slightly expanded definition of electioneering communication, and making the definition precise and narrow, this provision does not do violence to the “magic words” approach, but has Congress refine it in a sensitive and sensible way. Voter guides, newspaper ads, fliers and other print communications would not be covered.

Charitable and other non-profit groups are understandably sensitive about any measures that would impinge upon their freedom to communicate with Congress, advocate on the issues they care about, or have a chilling effect on their members. We are confident that our provision addresses these concerns in a reasonable way, while staying firmly within First Amendment principles and Court precedents.

¹⁴ Unpublished document.

Even this modest change is vehemently opposed by a broad and unusual coalition of groups ranging from the NRA to the National Education Association, the National Right to Life organization and the Sierra Club. These groups oppose even any disclosure requirements!

For their different political views and partisan interests, these groups had something in common in 1996. All tried to influence the outcome of elections; all were directly exploiting the Supreme Court's language to do so; and all were happily engaged in this enterprise so that they could avoid operating by a set of rules that apply to everyone else in the political arena. All, obviously, want to continue to operate outside the framework. The attitude of many advocacy groups is reflected in the comments of Citizens for Reform's Flaherty: "As long as we don't use Express Advocacy words, anything we do is permissible."¹⁵ They would like to keep it that way.

One thing is clear: closing the soft money avenue without touching the issue advocacy scam will mean hundreds of millions of dollars channeled into existing and new groups to operate as "issue advocacy" agents to influence outcomes in the 1998 and 2000 elections. Huge sums of money will come from foreign sources, corporate bank accounts and union dues. Most of the money will go for harshly negative political attack ads run shortly before the election, designed simply to avoid using the words "vote for," "vote against," "elect" or "defeat." In many districts the ads run by outside groups will drown out the messages of the candidates themselves. Many of the groups will have meaningless names that make it difficult to discover the sources of the messages; with no disclosure or contribution limit, the potential for corruption will be strong and the ability to enforce

laws against it will be weak. And we might end up looking back on the 1996 campaign as the good old days.

¹⁵ Eliza Newlin Carney, “Stealth Bombers, National Journal, August 16, 1997.”