Why Congress Can't Ban Soft Money

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This article first appeared in *Heritage Backgrounder*, no. 1130 (July 21, 1997). In this article David Mason explains soft money and the constitutional protection for political speech that prevents Congress from limiting it by legislating what can and cannot be done or said and how much money may be spent doing so. In fact Supreme Court decisions over the years have declared unconstitutional any but voluntary restrictions on campaign spending, while leaving in place a variety of limitations on contributions.

From the view point of the authors of the bills Mason discusses, "soft" money, money that is not under the contribution and expenditures controls and reporting requirements of the federal government, is evil. Soft money has always existed, Mason points out, but with limits on hard money—money specifically going to candidates' campaigns—soft money, free from limitations on amounts that can be contributed, expands. Thus contributions to parties and PACs increase. It becomes difficult to tell whether party-building activities really support a particular candidate and should count in spending limitations.

If such spending is also constrained, money will flow to independent special interest groups—the many organizations from the Sierra Club to the Christian Coalition that work on behalf of ideas that they wish to see supported by candidates and eventually embodied in legislation. Is their issue advocacy too to be brought under the control of the Federal Election Commission because it comes too close to supporting candidates in an election?

Mason's lesson is that this is a slippery slope and that what divides the players on the issue is whether they choose to stand atop the slope or slide right down to the mud at the bottom.

Eliminating political party "soft money" and regulating similar spending by groups other than political parties are central features of many proposals that would reform campaign financing. Soft money (defined as money raised and spent outside the regulatory structure for federal election campaigns) has played a growing and increasingly controversial role in politics for a decade; in fact, most of the fund-raising abuses alleged to have occurred during the 1996 elections involved soft money.

One of the leading reform proposals is the Bipartisan Campaign

Reform Act of 1997 (S. 25), introduced by Senators John McCain (R-Ariz.) and Russell Feingold (D-Wisc.). Both McCain-Feingold and H.R. 493, a companion bill introduced in the House by Representatives Christopher Shays (R-Conn.) and Martin Meehan (D-Mass.) would impose extensive restrictions and regulations on soft money activities. Another proposal from a group of House freshmen would ban soft money donations to political parties and impose government regulation on "issue advertising" that refers to specific candidates or officeholders. Shays, Meehan, and President Clinton have petitioned the Federal Election Commission (FEC) to ban or limit soft money donations to political parties.

Efforts to ban, limit, or regulate soft money and related spending such as issue advertising are complicated by constitutional limits on government power, difficulties in defining targeted activities, and the relative ease with which political activists avoid targeted regulations that are constitutionally valid. Specifically,

- Most soft money activities already have been approved by the Supreme Court as exercises of First Amendment rights.
- Although Congress has some authority to regulate national political parties, even those regulations must be focused narrowly on preventing fraud or corruption.
- Regulation of the soft money activities of nonparty groups and individuals is both subject to the strictest constitutional scrutiny and nearly always constitutionally invalid.

Regulating advertising because it includes the name or likeness of a public official, for example, is clearly unconstitutional.

Congressional motives and interests also should be examined. Campaign laws and regulations clearly tend to favor incumbents,[1] and con-

1. David M. Mason and Steven Schwalm, "Advantage Incumbents: Clinton's Campaign Finance Proposal," *Heritage Foundation Backgrounder*, no. 945 (June 11, 1993), and Bradley

gressional statements indicate that efforts to limit soft money issue advertising are motivated by incumbents' desire to suppress criticism of their actions. In other words, it appears that some politicians are trying to use public dissatisfaction with their own actions and campaigns as an excuse to expand government regulation of, and reduce citizen participation in, the political process.

In considering any limited steps it might take on soft money, Congress should recall that existing practices are direct responses to previous attempts to regulate political activity. As "hard money" (direct expenditures on campaigns) was limited and regulated, activists simply changed tactics. It is arguable that total political spending has increased as a result; it is certain that there is a less complete and less open accounting of such spending and wholly foreseeable that political activists will discover legitimate ways to avoid any new regulations by pursuing behavior that is more objectionable and less accountable than the activities targeted by regulation.

Rather than embark on another pointless and constitutionally suspect cycle of regulatory expansion, Congress should reexamine existing regulations on hard money, lifting and easing regulations in order to encourage donors and activists to move toward entities like parties, campaigns, and political action committees (PACs) that already are subject to regulation and disclosure. The real solution to the problem of soft money lies in minimizing, not expanding, government controls.

ROOTS OF A CONTROVERSY

This controversy has arisen because of the size of certain soft money donations (more than $1 million in some cases); the growing use of soft money by political parties, labor unions, and other groups; and certain practices involved in the raising of soft money. White House coffees and sleepovers during the 1996 campaign, for example, allegedly were

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A. Smith, "Campaign Finance Regulation," Cato Institute Policy Analysis, no. 238, September 3, 1995.

associated with soft money fund-raising efforts by the Democratic National Committee (DNC).

A series of laws passed in the 1970s[2] limited the source and size of donations to federal election campaigns and required the extensive reporting and disclosure of campaign expenditures. These limited and reportable funds became known as hard money: contributions made directly to candidates by individuals and political action committees. Certain spending, such as internal communications by corporations and labor unions and spending on headquarters space by political parties, was exempt from most regulatory requirements. Other activities, like spending on state campaigns, were not addressed by federal statutes.

In 1976, in *Buckley v. Valeo*,[3] the U.S. Supreme Court struck down significant parts of the Federal Election Campaign Act (FECA) and established strict limits on the government's ability to regulate political activity. Subsequent decisions expanding on *Buckley* declared various activities by parties and other groups to be exempt from FECA and other government regulation. Activities exempt from the FECA escape its donation limits of $1,000 (for individuals) and $5,000 (for political committees), bans on union and corporate donations, and requirements for disclosure of donors and spending. As parties and other groups have adjusted their tactics to take advantage of these features, soft money has grown.

Originally, the term *soft money* was applied solely to labor union spending for political advocacy among union members. Internal activities could be financed by dues from the union's general treasury; political communications with the general public had to be paid for through voluntary contributions and reported to the FEC. The distinction between hard and soft union activity goes back to 1943 and 1947 legislative prohibitions on union donations to, or spending on, elections.

2. The Federal Election Campaign Act of 1971, which was amended in 1974, 1976, and 1979, and the presidential campaign funding provisions of the Tax Act of 1971.

3. 424 U.S. 1 (1976).

After passage of FECA, as political parties explored the distinctions between regulated federal campaign activities and other party functions, the term was applied to unregulated party activities, including voter registration, headquarters construction, and state and local political activity. Later, politically active groups began to provide voter scorecards and other printed materials under the "express advocacy" exemption specified in the *Buckley* ruling. Issue-related television and radio advertising became a significant factor in campaigns beginning in 1994, when independent term limits, tax reform, and conservative religious groups ran ads to alert voters to candidates' positions on various issues. In 1996, unions and environmental organizations made extensive use of such issue advertising, and business and independent conservative organizations responded in kind.

In many 1996 races, this advertising by organizations independent of candidates and political parties was seen as a major factor. This had been the case in a few races in 1994 and only rarely before that time.

As with nonparty efforts, political party issue advertising had been present, but generally as a minor factor, before 1996, when it exploded in both scope and significance. Clinton adviser Dick Morris cites the DNC's issue advertising effort as one of the key elements in Clinton's reelection.[4] From 1992 to 1996, overall soft money receipts by the national political parties grew more than threefold, from $86 million to $262 million. At the state level, soft money receipts appear to have grown even more rapidly as a result of a vigorous Democratic effort to channel soft money donations directly to state parties.

The rapid growth in soft money means that these largely unregulated funds represent a far larger proportion of total political spending. Soft money represented just 16 percent of national party receipts during the 1992 election cycle but 30 percent during the 1996 elections. The DNC, the most dependent on soft money of all major party organizations,

4. Dick Morris, *Behind the Oval Office: Winning the Presidency in the '90s* (New York: Random House, 1996).

received almost 50 percent of its 1995–1996 income in soft dollar donations: $102 million as opposed to $108 million in hard dollars. Comparable figures for the Republican National Committee were $113 million and $193 million. Today, the term *soft money* is applied to activities as diverse as an internal union newsletter touting a candidate endorsement, the "Harry and Louise" ads on the Clinton health plan, and donations to state political campaigns. The only common element is that these activities are not regulated under FECA.

SOFT MONEY, ISSUE ADVOCACY, AND FREE SPEECH

The problems involved in regulating soft money begin with its definition, as evidenced by the wide variety of activities to which the term is applied. In terms of contributions to political parties, soft money is a donation that is outside limits established by FECA, either because it is above specified dollar limits ($20,000 per year for an individual) or because it comes from a "prohibited source" (a corporation or labor union). In terms of spending, soft money is literally anything other than donations to, or spending in behalf of, federal election campaigns.

Some soft money proposals address only political party fund-raising. President Clinton and House sponsors of the Shays-Meehan Bill have petitioned the FEC to take regulatory action to ban or limit contributions to parties, other than those already subject to FECA. This appeal is based on the commonly repeated (but incorrect) claim that the FEC "created" soft money. In fact, it merely defined the parameters of regulation of campaigns and political parties, establishing accounting rules to keep regulated and unregulated activities separate and to allocate shared expenses. Such regulations are essential, considering the limits of the FEC's authority under FECA and the Constitution. To argue that because the FEC has defined certain attributes of soft money, either the FEC or Congress can abolish or arbitrarily limit the practice is the same as saying that Americans' political liberties are granted by the government and may be altered or abolished at any time.

Other soft money proposals, such as one drafted by a bipartisan

group of House freshmen, would combine a ban on soft money fund-raising by political parties with restrictions on issue advertising by nonparty groups. Still other legislation, including the McCain-Feingold proposal (similar to the Shays-Meehan Bill in the House), would attempt to subject issue advertising and many other soft money activities to the same FECA regulations and fund-raising limits that now apply to hard money activity.

Issue advertising by nonparty ideological groups appears to bother politicians. Senator Max Cleland (D-Ga.) called for new regulations after being subjected to a barrage of ads in Georgia urging him to vote for the ban on partial-birth abortions. The problem with regulating such ads as if they were campaign expenditures is that Cleland is only some six months into a six-year term and will not face voters again until 2002. A "Blue Dog Democrat" reform bill would limit such ads because the "candidate risks losing control of the tone, clarity and content of his or her own campaign."

Thus, the real reason for limiting issue advocacy is revealed: politicians do not want to contend with citizens bringing up issues they would rather ignore. In a classic "I'm from the government and I'm here to help you" story, politicians are attempting to use understandable disgust at their own campaign tactics as an excuse to muzzle anyone who dares to criticize them: Republicans are outraged by labor unions' issue ads; Democrats are outraged at Christian Coalition scorecards; both types of ads are paid for with soft money; and politicians from both parties are trying to figure out how to stop them.

Perhaps the most striking expression of this attitude is the declaration by House minority leader Richard Gephardt (D-Mo.) that "what we have is two important values in conflict: freedom of speech and our desire for healthy campaigns in a healthy democracy. You can't have both."[5] The truth, however, is that these values are not in conflict: the

5. Michael Lewis, "A Question of Honor: The Subversive," *New York Times Magazine*, May 25, 1997, p. 32.

First Amendment's guarantee of freedom of speech was designed to ensure a healthy democracy. One cannot exist without the other.

CAN CONGRESS LIMIT SOFT MONEY DONATIONS?

The courts generally have insisted that Congress can regulate only direct campaign spending that calls explicitly for the election or defeat of a particular politician: what the Supreme Court called "express advocacy" in its landmark 1976 decision in *Buckley v. Valeo*. To do more than this would encroach on the right to free speech. Freewheeling political debate would be impossible if citizens or organizations had to wonder whether every statement was or was not permissible. Therefore, regulations on political discussions require a "bright line" test, with specific words such as *vote for*, *elect*, or *defeat* required to trigger regulation.

Since 1976, the Supreme Court has referred to the *Buckley* decision more than 100 times in setting limits on the government's authority to regulate political debate. In a 1996 case, *Colorado Republican Committee v. FEC*,[6] the Court stated very clearly that the "FECA permits unregulated 'soft money' contributions to a party for certain activities." In making this ruling, the Court referred not to any specific permission from Congress for soft money but to the act's definition of "contribution," which was circumscribed in *Buckley* to limit only "express advocacy" of the election or defeat of a federal candidate. In other words, the right to soft money contributions rests in the constitutional limitation on Congress's power to regulate speech. Among the implications of this ruling is that Congress has no authority to regulate contributions for or spending on state elections, even when those contributions are made by, to, or through national political parties.

That political parties, or any other group of Americans, have a right to spend unlimited amounts for politically oriented issue advertising has long been clear; now the Supreme Court has clarified that contri-

6. *Colorado Republican Federal Campaign Committee v. Federal Election Commission*, No. 95-489, 135 L.Ed. 2nd 795.

butions for such purposes may not be regulated. *Buckley* distinguished between spending by campaigns and political committees, which may not be limited, and contributions to those committees, which may be subject to limits. Some argue by analogy that Congress might limit soft money donations to parties. Even ignoring the Supreme Court's flatly contrary statement in *Colorado*, extending campaign regulation to activities that, by definition, are not campaign activities would be difficult for the following reasons:

1. The Supreme Court consistently has denied efforts to regulate anything other than campaign funds and "express advocacy" for or against a candidate.
2. If groups other than political parties can collect unlimited donations for soft money activities, political parties arguably have that same right under *Colorado*.
3. *Colorado* suggests that it will be difficult to show a potential for corruption (which is necessary to justify donation limits) through donations to political parties.

Buckley specifically rejected an intent test in defining spending to influence a federal election. To claim that soft money, which by definition avoids express advocacy, influences elections in ways that justify regulation flatly contradicts *Buckley*. The Court even anticipated use of the express advocacy loophole exactly as now objected to:

> It would naively underestimate the ingenuity and resourcefulness of . . . groups desiring to buy influence to believe that they would have much difficulty devising expenditures that skirted the restriction on express advocacy of election or defeat but nevertheless benefitted the candidate's campaign.

Colorado suggests that the Supreme Court will not buy the argument that there is something unique about political parties that legitimizes

restrictions not imposed on other groups: "We do not see how a Constitution that grants to individuals, candidates and ordinary political committees the right to make unlimited independent expenditures could deny the same right to political parties." By similar reasoning, the ability of nonpartisan organizations to collect unlimited donations for issue advocacy would be extended to political parties.

If the Supreme Court did agree to revise its express advocacy rulings, it would still require a showing of potential corruption to legitimize limits on soft money donations. Again, the *Colorado* ruling presents a roadblock: "If anything, an independent expenditure made possible by a $20,000 donation, but controlled and directed by a party rather than the donor, would seem less likely to corrupt than the same (or a much larger) independent expenditure made directly by that donor."

By extension, the Court would find less danger of corruption in soft money donations to parties than in direct (and undisclosed) spending by individuals, unions, or corporations.

Despite the Supreme Court's clarity, regulators and attorneys continue to advance theories to explain why it is acceptable to bend the Constitution to stop some practice they consider objectionable. Some argue that everything a political party does must be related to electing candidates, so it might be acceptable to limit party soft money. But even limits on soft money (well short of a ban) appear to be off the table in the *Colorado* ruling: "We do not see how a Constitution that grants to individuals, candidates and ordinary political committees the right to make unlimited independent expenditures could deny the same right to political parties."

The right to make independent expenditures was established by the same 1976 *Buckley* decision that declared soft money beyond the power of government to regulate. Taken together, the *Buckley* and *Colorado* decisions point inescapably to the conclusion that political parties have a right to spend whatever they wish on activities not directly related to federal elections.

CAN CONGRESS REGULATE ISSUE ADVERTISING?

Limiting or requiring disclosure of soft money issue advertising by political parties and other groups will prove nearly impossible under *Buckley* and other First Amendment rulings.

Express Advocacy

As *Buckley* makes clear, the Supreme Court requires "express advocacy" to trigger federal regulation of political advertising. The fact that issue discussions "tend naturally and inexorably to exert some influence on voting at elections" makes no difference. Noting that candidates "are intimately tied to public issues," the Court acknowledges that "the distinction between discussion of issues and advocacy of election or defeat of candidates may often dissolve in practical application." It is for this very reason that it crafted the express advocacy standard; thus, arguing that certain issue ads are practically the same as election advocacy is unlikely to strike the Court as convincing.

One Ninth Circuit case, *FEC v. Furgatch*,[7] is slightly broader than *Buckley* in its definition of express advocacy. The Supreme Court did not review *Furgatch*, however, partly because the FEC argued that it was based on a unique set of facts and unlikely to be more broadly applicable. In addition, the Court had reaffirmed its original *Buckley* express advocacy standard only a month before, in *FEC v. Massachusetts Citizens for Life*.[8]

Even if one accepts *Furgatch*, it provides little additional room for regulation, requiring that a communication be "unmistakable and unambiguous" and present a "clear plea for action" (to vote) about which there can be no reasonable doubt. "We emphasize," the Court notes in *Furgatch*, "that if any reasonable alternative reading of speech can be suggested, it cannot be express advocacy subject to the [FECA's] disclo-

7. *Federal Election Commission v. Harvey Furgatch*, No. 88-6047, 869 F. 2nd 1256.

8. *Federal Election Commission v. Massachusetts Citizens for Life, Inc.*, No. 85-701, 479 U.S. 238 (1986).

sure requirements." Illustrating the difficulty of attempting to regulate in this area, most issue ads already contain appeals to take some action other than voting, such as writing an officeholder or letting a nonincumbent candidate "know what you think." Any such appeal would make a *Furgatch* standard inapplicable. Any slight expansion of "express advocacy" would cause interested groups merely to recast their ads to avoid whatever bright line test the courts approved.

Intent, Timing, and Identification of Candidates

Both *Buckley* and other cases explicitly reject any sort of intent test for regulating speech. As *Buckley* again makes clear, such tests put a speaker "wholly at the mercy of the varied understanding of his hearers, and consequently of whatever inference may be drawn as to his intent and meaning." A speaker or an ad may well mean to support or oppose a candidate; but as long as explicit appeals to vote are avoided, such speech may not be regulated.

Many proposals to regulate (or require disclosure of) issue advertising focus on their identification of a candidate in a time period before an election. This standard, however, reaches only half of the express advocacy requirement. Blanket regulation of ads simply because they contain a politician's name or image is clearly unconstitutional. A specific election-related appeal would be required to trigger regulation. Requiring advance notice of such ads would excite particular scrutiny as a form of prior restraint on free speech.

Lobbying and Broadcasting

Attempting to regulate issue ads as lobbying would prove even more difficult than arguing that they were election-related. In its 1995 decision in *McIntyre v. Ohio Elections Commission*,[9] the Supreme Court defined a right to anonymous pamphleteering even when the subject of the

9. *Joseph McIntyre, Executor of Estate of Margaret McIntyre, Deceased, Petitioner v. Ohio Elections Commission*, No. 93-986, 514 U.S. 334.

advertising was an election referendum. Describing efforts to influence public opinion as "core First Amendment activities," the Court specified that regulation of such activities is subject to "exacting scrutiny" and must be "narrowly tailored to meet a compelling state interest."

In *McIntyre*, the Ohio agency argued that a law requiring disclosure of the author's name and address was needed to discourage fraud or libel and to provide voters with a way to evaluate materials. The Court ruled that a blanket disclosure requirement was overly broad as a protection against potentially misleading statements and that the "informational interest" of voters was "plainly insufficient" to justify mandatory disclosure. The *Federalist Papers* arguing for the adoption of the Constitution were printed anonymously, the Court pointed out. Issue advertising unrelated to an election referendum would receive even more protection than the *McIntyre* statements.

The practical limit on the number of broadcast licenses has been advanced as an excuse for requiring mandatory disclosures regarding issue ads on television. The Supreme Court has said that the scarcity of broadcast licenses can justify a requirement that broadcasters provide equal time for opposing viewpoints and that they be fair in their public affairs programming. But a requirement that broadcasters be fair or balanced cannot be stretched to justify regulating those who buy time from broadcasters. The fact that statements are paid advertising rather than a publisher's (or station owner's) own opinions makes no difference from a constitutional standpoint. Congress may promote opportunities for a variety of viewpoints to be heard, but it may not regulate groups simply because they take advantage of those opportunities.

CONCLUSION

Political parties enjoy the same rights as other groups to participate in political debates. Party spending cannot be limited except for direct election spending coordinated with candidates and possibly not even then. Further, Congress cannot limit donations to parties for activities that it cannot regulate directly, including activities protected by the First

Amendment and state elections. Limits on spending or donations for activities other than federal campaigns are beyond the power of Congress. Congress can address divisions between regulated and unregulated activities of political parties, but it cannot arbitrarily define issue discussions, including advertising, as campaign related.

Even if the Supreme Court allowed Congress to change the law to limit political party soft money, we would be far worse off than we are today. Once again, political activity would follow the line of least resistance. Since the right of unions, business groups, and others to conduct unlimited, unregulated, and unreported issue advertising is clear, donors would turn to those groups, which are far less accountable than political parties, to run the same sort of ads we see today.

Politicians are aware of this dynamic, which is why they always couple proposals to limit political party fund-raising with efforts to regulate public affairs discussions by labor unions, business organizations, citizen groups, and even individuals. Rather than just clean up their own campaign practices, President Clinton and many members of Congress want to regulate what everyone else has to say about them. In other words, when politicians say "reform," citizens should run for cover.

Policymakers are struggling with the consequences of constitutionally protected efforts to avoid regulation of political activity. Adding new regulations and limits to the extent permitted by the courts will serve only to add complexity and spur further avoidance of regulated activities. Instead of adding new rules, lawmakers should consider relaxing current rules to encourage political activity to flow through minimally regulated and disclosed channels.