



A Narrow and Appropriate Response to Cloaked Electioneering: Measuring the Impact of the 60-Day Bright-Line Test on Issue Advocacy

**A Report from the Brennan Center for Justice
New York University**

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The right of all persons to advocate controversial political issues and to press for the furtherance of these issues in Congress, legislatures or among the public is a cherished and constitutionally-necessary principle of democracy. So is the right of the American public to have reasonable access to information about candidates when casting ballots, including an opportunity to know who are the key players financing advertisements for or against candidates. These principles work hand-in-hand in providing robust political speech and an informed electorate.

In recent years, particularly in the 2000 election, party committees and independent groups have increasingly sought to blur the distinction between issue advocacy and candidate electioneering, thereby evading the responsibilities associated with campaigning—such as informing the public who is paying for campaign ads—all the while casting a pall over the intent and purposes of issue advocacy in general. The distinction has become blurred through the dramatic rise of electioneering ads disguised as issue advocacy, widely known as “sham issue ads.”

A congressional proposal, offered as the Snowe-Jeffords amendment to the McCain-Feingold campaign finance reform bill (S 27), attempts to re-establish the distinction between issue ads and electioneering ads by imposing some, but not all, of the campaign finance regulatory scheme on a new category of political advertising called “electioneering communications.” In brief, any broadcast advertisement is an electioneering communication if the ad: (1) airs within 60 days of a general election, or 30 days of a primary election; (2) features a candidate’s name, image or likeness; (3) reaches the candidate’s general constituency; and (4) is paid for by an individual or group that has spent \$10,000 or more on electioneering communications within a calendar year.

In an effort to bring the debate over issue advocacy out of the realm of hunches and speculation, the Brennan Center for Justice at NYU has worked in cooperation with Professor Ken Goldstein at the University of Wisconsin/Madison in developing a national database of political television advertising in the 2000 election. Using data from the Campaign Media Analysis Group (CMAG) to monitor political advertising in the nation’s top 75 media markets, researchers at the Brennan Center and the University of

Wisconsin have documented the frequency, content and costs of television ads in the 2000 election, duplicating a similar study conducted in 1998. The study is funded by the Pew Charitable Trusts.

The research has produced a number of key findings. Among these findings are:

- Independent groups have spent, conservatively estimated, about \$98 million on media buys for political television commercials in 2000—roughly a six-fold increase since 1998. Even when comparing political advertising affecting just House elections, political advertising by independent groups has sharply risen over 1998 levels.
- In the 2000 presidential election, voters received the largest share of political advertising messages from party committees and independent groups, not candidates.
- The “magic words” test of whether an advertisement constitutes express advocacy as opposed to issue advocacy has no basis in the reality of political advertising.
- All television ads sponsored by party committees are perceived by viewers as electioneering ads.
- Over the course of the year, a majority of television ads (59%) sponsored by independent groups are perceived by viewers as electioneering ads. Within 60 days of the election, the proportion of group-sponsored ads viewed as electioneering (86%) overwhelm those perceived as genuine issue ads.
- Among those ads that would be “captured” by the 60-day bright-line test and classified as electioneering communications subject to financial disclosure laws, only a fraction of a percent are genuine issue ads.
- Issue advocacy not only becomes overwhelmingly electioneering in nature as Election Day approaches, but also increasingly negative in tone. Issue ads by independent groups are far more likely than candidate or even party ads to attack candidates.

A. Spending and Frequency of Television Buys in the 2000 Election

The Brennan Center database shows that there were 940,755 airings of political television commercials over the 2000 calendar year in the nation’s top 75 media markets—at a total cost of \$672,045,453. The greatest share of these airings occurred in the last few months prior to the general election (*see* Table 1).

Over all elections combined in 2000, candidates were the principal sponsors of most political television ads, with party committees running second and independent groups third. Parties played almost no role in primary elections, but became a viable political player in the general election at all levels—House, Senate and Presidential. There was, however, one very important caveat to this overall trend: for the first time in recent history, political advertising by parties and groups outnumbered political ads by candidates in the 2000 presidential general election. That means political players other than candidates were primarily responsible for setting the political agenda of which issues

were discussed and which candidate images were seen on the television airwaves (*see* Table 2-1 through Table 2-4).

Although group-sponsored ads are not as prominent as candidate and party ads, group ads are rapidly gaining ground. In a matter of just a few years, issue advocacy has come on the political scene with a vengeance. Issue advocacy largely became a concern in the 1996 presidential election, spiraled in use in the 1998 congressional elections, and increased six-fold two years later. In the 2000 election, there were 143,194 airings of political television ads sponsored by independent groups—at a cost conservatively estimated above \$98 million (*see* Table 3-1 through Table 3-4). [All cost figures offered in this study under-estimate the actual costs because (i) estimates do not include any costs beyond media buys, such as production costs; (ii) estimates are of ideal market prices, not actual market prices that increase as demand increases or as election day nears; and (iii) estimates are limited to major media markets and do not include all media markets.]

B. Electioneering and the “Magic Words”

Under the direction of Professor Ken Goldstein, students at the University of Wisconsin/Madison viewed each of the 3,327 unique political ads that aired a total of 940,755 times in various markets across the nation and coded each of the ads for content. Most of the content codes were objective in nature: Did the ad use any of the “magic words” of express advocacy such as “vote for (candidate X),” “reject (candidate X),” or “(candidate X) for Congress”? Was a candidate identified or pictured in the ad? What action, if any, did the ad encourage viewers to take? Some of the content codes were subjective in nature, the most important of which being: In your opinion, is the primary purpose of this ad to provide information about or urge action on a bill or issue, or is it to generate support or opposition for a particular candidate? As such, the study applies a “reasonable person” standard to the content of the television ads.

The results that can be gleaned from this database are numerous and fascinating. First of all, it is evident that no one in the political arena—candidates, parties or groups—makes much use of the “magic words” of express advocacy.

In its landmark 1976 *Buckley* decision, the U.S. Supreme Court ruled that federal election campaign finance laws only address advertisements that “expressly advocate” the election or defeat of a specific candidate.¹ The court explained in a footnote—and without the benefit of empirical data—that express advocacy required such explicit words as “vote for,” “vote against,” “cast your ballot for,” or “elect.”² In other words, if an ad does not contain what has since become known as the “magic words” of express advocacy, or other such explicit words of electioneering as interpreted by subsequent court rulings, then the ad is not defined as a campaign ad and thus falls outside the regulatory regime of campaign finance laws. The ad would then be classified as an “issue ad” not subject to disclosure under the FECA, may be paid for by corporate or union funds, and is not subject to contribution limits.

When the “magic words” test is applied to campaign advertisements in the real world, it has very little, if any, relevance in defining electioneering activity. Political ads by party committees, which are universally perceived as electioneering by the coders in

¹ *Buckley v. Valeo*, 424 U.S. 1 at 44, 79-80 (1976).

² *Id.* At 44, n. 52.

this study, almost never employ the magic words. More telling, candidate ads, which are universally defined as electioneering by law, employ the magic words only 9.6% of the time. More than nine out of 10 candidate ads do not end with such proclamations as “vote for me” or “reject my opponent.” Candidate ads, as well as party ads and groups ads, are usually much more subtle and suggestive, avoiding any use of the “magic words,” and thus more effective at electioneering (*see* Tables 4 and 5).

C. Electioneering and Issue Advocacy

Within a matter of just a few years, special interest groups have turned the “magic words” standard of express advocacy into a major loophole of federal and state campaign finance laws. Through the veneer of issue advocacy, corporations, labor unions and ideological groups have found a new way to influence elections and evade contribution limits and disclosure requirements. Spending more than \$98 million on media buys in 2000, these groups have saturated the airwaves with political advertising.

Without a doubt, a significant share of this political advertising is legitimate, discussing pressing political issues or pending legislative matters and attempting to public policy. According to the coders of this study, about \$41 million of group spending on political advertising involved genuine issues or legislation. However, substantially more was spent by independent groups on ads perceived as campaign ads, intending to influence the outcome of candidate elections. Indicatively, while issue ads that are perceived as discussing political issues or pending legislation—genuine issue ads—are distributed fairly evenly throughout the year, electioneering issue ads primarily air near the Election Day. Nearly 80% of group sponsored issue ads perceived as electioneering aired within 60 days of November 7; most of the remainder of electioneering issue ads appear to have aired around primary election dates (*see* Tables 6 and 7).

D. The 60-Day Bright-Line Test

Electioneering issue ads, of course, avoid using the “magic words” that would immediately classify them as campaign ads for or against candidates, but they do not shy away from talking about the candidates. Almost all group sponsored ads perceived as electioneering focused on a candidate, either by mentioning a candidate’s name or depicting a candidate’s image, or both. Very few ads perceived as genuine issue ads depicted a candidate; those that did referred to a candidate indirectly, usually as a sponsor of a bill. Within 60 days of the general election, about 86% of electioneering issue ads sponsored by groups depicted a candidate. Others made references to a candidate, such as condemning the policies of a particular party or administration (*see* Table 8).

Applying the Snowe-Jeffords 60-day bright line test to these ads produces very non-intimidating results. Of all group sponsored issue ads that depict a candidate within 60 days of the election, 99.4% are viewed as electioneering ads in reality. Only 0.6% of ads that the bright-line test would capture are viewed as genuine issue ads (*see* Table 9). In absolute numbers, three genuine issue ads (which aired a total of 331 times) would be captured by the Snowe-Jeffords bright-line test. These ads would have to disclose who paid for them.

E. Tone of Issue Ads

Though having no direct bearing on the bright-line test or campaign finance law in general, it is worth noting the comparative tone of issue ads. Issue ads viewed as electioneering in nature are decisively negative in tone and attack a candidate's character.

Candidate ads and, less so, party ads are much more inclined than group-sponsored ads to promote candidates or to compare and contrast candidates on issues. Conversely, electioneering "issue" ads sponsored by groups tend to attack candidates and attempt to denigrate their character. These ads tend to be very negative in tone, do not discuss substantive issues, and frequently focus on the personal histories of candidates. As Election Day nears, electioneering issue ads become increasingly negative and personal in tone (*see* Tables 10-1 through 10-4).

F. Conclusion

The empirical evidence offered in this study confirms much of what is already known by common sense. Issue advocacy has become a new avenue for special interest groups to evade federal and state campaign finance laws and affect election outcomes. Disguised as issue ads by avoiding the magic words of express advocacy, corporations, unions and ideological groups are rapidly learning that campaign contribution limits and disclosure requirements under federal and state laws can be ignored through "sham" issue ads. This type of electioneering activity is increasing several-fold each election and casts a negative and personal tone to campaigns. The Snowe-Jeffords 60-day bright-line test offers a sensible standard for defining what constitutes electioneering, far more sensible than the "magic words" test. At the same time, the Snowe-Jeffords bright-line test is narrowly tailored so as not to impinge on genuine issue advocacy.

Table 1

Frequencies of All Campaign Ads, by Month

Statistics

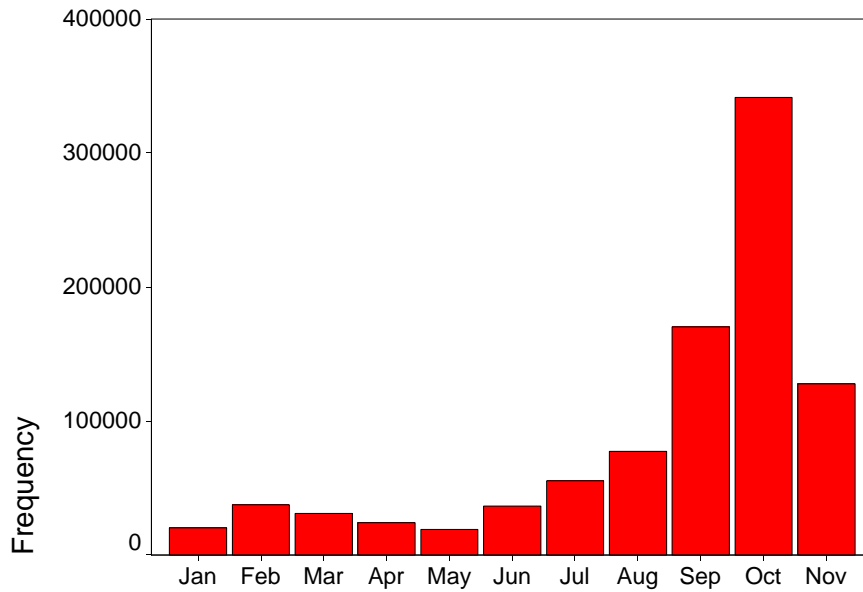
MONTH

N	Valid	940733
	Missing	22

MONTH

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Jan	20231	2.2	2.2	2.2
	Feb	37386	4.0	4.0	6.1
	Mar	30944	3.3	3.3	9.4
	Apr	24037	2.6	2.6	12.0
	May	19178	2.0	2.0	14.0
	Jun	36652	3.9	3.9	17.9
	Jul	55294	5.9	5.9	23.8
	Aug	77441	8.2	8.2	32.0
	Sep	170300	18.1	18.1	50.1
	Oct	341394	36.3	36.3	86.4
	Nov	127876	13.6	13.6	100.0
	Total	940733	100.0	100.0	
Missing	System	22	.0		
Total		940755	100.0		

MONTH



MONTH

Table 2-1

**Television Ads by Candidate, Parties and Groups by Election Type:
All Elections**

Table Total

		Candidate		Party	
		Count	Col %	Count	Col %
Generate support	Magic words	52420	9.6%	5282	2.3%
	No magic words	487959	89.4%	225719	97.7%
Provide information	Magic words	106	.0%		
	No magic words	5114	.9%		
Table Total		557935	100.0%	231026	100.0%

Table Total

		Group		Table Total	
		Count	Col %	.00	
Count	Col %			Count	Col %
Generate support	Magic words	2835	2.1%	61021	6.7%
	No magic words	75835	56.3%	790118	86.6%
Provide information	Magic words	418	.3%	524	.1%
	No magic words	55566	41.3%	60708	6.7%
Table Total		143194	100.0%	940755	100.0%

Table 2-2

**Television Ads by Candidate, Parties and Groups by Election Type:
Presidential General Elections**

Presidential-General

		Candidate		Party	
		Count	Col %	Count	Col %
Generate support	Magic words	2615	2.6%	2363	1.9%
	No magic words	95446	93.7%	120997	98.1%
Provide information	Magic words				
	No magic words	3819	3.7%		
Table Total		101880	100.0%	123360	100.0%

Presidential-General

		Group		Table Total	
		Count	Col %	.00	
Count	Col %			Count	Col %
Generate support	Magic words	9	.0%	4987	2.0%
	No magic words	21935	99.9%	238378	96.4%
Provide information	Magic words				
	No magic words	21	.1%	3840	1.6%
Table Total		21966	100.0%	247206	100.0%

Table 2-3

Party and Group Ads Outnumbered Candidate Ads: Presidential General Election

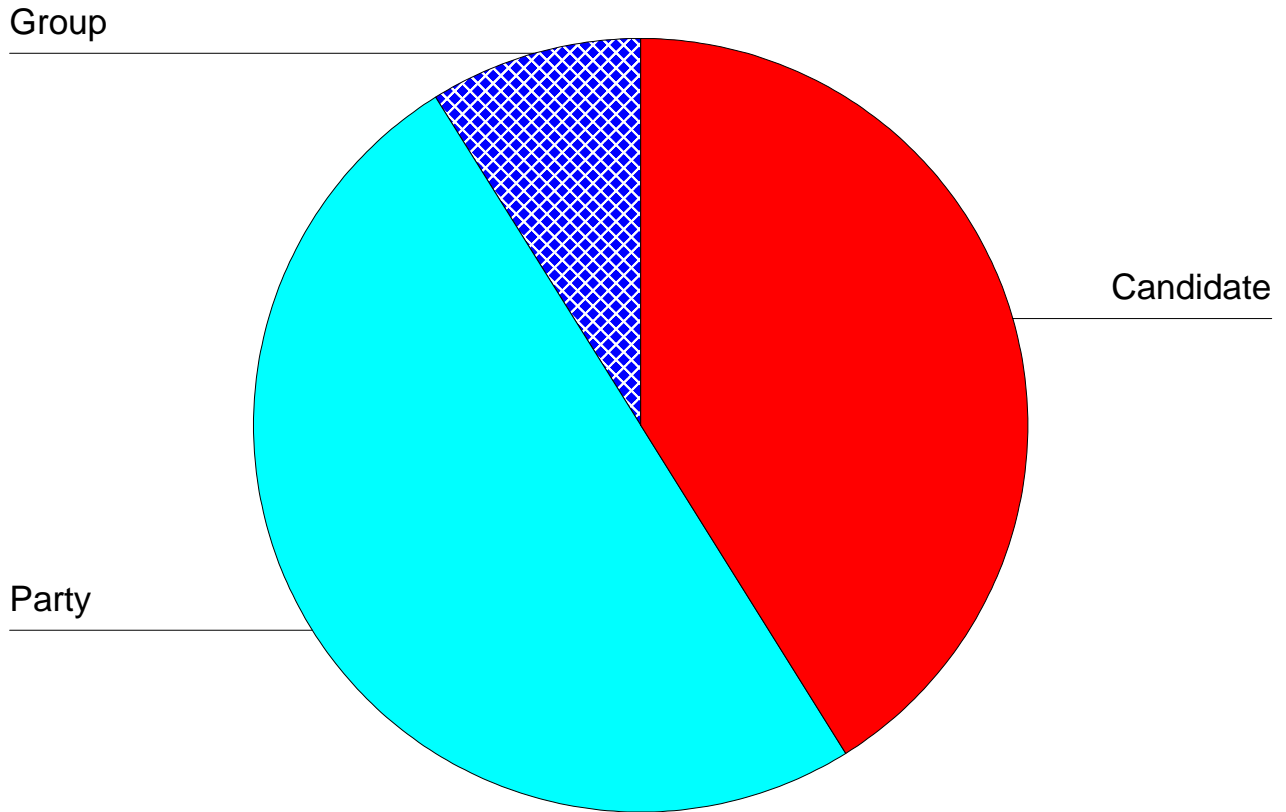


Table 2-4

**Television Ads by Candidate, Parties and Groups by Election Type:
Senate General Elections**

Senate-General

		Candidate		Party	
		Count	Col %	Count	Col %
Generate support	Magic words	6208	4.6%	1783	3.4%
	No magic words	128803	95.1%	51256	96.6%
Provide information	Magic words				
	No magic words	395	.3%		
Table Total		135406	100.0%	53039	100.0%

Senate-General

		Group		Table Total	
		Count	Col %	.00	
Count	Col %			Count	Col %
Generate support	Magic words	1359	9.0%	9350	4.6%
	No magic words	12926	86.0%	192985	94.8%
Provide information	Magic words				
	No magic words	738	4.9%	1133	.6%
Table Total		15023	100.0%	203468	100.0%

Table 2-5

**Television Ads by Candidate, Parties and Groups by Election Type:
House General Elections**

House-General

		Candidate		Party	
		Count	Col %	Count	Col %
Generate support	Magic words	15399	12.3%	903	1.7%
	No magic words	109397	87.4%	51919	98.3%
Provide information	Magic words	52	.0%		
	No magic words	338	.3%		
Table Total		125317	100.0%	52847	100.0%

House-General

		Group		Table Total	
		Count	Col %	.00	
Count	Col %			Count	Col %
Generate support	Magic words	1467	3.6%	17769	8.1%
	No magic words	38178	94.2%	199494	91.3%
Provide information	Magic words			52	.0%
	No magic words	898	2.2%	1236	.6%
Table Total		40543	100.0%	218707	100.0%

Table 3-1.

Total Media Buys in the 75 major Markets, by Candidates, Parties and Groups

	Sum
Candidate	\$407,226,090
Party	\$163,055,054
Group	\$98,303,365
Table Total .00	\$672,045,453

Graph

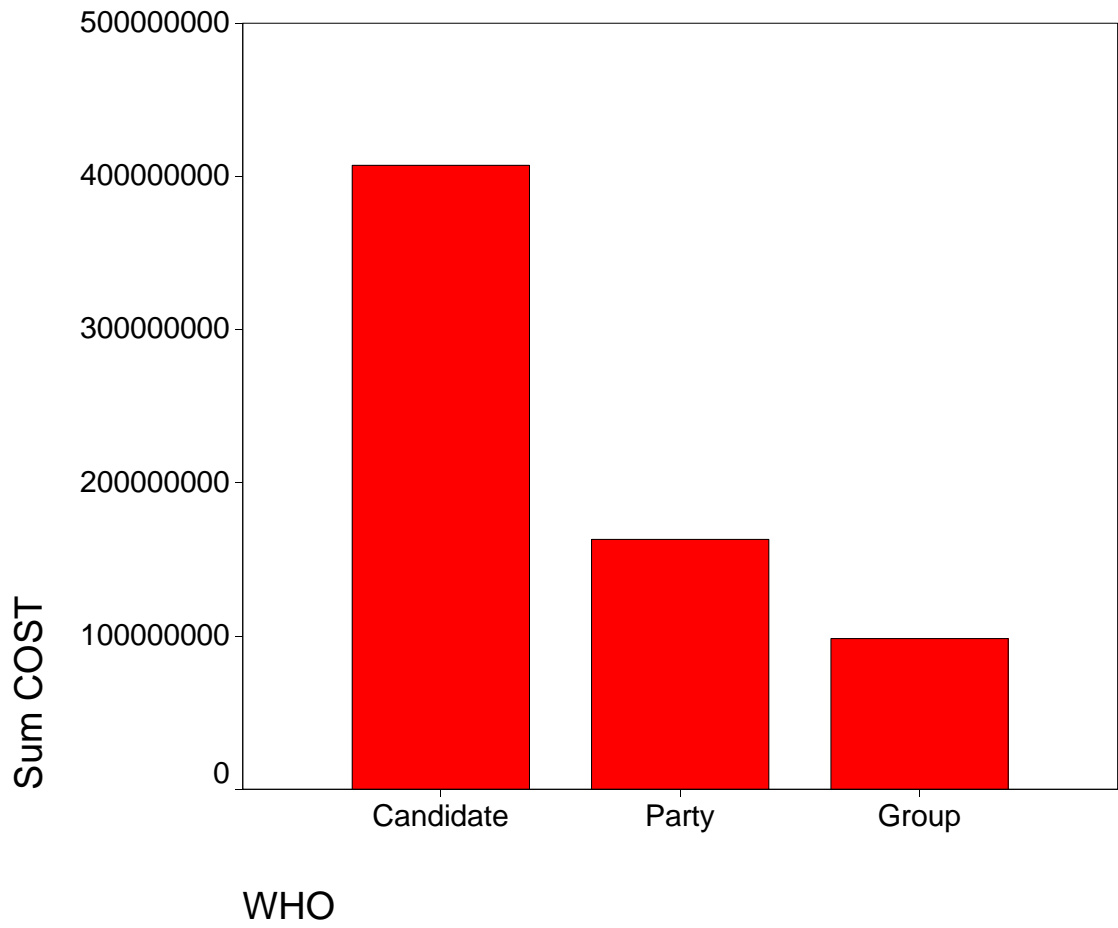


Table 3-2

Media Buys in the Presidential General Election by Candidates, Parties and Groups

Presidential-General

	Sum
Candidate	\$70,839,767
Party	\$81,439,726
Group	\$15,198,074
Table Total .00	\$167,477,567

Graph

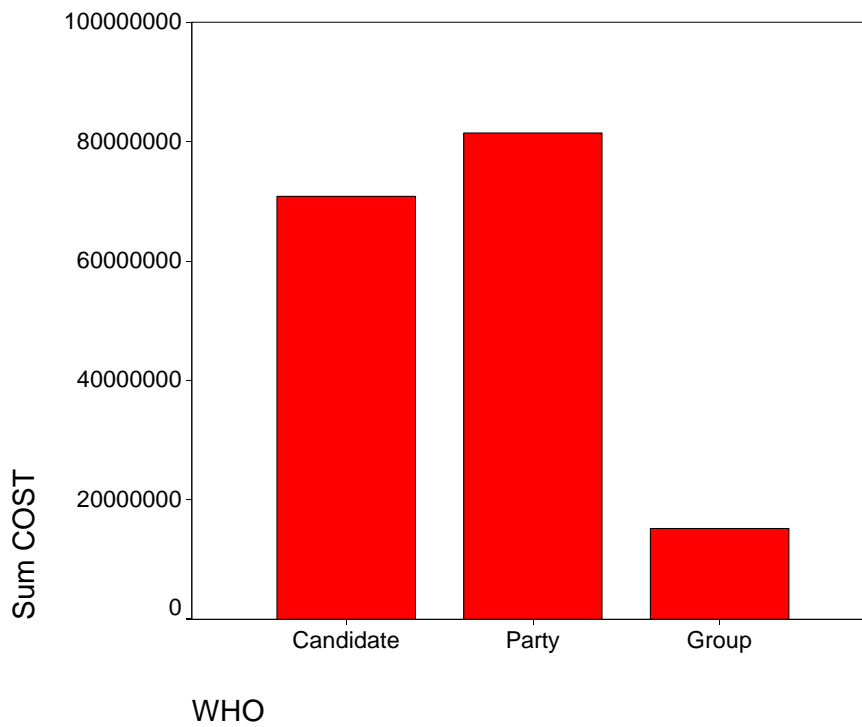


Table 3-3

Media Buys in the Senatorial General Election by Candidates, Parties and Groups

Senate-General

	Sum
Candidate	\$128,191,745
Party	\$37,519,354
Group	\$10,866,058
Table Total .00	\$176,577,157

Graph

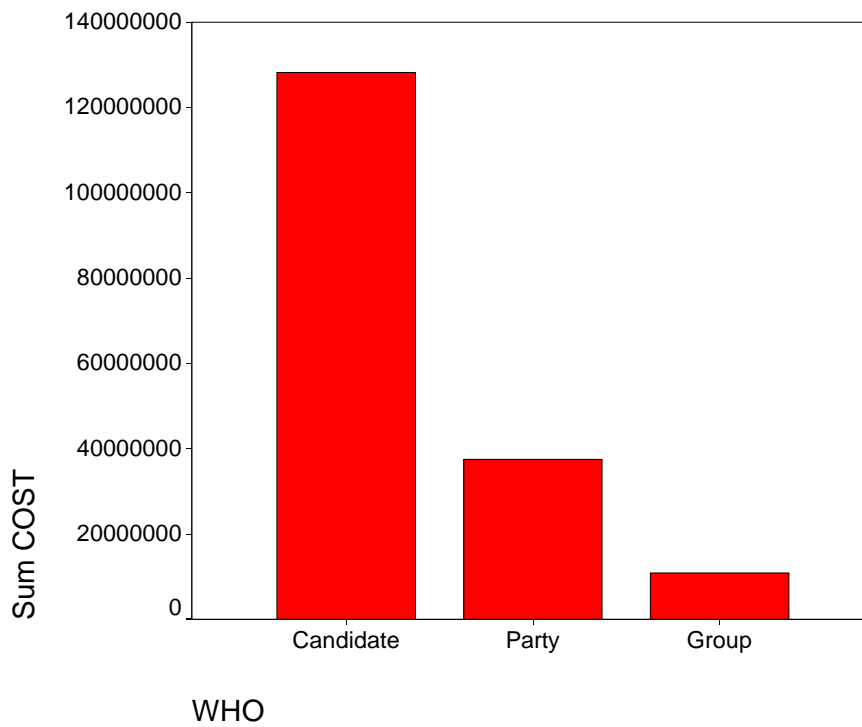


Table 3-4

Media Buys in the House General Election by Candidates, Parties and Groups

House-General

	Sum
Candidate	\$79,892,649
Party	\$42,829,686
Group	\$24,744,395
Table Total .00	\$147,466,730

Graph

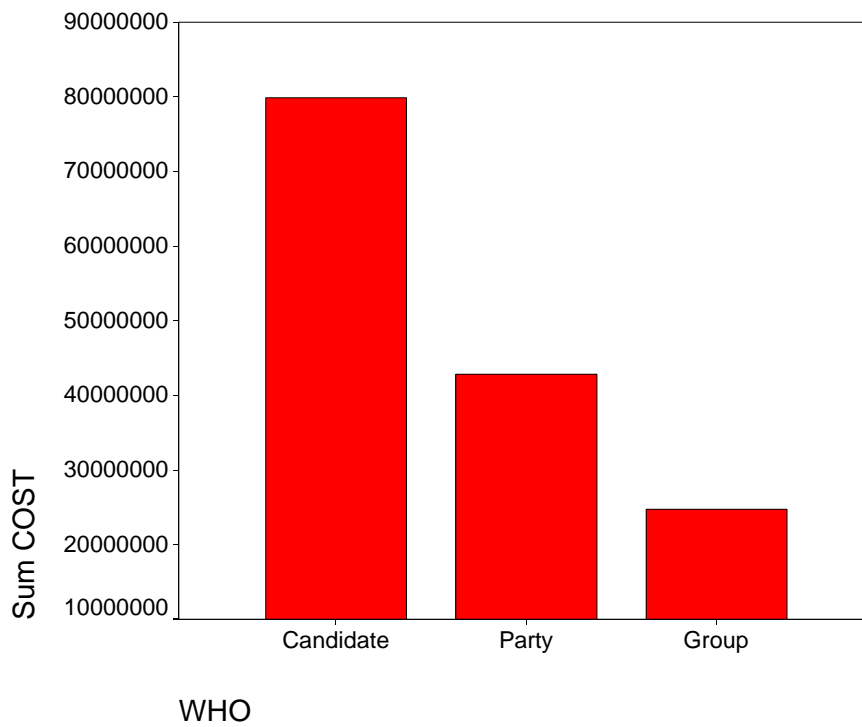


Table 4.

**All Television Advertisements Perceived as
Electioneering v. Providing Information
and Use of the Magic Words,
by Candidates, Parties and Groups**

		Candidate		Party		Group	
		Count	Col %	Count	Col %	Count	Col %
Generate support	Magic words	52420	9.6%	5282	2.3%	2835	2.1%
	No magic words	487959	89.4%	225719	97.7%	75835	56.3%
	Group Total	540379	99.0%	231001	100.0%	78670	58.4%
Provide information	Magic words	106	.0%			418	.3%
	No magic words	5114	.9%			55566	41.3%
	Group Total	5220	1.0%			55984	41.6%

		Group Total	
		Count	Col %
Generate support	Magic words	60537	6.6%
	No magic words	789513	86.6%
	Group Total	850050	93.3%
Provide information	Magic words	524	.1%
	No magic words	60680	6.7%
	Group Total	61204	6.7%

Table 5.

**All Ads Sponsored by Parties Are Perceived as Electioneering.
 Most Ads Sponsored by Groups Are Perceived as Electioneering.
 Neither Make Much Use of the Magic Words.**

		Party		Group		Table Total	
		Count	Col %	Count	Col %	Count	Col %
Generate support	Magic words	5282	2.3%	2835	2.1%	8117	2.2%
	No magic words	225719	97.7%	75835	56.3%	301554	82.5%
Provide information	Magic words			418	.3%	418	.1%
	No magic words			55566	41.3%	55566	15.2%
Table Total		231026	100.0%	143194	100.0%	374220	100.0%

Graph

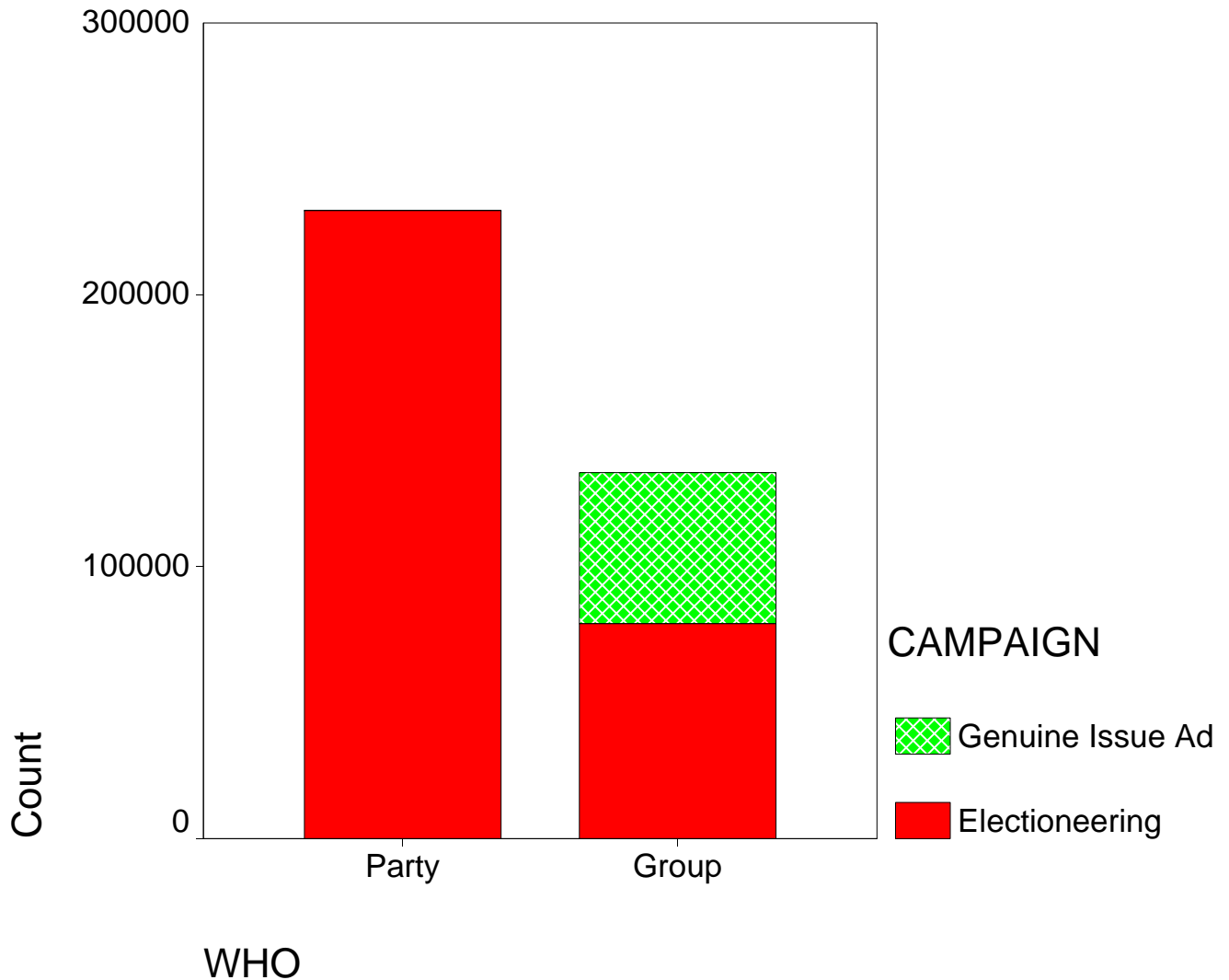


Table 6

**Electioneering v. Genuine Issue Advocacy by Groups,
Over the Year**

	Count	Col %	Sum
Electioneering	79088	58.7%	\$51,540,165
Genuine Issue Ad	55566	41.3%	\$41,600,874
Table Total .00	143194	100.0%	\$98,303,365

**Electioneering v. Genuine Issue Advocacy by Groups,
Within 60 Days of the Election**

	Count	Col %	Sum
Electioneering	62748	85.9%	\$42,209,344
Genuine Issue Ad	10287	14.1%	\$7,732,989
Table Total .00	80751	100.0%	\$54,189,948

**Electioneering v. Genuine Issue Ads by Groups Within 60 Days
of the Election that Depict a Candidate**

	No mention			Mention a candidate		
	Count	Col %	Sum	Count	Col %	Sum
Electioneering	9046	47.4%	\$5,408,294	53702	99.5%	\$36,801,050
Genuine Issue Ad	10037	52.6%	\$7,446,614	250	.5%	\$286,375

**Electioneering v. Genuine Issue Advocacy by Groups Within 30 Days
of the Election that Depict a Candidate**

	No mention			Mention a candidate		
	Count	Col %	Sum	Count	Col %	Sum
Electioneering	5913	61.0%	\$3,283,153	40564	99.8%	\$28,732,618
Genuine Issue Ad	3782	39.0%	\$2,288,959	78	.2%	\$45,374

Table 7

Distribution of Electioneering v. Genuine Issue Ads Sponsored by Groups, by Month

	Electioneering	Genuine Issue Ad	Table Total
			.00
	Count	Count	Count
Jan	545	3264	3809
Feb	232	3895	4129
Mar	1814	2229	4215
Apr	351	7698	8092
May	745	6088	6835
Jun	800	10151	11378
Jul	2379	9813	12219
Aug	7162	1546	8821
Sep	13724	4705	19040
Oct	35546	5147	46392
Nov	15785	1030	18255
Table Total	79088	55566	143194

Graph

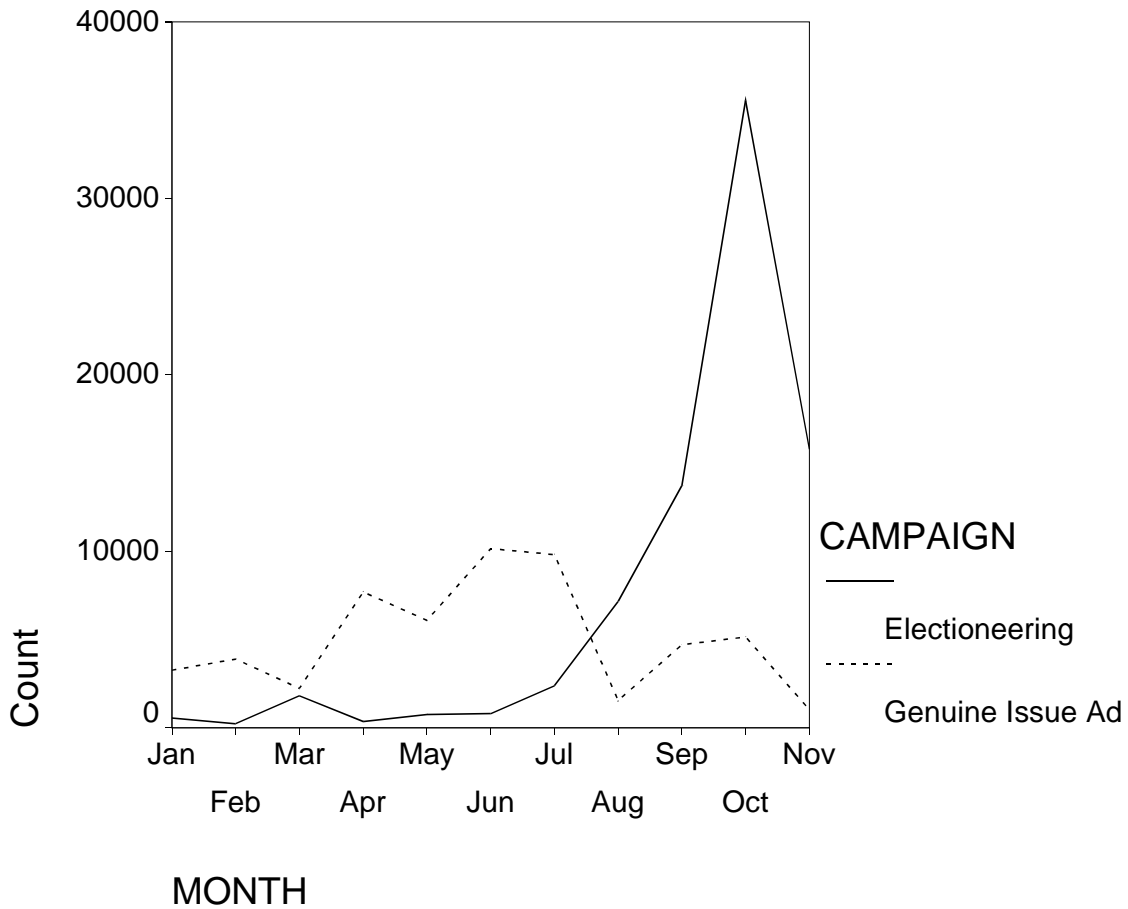


Table 8

Proportion of Electioneering v. Genuine Issue Ads Sponsored by Groups that Depict a Candidate Within 60 Days of the Election

	Electioneering			Genuine issue ad			Group Total	
	Count	Row %	Col %	Count	Row %	Col %	Count	Col %
No mention	8681	45.7%	13.1%	10321	54.3%	96.9%	19002	24.7%
Mention	57532	99.4%	86.9%	331	.6%	3.1%	57863	75.3%
Group Total	66213	86.1%	100.0%	10652	13.9%	100.0%	76865	100.0%

Graph

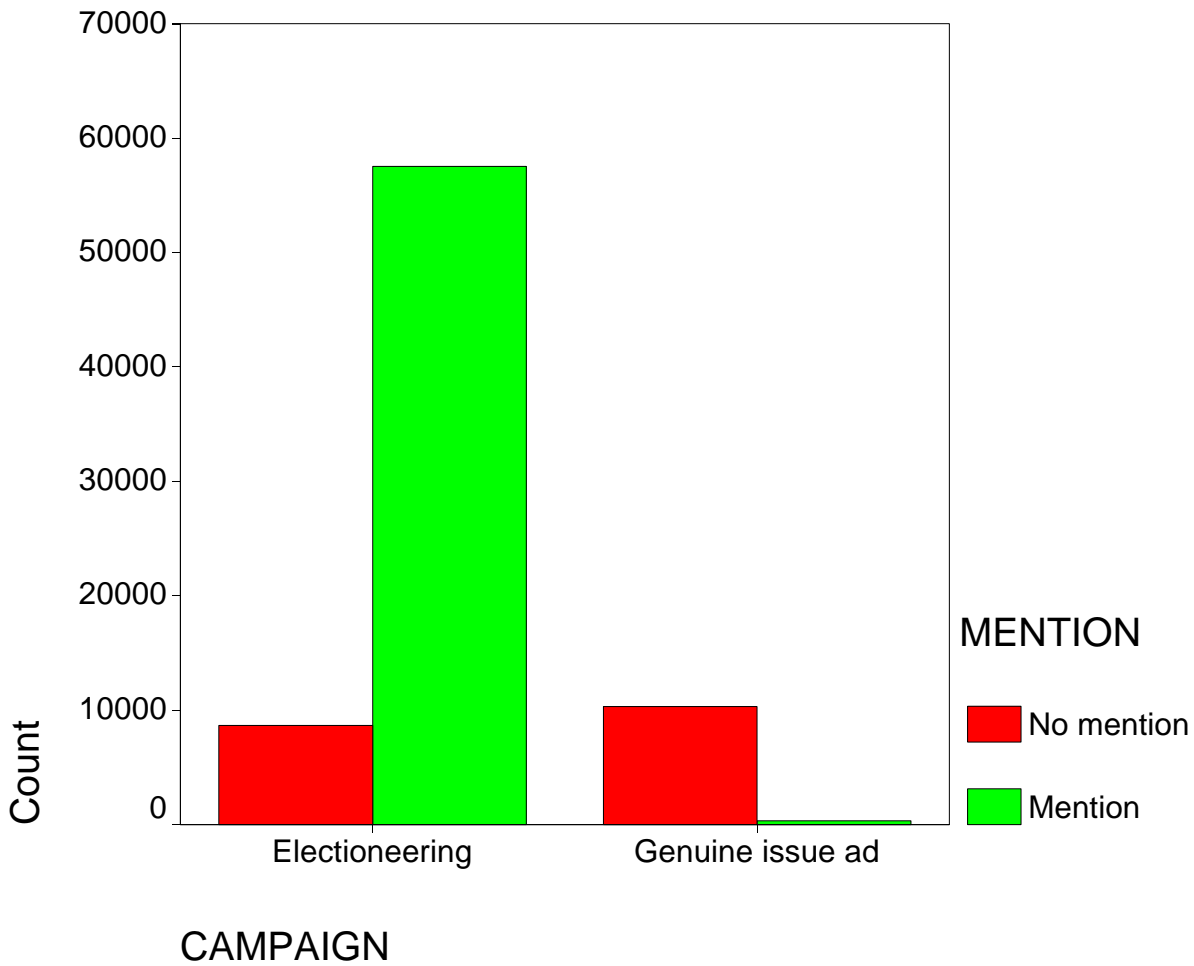


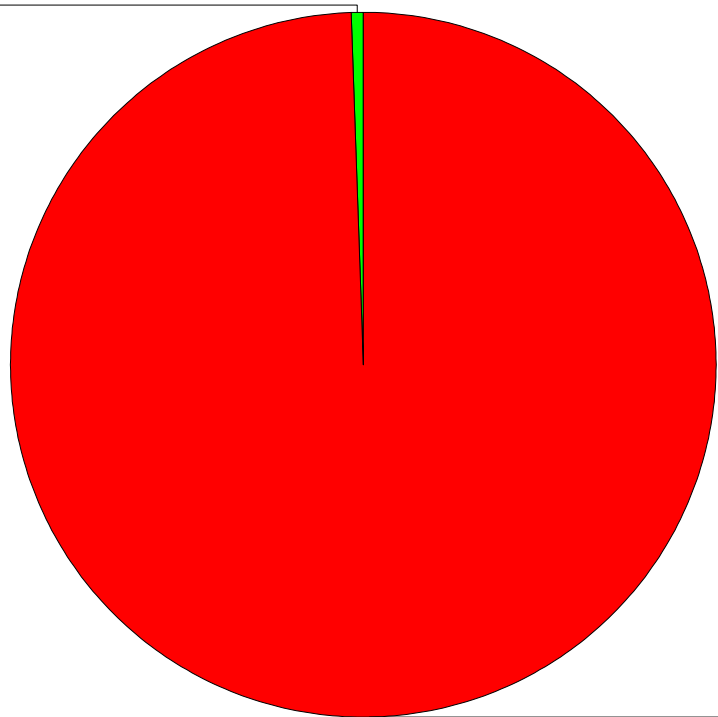
Table 9

Ads by Groups Aired Within 60 Days of the Election that Depict a Candidate

	Generate support		Provide information		Table Total	
	Count	Row %	Count	Row %	.00	
					Count	Row %
Magic words	2376	97.8%	54	2.2%	2430	100.0%
No magic words	55102	99.4%	331	.6%	55433	100.0%
Table Total	57478	99.3%	385	.7%	57863	100.0%

Genuine Issue Ads Aired Within 60 Days of the Election that Depict a Candidate, and Thus Would Be Caught by the Bright-Line Test, as a Proportion of All Group Ads that Depict a Candidate in the Same Time Period.

Genuine issue ad



Electioneering

Table 10-1

Tone of Ads Between Candidates, Parties and Groups

	Candidate		Party		Group	
	Count	Col %	Count	Col %	Count	Col %
Not applicable	269	.0%			62150	43.5%
Attack	85729	15.7%	104133	45.1%	55383	38.8%
Contrast	139729	25.6%	70401	30.5%	6752	4.7%
Promote	319382	58.5%	56467	24.4%	18404	12.9%
Unsure or Unclear	490	.1%			88	.1%
Table Total	557935	100.0%	231026	100.0%	143194	100.0%

Graph

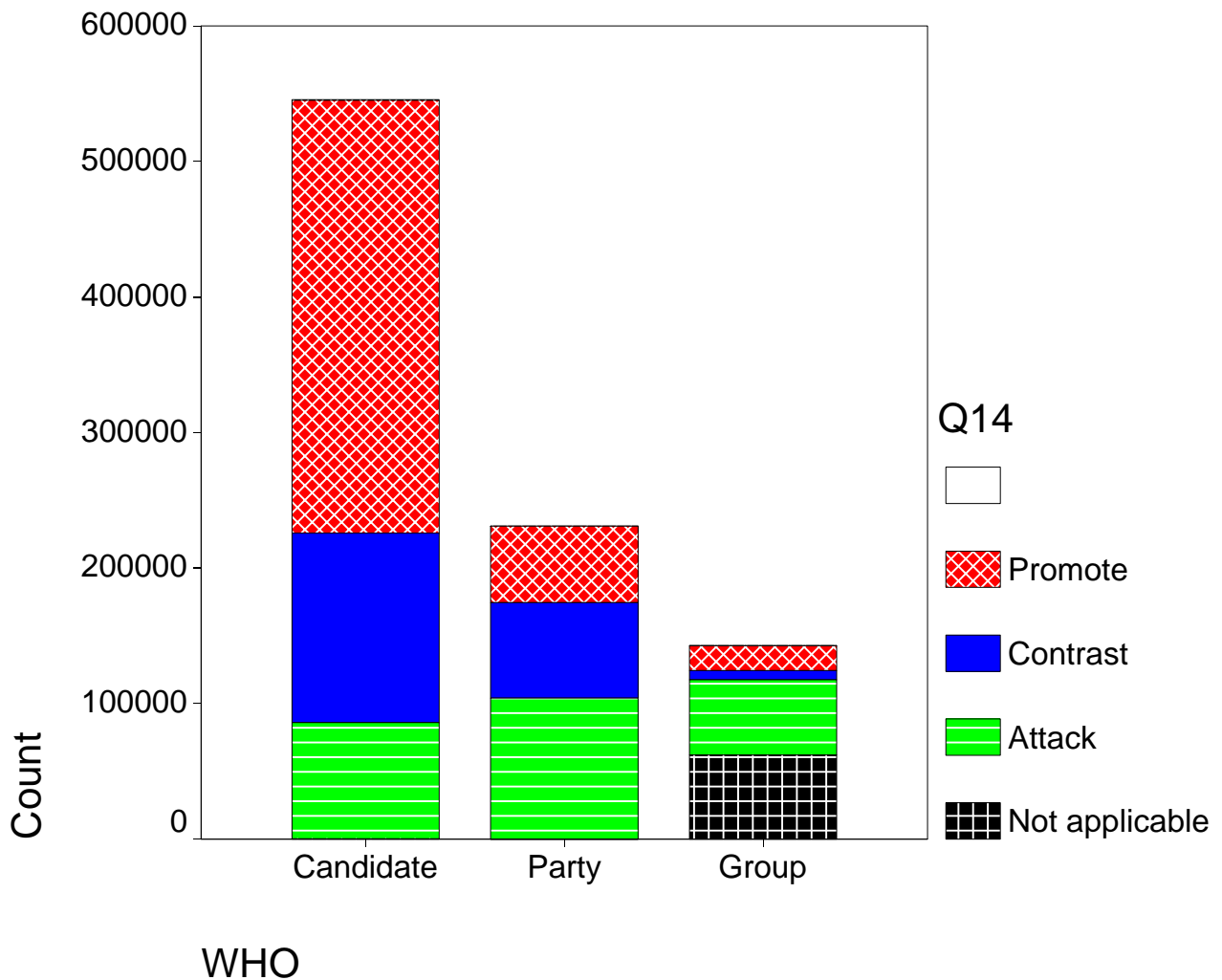


Table 10-2

Difference in Tone Between Electioneering Issue Ads and Genuine Issue Ads Sponsored by Groups

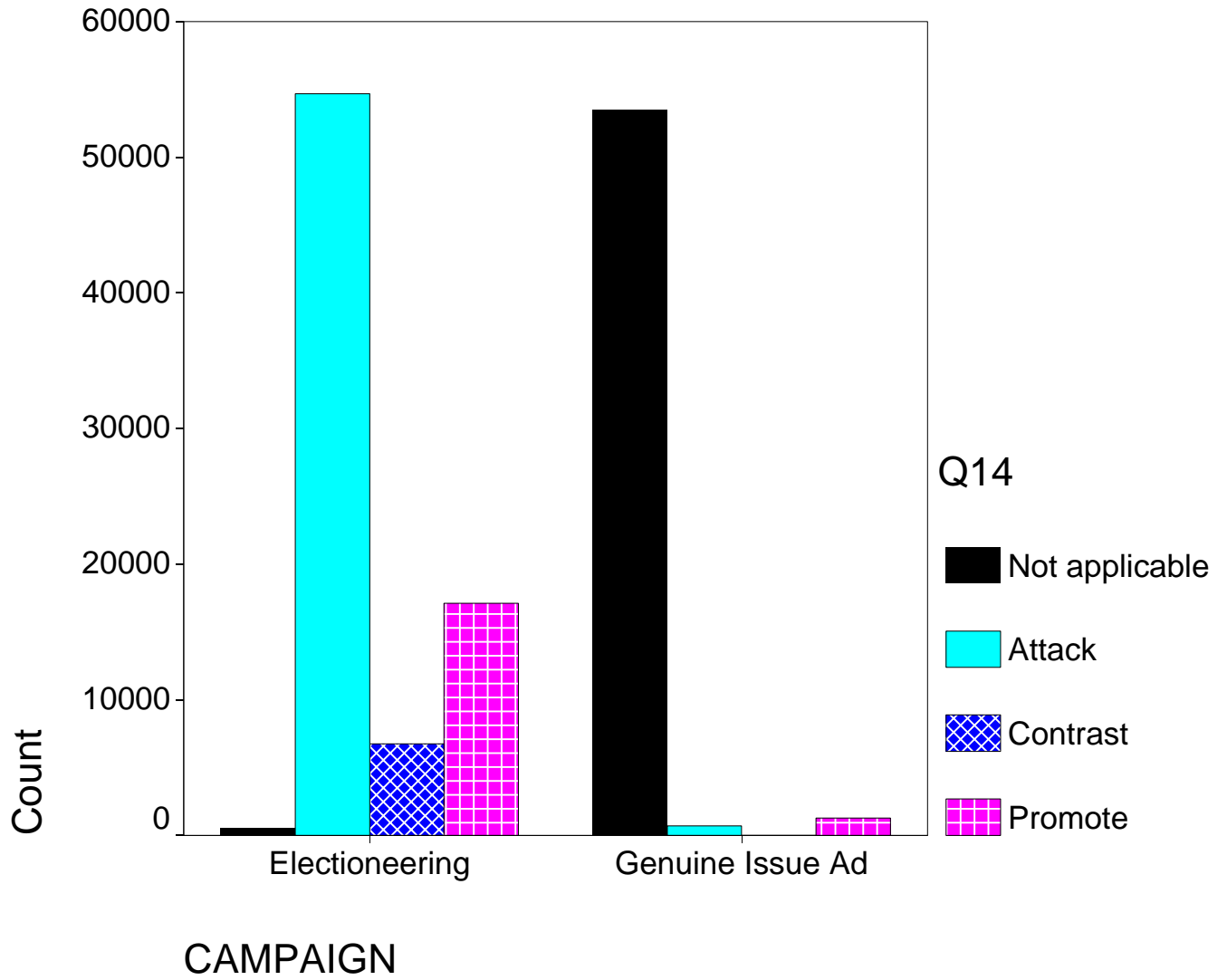
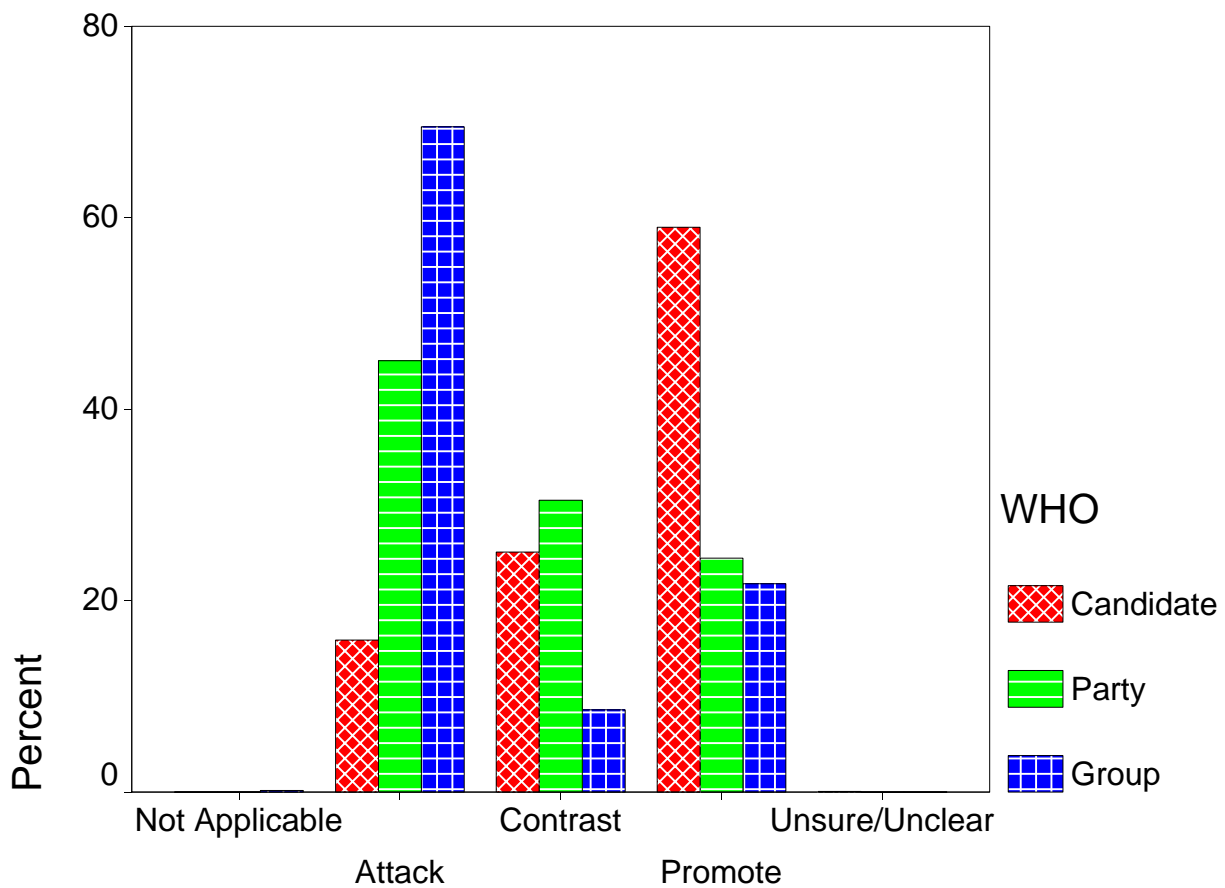


Table 10-3

Electioneering Ads by Candidates, Parties and Groups that Attack, Contrast or Promote Candidates

	Attack		Contrast		Promote	
	Count	Row %	Count	Row %	Count	Row %
Candidate	85729	15.9%	135531	25.1%	318798	59.0%
Party	104133	45.1%	70401	30.5%	56467	24.4%
Group	54671	69.5%	6752	8.6%	17117	21.8%
Table Total	244833	28.8%	212863	25.0%	392992	46.2%

Graph



Q14

Table 10-4

Growth of Negative Tone of Electioneering Issue Ads as Election Day Nears

