

Closing the Loopholes: Assessing the Impact of Reform

For the first time in almost a quarter century, a major revision of federal campaign finance law is under serious consideration. The magic words standard of express advocacy is widely recognized as an inadequate test for electioneering with little relevance to the real world of political advertising. Under the guise of issue advocacy, parties and groups have waged expensive and sometimes secretive campaign wars for and against candidates. And the unabated influx of soft money has rendered contribution limits under the Federal Election Campaign Act impotent. These are some of the problems that Congress, state legislatures, and citizen initiatives are attempting to address. This chapter examines the likely impact of some of the principal proposals for reform of the campaign finance system that are under consideration.

CAMPAIGN FINANCE REFORM IN CONGRESS

Although the 107th Congress offers the best opportunity in decades for meaningful reform of federal campaign finance laws, Congress has been feverishly debating a variety of campaign finance bills since 1986. With Democrats taking control of the Senate in that year, a number of bills calling for public subsidies or campaign cost-reduction benefits occupied floor debates. In the 100th Congress, Democratic campaign reform bills were blocked by a Republican filibuster. In the next three congressional sessions, public financing bills were approved by both houses, only to fail conference committee reconciliation in two of those sessions and a veto by President George Bush in the 102nd Congress. With Republicans again assuming control of the Senate in the 104th Congress, campaign finance reform could not survive a Senate filibuster, and the House declined to act.

The 1996 elections marked a significant change in the reform movement in Congress. These new trends in financing campaigns, documented in this study, shifted the debate away from strengthening the current regulatory framework toward closing loopholes in existing federal election law. Rapidly escalating abuses of issue advocacy and soft money threatened the very integrity of the existing system and raised serious questions about the feasibility of any limits on money in politics.

As a result, Christopher Shays (R-CT) and Marty Meehan (D-MA) introduced a bill (H.R. 2183), now known as the Shays-Meehan bill, seeking to regulate issue advocacy and soft money. Known more popularly at the time as the “freshmen bipartisan bill,” the measure proposed strict limits on soft money in federal elections, especially as used by the parties, and redefined express advocacy to include any ads that depict a candidate within 60 days of an election. This latter provision would have included electioneering issue ads aired within 60 days of an election within the entire contribution and disclosure regulatory framework. Though a floor vote was temporarily prevented by the House leadership, H.R. 2183 eventually reached the House floor through a successful discharge petition. Debate ended with the House passing the Shays-Meehan bill, only to see it killed by a Senate filibuster of its companion measure, the McCain-Feingold bill. The next congressional session was a replay of

House passage of Shays-Meehan and Senate filibuster of the McCain-Feingold version. However, the 106th Congress did implement new disclosure rules for certain tax-exempt political organizations under Section 527 of the Internal Revenue Code, which previously had not reported their financial activity.

KEY ELEMENTS OF CURRENT REFORM EFFORTS

In a striking reversal of fortunes, campaign finance reform in the 107th Congress first passed the Senate in April of 2001 and was then delayed in the House. Campaign finance reform had received a serious boost from the presidential primary campaign of Senator John McCain. In 2000, Senator McCain energized previously disaffected voters by making campaign finance reform a top priority in his bid for the Republican presidential nomination. Though he lost his nomination bid, much of the Republican Party in general, and the U.S. Senate in particular, saw the writing on the wall and came to embrace some limits on soft money and issue advocacy. The Senate ratified the McCain-Feingold bill (S. 27) on April 2, 2001, after an intense two-week debate on the Senate floor. But the House stalled action on the Shays-Meehan counterpart (H. 380), and the bill’s fate is uncertain as of this writing.¹

Key policy proposals of the current campaign reform bills remain much the same as those in the versions of the 105th Congress: (1) to include in the campaign regulatory framework electioneering issue ads that depict a candidate and are aired within 60 days of the general election (within 30 days of a primary election); and (2) to ban or dramatically curtail the use of soft money in federal elections, especially by the parties. The objective of the first key proposal is to replace the dysfunctional magic words test with a more realistic “60-day bright-line” test. The objective of the second key proposal is to preserve the integrity of federal contribution and source limitations. The analyses of political advertising and party soft money conducted in this study provide important insights into the impact on campaigns that these reform proposals are likely to bear.

1. After the Senate approved the McCain-Feingold bill, supporters of the McCain-Feingold bill urged the House to act on the Shays-Meehan bill by Memorial Day. Speaker Hastert pledged that the House would take up the matter during the week of July 9th. However, Hastert then imposed a series of unique procedural rules which would have required a separate vote on each of the 14 amendments proposed by the bill’s sponsors, a procedure calculated to defeat the entire package. In a cooperative lobbying effort between Senator McCain, the House sponsors, and House Democratic leadership, the House (including 19 Republicans) rejected Speaker Hastert’s rules of procedure. Speaker Hastert then removed the bill from further floor debate. Until such time as a discharge petition may force the issue back onto the House floor, the bill remains in limbo.

	Magic words		No Magic words		Table Total	
	Number of Airings	Row %	Number of Airings	Row %	Number of Airings	Row %
Candidate	48,803	10.4	419,114	89.6	472,266	100.0
Party	5,282	2.3	224,840	97.7	230,147	100.0
Group	2,882	2.2	130,999	97.8	142,421	100.0
Table Total	57,451	6.9	775,558	93.1	845,923	100.0

Figure 8-1. Proportion of Advertisements by Candidates, Parties, and Groups that Employ “Magic Words”

	Generate support for candidates		Provide information on issues		Table Total	
	Number of Airings	Row %	Number of Airings	Row %	Number of Airings	Row %
Candidate	462,751	98.9	5,166	1.1	472,266	100.0
Party	230,122	100.0	0	0.0	230,147	100.0
Group	77,901	58.2	55,981	41.8	142,421	100.0
Table Total	771,863	92.7	61,147	7.3	845,923	100.0

Proportion of Advertisements by Candidates, Parties, and Groups that Are Perceived as “Electioneering”

THE BRIGHT-LINE TEST ADDRESSES THE ISSUE ADVOCACY LOOPHOLE

Within a matter of just a few years, parties and special interest groups have turned the magic words standard of express advocacy into a major loophole in 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.

A significant share of the issue ads sponsored by groups in 2000 did in fact discuss pressing political issues, inform viewers of pending legislative matters, or attempt to influence public policy. About a third of group spending on political advertising involved genuine issues or legislation. Most group-sponsored issue ads, however, were designed to influence elections by promoting or attacking candidates—in other words, they were electioneering issue ads.

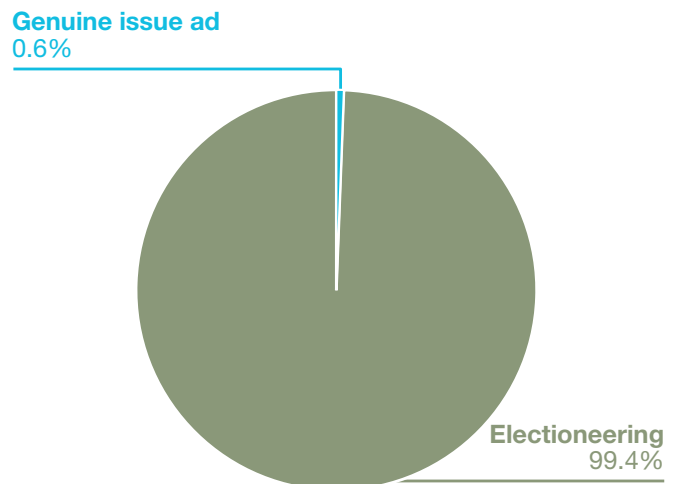


Figure 8-2. Genuine Issue Ads by Groups Aired Within 60 Days of the Election that Depict a Candidate, as a Proportion of All Group Ads that Depict a Candidate in the Same Time Period

Electioneering issue ads, of course, avoid using 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 found to be electioneering focused on a candidate, either by mentioning a candidate's name or depicting a candidate's image, or both. Very few 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 in condemning the policies of a particular party or administration.

A congressional proposal, offered as the Snowe-Jeffords amendment to the McCain-Feingold bill and originally part of the Shays-Meehan bill, attempts to re-establish the distinction between genuine issue ads and electioneering issue ads by creating a new category of political advertising called "electioneering communications." In brief, the bill defines a broadcast advertisement as 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.

The data in this study show the inadequacy of magic words as a test for electioneering. No more than 7% of all political advertisements in the 2000 election cycle contained magic words. Only about 10% of all candidate ads used magic words; party and group-sponsored ads used magic words about 2% of the time. Conversely, as shown in Figure 8-1, coders found that about 93% of all political advertisements in the 2000 election cycle were electioneering ads (i.e., they generated support for or opposition to candidates), whether or not they used magic words. All party-sponsored ads were coded as electioneering, as were well over half of group-sponsored ads.

The Snowe-Jeffords 60-day bright-line test correlates much more closely with electioneering in advertising than the magic words test does. Of all group-sponsored issue ads that depicted a candidate within 60 days of the election, 99.4% were found to be electioneering issue ads (see Figure 8-2). In absolute numbers, *only three genuine issue ads (which aired a total of 331 times in the 2000 elections) would have been defined as electioneering communications under the Snowe-Jeffords amendment.* Unlike the magic words test, the 60-day bright-line test offers a far more accurate standard for defining electioneering that reflects the realities of modern campaign advertising.

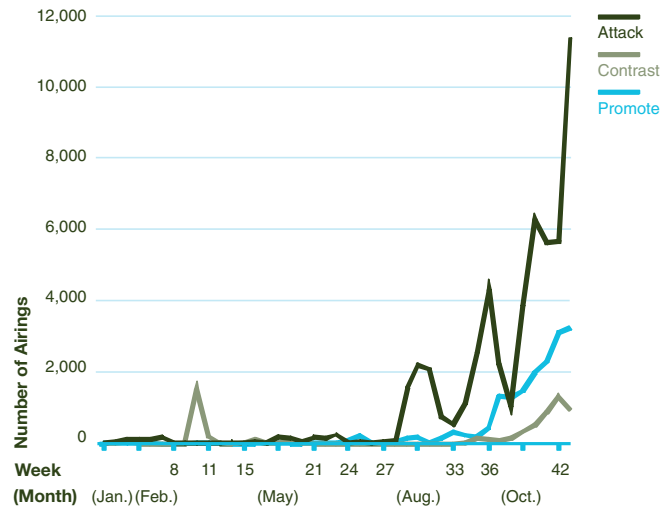


Figure 8-3. Tone of Group Electioneering Issue Ads in All Federal Elections, by Week

A REALISTIC TEST FOR ELECTIONEERING COULD IMPROVE ACCOUNTABILITY FOR ATTACK ADS

Electioneering issue ads sponsored by groups are decidedly negative in tone and often 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. More than 70% of electioneering ads sponsored by groups are attack ads that denigrate a candidate's image or character, as opposed to fewer than 20% of candidate-sponsored ads.

As discussed in Chapter Six, when Election Day nears, electioneering issue ads become increasingly negative and personal in tone, souring the campaign process for many candidates and voters alike. As shown in Figure 8-3, in the last 60 days of an election, candidates and the American public can expect a wave of group-sponsored television advertising casting aspersions on a candidate's integrity, health, or intentions. Because these ads avoid using magic words, the public often never learns the true identity of the accuser.

The 60-day bright-line test would not prohibit these types of ads, but it would require disclosure of who is sponsoring the ads in the two months preceding the election. Political advertisements tend to grow increasingly negative and attack-oriented the more the sponsor is shielded from association with the ad. If groups were required to

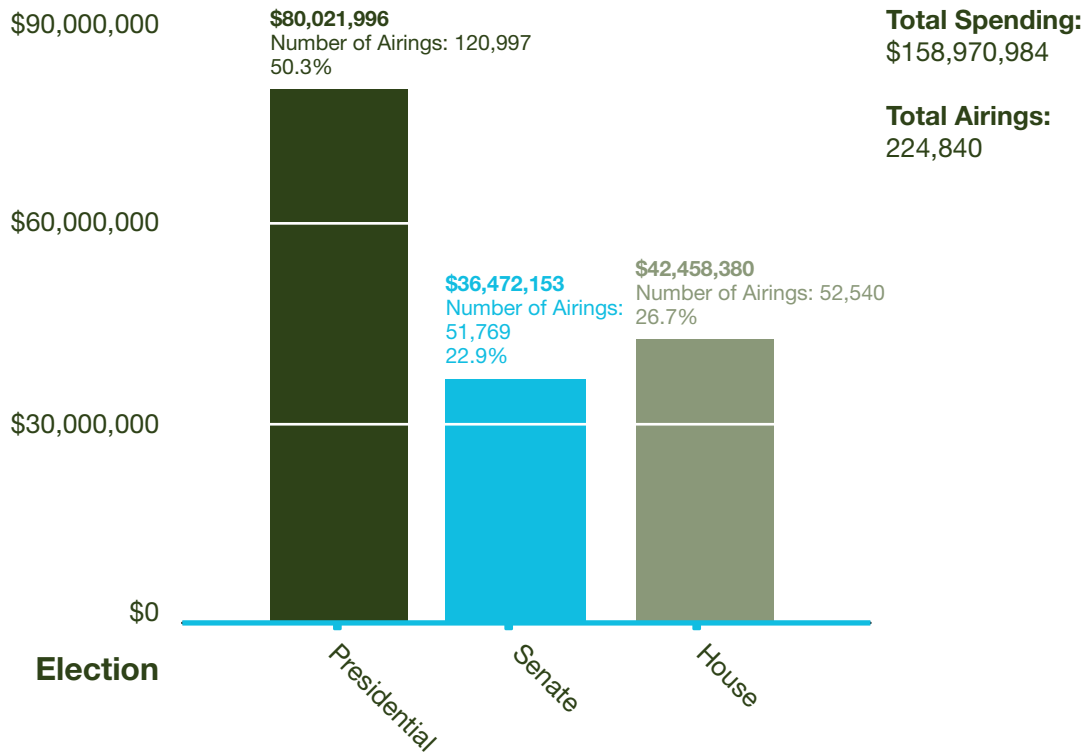


Figure 8-4. Proportion of Party Spending on Electioneering Issue Ads Targeting Presidential, Senate, and House Races

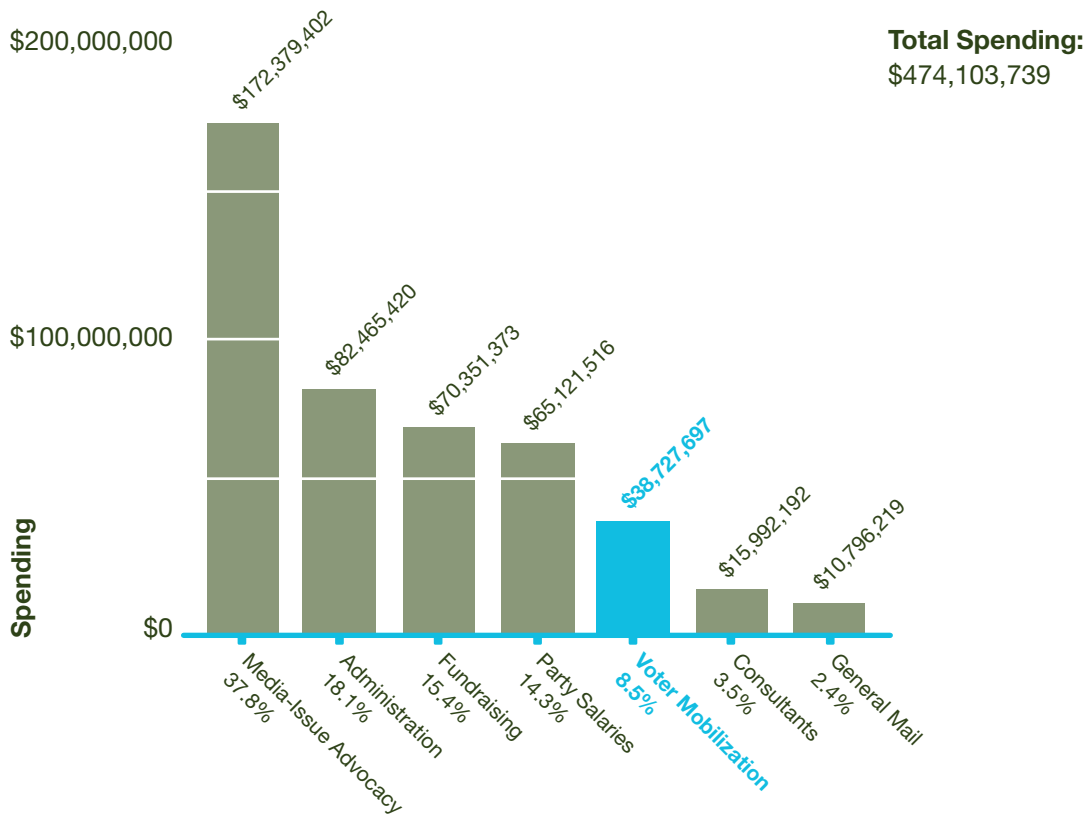


Figure 8-5. Soft Money Spending by All National and State Party Committees in Federal Elections, 2000 Election Cycle

identify who is paying for ads, they would be held more accountable for the content of the ads. The requirement might influence sponsors to tone down the negativity in some of these ads.

A BAN ON PARTY SOFT MONEY WOULD PRESERVE THE INTEGRITY OF FECA

The original intent of Congress when it passed FECA was to require that all money spent to influence federal elections be raised in specified, limited amounts. Soft money—since it consists of funds raised outside federal limitations on the sources and amounts of contributions—is not supposed to be used for electioneering purposes. Under federal election law, campaign advertisements are to be paid for by hard money. Because television campaign ads are often the heart and soul of candidate campaigns, the financing of television advertising is certainly one area in which FECA should be controlling.

For the first time since creation of FECA, soft money constituted the majority of funds paying for party-sponsored television advertisements promoting or attacking federal candidates. As discussed in Chapter Seven, an estimated 55% of all funds used to buy television time for party electioneering purposes came in the form of soft money. This means that in terms of party fundraising and spending activity for television ads, federal law was effectively evaded.

The ban on soft money fundraising and spending by the national parties contained in the McCain-Feingold and Shays-Meehan bills would reverse this trend and reaffirm the tenets of FECA. This study, and others like it,² have documented the dramatic rise in party soft money since 1996 and the subsequent erosion of FECA. A ban on soft money fundraising and spending by the national parties would go a long way toward preserving the integrity of federal election law.

A BAN ON SOFT MONEY IN TELEVISION ADVERTISING WOULD HAVE LITTLE IMPACT ON PARTY-BUILDING ACTIVITIES

Every party ad aired in the 2000 election cycle was coded as electioneering—that is, designed to campaign for or against candidates. The finding is unsurprising in view of the fact that almost 96% of all party ads

mentioned a candidate's name or pictured a candidate's likeness or image. By contrast, only about 8% of all party ads encouraged voters to join or work with a party or even mentioned the name of a political party (see Figure 8-4). These ads were focused on electing candidates, not on mobilizing voters or enhancing party strength. Yet these television ads were and remain the primary emphasis of soft money spending by the parties. If party soft money were banned, the ban could have a significant impact on televised issue advocacy, but it would have little impact on party-building activities.

A BAN ON PARTY SOFT MONEY FOR ANY PURPOSES WOULD HAVE LITTLE SIGNIFICANCE FOR PARTY VOTER MOBILIZATION ACTIVITIES

Simply put, the parties spend very little soft money on any activity associated with voter mobilization, including get-out-the-vote efforts, phone banks, voter registration, absentee ballot drives, party slate mailers, or any other activity intended to rally potential voters to the polls. Only 8½ cents out of every party soft money dollar in the 2000 election cycle was spent on voter mobilization activities. Instead, as noted above, the parties spent the largest bulk of soft money on electioneering issue ads that promoted or attacked candidates for federal office, either in the form of television, radio, or direct mail advertising. Coming in as distant second, third, and fourth priorities for soft money spending by the parties were administration, fundraising, and party salaries (see Figure 8-5).

This lack of soft money spending by the parties for voter mobilization has remained fairly constant over the last decade, despite dramatic escalations in the amount of soft money dollars pouring into party coffers in 1996 and again in 2000. More soft money has not translated into a higher proportion of expenditures on voter mobilization drives. In all probability, whatever money for get-out-the-vote drives that may be lost by a ban on soft money could be replaced by hard money dollars.

NEITHER MAJOR PARTY CLEARLY WINS OR LOSES WITH CAMPAIGN FINANCE REFORM

The congressional debate over the McCain-Feingold and Shays-Meehan bills has been mired in partisan

2. David Magleby, ed. "Election Advocacy: Soft Money and Issue Advocacy in the 2000 Congressional Elections," Paper prepared for The Pew Charitable Trusts (Feb. 26, 2001), available at [www.byu.edu/outsidemoney]; Jill Abramson and Leslie Wayne, "Democrats Used the States to Bypass Limits," *New York Times* (Oct. 2, 1997), at 1.

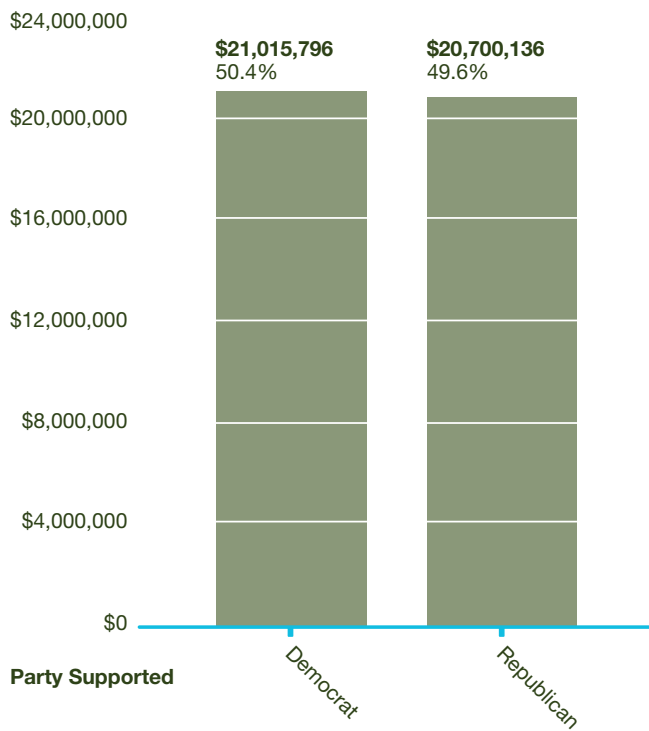


Figure 8-6. Group-Sponsored Electioneering Ads Supporting Democratic vs. Republican Candidates Within 60 Days of the 2000 Election

politics. Opponents of the bills have attempted to rally additional opposition through appeals to partisan loyalties.

“I believe the McCain-Feingold bill will hurt the Republican Party and hurt conservative causes,” said Republican presidential candidate George Bush during the January 7, 2000 Republican debate.³

“This [McCain-Feingold bill] is going to have a devastating effect on the ability to elect Democrats.... There is absolute unanimity on the part of the Democratic consulting community that this bill is a disaster for Democrats,” said one Democratic strategist.⁴

Which party stands to gain and which party stands to lose, if any, in a new system regulating electioneering issue advocacy and banning soft money? It is always difficult to give a definitive answer on the impact of any campaign finance reform because much depends on how the players adapt to the new campaign finance system and how well

the regulators address new challenges. But there is considerable empirical evidence from the television advertising databases and the soft money database to provide reasonable assessments of the impact of these campaign reform proposals on party politics.

Trends in group-sponsored advertising broken down by level of office suggest that Democrats may be affected most by a regulation on group-sponsored electioneering issue ads at the presidential level, but Republicans would be affected most by such a regulation in congressional elections. Group-sponsored ads in the 2000 presidential contest were decisively Democratic-leaning, while group-sponsored ads at the congressional level were predominantly Republican-leaning. However, as discussed in Chapter Five, the underlying reason for this partisan bias at different levels of office appears to have been the fact that the respective party organizations made a decision to target their own resources. The Democratic Party poured more money into television advertising in congressional elections, while the Republican Party targeted the presidential race. Group spending appeared to have complemented the parties’ strategic decisions. Where Democratic Party spending was weakest (the presidential race), groups picked up the slack—and vice versa for the Republicans. Party and group spending decisions were indeed mutually beneficial, if not coordinated.

But taken as a whole, the notion of partisan favoritism by groups does not hold up. The proposed electioneering issue advocacy regulations are not likely to impact one party more than the other, where group ads are concerned.⁵ The partisan bias by level of office washes out in the aggregate.

Overall spending by special interest groups on electioneering advertisements—electioneering issue ads as well as ads using magic words—has not consistently favored candidates of one major party over the other. Aggregate spending on group-sponsored electioneering ads slightly favored Republican candidates in 1998, and slightly favored Democratic candidates in 2000. But the differences in partisan support in both election cycles were very small. In the 2000 election, for example, 52% of spending by groups on electioneering advertisements favored Democrats while 48% favored Republicans over the course of the year. Within 60 days of the general election—the time period that would be affected by the proposed regulation of electioneering issue advocacy—the

3. Quoted in Andrew Stober, “Bush is No Poster Child for Morality,” *University Wire* (Oct. 18, 2000).

4. Quoted in Ruth Marcus, “Democrats’ ‘Soft Money’ Fears,” *Washington Post* (July 11, 2001), at 9.

5. This assumes that pro-Democrat and pro-Republican groups are currently receiving similar amounts of corporate and union treasury donations, and that each side would be impacted roughly equally by the prohibition on such donations described in Snowe-Jeffords.

proportion of support for Democratic versus Republican candidates breaks almost evenly, with 50.4% of group spending on ads favoring Democrats and 49.6% favoring Republicans (see Figure 8-6).

Nor is banning soft money to the national party committees likely to produce a partisan strategic imbalance for one party over the other. The trends here are more difficult to assess because of erratic fluctuations in soft money fundraising since 1992, but the numbers suggest that the partisan impact of a soft money ban would be mixed, depending on election cycle and other conditions. The Republican Party has always raised more soft money than the Democratic Party in absolute dollars, including in the 2000 election cycle, when the Democrats diverted considerable energy to soft money fundraising and almost reached parity with the Republicans. In absolute dollars, then, a ban on soft money may disadvantage the Republican Party somewhat more than the Democratic Party. Looking at soft money fundraising in the first half of 2001, Republicans clearly have more to lose in terms of dollars than Democrats. Following the concerted effort of Democratic soft money fundraising and spending in the 2000 elections, Republicans have decided to make a stronger effort at soft money fundraising in the next election cycle and have succeeded in raising 40% more in soft money than their counterparts. Fundraising figures for the first six months of 2001 show that the national committees of the Republican Party raised \$65.8 million in soft money—more than double the amount Republicans raised during the comparable period in the previous election cycle. The national committees of the Democratic Party raised \$38.1 million in soft money in the first

half of 2001—a 40% increase over the previous cycle, but clearly losing ground to Republican soft money fundraising.⁶ Given that the Republican Party has retaken the White House, and that business interests are a far more formidable source of soft money than labor, the Republican Party should continue to exceed the Democratic Party in soft money fundraising.

In percentage terms, however, soft money comprises a larger proportion of Democratic Party expenditures because of the inability of Democrats to rival Republican hard money fundraising. The Democrats raise less soft money but rely on it far more than the Republicans. The proportions have fluctuated wildly over each election cycle, but in 2000 soft money accounted for 47% of national Democratic party committee funds and 35% of Republican Party funds (see Figure 8-7). In this sense, a soft money ban could be seen as disadvantaging the Democratic Party somewhat more than the Republican Party. But again the universe of fundraising is not static. Republicans appear to be focusing greater efforts on soft money fundraising and may be closing the percentage gap while expanding the divide in absolute dollars. And Democrats are beginning to strengthen their hard money fundraising capabilities. The numbers presented here show mixed results for both parties from a soft money ban. Neither party stands to clearly gain or lose a strategic advantage.

Instead of looking for a strategic advantage from a soft money ban, the parties should be looking for the structural benefits to be gained by such a ban. Without digressing into the image problems and actual and perceived corruption that soft money has brought to the national parties—from Lincoln bedroom sleepovers to

		Hard Money	Soft Money	Total	% Soft Money
1992	Democrats	\$ 155.5	\$ 36.3	\$ 191.8	19%
	Republicans	\$ 266.3	\$ 49.8	\$ 316.1	16%
1994	Democrats	\$ 121.1	\$ 49.1	\$ 170.2	29%
	Republicans	\$ 223.7	\$ 52.5	\$ 276.2	19%
1996	Democrats	\$ 210.0	\$ 122.3	\$ 332.3	37%
	Republicans	\$ 407.5	\$ 141.2	\$ 548.7	26%
1998	Democrats	\$ 153.4	\$ 91.5	\$ 244.9	37%
	Republicans	\$ 273.6	\$ 131.0	\$ 404.6	32%
2000	Democrats	\$ 269.9	\$ 243.1	\$ 513.0	47%
	Republicans	\$ 447.4	\$ 244.4	\$ 691.8	35%

Figure 8-7. Total Hard Money and Soft Money Expenditures in Federal Elections by the Democratic and Republican Parties, 1992-2000

6. Editor, "GOP Doubles Soft Money Over Last Election Cycle, While Democrats Receipts Increase 40%," *Money & Politics Report* (Aug. 27, 2001), at 1.

foreign sources of campaign contributions—other major structural injuries to party politics have come from the growth in soft money.

The soft money system has made both political parties dangerously dependent on a few wealthy contributors. In the 2000 election cycle, some \$300 million of the parties' soft money came from only 800 donors. The national party committees have developed fundraising operations to cater to these wealthy few, a decision that is particularly evident within the Democratic Party. These soft money funds are used primarily for electioneering purposes, undermining the integrity of federal campaign finance limits. And soft money has led to a "nationalization" of the party system, in which the national party leadership doles out the money to state and local party committees and usurps control over many of their activities.

None of these developments are healthy for a strong party system. As 17 leading political scientists—all advocates of a strong party system—wrote in defense of the McCain-Feingold and Shays-Meehan bills:

"The elimination of soft money will have a significant impact, at least in the short run, on political party fundraising. However, political parties will be able to raise very substantial amounts of hard money in the future, even more than they have in the past, and they will doubtless maintain their position in the forefront of electoral actors. Money will be raised in smaller amounts, from a larger base of contributors, which will ameliorate the current potentially corrupting and agenda-altering focus on a small set of large donors. In terms of spending, the parties will likely shift away from candidate-specific advertising and towards more grass-roots, get-out-the-vote, and party-building activities. Because parties have longer term interests than individual candidates, this shift in emphasis should ultimately strengthen the political parties."⁷

CONCLUSION

The future of the American campaign finance system rarely looks bright. Each election cycle brings new innovations in campaign finance evasion as parties, candidates and groups strive to bend the system to their benefit. At times the existing rules and regulations seem more like fiction than fact and new reforms at the federal level seem doomed before they are even proposed.

Clearly, the magic words test has become impoverished in the face of skilled issue advertising and the realities of mass communication. The magic words test stands no chance against advertisers who make a living by expressing messages in subtle but effective terms. In an age where Nike shoes are promoted with a silent swoosh rather than a loud proclamation of "buy me," the line separating issue advocacy from express advocacy is in need of strengthening. Closing the issue ad loophole is necessary to catch ads that have an explicit electioneering message but no magic words.

Though this loophole has been expanding for years, public opinion has started to catch up with those who have for years taken advantage of the system in the pursuit of electoral success. Regardless of refined legal or policy distinctions in types of advertisements, the public is keenly aware that most political ads are indeed electioneering ads and that the political players are sidestepping federal campaign finance laws. The legal community has begun to catch up, recognizing the futility of the magic words test and taking steps to draft more sophisticated methods for regulating electioneering. Political scientists, too, have responded to the dearth of information about the nature and scope of electioneering issue ads by conducting studies to shed light on this once-secretive tool.

Combining the insight from these three communities adds to the likelihood that public policy will emerge that is grounded in scholarship, legal expertise, and political realism. The shared effort of citizens, lawyers, and political scientists working with legislators creates room for optimism about a system few deny is in dire need of repair.

7. Paul Allen Beck et al, "Scholars' Letter on Shays-Meehan" (July 9, 2001), available at [www.brennancenter.org].

