

INDEPENDENT SECTOR Policy Briefing Paper

Nonprofit Advocacy and the McCain-Feingold Bill

Prepared by:

Jonathan Krasno, Visiting Fellow, Yale University Institution for Social and Policy Studies

This briefing paper evaluates the impact of the McCain-Feingold bill on nonprofits and on nonprofit advocacy. I begin with the relatively narrow question of how the issue advocacy provisions of McCain-Feingold would affect c(3) and c(4) organizations by examining broadcast patterns from the last two election cycles. I then briefly consider the factors behind the decisions of several prominent organizations to support or oppose McCain-Feingold before concluding with a broader discussion of the likely effect of this legislation on our political system and how nonprofit organizations stand to benefit or lose influence should it become law.

I. McCain-Feingold's regulation of issue advocacy.

McCain-Feingold would shift the dividing line between issue advocacy and express advocacy (electioneering) by replacing the "magic words test" with the so-called "bright-line test." Currently, according to a footnote in 1976's *Buckley v. Valeo*, the Federal Election Campaign Act (FECA) only applies to ads that expressly advocate the election or defeat of a candidate by using words like "vote for," "elect," "support," or "oppose." As a result, ads sponsored by parties and interest groups that exclude these words manage to avoid FECA's reach. This benefits their sponsors in three important ways by allowing them to receive contributions in 1) unlimited amounts from 2) all donors including corporations and labor unions, and 3) to bypass the requirements to disclose information about their receipts and expenditures.

One might imagine that the failure to urge viewers directly to vote for or against a candidate could make an ad less effective, but there appears to be little downside to not using magic words. Two important research findings stand out. Professor Kenneth Goldstein of the University of Wisconsin-Madison and I have used satellite-tracking data purchased from a commercial media tracking firm, CMAG, to examine all political ads aired on television in the nation's top 75 media markets. We found that fewer than one in ten candidate ads use magic words, even though all commercials sponsored by candidates are automatically regarded by the FEC as electioneering regardless of their language. Clearly, candidates generally do not find it essential to urge television watchers directly to vote for themselves or against their opponents. In addition, Professor David Magleby of BYU has shown using interactive polling that viewers do not distinguish between ads that use magic words and ads that do not.¹

¹See www.polisci.wisc.edu/tvadvertising/mccain-feingold.pdf for research by Krasno and Goldstein, and <http://www.byu.edu/outsidemoney> for work by Magleby. In addition, see Krasno and Seltz, *Buying Time: Television Advertising in the 1998 Congressional Elections*, NY: Brennan Center, 2000.

This combination of factors, of course, has fueled an enormous explosion of issue advocacy since 1996 – from nearly 58,000 issue ads in the top 75 media markets (excluding those dealing with state and local candidates or initiatives) in 1998 to over 370,000 in 2000. Senators McCain and Feingold have responded to this development by redrawing the line between issue and express advocacy so that TV and radio commercials that mention a federal candidate by name within 30 days of the primary or 60 days of the general election are treated as electioneering regulated by FECA. Sponsors of such ads under McCain-Feingold would have to comply with size and source restrictions from the first dollar of donations they receive, but they would not be required to file reports to the FEC until they spend \$10,000.

The satellite tracking data that Goldstein and I analyzed show that political parties sponsored most of the issue ads aired in 1998 and 2000, outstripping interest groups by a ratio of approximately 3:2. These results are reflected, too, in the Annenberg Public Policy Institute's list of 125 groups that have sponsored issue ads since 1999.² Fifty-five of the organizations it identifies are national and state political parties; the remaining 70 are a variety of interest groups from labor unions and well-established nonprofits to a panoply of lesser-known organizations. Unfortunately, determining the tax status of all of these groups was nearly impossible. I compromised by investigating the dozen or so interest groups on this list that were most active advertisers. A few of these interest groups have c(3)s, but it is unlikely that they used their c(3)s to fund many issue ads – especially the ones most resembling candidates' commercials – because of the restrictions on these organizations and the careful scrutiny of the IRS. A fair number of c(4)s were also prominent among issue advertisers during this period, including Citizens for a Better Medicare (a group funded by HMOs), Federation for American Immigration Reform, Handgun Control, League of Conservation Voters, NARAL, NAACP, National Pro-Life Alliance, NRA, People for the American Way, Planned Parenthood, Right to Life, Sierra Club, US Term Limits, and Voters for Choice.³ Labor unions were the most important non-c(4)s among interest groups that aired many issue ads. In the end, it seems reasonable to estimate that c(4)s accounted for half to two thirds of the issue ads sponsored by interest groups. That makes them major players, but still leaves c(4)s well behind candidates and parties as political

²See <http://www.appcpenn.org/issueads/gindex.htm>.

³Incidentally, five issue advertisers identified by Annenberg – AARP, American Cancer Society, American Medical Association, League of Women Voters, and People for the American Way – are members of Independent Sector and a sixth member, The Sierra Club Foundation, exists largely to support the tax deductible work of the Sierra Club. Comparing the Annenberg list to Independent Sector's roster is straightforward since established interest groups have every reason to use their own names on the ads they sponsor. That is often not the case for other advertisers, like "Republicans for Clean Air" or "Citizens for Better Medicare," who chose names (and sometimes create nonprofits) that are more attractive, suggest a broad base of support, and obscure the identity of their sponsors.

advertisers.⁴

The more pertinent issue, however, involves the structure and content of the ads that interest groups produced. McCain-Feingold is aimed at a particular type of issue ad, the ones that are virtually indistinguishable from the commercials that candidates sponsor. Issue ads that truly focus on issues, as opposed to praising or condemning candidates, are supposed to be untouched by this legislation. Are they?

The satellite-tracking data speak directly to this question. The data include “storyboards” for approximately 5,000 separate commercials produced by candidates, parties and interest groups in 1998 and 2000. Altogether, these ads aired over 1.1 million times in these two years. To determine which of these ads ought to be regarded as genuine issue advocacy and which should be considered thinly veiled electioneering, coders were asked the following question:

In your opinion, is the purpose of the 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?

Not surprisingly, virtually all of the commercials aired by candidates and political parties were rated as generating support or opposition for a particular candidate. Interest groups, however, were a different story. Coders classified 65 percent of interest group ads in 1998 and 40 percent in 2000 as providing information about or urging action on a bill or issue. It is these ads that qualify as genuine issue advocacy and thus should not be affected by McCain-Feingold.

I analyzed the impact of McCain-Feingold on genuine issue ads (almost all of which were sponsored by interest groups) by dividing these ads into two categories: ones that mentioned candidates and appeared within sixty days of the general election, and ads that did not. The results are reassuring. Just 6 percent of genuine issue ads in 1998 and 1 percent in 2000 fell in the first category, and thus would have incorrectly been treated as electioneering by McCain-Feingold. The total number of ads affected was just five (each of which, of course, aired multiple times): spots from the AFL-CIO (1998), Committee for Common Sense (an anti-tax group active in Nevada in 1998), Federation for American Immigration Reform (2000), Coalition for the American Worker (2000), and the Chamber of Commerce.⁵ The remaining issue ads

⁴Goldstein and I counted approximately 665,000 ads by candidates in 1998 and 2000 combined, versus 314,000 for parties and 162,000 for all interest groups.

⁵To clarify, the total number of times within 60 days of the general election that the two ads in 1998 *aired* comprised 6 percent of all genuine issue ads shown in that year; similarly, the number of times the three ads from 2000 *aired* comprised 1 percent of all genuine issue ads that appeared that year. These numbers are entirely consistent with the Annenberg School’s finding (<http://www.appcpenn.org/issueads/pressrelease.pdf>) that 94 percent of issue ads that appeared after Labor Day made a case for or against a candidate. In fact, our coding shows an almost identical result: 95 percent of issue ads after Labor Day were intended to generate support or opposition to a particular candidate, leaving just 5 percent that focused on a particular bill or issue. Two things occurred after Labor Day in 2000. First, the pace of issue advertising accelerated markedly with almost twice as many issue ads airing in the final two months of the

either appeared earlier in the year and/or did not identify a candidate. Some of those ads, of course, might have been picked up in the 30-day period before a primary. Unfortunately, the different primary dates in different states and the way in which media markets cross state lines make this issue extraordinarily difficult to assess. I suspect that incorporating the primary period into the analysis would have little impact for the simple reason that most genuine issue ads do not identify any candidate. I interpret these findings as a sign that McCain-Feingold is fairly well calibrated to affect only the ads it seeks to affect.

II. Decisions to support or oppose McCain-Feingold

McCain-Feingold has generated different responses from a number of the most important advocacy organizations. AARP, American Heart Association, Campaign for Tobacco-Free Kids, Children's Defense Fund, Environmental Defense Fund, National Council of Churches, Natural Resources Defense Council, Sierra Club and others have joined the "Americans for Reform" coalition to lobby for McCain-Feingold. Others, like the Alliance for Justice, have taken the opposite position, urging legislators to defeat this bill or, like Planned Parenthood, have privately expressed some reservations and are continuing to study the bill.

A variety of considerations, both normative and strategic, may influence these decisions. These include:

1. Ideological opposition to government regulation. This may be rooted in reverence for the First Amendment or in a more general orientation toward government and the role of nonprofit advocacy.
2. Belief in reducing or eliminating the role of money in the political system.
3. Desire to protect activities in which a group already engages or might engage.
4. Strategic calculation about the expected impact of McCain-Feingold on one's opponents versus oneself.

Obviously, the first and third considerations cut against McCain-Feingold, while the second and fourth are reasons to favor the bill. Each of these reasons figures prominently in the decisions that various organizations have made.

The ACLU is an obvious example of a group with deep philosophical objections (#1) to McCain-Feingold. While the Alliance for Justice shares some of the ACLU's concerns about the First Amendment, its statements also reveal an appreciation of its outsider status and a fair degree of suspicion about insiders. For example, the press release announcing the Alliance's opposition to McCain-Feingold quotes an official that "[p]ublic interest groups are the only ones to speak out on many of the tough issues in an era when pollsters have convinced many

campaign as in the first nine months of the year. Second, as Annenberg notes, virtually all of those ads are electioneering whereas earlier in the year genuine issue ads were common. As a result, my examination of McCain-Feingold shows relatively few genuine that aired through the year would have been affected in the last 60 days of the campaign.

politicians to avoid taking tough stands.”⁶ Certainly, this raises a valid point. However, there is no empirical evidence of an advertising campaign that tackled an issue shunned by candidates in 1998 or 2000, and I remain skeptical that there is much money available to introduce such an issue immediately before an election when airtime is most expensive.

On the opposite side of the ideological spectrum (#2) are groups like Common Cause, the League of Women Voters, Democracy 21, Campaign for America and others primarily concerned about political process issues. McCain-Feingold’s promise to reduce the influence of money in federal elections makes it attractive. Many of these groups are already on record favoring more dramatic reforms and even a constitutional amendment to tackle the problems created by money in politics.

Planned Parenthood is an organization that, aside from any potential philosophical reservations about governmental activity in this realm, has a clear interest in protecting activities that it already carries out (#3). Planned Parenthood has been a major sponsor of issue advertisements in the last two election cycles through its c(4). McCain-Feingold would clearly affect those ads since many were barely disguised electioneering that identified candidates by name in the days leading to the elections, exactly the sort of commercials the bill hopes to bring under existing campaign finance laws.⁷

Finally, there are a number of organizations that have run issue advertisements but seem to have concluded that their interests are better served by regulating these ads. Several of these groups, including the American Heart Association, have sponsored generic nonpartisan advertising that would not be affected by McCain-Feingold. Others like the Sierra Club have run commercials that would be regulated under this bill. What both groups have in common is the perception that their opponents will be hamstrung more by McCain-Feingold. The American Heart Association’s statement supporting McCain-Feingold notes that “[f]or more than 40 years, the tobacco industry has used its deep pockets to buy political access and influence.” The Sierra Club takes a similar position against the ability of corporate polluters to buy access and influence.⁸ These groups seem to have reached that conclusion that fighting their opponents with soft money is a losing proposition. This may reflect recognition of the amount of money that can be mobilized against their position or optimism about their ability to compete effectively in other areas, such as mobilizing volunteers or attracting free media coverage. Either way, these groups have made a strategic decision that McCain-Feingold serves their purposes.

III. The broader impact of McCain-Feingold

⁶From March 27, 2001 press release, “Alliance For Justice to Oppose McCain-Feingold Campaign Finance Reform Bill.”

⁷For example, one Planned Parenthood ad featured a female internist telling viewers that “the fact is that George W. Bush doesn’t trust women to make their own choices.”

⁸For these and other statements, see the www.americans4reform.com.

The decisions discussed above suggest a variety of ways to assess the likely impact of McCain-Feingold. Is the bill a threat to outside voices rarely heard or an affront to the First Amendment? Or, is McCain-Feingold an important mechanism for removing the influence of money from politics, perhaps thereby leveling the playing field and allowing the less lavishly funded to be heard? Does McCain-Feingold constitute a greater threat to the advocacy efforts of nonprofits than to other, often opposing, organizations? How will politics be different if McCain-Feingold becomes law, and who is likely to benefit?

While the concerns about silencing outsiders deserve serious attention, the overwhelming preponderance of evidence from recent years suggest that this is not much of a problem. The voices that have dominated issue advocacy over recent election cycles were simultaneously well-heeled and closely allied with a particular party or candidate.⁹ This is an inherent byproduct of the cost of television and radio advertising. The financial requirements to advertise make it unlikely, at best, that a nonprofit championing a neglected issue would choose paid TV and radio to make itself known. It is much more likely that such a group would choose a less expensive, more time-honored and more effective route like trying to attract free media attention. The vast majority of nonprofits have no choice but to seek less expensive options and, as Professor Jeffrey Berry of Tufts shows, seek other ways to advocate.¹⁰

The potential damage to the First Amendment is also overstated. The civil libertarians' lament that McCain-Feingold is overly broad is contradicted by my research with Goldstein (cited in footnote 1) showing that relatively few genuine issue ads would be affected by McCain-Feingold. Critics will rebut that our criteria about what constitutes a genuine issue ad are subjective, but the fact that our subjective judgments correspond so well against the objective criteria in McCain-Feingold is reassuring. But perhaps even more important, the bright-line test of McCain-Feingold offers advertisers an obvious route to escape regulation by producing the same ad without referring to a federal candidate. That might seem to complicate the lobbying efforts, but my examination of commercials from 1998 and 2000 reveals scores of examples of nonspecific lobbying commercials asking viewers to call their representative or senators (and providing a phone number or address) without naming names.¹¹ It is possible that these ads are less effective, but I know of no evidence for or against this proposition. What is clear is that the most successful grassroots lobbying efforts likely rely on more than TV and radio to educate and mobilize the public. Finally, it is worth remembering that ads that express themselves on an issue or attempt to set the agenda (like the Arthur S. De Moss Foundation's "Life. What a

⁹One piece of evidence for this alliance with candidates is the degree to which issue ads echo the themes emphasized by candidates (see note 1).

¹⁰See http://ase.tufts.edu/polsci/fac_staf/berry/Recent_Paper.htm.

¹¹Labor unions have raised the possibility that Republican congressional leaders could schedule votes on bills of particular interest to them in periods in which the unions could not air commercials. That scenario seems unlikely, but groups could still produce more generic spots.

beautiful choice.” campaign several years ago against abortion) rarely mention any political candidates by name and would not be affected by this legislation.

Among the other things that McCain-Feingold will not do, despite all of the controversy, is eliminate or perhaps even substantially reduce the influence (as opposed to the amount) of money in politics. Its most important components – the ban on soft money and redefinition of issue advocacy – would essentially restore the system to where it was in the late 1980s and early 1990s. A quick look at aggregated federal campaign spending (from \$451 million in 1986 to \$725 million in 1994) suggests that there will still be plenty of money spent on campaigns, especially after a decade of prosperity and with the doubling of individual contribution limits in the Senate version of McCain-Feingold.¹² Money and those who can raise substantial amounts of it were significant before 1996; money and big donors will remain significant if McCain-Feingold becomes law. The playing field will surely be leveled, but only a bit.

That is not to say that there will not be winners and losers from McCain-Feingold, or that the sides are wrong to be fighting so hard over it. Hundreds of millions of dollars will disappear from the political system and only some of this money will be replaced. Put another way, nearly 15 percent of political ads in 1998 and more than 40 percent in 2000 were issue ads that praised or denounced a particular candidate. The vast majority of these ads identified federal candidates and appeared in the weeks immediately preceding the primary or general elections, and thus would have been affected by McCain-Feingold. The inability to air these advertisements without complying with campaign finance laws will affect the supply and demand for huge donations.

The ban on soft money and the redrawing of the line between express and issue advocacy will alleviate much of the pressure on candidates, parties and interest groups to solicit extra large donations. These large donors – whether corporations, trade associations, unions or wealthy individuals – will have much more limited options about how they can spend their money and many will opt not to spend it. It is one thing to help a party or interest group underwrite an ad campaign helping their preferred candidate, another to fund a series of commercials that may seem too subtle or appear too early to be much aid to their favorite candidate. Other less media-intensive alternatives, such as trying to develop a network of supporters, are expensive and nearly impossible to organize on short notice.

This development will have a variety of consequences for the political system, from helping keep down the price of airtime (especially with the lowest unit rate provision in the Senate bill) to reducing some of the advertising clutter on television and radio. Sorting out the winners and losers in this situation, especially from the standpoint of nonprofits, is complex. A number of nonprofits, including the NAACP, Planned Parenthood and the Sierra Club, will no longer be able to run all the commercials that they have in the past – unless they change the script of the commercials, run them earlier, or pay for them with hard money as independent expenditures. But, as I point out above, commercials by nonprofits comprised a relatively small

¹²See <http://www.fec.gov/press/canye98.htm>. Even with no changes in law, total campaign spending by congressional candidates alone will likely exceed \$1 billion in 2002.

part of electioneering issue ads in 1998 and 2000. This suggests that nonprofits as a group may stand to gain from eliminating this entire thicket.

On an issue-by-issue basis, however, things are not so simple. There are nonprofits on both sides of the some issues, whether industry front groups like Citizens for Better Medicare versus more traditional health care groups or the struggle between pro-choice and pro-life organizations or the NRA and gun control groups. And, many nonprofits are allied with other groups, starting with labor unions and parties.¹³ I think the best way to evaluate particular policy areas is to ask whether a for-profit economic enterprise is implicated. In such cases, the resources available to the other side are almost inevitably greater – as in the case of environmentalists versus polluters or anti-smoking groups versus the tobacco industry. This helps explain why some major environmental and anti-smoking groups have chosen to support McCain-Feingold. But groups like the NAACP or Planned Parenthood do not face economic interests that compete with them, a situation that gives them more confidence in their ability to compete successfully in the issue-advocacy arena.

It is not clear to me that, whatever their circumstances, nonprofits are best served by using their resources on television and radio ads. Berry's book, *The New Liberalism: The Rising Power of Citizen Groups*, and his subsequent work (note 9) shows that advocacy groups have a variety of mechanisms available to influence policy. Use of television and radio are only fairly recent additions to their arsenal and luxuries very few nonprofits can afford. If you accept Berry's conclusion, as I do, that advocacy groups have prospered since the 1960s, winning more battles than they lose and gaining ground in public opinion in many areas, then it is fair to wonder why nonprofits would be willing to let the underlying rules of the game change. That might seem rather conservative – and it is – but it strikes me a matter of common sense to continue using strategies that have worked while resisting the introduction of new modes of advocacy. The fact that Republicans now control all three branches of the federal government does not seem to me to be a sufficient reason for groups to seek a new playbook.

Beyond the risk-averse nature of this assessment, however, is the recognition that nonprofits are particularly well positioned to engage in advocacy efforts at the grassroots and governmental levels without using television and radio. Nonprofits often, but not always, enjoy established reputations in Congress and state legislatures, and in the communities they serve. Nonprofits often, but not always, have cores of supporters and membership lists that they have developed over time. Nonprofits often, but not always, have access to free media that other organizations envy. These are real assets. Expanding on them and exploiting them would seem to be far more effective than pouring money into a television and radio ads whose immediate impact is unclear and whose lasting impact is likely negligible.¹⁴

¹³One measure of the ideological orientation of issue advocacy is that slightly more than half of the ads by groups favored Democrats in both 1998 and 2000. Ads that did not promote a particular candidate were coded as favoring neither party.

¹⁴Academics and political pollsters report that campaign commercials may influence how

The activities of the NAACP in the last election are a useful illustration. Press reports put the organization's spending on get-out-the-vote activities at around \$10 million. These efforts included a modest television advertising campaign – eleven different ads that were broadcast just over 800 times in the top 75 media markets. The estimated cost of the airtime for these ads, while almost certainly too low, was approximately \$350,000.¹⁵ Even if the figure, along with production costs, spending on radio and in smaller media markets, is five times this amount, it is clear that the NAACP's spending on phone calls and door-to-door canvassing vastly exceeded its expenditures on mass media. There is good reason to believe that these grassroots activities were effective in increasing turnout by black Americans in the states where the NAACP was most active. Experimental research by two Yale professors, Donald Green and Alan Gerber, shows that door-to-door canvassing can raise voter turnout rates by more than five percentage points.¹⁶ Green and Gerber are currently working to analyze the NAACP efforts (having arranged in advance to create a small, random control group who received no letters, visits, or phone calls), but they expect results consistent with their other studies. The NAACP's good name and its ability to mobilize a mixture of volunteers and paid workers, not its television advertising, were almost certainly vital to what appears to have been a successful effort to increase voting by blacks.

It is true that the NAACP has the organizational advantage of reaching out to a target population readily identifiable by race and residentially concentrated. Still, nonprofits are in a good position to emulate those successes, at least in comparison to other organizations. Corporations and trade associations lack positive brand name recognition, membership lists, and organizational infrastructure to marshal a similar grassroots campaign. Only labor unions, and perhaps some local party organizations, can compare on these dimensions to groups like the Sierra Club, Christian Coalition, NRA or NARAL. Taking advantage of its network of supporters is not always easy – NARAL, for one, has not been able to translate support for abortion rights into sort of fervor exhibited by the pro-life side – but it is a more than viable advocacy strategy. Indeed, it is by most accounts the best way to attract the attention of policy-

viewers regard the candidates. Usually these research designs involve situations where subjects are required to view a particular ad in a controlled setting, a far cry from the normal situation in most homes and a factor that almost certainly exaggerates the impact of a commercial. In addition, I am aware of no studies that have returned to subjects in the weeks and months after their exposure to an ad to test for lingering effects. Campaign ads certainly have some influence on some voters, but most political scientists are skeptical, if not dismissive, of expansive claims about their effectiveness.

¹⁵It is worth noting that 10 of these 11 ads would not have been affected by McCain-Feingold since they mention no candidates by name. Only one, a spot asking viewers to call George Bush and ask him to support a Hate Crimes Bill he had already vetoed months before, would have been treated as electioneering.

¹⁶See <http://www.yale.edu/isps/publications/GerberGreen.pdf> and <http://www.yale.edu/isps/publications/leafletting.pdf>.

makers. That is especially true today in an era of close elections and closely divided Congress that any group able to deliver a core of committed supporters will be noticed.

Put another way, I think it makes sense for nonprofits to favor shifting from an advocacy economy based on money to one where labor and organization figure more prominently. Nonprofits are well positioned to take advantage of that sort of situation; other groups will have a more difficult time. That is not to say that nonprofits can expect to dominate in such an environment. Nonprofits prospered but hardly dominated in the decades before soft money and issue advocacy became such major parts of the political system. Turning the clock back to those days will help nonprofits by limiting the options of other organizations that have begun to spend heavily to advocate their issues and force nonprofits to focus on the activities that they arguably do best. McCain-Feingold attempts to do just that, and therefore seems like the sort of reform that will help nonprofits much more than it will hurt them.