CENTRE FOR LAW AND DEMOCRACY

Regulation of Paid Political Advertising:
A Survey

March 2012

Introduction[1]

The regulation of political advertising is one of the more difficult issues that democracies have to deal with. On the one hand, the ability of citizens to inject their ideas into the political discourse is central to the protection offered by the rights to freedom of expression and to political participation.[2] However, unlimited and unregulated paid advertising gives better-funded candidates and parties an unfair advantage, and can even lead to a political dependence on campaign fundraising, undermining the integrity of the democratic system. As a result, jurisdictions need to strike a balance to ensure that parties have the ability to get their message out, while simultaneously preventing one side from dominating the debate. In this context, it is important to regulate not only the candidates and political parties that are directly contesting the elections, but also their third party backers, in order to prevent wealthy interlopers from making an end-run around election laws.

This comparative analysis examines different approaches to regulation of political advertising, comparing their strengths and weaknesses. It provides an overview picture of the different options, rather than an in-depth analysis. However, by looking at a few key examples, the Report illustrates some of the main systems for regulating political advertising around the world. The Report is in four parts, starting by examining regimes which rely on light touch regulation, going on to more intrusive regimes which prohibit commercial broadcast advertisements, and then regimes where commercial broadcast advertising is permitted but regulated. The fourth part contains a discussion of the role of the media in regulating political advertising.

1. Permissive Regulatory Systems

One of the more permissive regulatory systems among established democracies is found in the United States, where paid advertising is deeply ingrained in the political culture. The United States' electoral laws do not place firm limits on campaign spending, or on the amount of advertising a candidate or party can purchase. Instead, campaign regulations in the United States target fundraising by placing limitations on how and how much individuals can give, and by barring corporations from directly supporting candidates. However, while supporters and corporations are limited in the cash that they can give directly to candidates, there is an increasing tendency to make an end-run around these rules by channelling money through third party political action committees (called Super PACs). These Super PACs can accept unlimited contributions from individuals or corporations with little

---

[1] This Report was drafted by Michael Karanicolas, Legal Officer, Centre for Law and Democracy. Addition research was carried out by James Green, Patrick O'Neill, Katie Sammon and Jason Smythe.

[2] *Universal Declaration of Human Rights,* UN General Assembly Resolution 217A(III), 10 December 1948, Articles 19 and 21.

transparency or oversight, and face almost no restrictions as long as they formally operate at arm's length from the candidate they support.[3]

Direct regulation of the media in the United States consists primarily of the "equal time rule", which requires radio and television stations and cable networks to treat legally qualified candidates equally in allocating airtime.[4] If a station sells or gives a block of airtime to one candidate, it must offer the same amount of airtime, with the same audience size, to all other candidates at the same rate.[5] If the other candidates cannot afford this rate, the media outlet is under no obligation to give them airtime. There are exceptions to this rule for newscasts, news interviews, documentaries and on-the-spot news events, which are allowed to cover candidates without regard to these restrictions. This rule is complimented by the "reasonable access" rule, which requires media outlets to make time available to candidates based on the rates offered to their most favoured advertisers. None of these rules apply to the print media, whose operations are basically unrestricted.

In dealing with political parties and candidates, the United States' approach to media regulation favours those that are well financed and well established, levelling the playing field only by preventing outright discrimination. However, none of these laws apply to political advertising by third parties, which is almost entirely unregulated. The result of this approach in the United States has been a political atmosphere that is signficantly influenced by money and where third party organisations – immune not only from spending limits but also, due to their arm's-length relationship with candidates, from the basic tenets of democratic civility – play an increasingly prominent and ugly role in the discourse.

The depths to which these third party organisations can stoop was vividly illustrated by the attacks on 2004 presidential candidate John Kerry by "Swift Boat Vets for Truth", a political action group. The group subjected Kerry, a decorated veteran of the Vietnam War, to a bevy of groundless allegations including having lied about his military service and about the engagements for which he was awarded medals. Kerry's war record had been seen as one of his political strengths, which was problematic for his opponent, President George W. Bush, who had himself avoided military service. Had Bush attempted to attack Kerry's service directly, he would have been criticised for practising dirty politics and for hypocrisy, given his own history. But since the attacks came from an arm's length third party, the Bush campaign was able to deny resonsibility, and to condemn the attack ads as "deplorable" even while they continued to air.[6] Thus, third party advertising allows

---

[3] *Citizens United v. FEC*, 130 S. Ct. 876 (U.S. 2010). Available at: http://www.supremecourt.gov/opinions/09pdf/08-205.pdf.

[4] Communications Act of 1934, 47 U.S.C. § 307(a) (1982 and Supp. V 1987).

[5] This rule can sometimes yield unexpected consequences as a result of the success of actor-politicians. During Arnold Schwarzenegger's gubernatorial campaigns, Californian networks were forced to stop airing reruns of his movies, since they were considered free airtime for the candidate.

[6] Jim Rutenberg, "Anti-Kerry Ad Is Condemned By McCain" *The New York Times* (6 August 2004), Available at: http://www.nytimes.com/2004/08/06/us/anti-kerry-ad-is-condemned-by-mccain.html.

for a dirtier brand of politics, enabling candidates to wash their hands of particularly ugly attacks by claiming that they are the work of outside operatives over whom the candidates have no direct control.

Although the United States is the most prominent example of a country with a loose regulatory regime, especially as applied to third party advertising, there are other nations that take a similar approach, including Venezuela, where paid advertising has had a similarly problematic effect. In Latvia, where election advertising laws also do not apply to third parties, there was criticism of the role that third party advertisers played in the 2006 election campaign.[7]

2. Strong Regulatory Systems

In contrast to the minimalist approach taken in the United States and elsewhere, several European states prohibit paid campaign advertising on radio and television altogether. These tend to be nations with a strong tradition of public broadcasting.[8] For example, in the United Kingdom, all paid political advertising is banned from television and radio. This prohibition extends not only to political candidates and parties, but to any advertisement which aims to influence public opinion on a matter of public controversy. The United Kingdom also maintains strict restrictions on printing and publishing by third parties during campaigns. Until recently, third parties were prohibited from spending more than GBP5 on publishing materials during an election period. However, this restriction was found by the European Court of Human Rights to violate the *European Convention on Human Rights*.[9] In response to the judgment, the United Kingdom raised the limit for individual third party spending in parliamentary elections to GBP500.[10] The total ban on political radio and television advertising was recently upheld by the House of Lords.[11]

Several other European countries maintain total bans on paid political advertising on television and radio, including France, Ireland and Belgium (though all three countries allow advertising in the print media). Generally, countries that ban paid political advertising on radio and television have put in place requirements for broadcasters to provide free broadcasting time to political parties and/or candidates. However, these arrangements generally do not include third parties, which are, as a result, barred altogether from access to the airwaves for election campaign purposes.

---

[7] OSCE – ODIHR, "Limited Election Observation Mission to 2006 Parliamentary Elections in Latvia 2006 Final Report". Available at http://www.osce.org/odihr/elections/latvia/23954.

[8] ACE Project, "Media and Elections: Paid Political Advertising". Available at http://aceproject.org/ace-en/topics/me/mec/mec04/mec04b/.

[9] *Bowman v. United Kingdom*, 19 February 1998, Application No. 24839/94.

[10] Political Parties and Elections Act, 2000, c. 41, s. 131.

[11] *R (Animal Defenders International) v Secretary of State for Culture, Media & Sport*, [2008] UKHL 15, 12 March 2008.

In some countries that prohibit paid political advertising, popular support for the prohibition remains strong. However, some other countries that have traditionally maintained such rules, most notably Norway and Sweden, are starting to move away from this strict approach.

3. Middle-paths

Between these two extremes are several countries where paid political broadcast advertising is permitted, but regulated. In Canada, the main broadcast regulatory body, the Canada Radio-television Communications Commission (CRTC), requires broadcast outlets to allocate time on an equitable basis. If one party receives free time or access to paid advertising, all rivals must be granted the same opportunity.[12] This principle of equity applies to pricing, timing, duration, scheduling and approach. For the purpose of the regulations, third party messages with a "partisan political character" are included in this calculation.

Political campaigns, however, are subject to strict spending limits, and third party election advertisements of all types are regulated by the Canada Elections Act (CEA).[13] Specifically, each third party's advertising spending is limited to CAD3,000 (approximately USD3,000) in a given electoral district and CAD150,000 nationally. The CEA prohibits all third party advertising on election day. The rules also require third parties to identify themselves in all election advertisements, to register with the Chief Electoral Officer and to file an election advertising report within four months of the elections, listing all advertisements and the names, addresses and amounts given by each contributor. The CEA defines "election advertising" as "transmission to the public by any means during an election period of an advertising message that promotes or opposes a registered party or the election of a candidate, including one that takes a position on an issue with which a registered party is associated."[14] These restrictions only apply during campaigns, defined as the six-month period preceding an election.

The regulations on third party advertising were recently challenged as being contrary to Canada's free speech guarantees, but they were upheld by the Supreme Court:

> Unlimited third party advertising can undermine election fairness in several ways. First, it can lead to dominance of political discourse by the wealthy.... Second it may allow political parties and candidates to circumvent their own spending limits through the creation of third parties. Third, unlimited third party spending can have an unfair effect on the outcome of an election. Fourth, the absence of limits on third

[12] Canada Radio-television and Telecommunications Commission, "Broadcasting Information Bulletin CRTC 2011-218". Available at: http://www.crtc.gc.ca/eng/archive/2011/2011-218.htm.
[13] S.C. 2000, c. 9, Part 17.
[14] *Ibid.*, s. 319.

> party advertising expenses can erode the confidence of the Canadian electorate who perceive the electoral process as being dominated by the wealthy.[15]

In Poland, third parties are limited to spending PLN5,000 (approximately USD1500) during presidential elections and PLN1000 (approximately USD300) during parliamentary elections.

In Barbados, parties and candidates receive a free allocation of broadcast time (totalling one hour for the ruling party and 45 minutes for the opposition). They are permitted to purchase radio and television advertising to supplement this, but the total amount of broadcast time they can purchase is capped. For radio broadcasts, the maximum is set at five 30 second advertisements per candidate per station, and for television stations the cap is three 60 second advertisements per candidate per station. No such restrictions are applied to print media.[16]

An interesting mixed approach is found in Montenegro, where each electoral list is limited to five minutes of broadcasting time. Two minutes of this time is free and broadcast at a specific time according to regulation, while the remaining three minutes can be purchased at market rates.

Mexico strictly limits radio and television advertising during presidential election campaigns according to a complicated formula. The total time allocated for advertising may not exceed 250 hours for each radio station and 200 hours for each television station. Of this, 30 per cent is divided equally among all candidates and 70 per cent is divided based on the party's current representation in Congress. Four per cent is set aside for candidates whose parties are not represented in the Congress. During congressional elections, a similar formula applies, but the total amount of time is halved.

4. Implications for Media Outlets

It is clear from the above that radio and television (broadcasters) tend to be subject to a much stricter regulatory regime than the print media. This may be due to the greater persuasive power and broader reach of broadcasters, the public nature of the airwaves upon which radio and television are (traditionally) distributed, or simply the general tendency to subject these media to greater regulation. Whatever the reason, print media are generally free to endorse a party or candidate, while broadcasters are prohibited from being openly partisan. In fact, an obligation of neutrality in the broadcast media appears to be one of the few commonalities that unite nearly all regulatory systems. Even in the United States, which is largely

---

[15] *Harper v. Canada*, 2004 SCC 33, para. 79.
[16] Peter W. Wickham and Dave Marshall, "Political Party and Campaign Financing in Barbados". Available at: http://bibliotecavirtual.clacso.org.ar/ar/libros/normas/El_desafio_del_Financiamiento/dream%20weaverr/INFORMES%20NACIONALES/Informes%20Caribe%20PDF/BARBADOS%20-%20Peter%20W.%20Wickham%20and%20Dave%20Marshall.pdf.

deregulated and where paid political advertising is most heavily entrenched in the culture, television and radio stations are required to adopt a non-discriminatory approach when it comes to campaign advertising.

This survey also suggests that regulatory systems which apply to third parties tend to be more effective. Not all systems which permit third party advertising have led to third party domination, but the analysis above does at least demonstrate the potential dangers of allowing unregulated third party campaigning. Although the manner of regulating third party advertising varies from country to country, jurisdictions that ignore the role that this can play in political campaigns do so at their own peril.

The practical implications of campaign advertising rules for the media largely depend on the nature of the regulatory system. Where the law simply prohibits paid political advertising, compliance should be simple. Where political expenditure is capped, it is usually the political parties themselves who must ensure they operate within the spending or advertising limits, subject to external auditing. In most systems, the main duty of the media in dealing with campaign advertising is to respect rules of impartiality, in order to ensure that they remain commentators outside of the political process rather than partisan participants in it.

5. Conclusion

There are a number of different approaches to regulating election advertising through the media. The diversity of regulatory models does not present any particular set of concrete "better practices." There are jurisdictions where the rules seem to work well, and jurisdictions where this is less so. However, the efficacy of a model is deeply tied to the political and social culture of the electorate.

One broad conclusion is that there seems to be something of a trend towards relaxing the rules on paid political advertisements in the broadcast media. It is at least true to say that while there have been some instances of this, there are few, if any, examples of countries which have moved to impose stricter rules. This may not be a positive trend, and there are cases where a relaxation of the rules has had a clearly detrimental effect on the democratic process. This suggests that once moneyed interests are allowed to exert their influence, this is extremely difficult to counteract. The many unsuccessful attempts to clean up campaign spending in the United States bear testament to this. In the 2012 presidential campaign, Barack Obama is expected to spend upwards of a billion dollars,[17] while his opponent (still yet to be determined, at the time of research) received an early pledge of one

[17] Chris Cillizza, "Obama's reelection campaign could hit billion-dollar mark" *The Washington Post* (12 December 2010). Available at: http://www.washingtonpost.com/wp-dyn/content/article/2010/12/12/AR2010121203181.html.

hundred million dollars from a group of wealthy donors.[18] A lesson for countries which are just starting to put in place regulatory systems may, therefore, be that it is better off to err on the side of more stringent regulation, particularly for third party candidates, since it is politically easier to loosen these restrictions than to tighten them.

[18] Amanda Terkel and Ryan Grim, "Koch Brothers, Allies Pledge $100 Million At Private Meeting To Beat Obama" *The Huffington Post*, 3 February 2012. Available at: http://www.huffingtonpost.com/2012/02/03/koch-brothers-100-million-obama_n_1250828.html.