

FROM: ELECTION LAW BLOG

# WHY JOHN EDWARDS PROBABLY DID NOT COMMIT A CRIME,

REGARDLESS OF HIS MOTIVES  
OR THOSE OF HIS DONORS

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**M**uch of the initial reaction to the Edwards indictment from experts in campaign-finance law has been critical or skeptical of the government's theory. But in my view, the reaction has not been critical enough. Some skeptics think the problem with the government's case is figuring out what the "true motives" of Edwards and his supporters were when they gave large amounts of money to keep his affair secret. If their motives were to benefit Edward's campaign, then perhaps this money was an illegal campaign "contribution;" if their motives were anything else, like preserving Edward's family relationships, then the money was not a campaign contribution. On this view, the government has a difficult, but not impossible, problem on its hands only because sorting out mixed motives in a situation like this is extraordinarily complex. This is Rick Hasen's view<sup>1</sup> of the case: the government's case is difficult, but plausible, because if the government can prove Edwards

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<sup>1</sup> Richard L. Hasen, *A Cover-Up, Not a Crime. Why the case against John Edwards may be hard to prove.*, Slate, [www.slate.com/articles/news\\_and\\_politics/jurisprudence/2011/06/a\\_coverup\\_not\\_a\\_crime.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2011/06/a_coverup_not_a_crime.html).

and the donors “really intended” the money to benefit his campaign, then a crime will have been committed.

But I believe the government’s case is even more tenuous than Hasen’s view suggests. What constitutes a “campaign contribution” under the federal election law for criminal-law purposes must be defined in objective terms. The definition of a “contribution” cannot turn on the subjective motive of the actors involved. There are a limitless number of ways supporters of a candidate can spend money that could indirectly benefit the electoral prospects of that candidate. Whether any of these means are “contributions” or not should depend, for purposes of criminal law, on objective facts, not on whether those involved intended to benefit some candidate. For example, if a candidate has published an autobiography, a supporter could buy up thousands of copies of the book and help turn it into a bestseller, which could enhance the candidate’s stature and visibility. Most forms of this kind of indirect activity will cost more than the \$2300 cap on campaign contributions (at \$25 a book, buying 93 books would exceed that cap). But the courts are unlikely to accept the view that whether buying up these books constitutes a crime turns on whether the purchases were motivated by a desire to help the campaign or, instead, a belief in the correctness of the ideas expressed and a desire to share those ideas with others. Motives are irrelevant. The FEC has already recognized<sup>2</sup> this in the flip-side of the Edwards case; when a donor gives money directly to a candidate, this will be treated as a contribution, regardless of whether the donor says my real motive is to give a gift to the candidate, not a campaign contribution. But just as subjective intent cannot turn a contribution into something else, it cannot turn something not a contribution into one. There are two points here: (1) not every form of spending that indirectly benefits a candidate is, in legal terms, a “campaign contribution;” (2) determining which forms of spending are contributions cannot turn on whether the actors involved are motivated to help the campaign or not – especially in the criminal-law context, where due process considerations require that

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<sup>2</sup> Letter from Darryl R. Wold, Chairman, FEC, to Philip D. Harvey, DKT International, June 14, 2000, [saos.nictusa.com/aodocs/2000-08.pdf](http://saos.nictusa.com/aodocs/2000-08.pdf).

potential defendants have clear notice of whether their conduct constitutes a crime or not.

The question in the Edwards case is thus whether money given to support a mistress is, under the law, a campaign “contribution,” period, regardless of trying to sort out why the money was given. Based on my knowledge of the election laws, I find it hard to believe the courts will answer yes to that question. For one, the money involved here was not a substitute for money the campaign itself might otherwise have spent; indeed, if Edwards has used campaign money to support his mistress, that would itself have violated the criminal law. So the donors did not save the Edwards campaign from spending money it might otherwise have spent. Criminal prosecutions under the federal election laws are extremely rare to begin with; the government has never brought a criminal case involving an expansive notion of “contribution,” let alone one as expansive as this case involves. Indeed, even in the civil context, the FEC has never tried to stretch the definition of “contribution” this far. The money spent here is almost certainly not a “contribution” within the meaning of the election laws, at least for criminal-law purposes. I believe at least nine out of ten election-law experts would have been of that view before this prosecution was announced. But even if there is uncertainty about that, the Constitution prohibits criminal prosecutions under statutes that are too vague to provide fair notice about the boundaries between lawful and criminal conduct.

The confusion on this issue might be a result of the fact that specific intent is *necessary* to establish a criminal violation of the federal campaign finance laws. Thus, the government must generally prove that the offender was aware of what the law required, and that he or she violated that law notwithstanding that knowledge. But the fact that intent is *necessary* doesn't mean it's *sufficient*: the payments either are contributions, within the meaning of the law, or they are not. Whatever motivated the donors or Edwards cannot turn spending that is not a contribution into a contribution. I have no sympathy as a moral matter for John Edwards, but regardless of his motives, I doubt the courts are going to accept the view that he can be prosecuted for criminal violations of the federal campaign-finance laws –

regardless of whether he or his donors intended to benefit his campaign through the payments. //