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Using campaign finance law as an electoral sword

By Reid Alan Cox

One of the most troubling election developments that is arising more and more frequently is the use of campaign finance law by candidates, political parties and their supporters as a tool to silence—or even punish—their opponents. I was reminded of this last week, not because of a yet another allegation raised or complaint filed, but because of the lack of one.

Coinciding with the Democratic National Convention in Denver, an independent group called the American Leadership Project (ALP) announced it was “launch[ing] a new radio ad in Colorado, urging Senator John McCain to work for a real solution to our energy crisis.” If the group’s name sounds familiar, it should because the American Leadership Project is the same group that prompted at least two complaints—the first by Obama supporters, and the second by the Obama campaign—filed with the Federal Election Commission during the Democratic primary season.

As you might remember from our earlier coverage, the American Leadership Project also ran ads touting issues associated with Sen. Hillary Clinton (http://www.campaignfreedom.org/blog/ID.524/blog_detail.asp) in states where some of the most hotly contested Democratic primaries were held, including in Texas, Ohio, Pennsylvania and Indiana. Like the current McCain/energy advertising, the earlier “ads didn’t contain express advocacy or even the “functional equivalent of express advocacy,” as our Stephen Hoersting observed in March. So, “[t]o most every compliance practitioner, ALP’s ads were ‘genuine issue ads’ fully protected under the First Amendment, recently reinforced by the Supreme Court’s ruling in *WRTL II*.”

But that conclusion—that ALP’s ads were constitutionally protected “genuine issue ads”—wasn’t Hoersting’s primary point. Rather, among the important issues he raised was that such a conclusion was almost beside the point since complaints—prompting an FEC, or even a criminal, investigation—could sufficiently threaten or consume the group so as to silence it, or worse shut it down. Indeed, such investigations are not only possible, but likely, since the FEC has taken the position that any group—including one that is completely independent and does not coordinate with any campaign—can be regulated as a “political committee” on the basis of its “contributions” and “major purpose,” regardless of what speech actually results.

Thus, when the FEC receives a complaint about what appears to be a protected independent non-express advocacy ad (or “genuine issue ad” in *WRTL II*-speak), the inquiry doesn’t stop there, it has only just begun. Examining the output side (the resulting speech) is the easy part, according to the FEC and campaign finance “reformers.” The hard part is on the other side, the input side, of the equation—namely whether the group’s “major purpose” is the nomination or election of a candidate, and whether the group solicited more than \$1,000 in contributions “used to support or oppose the election” of a federal candidate. And, if the group did, the FEC had found its regulatory hook, since its position is that the group is subject to the full extent of restrictions and regulations on “political committees.”

Not only does such a system bestow enormous power on the FEC as the investigative and enforcement agency, but it also provides tremendous opportunities for candidates, political parties and their supporters to use the FEC to pursue their own goals of silencing or shutting down “unfriendly” speakers—all in an area that is supposed to be constitutionally protected from such chill. After all, if merely filing a complaint is all it takes to trigger a full-fledged government investigation digging into all of the particulars of a disfavored group and its donors—not to mention possible enforcement of burdensome regulations and significant fines—then that is quite a sword to wield especially at little to no cost. In fact, the threat of such an investigation alone is enough to make many, if not most, groups steer far clear of such jeopardy.

All of this brings us back to the American Leadership Project, and how that group serves as an example of just how blatantly and easily candidates, political parties and their supporters use campaign finance laws and the FEC as an electoral tool to advance their own campaigns. You see, back during the Democratic primaries, both the Obama campaign and its supporters ran to the FEC complaining that the ALP violated the campaign finance laws by running what, on their face, appeared to be run-of-the-mill “genuine issue ads” that accentuated the positives of Obama’s opponent, Sen. Clinton. But just six months later, when ALP started running new issue ads turning negative attention to Obama’s new opponent, Sen. McCain, there was nary a word from the Obama campaign, the Democratic Party or their supporters.

Needless to say, the campaign finance laws didn’t change in those six months, just the apparent beneficiary of ALP’s free speech. So the conclusion that must be drawn is that those earlier complaints were motivated by the unadulterated desire of the Obama campaign and his supporters to threaten, disadvantage and even stop the opposition—not engage in some civic duty to inform the proper authorities of possible campaign finance violations.

Here at the Center for Competitive Politics, we understand that the world of campaigns and elections is the rough and tumble world of politics. But that doesn’t mean that candidates, political parties and their supporters should be able to deputize government investigative and

enforcement authorities as volunteers who are ready and able to assist in securing victories at the ballot box.

Reid Alan Cox is the legal director of the Center for Competitive Politics.