



The Bipartisan Affair of Threatening Free Speech

By Reid Alan Cox

Over the past few weeks, I have been beating the drum that candidates, political parties and their supporters have been, and currently are, using campaign finance laws to silence—or even shut down—independent opposing groups through fear and threat of investigation and prosecution. Politicians and their supporters exploit our complex campaign finance regime—not to mention the Federal Election Commission (FEC)—both inappropriately and unconstitutionally as just another tool to win elections.

In the Election 2008 Free Speech Project’s previous examples, each time the call to investigate and prosecute these independent groups and their speech came from the Democratic side of the partisan aisle. But Republicans also utilize these very same unfortunate tactics. Indeed, this week provided a timely example.

On Monday, the National Republican Congressional Committee (NRCC) filed a complaint with the FEC against several independent organizations affiliated under the banner of the Patriot Majority.

The NRCC’s complaint notes that, “[s]ince January 2008, the Patriot Majority and its affiliated committees have spent more than \$1 million on television advertisements opposing Republican candidates for federal office.” Fair enough, the Patriot Majority dutifully reported as much on multiple electioneering communications notices filed with the FEC.

But then the NRCC goes on to allege that such speech “clearly demonstrate[s] that [the Patriot Majority’s] major purpose is to influence federal elections.”

That allegation, according to the NRCC, is the ball game, so to speak. The NRCC claims that the Patriot Majority—*independent or not*—should be forced to register “as a [f]ederal political committee.” As a political committee, the Patriot Majority would be subject to “federal contribution limits” for donations from individual citizens, and would be unable to use—or even accept—any money from incorporated organizations or labor unions to fund the group’s speech.

These restrictions would be the final out for the Patriot Majority, as it would be for many, if not most, independent groups, which depend on raising substantial funds just to be able to let the public know about the issues that matter to them. Even the NRCC's allegation alone could equate to a metaphorical walk-off home run regardless of whether or not the NRCC's complaint leads to any actual enforcement.

The worst case scenario for the Patriot Majority would be, of course, that the NRCC's allegation is accepted. In that case not only would the Patriot Majority be subject to contribution limits and source restrictions in the future, but the group also could—and likely would—be punished for failing to follow those and a book full of other campaign finance regulations in the past.

The resulting fines and sanctions—not to mention the logistical and legal burden of complying—would teach the independent group not to try to speak any more.

But the Patriot Majority—and independent groups like it—can be forced to learn the very same lesson even if the NRCC's complaint goes nowhere after making a few headlines.

The reality is that free speech costs money if an independent group wants to get its issues noticed, heard and addressed as part of the public agenda. And, until an independent group and its issues get that wide and serious attention, it is all but impossible to raise the money needed to get the message out except in large amounts from citizens and other organizations that are fellow travelers.

That means that like-minded individuals and organizations with the resources to get independent groups and their issues into the ballgame are essential. Unfortunately, just the threat of a campaign finance complaint, and resulting investigation, can deter like-minded funders from ever stepping up by instilling fear that their good deed will not go unpunished. After all, even if they don't face legal jeopardy themselves—which itself is questionable—just by donating they open up their personal and professional lives to public criticism and official investigation.

The ease with which campaign finance complaints can harass and intimidate potential contributors is why both sides of the partisan political aisle find it so useful to produce trumped up complaints against independent groups that raise opposing issues. Filing a complaint is essentially a no-lose proposition, invoked with minimal cost, for any candidate, political party or their supporters who seek to muzzle their ideological opponents. Moreover, wielding the campaign finance stick will likely cause the desired result of returning the issues battleground to the candidate's control by eliminating the speech of the independent group.

Indeed, with the Federal Election Commission taking the position that it can investigate virtually any group—in order to prove that its “major purpose” is to influence a federal election, and that

it solicited just \$1,000 of donations “used to support or oppose” a candidate—not only is the campaign finance threat real, but there is little the independent group can do to avoid it.

The Patriot Majority tried, forcefully stating on its website that it “is an independent political organization,” and that “the First Amendment protects the rights of groups like [it] ... to encourage a public discussion about issues affecting American citizens.” In fact, the group goes on to disclaim any link to candidates, political parties and campaign committees, specifically affirming that the Patriot Majority “does not” and “will not coordinate.” The group even explains that “[a]ll decisions ... shall be made by the officers of the Patriot Majority independently,” and that “[n]o one may provide [the] Patriot Majority[] with non-public information about a campaign or political party’s plans, projects, activities, or needs.” But none of this was enough to avoid the NRCC’s complaint, and the now likely chilling threat of investigation and possible prosecution.

Therefore, since both sides of the partisan aisle have been playing this threatening game, would it be too much to ask that they both agree to end the bipartisan affair of threatening free speech?

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