



# CENTER *for* COMPETITIVE POLITICS

## **Uncertain Times Result in Unheard Speech**

By Reid Alan Cox

If you live in a battleground state like I do — Virginia — then for the past two months you've been well aware that each and every commercial break comes fully equipped with at least one or more political advertisements. Indeed, it's hard to turn on the television or radio and not hear Barack Obama, John McCain, your local senator or congressman, his opponent or the Democratic or Republican parties approving a message.

Of course, we don't think that's such a bad thing here at the Center for Competitive Politics. After all, if "We the People" elect our representatives, then we should also be able to hear why those representatives should or should not get our votes.

But lost in the cacophony of record-breaking campaign spending is that neither you nor I have been hearing much at all from independent groups that are not connected to or controlled by the candidates and political parties that will appear on the ballot next Tuesday. Quite frankly, independent groups are almost nowhere to be heard in 2008.

That's a dramatic difference from 2004, when the broadcast airwaves were not only occupied by ads run by George W. Bush, John Kerry, the RNC and the DNC, but also by so-called 527 and 501(c)(4) groups like the Swift Boat Veterans for Truth and MoveOn.org. Instead, if you listen to who's behind all of the political speech now, it's just the candidates and their political parties.

That anecdotal observation was confirmed with hard data last week when the Center for Responsive Politics released figures showing that total expenditures in 2008 by 527 groups focused on federal races and issues are less than half what they were in 2004. This comparative blackout of independent political advertising in this election cycle has prompted media reports attempting to explain why independent political speech has become so much more muted in just four years.

A *Washington Post* story led the speculation two Sundays ago, stating “[t]he recent collapse on Wall Street appears to have found another victim: the independent political groups aiming to make an impact on the 2008 elections.” The *Post*’s Matthew Mosk posited that, while a “decline” in independent political advertising “was underway before turmoil swept through the markets[,] ... fundraising consultants say the economic collapse ultimately slammed the door.”

The *Politico* pushed a similar storyline three days later. “For most of the donor pool for a robust third-party effort, this cycle appears to have come down to dollars and cents,” the *Politico*’s Jonathan Martin concluded. “Many, like Las Vegas casino mogul Sheldon Adelson, saw their portfolios slide, reducing their interest greatly in practicing their political hobby on the side.”

But while it may be that the sudden across-the-board reduction in net worth played a role in preventing independent groups from amassing the funds necessary to maintain a significant advertising presence in this election cycle, there is more to it. As Loyola law professor Rick Hasen blogged in response to the *Politico*’s analysis: “I’m thinking much of this had to do with the uncertain legal terrain surrounding [independent political] activity.”

Indeed, that legal linchpin actually builds upon and adds another layer to the economic explanation since regulatory uncertainty with respect to independent political groups only piles on to the financial losses that have already been inflicted on prospective donors. In other words, why would it make sense for a contributor — whose resources have already been diminished and remain at risk — to decide to open up another possibility of exposure?

Such legal risk for contributing to independent political speech efforts became real after the 2004 federal election cycle when, as the *Washington Post* acknowledged, “the Federal Election Commission issued an unprecedented \$2.6 million in fines against seven 527 groups.” In fact, “[t]his year, lawyers advising the donors to those groups warned that FEC fines could be a precursor to action by the Justice Department,” the *Post* reported.

True, the fines were imposed on the groups, but their donors were an important and integral part of the story. You see, in the aftermath of the 2004 election, the FEC took the position — and brought enforcement actions alleging — that even independent political groups that didn’t expressly advocate the election or defeat of a federal candidate were subject to regulation as “political committees” if they (1) had the “major purpose” of influencing a federal election, and (2) solicited more than \$1,000 “used to support or oppose the election of a ... Federal candidate.”

Unfortunately, the donors to those independent groups got put on the hook at the same time because what the donors saw, heard, believed and understood was relevant to any investigation and enforcement. Quite simply, the donors were prime evidence.

Thus, the FEC did not limit its investigations solely to the independent political groups and their officials and employees, but investigated the donors, as well. Indeed, since the FEC has subpoena power, the donors could be legally required to comply, or face serious legal consequences if they didn't. So the cost of donating to independent speech efforts amounted not just to the figure contributed on the check, but also could end up including the time, effort and legal fees that resulted months later if and when the FEC decided there was something worth investigating.

Quite frankly, those are some pretty good reasons for a donor to keep his pocketbook closed and mouth shut even when the rules are clear and the lines are bright. But there were no easy to understand black-and-white tests here.

The regulators did not have a singular standard for when an independent group's "major purpose" was to influence an election. Rather, the FEC insisted that a case-by-case approach was necessary. Indeed, even this individualized standard was incredibly fuzzy, with the FEC explaining that "the major purpose doctrine requires a fact-intensive analysis of a group's campaign activities compared to its activities unrelated to campaigns, any rule must permit the Commission the flexibility to apply the doctrine." That flexible fact-intensive scrutiny reached all the way down to the donors.

Likewise, the FEC's solicitation trigger was problematic. The provision swept in for regulation any contribution made "in response to any communication ... indicat[ing] that any portion of the funds received will used to support or oppose the election of a clearly identified Federal candidate." So the regulators could consider any part of every communication between the independent group and the donor that might have prompted the donation. That made it relevant whether the donor was told, understood or even believed that his donation would be "used to support or oppose" a candidate. And, all of these "facts" would be uncovered through an investigation undertaken months after the communications had occurred and the donations had been collected.

Finally, to top it all off, such investigations and enforcement actions could be launched regardless of whether the independent political group ever actually used the donation to expressly advocate the election or defeat of a candidate. In other words, neither the donor nor the independent group might ever engage in regulable expenditures, but no matter, an investigation and even enforcement was still a real threat.

There can be little doubt that the world's economic travails have forced Americans to cut their spending, with political contributions being quick on the chopping block for many. But the financial collapse alone does not seem to tell the whole story of why independent political speech has not played a leading role in the 2008 election cycle. Remember, the stock market

crashed in late September and early October — a month after the presidential nominating conventions, with the election season already in full swing. So maybe, just maybe, legal risk and uncertainty have a lot to do with the sound of silence so many of us are hearing from independent 527 and 501(c)(4) groups.

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