Americans for Campaign Reform

Statement
of
Lawrence M. Noble
President and C.E.O.
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Before the
Subcommittee on Crime and Terrorism
Senate Committee on the Judiciary
"Current Issues in Campaign Finance Law Enforcement"

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Chairman Whitehouse, Ranking Member Graham and distinguished Members of the Subcommittee, I am president and CEO of Americans for Campaign Reform (ACR), a non-partisan non-profit organization that advocates for small donor public funding of elections. I am also currently an Adjunct Professor at George Washington University Law School, where I teach campaign finance law. Prior to joining ACR, I served as general counsel of the Federal Election Commission (FEC) for 13 years, was executive director of the Center for Responsive Politics and was in private practice, where I advised corporate clients on compliance with federal and state campaign finance laws. I appreciate the opportunity to address the Subcommittee on issues with the enforcement of the campaign finance laws.

It is hard to look at the 2012 election and not conclude that there are very serious problems with our current campaign finance system. It is estimated that we spent over $6 billion dollars on the last election. According to the FEC, so-called "independent" SuperPACs reported spending over $600 million, while 501(c)(4) organizations reported spending over $250 million advocating the election of candidates through independent expenditures or electioneering communications. And, these figures only include what was reported to the FEC. They do not include all of the unreported money spent by various groups that were actively seeking the election or defeat of candidates, often working as surrogates for the campaigns and political parties while shielding their donors from public view.

Some argue that this spending reflects a spirited and healthy debate about the candidates and issues. It is true that there was a loud debate during the last election, but participation was largely limited to only those who could afford to buy expensive ads or donate large amounts of money to various groups. And, it was a debate where we often didn't know the real identity of those speaking.

Many, including some who agree that the current campaign finance system is broken and has resulted in the disenfranchisement of the average voter, point to Supreme Court decisions such as *Citizens United* as the reason it appears the current laws are no longer effective. In fact, some have concluded that the power that corporations, unions and wealthy individuals currently have over our elections is now a fact of life and that, short of a constitutional amendment, there is little Congress can be done to curb that power.

However, this analysis ignores how much of the problem has been caused by the failure of the FEC, Department of Justice (DOJ) and the Internal Revenue Service (IRS) to properly interpret and enforce the laws that do exist. While it is outside the power of the FEC and DOJ to prohibit corporations, unions and individuals from making independent expenditures in connection with federal elections, they do have the power and responsibility to make sure the sources of money spent on many of these expenditures are disclosed and that all of this unlimited spending is truly independent of the candidate. In fact, the laws requiring disclosure of the sources of this outside spending have been upheld by the Supreme Court. Equally significant is the fact that the Court presumed the rules prohibiting the spending of this money in coordination with candidates were being enforced when it determined there was insufficient justification to ban corporate independent expenditures.

I. Disclosure

The fact is that the Supreme Court has consistently held that disclosure serves a compelling governmental interest. In fact, four of the five justices who struck down the long-standing ban on corporate independent expenditures agreed with the four justices who would have upheld the ban that broad disclosure laws were justified when applied the same activity. However, the laws are currently being interpreted and enforced in such a way as to undermine core disclosure requirements as applied to both SuperPACs and 501(c)(4) organizations.

So-called SuperPACs are a product of the Supreme Court's decision in *Citizens United,* allowing corporations and unions to make unlimited independent expenditures, and the subsequent decision of the U.S. Court of Appeals for the D.C. Circuit, in *SpeechNow v. FEC,* allowing PACs that make only independent expenditures to accept unlimited corporate and union money. Nevertheless, SuperPACs must register with the FEC and publicly report the source of their funds. Therefore, the public should be able to learn who is funding the SuperPAC activity.

However, there have been instances where a SuperPAC has reported another corporation or organization as a donor, when in fact that entity was being used to shield the true individual donor of the funds. Disclosure can be easily circumvented if all you have to do is use an intermediary organization between the real donor and the SuperPAC. Fortunately, that is currently illegal under 2 U.S.C. §441f. Unfortunately, it does not appear that law is being enforced. Section 441f provides:

> No person shall make a contribution in the name of another person or knowingly permit his name to be used to effect such a contribution and no person shall knowingly accept a contribution made by one person in the name of another person.

Under the clear application of this law, providing a contribution to a SuperPAC through the use of a straw donor, and knowingly accepting such a contribution, is illegal. This means anyone who passes money through an organization for the purpose of making a contribution to a SuperPAC, the organization used as a pass-through, and the recipient SuperPAC who knows of the arrangement can all be prosecuted for violation of §441f. While the FEC and the Department of Justice have prosecuted cases where individuals and corporation have reimbursed donors to candidates, it does not appear there is any effort to target donors to SuperPACs who use front organizations to hide their contributions or the SuperPACs who knowingly accept such contributions.

Of course, many donors prefer to avoid the use of SuperPACs and work through organizations that do not report any of their donors. One of the most common ways to hide the source of funds used for independent expenditures is for the expenditures to be made by a group claiming status as a 501(c)(4) organization under the Internal Revenue Code. To be a 501(c)(4) organization a group must be engaged in social welfare activities and not have political activity as its primary activity. These groups are not required to publicly disclose their donors under the Internal Revenue Code. Under *Citizens United,* they may make independent expenditures.

Nevertheless, falsely declaring an organization to not have political activity as its primary purpose in an effort to obtain 501(c)(4) recognition could be treated as a criminal violation. However, given the number of 501(c)(4) organizations that appeared to spend most of their time on political activity during the last election, there appears to be little effort being given to making sure politically active groups claiming 501(c)(4) status are complying with the law. In fact, the IRS has never made clear when a group's purpose is "primary" or "political." And, while IRS proceedings are confidential, it appears that the agency rarely challenges a group's 501(c)(4) designation based on political activity.

Moreover, if such any group spends or receives more than $1,000 for an independent expenditure and its major purpose is election advocacy, it becomes a political committee under the Federal Election Campaign Act (FECA) and has to publicly report its contributors and expenditures, just like any other political committee. The FEC, however, no longer appears to be interested in determining whether any of these politically active groups should be reporting as political committees. In fact, the FEC Commissioners can no longer even agree on what activity will trigger political committee status for an organization.

Even if a group does not have to report as a political committee, it must report its independent expenditures. FECA provides that any person or organization that makes an independent expenditure in excess of $250 during a calendar year must disclose "each person who made a contribution in excess of $200 …made for the purpose of furthering an independent expenditure." 2 U.S.C. §434(c).

Thus, when someone gives $25,000, $100,000 or $1 million or more to a 501(c)(4) organization with the knowledge or expectation that the money will be spent on election advocacy ads, it would seem that the law requires the identity of that donor be disclosed. Of course, we all know that is not being done. Why? Because certain members of the FEC have decided that the law only applies where the contributor gives for a specific advertisement, regardless of whether they gave with the knowledge that the organization was going to use his or her money for independent expenditures and with the intent that the organization do so. Utilizing this artificially narrow reading of the law, the FEC has failed to enforce the disclosure provisions as written by Congress.

To be clear, disclosure not only provides the public with information with which it can judge the message being funded, it also provides law enforcement with a necessary tool to prevent and prosecute other violations of the law. As Justice Louis Brandeis said, “Sunlight is said to be the best of disinfectants; electric light the most efficient policeman." The failure to enforce the disclosure laws means that we do not know the true source of funds being used to influence our elections. For example, it is still illegal for foreign nationals to make expenditures to influence any election in the United States, whether or not independent of a candidate. However, a system that provides easy ways to hide the true source of the funding of an independent expenditure allows those so inclined to evade that prohibition. While the Department of Justice has prosecuted cases where foreign nationals contributed directly to candidates, funding “independent” election advocacy through an organization that does not disclose its donors is way for to influence U.S. elections by hiding in plain site.

II. Coordination

Individuals have been allowed to spend unlimited amounts of their own money on “independent expenditures” since 1976 when, in *Buckley v. Valeo*, the Supreme Court first articulated what it saw as the important constitutional distinction between money spent independently of a candidate and money contributed to, or spent in coordination with, a candidate. “Independent expenditure” took on heightened significance after *Citizens United*, when the Court found that corporations and unions had the same constitutional right as individuals to make independent expenditures. While there is no doubt that both the *Buckley* and *Citizens United* decision opened the door to a new level spending in elections, what is often overlooked is that, as the word “independent” suggests, the key feature of such an expenditure is the absence of coordination with a candidate.

The Supreme Court has been very clear about why it is unconstitutional to limit independent expenditures. According to the Court, the lack of coordination with a candidate means the expenditure can hurt, as well as help the candidate, and eliminates the possibility of

any real or apparent corruption arising from the making of the independent expenditure. The presumed lack of connection between the candidate and spender means there is little chance for the candidate to feel beholden to the spender. At least that's the theory.

Congress carried this idea forward in FECA, where it defined an independent expenditure, in part, as an expenditure "that is not made in concert or cooperation with or at the request or suggestion of such candidate, the candidate's authorized political committee, or their agents, or a political party committee or its agents." 2 U.S.C. §431(17). At one time, the FEC applied the statute in a way that virtually prohibited any discussion about campaign strategy between the candidate and the independent spender. However, in what has become an all too common process, the FEC narrowed the coordination rules over time to the point where they were seen as totally ineffective.

Frustrated with the FEC, Congress enacted the Bipartisan Campaign Reform Act of 2002 (BCRA). One of the many reforms included in BCRA was the overturning of the then existing weak FEC coordination regulations and the direction to the FEC to draft new coordination rules. After a long drawn out process that involved a court sending the regulations back to the FEC more than once, in 2008 the FEC finally adopted a complex three part test with numerous subparts that runs well over 2,500 words. These new rules carve out major exemptions to the definition of coordination. But even these new weak rules have been too much for some FEC Commissioners and the FEC has deadlocked over any real attempts to enforce the coordination rules.

The result was an election where it was impossible to reconcile the normally understood concept of "independence" with the connections we routinely saw between the so-called independent spenders and the candidates and political parties. During the last election cycle, supposedly independent SuperPACs were publicly aligned with specific candidates and were established and staffed by former campaign officials, while the candidates raised funds for "their" SuperPACs and met with the SuperPACs supporters. There was no reason for these connections to be allowed to exist other than a lack of enforcement of the law. Given these connections, however, it is not surprising that no one, including the public and the candidates, seriously considered the SuperPACs independent of the candidates in any meaningful way.

III. The Role of The FEC, DOJ and IRS

There should be no doubt that a major portion of the responsibility for the lack of enforcement of the campaign finance laws lies with the FEC, which has primary jurisdiction over civil enforcement of FECA. It is the FEC which is responsible for administering and interpreting the law in the first instance. Nevertheless, the Department of Justice has independent authority to prosecute criminal violations and has made clear in the past that is not bound by the FEC's

inaction where it believes the law is clear. While one would hope the two agencies will work together, and they often do, the Department of Justice can prosecute a criminal violation of the law even where the FEC may not have the necessary votes to move forward. Unfortunately, the Justice Department seems to be willing to rely on the inaction of the FEC as justification for not moving forward on egregious cases involving SuperPACs and 501(c)(4) organizations.

While the IRS has no direct responsibility for enforcement of FECA, the Internal Revenue Code and FECA both deal with the regulation of political activity. The IRS cannot ignore its responsibility to ensure that organizations seeking to take advantage of being classified as a 501(c)(4) organization are complying with the Internal Revenue Code's restrictions on their political activity.

IV. Conclusion

It should be fundamental that, whether by action or inaction, an agency or law enforcement body cannot interpret or enforce a law in such a way as to make legal what Congress sough to prohibit. Yet, we seem to have tolerated just such a situation when it comes to our campaign finance laws. When the laws going unenforced regulate how we finance the elections of those who govern us, the public's trust in government is undermined.

I want to thank this Committee for exploring this problem and am hopeful that this is the beginning of an effort to bring about some fundamental changes to how the campaign finance laws are enforced.