



CENTER *for* COMPETITIVE POLITICS

The criminal proclivities of Democracy 21

By Reid Alan Cox

Could independently running an issue advertisement lead to a criminal investigation, possible prosecution and even prison time?

That sounds like a ridiculous question, and, according to the long-time federal prosecutor who heads the Justice Department's election crimes branch, "You don't see a whole lot of cases." But Fred Wertheimer of Democracy 21 believes that lack of history does not mean that independent groups should rest any easier today.

Democracy 21 sent a letter last week more than suggesting that independent groups—and their major donors—should worry about the possibility of a criminal investigation before speaking publicly ahead of the upcoming election.

Specifically, Wertheimer asked U.S. Attorney General Michael Mukasey to "make it clear to the public that knowing and willful violations of the campaign finance laws by [independent] groups will be subject to potential Justice Department investigation and prosecution."

Now, Wertheimer's suggestion may not sound all that ominous. After all, federal law has long made it a criminal offense for any person to "knowing[ly] and willful[ly] violat[e]" the Federal Election Campaign Act (FECA). But Wertheimer does not want criminal enforcement of the campaign finance laws as they were enacted by Congress and interpreted by the Supreme Court.

Instead, in explaining just what criminal investigations he would like to see, Wertheimer cites Federal Election Commission (FEC) "enforcement actions" brought "against 527 groups arising from the 2004 election"—enforcement actions that were themselves based on new (11 C.F.R. 100.57) or discredited (11 C.F.R. 100.22(b)) regulations, absent new 527 legislation from Congress or new decisions from the Supreme Court.

Indeed, Wertheimer claims that those "FEC enforcement actions ... established a body of law that sets forth the campaign finance rules that apply to 527 ... and nonprofit groups ... [in] the 2008 elections."

Wertheimer asserts that, “[b]ased on this established body of law, campaign finance violations by 527 ... and nonprofit groups in the 2008 election that are similar to the kinds ... that occurred in the 2004 election should be treated as ‘knowing and willful’ ... and subject to potential criminal prosecution.”

In other words, Wertheimer wants the Justice Department in 2008 to pick up from where the FEC left off after the 2004 elections, and turn up the prosecutorial heat—based on regulations written by the FEC, and later interpreted and enforced by the same FEC. No need to wait for the lawmakers or the judges to proceed with this criminal enforcement.

But there has been much dispute—some of it from the Center for Competitive Politics—that the FEC exceeded its authority in bringing those enforcement actions and, more importantly, in even promulgating those regulations.

Quite simply, as merely an implementing agency the FEC cannot take what the law has not given, and federal campaign finance laws, as written by Congress and interpreted by the Supreme Court have not yet given the FEC (or the Justice Department) the authority to regulate and restrict issue advocacy that is independent of candidates and political parties.

Thus, there is a reason—a very good reason—why there really haven’t been too many, if any, criminal prosecutions brought based on independent issue speech. And, that reason is that the Supreme Court has consistently refused to allow Congress—or for that matter anyone else—to make it illegal, much less criminal, for independent groups to speak about and advocate for issues of public importance around election time—at least so long as they do not expressly urge the election or defeat of a candidate or political party.

Indeed, this is why the Supreme Court narrowed the statutory definitions of both “expenditure” and “political committee” in *Buckley v. Valeo* because otherwise the regulatory regime “could be interpreted to reach groups engaged purely in issue discussion.”

This judicial emphasis in providing breathing room—free from regulation, restriction and prosecution—for issue advocacy has steadfastly continued through today. After all, when campaign finance “reformers” succeeded in getting Congress to define a new special category of regulable political speech—namely, “electioneering communications”—the Supreme Court reiterated its constitutional commitment to protect independent issue advocacy from regulation and restriction. The result was the *Federal Election Commission v. Wisconsin Right to Life II* (*WRTL II*) decision, which explicitly instructed that the “[d]iscussion of issues cannot be suppressed simply because the issues may also be pertinent in an election. Where the First Amendment is implicated, the tie goes to the speaker, not the censor.”

What's more, *WRTL II* made it perfectly clear that to adequately protect independent issue speech, the regulatory regime could not restrict speech based on the intent of the speaker. "Far from serving the values the First Amendment is meant to protect, an intent-based test would chill core political speech by opening the door to a trial on every ad ... on the theory that the speaker actually intended to affect an election," the Court ruled. "No reasonable speaker would choose to run an ad if its only defense to a criminal prosecution would be that its motives were pure."

Likewise, the Court rejected regulation based on the effect of the speech. "Such a test 'puts the speaker ... wholly at the mercy of the varied understanding of his hearers,'" the Court explained. "It would also typically lead to a burdensome, expert-driven inquiry, with an indeterminate result. Litigation on such a standard may or may not accurately predict electoral effects, but it will unquestionably chill a substantial amount of political speech."

Yet in the face of this consistent legal precedent designed to ensure a protected space for independent issue speech, Wertheimer and Democracy 21 want the Justice Department to jump into the fray with criminal investigations and prosecutions against "527 groups and nonprofit groups spending soft money" presumably on issue ads. In fact, Wertheimer and Democracy 21 have now gone so far so far as to call for the removal of the veteran federal election crimes prosecutor because he publicly expressed doubt about the propriety of bringing such criminal cases.

Both Wertheimer and Democracy 21's response should have been exactly the opposite—especially from an independent non-profit organization whose mission states that it is "dedicated to making democracy work for all Americans."

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