

Recent Prosecution Presents Risks of Coordination, PACs

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On Feb. 12, Republican operative Tyler Harber pleaded guilty in a federal court in Virginia to illegally directing a political action committee to buy ads for a candidate whose campaign he also managed. Harber admitted to arranging for a separate “super PAC” to buy \$325,000 in ads to help Virginia Republican congressional candidate Chris Perkins, even though he served as Perkins’ campaign manager.

According to a recent Wall Street Journal article, this is the first criminal prosecution in the United States based upon the coordination of campaign contributions between political committees despite the explosion of political spending by independent groups in recent years.

These super PACs have become a dominant presence in Arizona elections. Labeled “independent expenditure” committees, they spend money to influence candidate races independently of the candidates themselves and must report their contributions and expenditures. Arizona has seen a dramatic increase in money spent by these groups over the past two election cycles.

In 2014, independent expenditure committees spent almost \$30 million to influence Arizona’s statewide and legislative elections. This is ten times the approximately \$3 million spent during the 2010 elections. Unlike the capped contributions that individuals can make directly to candidates, there is no limit on the amount of money that can be contributed to an independent expenditure committee, and corporate cash is permitted following the U.S. Supreme Court’s landmark 2010 decision in *Citizens United v. FEC*. So-called “dark money,” whose source wishes to remain anonymous, often finds its way into independent expenditure accounts.

The right of these committees to express their political views apart from any candidate is almost without limit except for the time, place and manner in which such expression occurs. This speech, however, loses its protection if the independent expenditure committee coordinates its efforts with a candidate. Such conduct can be detrimental to those who push and exceed the limits of the law.

Because federal and state law limit the amount an individual can contribute to a candidate and prohibit candidates from accepting corporate donations, the temptation exists to circumvent these laws by coordinating efforts between candidates and independent expenditure committees. The recent prosecution of Tyler Harber in Virginia should be a wake up call to all federal, state and local candidates who are supported by independent expenditures.

Federal candidates should take note of the statements made by the federal prosecutors following the Virginia prosecution, which indicate an effort to “aggressively pursue coordination offenses at every opportunity” in the future. The same is true for all Arizona state and local candidates, who are subject to similar restrictions under state law.

Arizona law spells out when illegal coordination occurs in the statute aptly numbered A.R.S. § 16- “911”. For example, it is illegal for an individual to serve as an agent of a candidate and an independent expenditure committee supporting that candidate or for an individual to raise money for a candidate and then make independent expenditures in support of that candidate in the same election.

There have been several allegations of illegal coordination in Arizona in recent years. The highest profile enforcement involved an allegation of illegal coordination between former Attorney General Tom Horne and an independent political committee run by a former campaign worker during the 2010 election. The enforcement was upheld by a Maricopa County Superior Court judge and is currently on appeal.

The consequences of Horne’s violation will be a civil penalty. However, if the violation amount is large enough, it could result in a candidate’s disqualification or even forfeiture of office if the candidate is an incumbent. And if the independent expenditure committee accepted corporate cash, criminal prosecution is possible.

With the recent efforts to shine a spotlight on dark money and crack down on illegal coordination, it is incumbent upon candidates, political consultants and contributors to know the outer bounds of the law governing campaign finance and to stay well within them or possibly suffer the same fate as Tyler Harber.

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