



THE COORDINATION CONUNDRUM

Parties, Candidates, and Independent Groups Push the Limit

By Paul H. Jossey

As the barrage of half-truths, guilt-by-association, and other sharp-elbowed attack ads lit up the airwaves in the recent midterm elections, another more covert battle was also raging. Candidates, party committees, and their allied independent groups pushed the limits in the non-coordinating-coordination game. The players sought to direct resources in the most efficient way possible while staying within Federal Election Commission regulations that forbid private “material” and “substantial” discussions of advertising strategy.

Last year's winner may be the trio of the National Republican Congressional Committee (NRCC), American Action Network (AAN), and American Crossroads. CNN recently discovered a clever but nondisclosed Twitter account the groups were allegedly using to relay polling data through coded messages.¹ Whether these groups, particularly AAN and Crossroads, who bear the burden, actually broke any rules remains to be seen. The liberal watchdog group American Democracy Legal Fund (ADLF) filed an FEC complaint against all three on Nov. 25.²

But the larger question of how far candidates and party committees can go to provide cues to the independent groups trying to help them remains murky. Some have pointed to the guilty plea of Virginia operative Tyler Harber in February as watershed moment.³ Harber ran a supposedly independent super PAC while managing the campaign of the candidate the PAC was supporting. The plea was noteworthy because it marked the first federal prosecution of a coordination case. But Harber's actions were so blatant—he used an alias and skimmed money off the transactions—that they didn't touch on the difficult line-drawing exercises campaigns and outside groups continue to face. At most, the Harber case signals the Department of Justice's interest in prosecuting political fraud cases. For the less obviously illegal scenarios, however, candidates, consultants, and outside groups will continue to push the limits.

FEC regulations proffer a three-part test (payment, conduct, and content) to determine whether a communication is coordinated and therefore must adhere to contribution limitations.⁴ Controversy usually arises over the “conduct” prong, which contains five criteria, any of which can trigger in-kind contribution headaches for campaigns and outside spenders.⁵

Most close calls implicate the first three conduct factors: (1) Did the candidate or political party committee make a “request or suggestion” for the communication? (2) Was the candidate or party committee “materially involved,” or did he participate in “substantial discussions” about the communication? (3) For 2, was the request made through a publicly available forum? Each factor touches on different aspects of the law, and all three drew scrutiny this cycle.

Candidates and parties can avoid the “request or suggestion” factor by making their request to the “public generally” as opposed to a “select audience.”⁶ In its NRCC complaint, ADLF asserts the now-infamous “BrunoGianelli44” Twitter account breached this factor by “hiding” the Twitter account in plain sight through coded messages decipherable only to its intended audience. Relatedly, both the “materially involved” and “substantial discussions” factors contain a “publicly available” exception.

But how public is public enough? New Hampshire Senate incumbent Jeanne Shaheen provided a close call. There the Democratic Senatorial Campaign Committee (DSCC) tweeted out “Important messages for New Hampshire” that linked to suggested scripts and opposition research allies could use to attack challenger Scott Brown. But the links directed to a “hidden” page on Shaheen's website apparently accessible only through the Twitter link.⁷ On the

other end of the spectrum was U.S. Senate candidate Tom Tillis of North Carolina. His campaign raised eyebrows by posting an entire advertising strategy document online, but its thoroughly public nature relieved the campaign of any coordination concerns.

Few would doubt that but for their public nature, opposition research and advertising strategy memos would implicate the second and third factors, “material involvement” and “substantial discussions,” because they involve the candidates' “projects, activities, or needs.” But the parameters are nonetheless ill-defined according to prominent Democrat election lawyer Bob Bauer. “No one is especially clear about what amounts to a ‘substantial’ discussion or about the information that would be considered ‘material’ to the formulation of ad strategy.”⁸

Even if considered nonpublic, does the NRCC's internal polling qualify? According to election law professor Daniel Tokaji in an interview for the CNN article, probably not: “It may bend common sense, but not necessarily the law ... I don't think sharing polling data is going to be enough to establish that the campaign was materially involved in decisions about content, target audience or timing.”

The FEC commissioners may view the Twitter complaint differently on ideological grounds. In a previous “b-roll” imbroglio, the Commission split 3-3 on whether the use of candidate footage accessed through the candidate's website or YouTube channel constituted illegal “republishing” of campaign materials.

In the 2012 case, the Republican commissioners displayed reluctance to embroil the FEC in “b-roll” enforcement, relying on the “brief quote” exception. “The Act's republishing provision is designed to capture situations where third parties, in essence, subsidize a candidate's campaign by expanding the distribution of communications whose content, format, and overall message are devised by the candidate. ... [T]he [group's] use of the video footage snippets in its own communication was consistent with the Act and Commission regulations.”⁹ The Democrat commissioners, however, would have prosecuted the case based on a stricter interpretation of the regulation, “[T]he republished material ... is not a ‘brief quote’. ... To the contrary, the material is a central part ... appearing for 10-15 seconds of the 30-second ad.”¹⁰

Regardless of ideological differences, coordination actions have proven difficult to enforce. A recent Ohio State University study, *The New Soft Money, Outside Spending in Congressional Elections*,¹¹ revealed the frustration many operatives felt for what they believed was illegal coordination by their opponents. But even where evidence does exist, the result may be underwhelming. In 2009, Club For Growth filed a complaint against former Rep. Joe Schwarz, R-Mich., and the Republican Main Street Partnership PAC. Although the FEC did unearth emails suggesting coordination, the three-year legal battle resulted in a settlement and \$5,000 in penalties.¹²

⁶¹See, e.g., *NISH v. Rumsfeld*, 348 F.3d 1263, 1272 (10th Cir. 2003).

⁶²*New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) (“[W]e have not had occasion to discuss the doctrine elaborately . . .”).

⁶³*Robinson v. District of Columbia*, 10 F. Supp. 3d 181, 186 n.3 (D.D.C. 2014) (acknowledging split); *Spain v. Community Contacts*, 2013 WL 4782158, at 5 n.2 (N.D. Ill. Sept. 6, 2013) (same); *Jethroe*, 412 F.3d at 601 n.4; *Current Circuit Splits*, 10 SETON HALL CIRCUIT REVIEW 145, 151-52 (2013) (same); Nat’l Consumer Bankruptcy Center, Ninth and Tenth Circuits Differ on Judicial Estoppel Considerations (Sept. 9, 2013), at www.ncbrc.org/blog/2013/09/09/ninth-and-tenth-circuits-differ-on-judicial-estoppel-considerations/ (similar); B. Shapiro, Las Vegas Bankruptcy Blog, The 9th Circuit vs. the 10th Circuit — Judicial Estoppel (Aug. 26, 2013), at brianshapiro.blogspot.com/2013/08/the-9th-circuit-vs-10th-circuit.html (similar).

⁶⁴*Ah Quin*, 733 F.3d at 277.

⁶⁵*Ah Quin*, 733 F.3d at 294 (Bybee, J., dissenting) (quoting 2 *Anna Karenina* 76 (N.H. Dole trans., 1899) (1877)).

⁶⁶*Coastal Plains*, 179 F.3d at 207; *Kamont v. West*, 83 F. App’x 1, 2 (5th Cir. 2003).

⁶⁷*Ah Quin*, 733 F.3d at 283 n.3 (Bybee, J., dissenting) (quoting *Holland v. Florida*, 560 U.S. 631, 649 (2010)).

⁶⁸*Holmberg v. Armbrecht*, 327 U.S. 392, 396 (1946).

⁶⁹See, e.g., *Perry v. Blum*, 629 F.3d 1, 13 (1st Cir. 2010); *Johnson*, 141 F.3d at 1369.

⁷⁰*Fairchild v. Touchtunes Music Corp.*, No. 1-C-9699, 2002 WL 31833768, at *3 (N.D. Ill. Dec. 12, 2002).

⁷¹*Cheek v. United States*, 498 U.S. 192, 199-200 (1991); *United States v. Isaacs*, 539 F.2d 686 (9th Cir. 1976).

⁷²*Ah Quin*, 733 F.3d at 275; see also *Oneida Motor Freight Inc. v. United Jersey Bank*, 848 F.2d 414, 423 (3d Cir. 1988) (Stapleton, J., dissenting); *In re Griner*, 240 B.R. 432, 439 (Bankr. S.D. Ala. 1999); *Beiner & Chapman*, supra note 4, at 57.

⁷³*Ah Quin*, 733 F.3d at 275.

⁷⁴*Id.*; see also *Cannon-Stokes*, 453 F.3d at 448; *Oneida*, 848 F.2d at 422 (Stapleton, J., dissenting).

⁷⁵547 U.S. 388, 393-94 (2006).

⁷⁶See also *Monsanto Co. v. Geerston Seed Farms*, 561 U.S. 139, 157 (2010); *Flexible Lifeline Sys. Inc. v. Precision Lift Inc.*, 654 F.3d 989, 995-96 (9th Cir. 2011).

⁷⁷See *Ready Transp. Inc. v. AAR Mfg. Inc.*, 627 F.d 402, 404-05 (9th Cir. 2010) (collecting cases).

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With the stakes so high, candidates, parties, and outside spenders will continue to push the boundaries. Conversely, reformers and partisans stand at the ready to file a complaint at the slightest hint of impropriety. Indeed, some groups exist for little else. After the CNN report ran, ADLF, run by veteran Democrat operative Brad Woodhouse, almost immediately filed its FEC complaint. A glance at the group’s website reveals little except a menu of FEC and other complaints against Republicans. This should give both sides pause before pushing the coordination limits too far. ☺



Paul H. Jossey is an election lawyer in Alexandria, Virginia. This is not intended to be legal advice. © 2015 Paul H. Jossey. All rights reserved.

Endnotes

¹Chris Moody, *How the GOP Used Twitter To Stretch Election Laws*, updated Nov. 17, 2014, available at www.cnn.com/2014/11/17/politics/twitter-republicans-outside-groups/.

²Available at americandemocracy.org/app/uploads/ADLF_Before-The-Federal-Election-Commission-11.24.14.pdf.

³Campaign Manager Pleads Guilty to Coordinated Campaign Contributions and False Statements, Department of Justice Press Release, Feb. 12, 2015, available at www.justice.gov/opa/pr/campaign-manager-pleads-guilty-coordinated-campaign-contributions-and-false-statements.

⁴See the FEC brochure on Coordinated Communications and Independent Expenditures, available at www.fec.gov/pages/

[brochures/indexp.shtml](#).

⁵11 CFR 109.21(d).

⁶Coordinated and Independent Expenditures, 68 Fed. Reg. 421, 432 (Jan. 3, 2003).

⁷See www.nrscc.org/blog/how-democrats-subvert-campaign-finance-laws.

⁸See www.moresoftmoneyhardlaw.com/2014/11/coordination-controversy-twittersverse/.

⁹*In the Matter of American Crossroads*, (MUR 6357), Statement of Reasons, Chair Caroline C. Hunter and commissioners Donald F. McGahn and Matthew S. Peterson, Feb. 22, 2012, available at eqs.fec.gov/eqsdocsMUR/12044312281.pdf.

¹⁰*In the Matter of American Crossroads*, (MUR 6357), Statement of Reasons of Vice Chair Ellen L. Weintraub and commissioners Cynthia L. Bauerly and Steven T. Walther, Feb. 27, 2012, available at eqs.fec.gov/eqsdocsMUR/12044312290.pdf.

¹¹Daniel P. Tokaji and Renata E. B. Strause, *The New Soft Money, Outside Spending in Congressional Elections*, (2014) available at moritzlaw.osu.edu/thenewsoftmoney/wp-content/uploads/sites/57/2014/06/the-new-soft-money-WEB.pdf.

¹²See Rachel Marcus and John Dunbar, *Rules Against Coordination Between Super PACs, Candidates Tough To Enforce*, Jan. 13, 2012, available at www.publicintegrity.org/2012/01/13/7866/rules-against-coordination-between-super-pacs-candidates-tough-enforce.