MEMORANDUM

TO: JUSTIN MILLER, ECRB CHAIRPERSON
FROM: ZACK SHANDLER, ASSISTANT CITY ATTORNEY ZS
SUBJECT: WHAT IS COORDINATION?
DATE: 2/12/15
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ISSUES

#1 Should the ECRB be a watchdog body or investigative body for "coordination" issues? I defer this policy decision to the ECRB. The ECRB has addressed its role in the "Board Complaint Procedures" in its "Rules of Organization and Practice.

#2 What is "coordination" between independent organizations and candidate organizations? The legal doctrine of "I know it, when I see it" appears to be the most prevailing view of interpreting the term "coordination." It has been noted: [o]n the federal level, the FEC has conducted just three investigations into coordination since 1999-not necessarily because it hasn't happened, but because it is so hard to detect." www.publicintegrity.org/2012/01/13/7866/rules-against-coordination-between-super-pacs-candidates-tough-enforce. I have cited several examples below for your review and provided accompanying source materials from jurisdictions/organizations that have tried to define coordination.

SOME EXAMPLES WHEN PENALTIES ASSESSED

1. "Former Utah Attorney General John Swallow, for example, raised funds to support his 2012 campaign from payday lenders by routing their donations through "independent" dark money nonprofits that were formed by Swallow's campaign staff." This offense was part of a larger bribery operation. "Swallow resigned from his post, and now faces 12 felonies and two misdemeanors, including racketeering, bribery, accepting gifts and falsifying government records."

   Source: *www.sourcewatch.org/.../2/.../Assault_on_Clean_Election_Laws_final.pd*

2. "The most recent FEC investigation regarding coordination was settled in May 2009 and involved the election committee of former Rep. Joe Schwarz, R-Mich., and the Republican Main Street Partnership PAC. The FEC uncovered emails spanning six months in 2006 between members of the PAC and the Schwarz campaign. One email revealed Schwarz campaign director Matt Marsden had contacted the PAC's treasurer with a suggestion for a radio ad on behalf of Schwarz. One week later, two radio stations ran ads following the theme the Schwarz director suggested. Other emails revealed Schwarz staffers recommended which radio stations the PAC should target. The complaint was filed by Club for Growth, a conservative PAC backing Schwarz's main challenger. Schwarz vehemently denied his staff broke any laws and spent around $50,000 and three years fighting the charge before agreeing to settle...each side was fined $2,500."

Source: *www.sourcewatch.org/.../2/.../Assault_on_Clean_Election_Laws_final.pd*

SOME EXAMPLES WHEN NO PENALTIES ASSESSED

3. "In 2014, for example, Senator Mitch McConnell's campaign quietly uploaded a video to Youtube featuring the senator smiling at the camera in a variety of poses, providing footage for outside groups to produce ads featuring McConnell, but without McConnell actually "coordinating" or directly communicating with those groups. The tactic took on the name "McConnelling" and was pilloried by the likes of the Daily Show–but it ultimately resulted in a $1.8 million ad campaign by a supportive group that used the footage."

   Source: *www.sourcewatch.org/.../2/.../Assault_on_Clean_Election_Laws_final.pd*

4. "Conservative super PAC American Crossroads asked the FEC to allow candidates to appear in super PAC ads. The PAC argued that while the ads are "fully coordinated" with candidates, they should not count as "coordinated communications" in the campaign finance sense. FEC commissioners deadlocked 3-3 [if this was permissible]."

   Source:www.publicintegrity.org/2012/01/13/7866/rules-against-coordination-between-super-pacs-candidates-tough-enforce

5. "The Republican National Committee and the 2004 Bush campaign filed a complaint against liberal PAC MoveOn.org and its affiliates for coordination with the John Kerry campaign. The investigation did not turn up enough evidence to fine the group even with Kerry's hiring of Zach Exley, a MoveOn.org project director." No fines were assessed.

Source:www.publicintegrity.org/2012/01/13/7866/rules-against-coordination-between-super-pacs-candidates-tough-enforce

6. "Election watchdogs Democracy 21 and the Campaign Legal Center filed a related complaint against Rick Perry and the Make Us Great Again PAC, alleging that Perry used several video clips, free of charge, in his own ad that Make Us Great Again produced. This constitutes an illegal in-kind contribution, the groups say."

Source:www.publicintegrity.org/2012/01/13/7866/rules-against-coordination-between-super-pacs-candidates-tough-enforce

Super PAC manager convicted of funneling funds for candidate

By MATTHEW BARAKATBy MATTHEW BARAKAT, Associated Press

More News

ALEXANDRIA, Va. (AP) — A Virginia man who managed a losing congressional campaign while running a Super PAC has pleaded guilty to illegally funneling money from the PAC to bolster his candidate's campaign.

Federal prosecutors said it is the first time a person has been convicted of illegally coordinating campaign contributions between political committees.

Tyler Harber, 34, of Alexandria was campaign manager and political consultant for Chris Perkins, who ran in 2012 as a Republican against Democratic incumbent Gerry Connolly in a northern Virginia district. Harber was also a frequent guest on cable news talk shows, appearing as a Republican pundit or strategist.

At a plea hearing Thursday in federal court in Alexandria, Harber admitted causing the PAC, which is not named in court records, to spend $325,000 in ads targeting Connolly.

Super PACs can solicit and spend unlimited amounts of funds, but cannot coordinate their activity with specific congressional candidates. They were born in the wake of the 2010 Citizens United decision by the U.S. Supreme Court, which lifted federal limits on contributions to and expenditures by independent political organizations. Those groups can spend as they see fit to try and sway voters, but cannot coordinate their spending with candidates.

In his plea deal, Harber also pleaded guilty to making a false statement to the FBI, denying that he knew Perkins or campaigned for him when, in fact, he served as his campaign manager.

At Thursday's plea Hearing, Harber said little except to confirm his guilty plea, and to ensure that the terms of his plea deal will prevent his family members from being prosecuted — an assurance that prosecutors provided.

According to a statement of facts filed with the plea deal, Barber and his family profited from the coordinated campaign activity. It states that Harber received a $9,100 commission on the $325,000 ad buy from the Super Pac that targeted Connolly. It also states that Harber and his family used $138,000 of the money taken in by the PAC —about 23 percent of the PAC's entire receipts — for personal use.

Perkins, who lost to Connolly by more than 20 points in 2012, did not immediately return a call Thursday seeking comment. The court documents do not allege he participated in any wrongdoing.

The two counts to which Harber pleaded guilty each carry a maximum of five years in prison. He is scheduled for sentencing in June.

Harber's plea deal also requires that he cooperate with prosecutors in what was described in court as an ongoing investigation.

BRENNAN CENTER FOR JUSTICE

AFTER *CITIZENS UNITED*: THE STORY IN THE STATES

Chisun Lee, Brent Ferguson, and David Earley

Brennan Center for Justice *at New York University School of Law*

Election Commission (FEC), the agency charged with enforcing the law,[175] regulates communications as coordinated if a three-part test is met.[176]

First, the test asks if the communication was paid for by an outside spender — not the candidate, the campaign, or the party.

Second, the so-called content part of the federal test asks if the spending in question concerns a type of communication that is subject to coordination regulation in the first place — if it is closely enough related to a pending election. An expenditure is subject to regulation if it expressly advocates the election or defeat of a clearly identified candidate,[177] is the "functional equivalent" of such express advocacy,[178] republishes campaign material, or refers to a candidate and occurs within certain time periods before the election.[179]

Third, the test asks if the conduct in question is of a type that could lead to a finding of illegal coordination. Such conduct includes:

- The candidate requested or suggested that the communication be created or distributed;[180]
- The candidate had "material involvement" in or "substantial discussion" about strategic planning of the communication;[181]
- The candidate and spender used the same vendor within a short window of the communication's distribution and the vendor used or conveyed to the spender nonpublic information about the campaign's plans (unless the vendor implemented a firewall policy to separate services to the two clients);[182]
- A person who recently worked for the candidate is involved in the outside group's spending and the former employee used or conveyed to the spender nonpublic information about the campaign's plans (unless the spender implemented a firewall policy to separate the candidate's former employee from work on the communication);[183] or
- The spender disseminates or republishes the candidate's campaign material.[184]

We provide a comprehensive analysis of the coordination law in each state, and descriptions of dozens of enforcement actions and compliance opinions, in the Appendix of this report.[185] The following chart delivers the highlights, ranking the 15 states and the federal government into categories of strictness of regulation (in alphabetical order within each category).

meantime other parts of the government are answering the call for change. The New Mexico secretary of state this year issued a candidate guide that advises politicians to follow the federal coordination standard.[229] In August the state attorney general urged the secretary of state to issue similar guidance to outside spenders.[230]

But the federal coordination standard is hardly robust, as our comparative review of different laws in Section Three shows. The bill introduced this September by U.S. Reps. David Price and Chris Van Hollen seeks to change that, proposing to modernize coordination regulation for the super PAC era.[231] Many features would address candidate-specific super PACs in particular, proposing to treat outside spending to promote a candidate as coordinated if it is "not made entirely independently of the candidate" or made after "more than incidental communication with[] the candidate."[232] Such spending also would be restricted if done by groups the relevant candidate encouraged to form or assisted through fundraising.[233] The proposed law would mandate a longer "cooling off" period before a candidate's former employee could direct unlimited spending to promote the candidate, and similarly expand the time period when an unlimited spender may not use a consultant or vendor that has been hired by a candidate.[234] Coordination rules would extend to all advertising that promotes or attacks a candidate, even if it does not run near the time of the election.[235]

Another federal proposal, the American Anti-Corruption Act, contains similar provisions.[236] It would also treat spending as coordinated if the spending group was helmed or assisted by current or former colleagues or campaign staffers of the relevant candidate, regardless of how much time had passed between roles, or if the candidate approved of any of the organization's activities.[237]

Our review of recent collaboration trends and of many different regulation approaches yields a clear set of recommendations for regulating coordinated spending more effectively. Generally, laws treat outside spending to promote a candidate's election as coordinated if it is based on "substantial discussion" between the spender and the candidate. As a number of jurisdictions have recognized in initiating reforms, that standard does not adequately capture the many ways collaboration occurs today. Our recommendations for a modern and more effective approach include:

- **Make laws apply to a realistic universe of spending.** The weakest laws exclude huge swaths of outside spending from coordination regulation. They cover only so-called express advocacy — communications that explicitly ask voters to elect or defeat a particular candidate — rather than including the more common form of election-season advertisement that promotes or attacks candidates' stances on issues. Jurisdictions that currently consider a reasonable range of spending in regulating coordination include Maine, Ohio, and the federal government. The Price-Van Hollen bill proposes improvements to federal coverage.

- **If a candidate raised money for a group, treat all spending by that group on behalf of the candidate as coordinated.** When candidates raise money for a group that then spends on communications to promote their election, they are cooperating to make those expenditures happen. What is more, it is this aspect of cooperation in particular — a candidate's ability to solicit funds for a supportive and unlimited spender — that raises concerns about corruption analogous to those that justify limits on direct campaign contributions. Most jurisdictions,

including the federal government, fail to regulate coordination on this basis.[238] But this year Minnesota announced that it would view any expenditure to promote the election of a candidate who has raised money for the spender as coordinated. Connecticut recently enacted a similar, but weaker, rule that would allow consideration of a candidate's fundraising role as evidence of coordination. Pending reforms to allow for determinations of coordinated spending because of related candidate fundaising include the Price-Van Hollen bill and the American Anti-Corruption Act.

- **Provide sensible "cooling off" periods before a candidate's former advisers may staff a group that is permitted to make unlimited expenditures to promote the candidate's election.** Otherwise, any spending in support of that candidate by a group with such staffing should be viewed as coordinated. Many cooling off periods, such as the federal rules' 120-day window, are too short for an age when super PACs work year-round, not just in the couple of months before Election Day. Maine and Connecticut currently provide for more reasonable windows, and the Price-Van Hollen bill and the American Anti-Corruption Act proposals seek to expand those periods for federal elections.

- **Treat as coordinated any spending to promote the election of a candidate that reproduces material produced by the candidate's campaign.** Many jurisdictions treat expenditures as contributions if they are used to reproduce or disseminate campaign communications. But few existing laws adequately address the now widespread practice of campaigns' making available images, silent "B-roll" video footage, scripts, and other raw material for outside spenders to use in supportive advertising. Current proposals in Philadelphia and San Diego would treat such spending as coordinated.

- **Treat as coordinated any spending to promote the election of a candidate, when the spender uses a consultant who has also served the candidate in a position privy to related campaign information.** Federal regulations partially address this behavior by providing that an outside spender may not use a vendor that the candidate has used in the past 120 days. California and Maine also regulate this conduct, without the short time limitation.

- **Publish scenario-based examples of what constitutes prohibited coordination and what does not.** Many jurisdictions provide only a basic, statutory definition of coordination, leaving candidates and spenders on their own to figure out what it means, for instance, to "consult or cooperate" and thus trigger penalties. It is useful to publish examples of prohibited activity, in realistic contexts. For example, Connecticut provides a fairly detailed list of scenarios that will create a rebuttable presumption of coordination. While the federal rules are unnecessarily narrow, they provide more detailed guidance than the laws of many states.

- **Ensure adequate enforcement and deterrence.** Even the most comprehensive coordination law will not deter violations without adequate and sensible enforcement. An effective approach should include vesting a single entity with clear, primary authority to enforce the law, including through proactive investigations — not just in reaction to private complaints. The size of a penalty should track the severity of the violation, to make allowances for minimal transgressions while also ensuring adequate consequences for sizeable and deliberate wrongdoing.

- **Allow use of firewalls under appropriate circumstances as evidence that an outside group's spending was truly independent.** Under some circumstances — such as when a vendor provides services to both a candidate and an outside group — it may be possible to mitigate the risk of coordination through the vendor's use of an adequate firewall to separate the two streams of work. In such cases, states should allow proof of a formal, written policy, prohibiting the exchange of relevant information, to be used as evidence that no coordination occurred.

These recommended reforms — which address the most obvious problems and do not preclude further ideas — come as a package. Some of the elements already appear in some form in existing local, state, or federal rules. But, as our review of constantly evolving collaboration tactics shows, any jurisdiction seeking to quell potentially corruptive coordination on a meaningful scale needs to embrace a comprehensive approach.