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Will Obama Throw a Grenade to Blow-Up Hidden Campaign Donations?

By Ben W. Heineman Jr.

April 25, 2011

Stymied by legislative and regulatory avenues, the president may turn to executive means for curbing federal election expenditures -- and risk a partisan uproar



Frustrated by limited, near-term legislative or regulatory options to increase disclosure of hidden federal election expenditures, President Obama is considering an [executive order aimed at government contractors](#) which would partially achieve that goal. If issued, this order will cause a political uproar--and stimulate immediate litigation to stay its effect.

The president is responding to the 2010 political cycle, when groups allegedly independent of candidate campaigns spent \$300 billion in attempts to influence the outcome of federal elections. According to the Center for Responsive Politics, almost 50

percent of that total was spent by organizations which did not disclose their donors, [up from 25 percent spent by entities with no disclosure in 2008.](#)

These funds are neither direct contributions to candidates from Political Action Committees (PACs) raised from company employees or union members nor outlays from political party committees. They are instead expenditures from corporate or union treasuries which cannot, by law, coordinate with candidate efforts.

With our electoral politics awash in money, the fundamental federal campaign finance issue today is no longer substantive limitations on corporate or union expenditures from their treasuries in support or opposition to candidates -- the Supreme Court last year declared such limits unconstitutional in *Citizens United*. Rather, the core issue is whether donors of large sums of money may hide their identities if expenditures are made, not by them, but by a variety of entities which are organized under the tax code and which channel donor's funds into election activities.

It is this issue which the Federal Election Commission, the Internal Revenue Service and the Congress show no signs of addressing. And it is this issue which has led the Obama Administration to circulate the draft executive order inside the government.

The story behind such an order begins, of course, with the January, 2010 decision in *Citizens United* striking down the substantive limitation of the Bipartisan Campaign Reform Act of 2002 (McCain-Feingold) which prohibited corporations and unions from using funds from their treasuries to run ads for or against candidates within 30 days of a primary election or 60 days of a general election. The First Amendment, said the 5-4 court majority, protects such communications---and, as long as the composition of the Court remains unchanged, the decision is viewed as the death knell of substantive limitations on "independent" expenditures.

But eight Justices (except Justice Thomas) upheld McCain-Feingold's disclosure requirements. Although it recognized that disclosure might burden First Amendment rights and that such provisions were subject to "exacting scrutiny," Justice Kennedy's opinion for the majority noted that: "The First Amendment protects political speech ; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages." Said Justice Kennedy: "...prompt disclosure of expenditures can provide shareholders and citizens with information needed to hold corporations and elected officials accountable for their positions and their supporters." Issues relating to potential harassment or intimidation or reprisals of corporate or union "speakers" whose identities must be disclosed would be addressed on a case-by-case basis, the Court said.

So, with the issue of further disclosure left open by the Supreme Court but huge amounts of money expended in the 2010 with little or no disclosure, the question in the 2012 election cycle is whether new rules will require umbrella entities organized under the tax code to disclose their donors or require the donors themselves to disclose their political expenditures channeled through such entities. (A number of major publicly-held corporations voluntarily disclose their own contributions from the corporate treasury but few disclose much, if anything, about corporate monies used by third parties for campaign expenditures. And little is known about voluntary practices of privately held corporations.)

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These umbrella entities are non-profits created under the tax code's Section 501(c)(4), "social welfare" organizations; 501(c)(5), labor unions; and 501(c)(6), trade associations. Without getting into the arcana of these organizations, the fundamental question is whether they are regulated solely by the Internal Revenue Service (in which case no public disclosure of donors is required) or whether, even if organized under the tax code, they engage in direct, express support of candidates and should be regulated as political committees by the Federal Election Commission (in which case public disclosure may be required). To oversimplify, this fundamental question, resolved first in administrative proceedings, turns on such issues as: whether the umbrella organizations improperly are "coordinating" with candidate's campaigns; whether they are dealing solely with issues, including a candidate's

views on issues (IRS only) or instead expressly advocate election or defeat of a candidate (IRS based, but FEC regulated); or whether the primary purpose of the entity is political advocacy (not allowed for "social welfare" or "trade associations" under IRS rules).

But there is historic absence of forceful regulatory action in this critical area due to the particular cultures of the relevant administrative agencies. For example, The Federal Election Commission is comprised of three Democrats and three Republicans and is often deadlocked. (Rep. Chris Van Hollen, D-Md, and several campaign finance reform organizations have recently brought suit and filed a regulatory action seeking increased FEC effort in requiring disclosure---but these legal actions are unlikely to be resolved

during the 2012 election cycle.) The IRS does not consider itself responsible for political campaign oversight, and only receives returns from affected organizations long after elections have been held.

Similarly, Congress last year failed, in the face of a Republican filibuster, to enact post-Citizens United legislation (the Disclose Act) aimed at requiring broad disclosure of donors who give to non-profit umbrella entities active in political advertising. And similar or stripped down disclosure legislation has yet to be introduced in either Congressional chamber this year. Of course, even if a bill were introduced, ultimate passage before November, 2012 would be an uphill battle, given other major pending issues and the acrid, partisan atmosphere (the days of wine and roses across the aisle on election law reform seem long past).

With limited legislative or regulatory options, the Obama Administration is thus considering issuance of an executive order which would require all entities seeking government contracts to disclose for the two years prior to submission of its proposal:

- all contributions to, or on behalf of, federal candidates, parties or party committees made by it or its directors or officers or its controlled affiliates and subsidiaries; and
- any contributions made to third party entities with the intention or reasonable expectation that parties would use these contributions to support or opposed federal candidates.

The order would apply when contributions to a given recipient exceeded \$5,000 in the prior year, would require prompt issuance of implementing regulations and would create a searchable data base.

Predictably, the Chamber of Commerce denounced the draft executive order saying that it attempted to do what Congress had failed to do when it rejected The Disclose Act last year---and arguing that it would expose contractors who supported candidates unpopular with the Administration in power to political discrimination. President Obama's spokesman said such an order would further "transparency and accountability."

If the executive order is issued, there will also be a predictable partisan explosion (Senator McConnell termed the draft "outrageous") and an immediate constitutional challenge in the courts. Unless and until a final executive order is issued and its purpose clarified, the question of constitutionality, which under Supreme Court precedent would be taken seriously by the courts, is difficult to assess. The general constitutional test is that the Administration would have to show a substantial relation

between the disclosure requirement and a sufficiently important government interest and would have to demonstrate further that the order was the least restrictive alternative.

What is clear right now is the paradox that, in anticipation of 2012, Democrats, like Republicans, are busily forming or funding umbrella organizations that can receive funds from donors who wish to keep their identities hidden, while President Obama, his immediate legislative and regulatory disclosure options limited, is considering a striking move that would expose the political activities of the many corporations who do business with the government.

If the President pulls the pin on this grenade, it will be one of the major political (and legal) stories of the year.

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