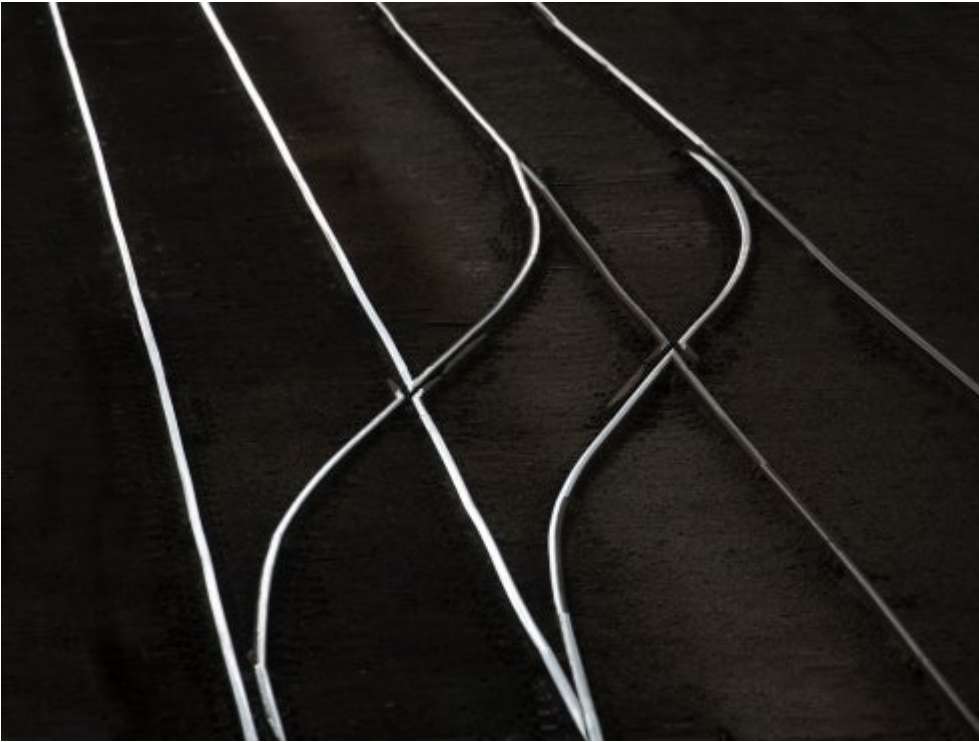


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Why We Should Expect More Criminal Cases Charging Illegal Coordination Between Campaigns and Super PACs



*Note: An earlier post on Perkins Coie's [In the Arena: Law and Politics Update](#) discussed, from a campaign finance lawyer's perspective, why the prosecution in *United States v. Harber* signals greater jeopardy in the future for operatives in down-ballot races who coordinate with hastily-formed "super PACs." And an earlier version of this post, which offers a different angle on the same question from a former prosecutor, was also cross-posted on the *Law and Politics Update*.*

As Brian Svoboda's recent post on *In the Arena* noted, DOJ's prosecution of Tyler Harber—a campaign finance manager and political consultant from Virginia who pled guilty to violating federal election campaign laws—may signal increased criminal enforcement of the campaign finance laws. That post aptly concluded that these enforcement efforts will likely focus on smaller campaigns for seats in the House. But there are some further reasons why additional prosecutions like Harber's—the first widely reported criminal case based on illegal coordination between a campaign and a "super PAC"—should be expected. Any discussion of DOJ enforcement efforts in this area should be set against the backdrop of two unique features of campaign finance law. First, establishing that a campaign finance offense has been committed requires DOJ to overcome significant evidentiary hurdles. In cases like Harber's, DOJ must prove that the defendant "knowingly and willfully" committed the putative offenses. This is a particularly demanding standard of proof because it requires prosecutors to establish that the would-be defendant took prohibited action knowing what the law forbade, and violating the law notwithstanding that knowledge. Satisfying this showing requires prosecutors to get inside a defendant's head, and to determine, often circumstantially, what the defendant understood: This can prove challenging, especially given the hyper-technical nature of campaign finance law and regulation. Second, compounding this challenge is that the Federal Election Commission, the independent regulatory agency responsible for administering the financing of federal elections, has been and remains silent as to the law's meaning. As my colleague Karl Sandstrom, a former FEC Commissioner, has [written](#), the FEC has done little to tell the public what the law is when it comes to many core issues of campaign finance regulation. The agency's silence means that it is hard for anyone, let alone DOJ, to claim an understanding of election law. Despite

making it difficult to prove a defendant's mental state, the FEC's lassitude may invite action by prosecutors seeking to draw bright-line rules to fill the regulatory vacuum. When DOJ aims to make a point through law-enforcement efforts, it generally takes one of two approaches. Under the theory that "the bigger they are, the harder they fall," DOJ may seek criminal charges against a few high-profile targets in order to achieve a broadly publicized deterrent effect. Given the opacity of the law, this approach has not fared well for DOJ, as the government's failed case against Presidential candidate John Edwards demonstrates. In the alternative, the government may focus on prosecuting in relatively greater numbers "low-hanging fruit." That is, the government can hope to deter certain conduct by bringing many cases against relatively lesser targets who are unlikely to be able to mount serious defenses against criminal charges. The Harber case suggests that the government may take the second approach. According to his plea agreement, Harber's conduct was both clear-cut and egregious. Tyler Harber was the manager of a failed Congressional race in Virginia's 11th District. In the last two months of the race, Harber created and operated a super PAC to support the campaign that he managed, siphoned \$138,000 from the super PAC for his own and his family's benefit, and then lied repeatedly about his actions when questioned by the FBI. The plea agreement suggests that the government had a strong case against Harber. The government's success in obtaining Harber's conviction may embolden additional prosecutorial efforts. Given the inherent challenges of prosecuting cases under the campaign finance laws, it is likely that the government's efforts will focus, at least initially, on low-hanging fruit like Harber. As Brian Svoboda previously explained, the environment most conducive to conduct like Harber's exists in the fight for seats in down-ballot races, where staff tend to be less experienced, there are fewer internal controls, and campaigns have more limited access to outside expertise, such as lawyers. To be sure, Harber's conviction may lead to DOJ initiating investigations against higher-level targets. The government may seek to build up to such cases after drawing what it would surely present as a clear line between legal and illegal conduct through smaller, more easily prosecuted, cases. The key question is whether this will help fill a void left by the FEC, or invite prosecutorial overreach.

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