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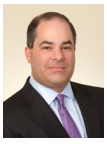
Super-PACs and Elections: Separating Myth from Reality



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Contributed by Jason A. Levine, Vinson & Elkins LLP

So far, 2012 is on track to be remembered as the Year of the "Super-PAC". President Obama and his Republican challengers each are supported by at least one Super-PAC, and the groups are proliferating among U.S. Senators and Congressmen.[1] More importantly, for as many dollars as Super-PACs have spent in this election cycle, it seems that commentators have used an equivalent number of words to denounce them. By most published accounts, the Super-PAC is an abomination created by the Supreme Court's *Citizens United*[2] decision and set loose to terrorize our democracy. In urging Democrats to form Super-PACs supporting President Obama's re-election, his campaign even analogized them to nuclear weapons, noting that to refrain from participation would be tantamount to "unilateral disarmament."[3]

Free to raise and spend unlimited sums of money on certain types of political advertising, the narrative goes, Super-PACs threaten to place elections up for sale through anonymous corporate donors.[4]

Given this melodramatic backdrop, it may come as a surprise that, in fact, Super-PACs have legal underpinnings dating back more than 35 years and are subject to strict public reporting and disclosure requirements. Conceptually, they are neither brand-new nor especially secretive. Although the impact of Super-PACs on elections surely merits debate, the hysteria accompanying them is rooted in three perennial myths–*not* reality. This article seeks to debunk these myths and help facilitate a more accurate assessment of Super-PACs and their implications for future elections.

Super-PACs Differ from Traditional PACs

Before addressing the myths surrounding Super-PACs, a brief description of political action committees ("PACs") is in order. As discussed in this article, several recent court decisions established that the First Amendment of the U.S. Constitution protects the right of individuals, corporations, and unions to spend their resources on *independent* political speech–not coordinated with candidates or political parties–advocating the election or defeat of specifically identified candidates for office. In response to these decisions, the Federal Election Commission ("FEC") issued several Advisory Opinions and amended its regulations to expressly permit the establishment and operation of political committees that *only* make independent expenditures–so-called Super-PACs. Accordingly, a Super-PAC is a PAC that makes no contributions to candidates or political party committees (such as the RNC

and the DNC), or to other PACs that contribute to candidates or political party committees. Further, there is no dollar limit on the amount of money a Super-PAC can raise or spend on its independent expenditures. Traditional PACs, in contrast, are limited to raising $5,000 per donor per year, but they in turn may make contributions directly to candidates, political party committees, and other PACs. Super-PACs may not.

Myth #1: *Citizens United* Was a Radical Decision That Created Super-PACs

Many pundits and politicians deem it obligatory to condemn *Citizens United* whenever discussing Super-PACs, but in fact the origins of Super-PACs pre-date *Citizens United* by over 35 years.[5] In 1976, the Supreme Court decided the case of *Buckley v. Valeo*, which upheld the First Amendment right of individuals to make unlimited "independent expenditures" supporting the election or defeat of candidates for federal office.[6] In contrast, the Court left in place limits on contributions to political candidates and campaigns, on the rationale that they amounted to only a "marginal restriction upon the contributor's ability to engage in free communication"—in part because independent expenditures were not restricted.[7] This dichotomy was the fundamental basis for the infamous "Swift Boat" ad campaign against Democratic presidential candidate John Kerry in 2004, which was a series of independent expenditures paid for by individuals calling themselves Swift Boat Veterans for Truth. Conversely, the same legal doctrine permitted George Soros to spend $24 million through independent expenditures supporting Senator Kerry's candidacy.[8]

Super-PACs are in a similar vein: they register with the FEC as "independent expenditure-only" political committees that do not make contributions to candidates or political party committees. The change flowing from *Citizens United* is that it upheld the First Amendment right of *corporations and unions*—not only corporations, as commonly reported—to make unlimited independent expenditures from treasury funds, just as *Buckley* had previously held for individuals.[9] Although this obviously affects the sources of funds potentially available for independent expenditures—and has itself been the subject of intense debate—there was no legal prohibition or limitation on independent expenditures by individuals before *Citizens United*.[10] All that *Citizens United* changed was the ability of corporations and unions to participate directly in independent expenditures on the same general basis as individuals.[11]

Further, *Citizens United* did not address existing limitations on corporate contributions to traditional PACs, which Super-PACs generally assume are applicable to them. These restrictions include a statutory ban on contributions to traditional PACs by foreign nationals and foreign corporations, government contractors, national banks, and corporations organized by authority of a law passed by Congress.[12] Although the constitutionality of these restrictions is presently being litigated, the Supreme Court did *not* opine about them in *Citizens United*, but let them stand. Taken together, once upheld (as is likely), the restrictions will continue to substantially narrow the universe of corporations—but *not* unions—that may form or contribute to Super-PACs.[13] *Citizens United* also did not address, but let stand, the century-old prohibition on direct contributions to candidates by corporations.[14] This bulwark of campaign finance regulation therefore continues to fundamentally limit corporate involvement in politics.

Myth #2: Super-PACs Are Super Secretive and Have Anonymous Donors

Super-PACs are also often condemned for being secretive, with *Citizens United* blamed for permitting them to operate anonymously.[15] On the contrary, the finances of Super-PACs are relatively transparent. Like other political committees, Super-PACs are legally required to report the identity of any donor who gives in excess of $200 in a year, including the donor's name, mailing address, occupation, and employer.[16] Super-PACs also must disclose how they spend their money, including the identity of any persons who are paid over $200 in a year and the purpose of the payment.[17] The FEC has gone so far as to issue regulations specifying examples of "inadequate" purpose disclosures that are too vague, with the consequence of civil penalties if not corrected publicly.[18] As for their organizational structures, when a Super-PAC registers with the FEC it must identify its Treasurer and Custodian of Records, provide mailing and email addresses, and list a website address (if one exists).[19] All of this information is publicly available on the FEC's website (www.fec.gov), and is updated periodically. These same requirements apply to all political committees: Super-PACs are *not* the beneficiaries of more lenient standards.

Although federal law does not require a Super-PAC to disclose the identity of other officers or by-laws—if it has them—this is also the case for traditional PACs. Of course, if Super-PACs choose to incorporate, their chosen state law of incorporation may impose additional public disclosure requirements as well. In short, Super-PACs are no less transparent than traditional PACs and other political committees, and the charge that they are unduly "secretive" is misguided.

Myth #3: Super-PACs Are Controlled by the Candidates They Support

Super-PACs are often described in the same breath as the candidate they support, and this has led some commentators to describe them as if candidates control them.[20] Quite to the contrary, as noted above, Super-PACs may make only *independent* expenditures. In other words, they must operate independently from the candidates they support. This is not a "technicality," but a fundamental requirement that can lead to substantial federal penalties (if not dissolution) if violated.[21] Spending that is found to be "coordinated" with—let alone controlled by—a candidate, a campaign committee, or a political party committee, may be deemed an illegal in-kind contribution with potentially criminal consequences for the parties involved.

For this reason, Super-PAC staff generally have internal structures and rules in place to prevent non-public information from moving between the organization and a candidate, campaign committee, or political party committee in a way that might influence the activities of the Super-PAC. The FEC also imposes requirements to minimize the threat of improper coordination. For example, Super-PAC employees or consultants who previously worked for a candidate's campaign or political party committee within the past 120 days cannot use information gained in those positions to prepare Super-PAC communications.[22] Likewise, the FEC recognizes the use of "firewalls" to ensure that vendors who work for candidates or political party committees do not become conduits of information that should not be shared with a Super-PAC.[23] The same is true for any other social welfare organizations or traditional PACs that may work with a candidate or political party committee simultaneously with a Super-PAC.

It is true that candidates for office are permitted to attend, speak at, or be featured guests of Super-PACs' fundraising events, but there are strict limits on this participation. The candidates may only solicit contributions that are within the legal limit for traditional PACs ($5,000), and from permissible sources (individuals and other traditional federal PACs). In general, candidates are reticent about appearing at Super-PAC fundraising events, and rightly so, because such appearances could lead to communications that call into question the "independence"–and thus the legality–of later expenditures by the group.

Conclusion: Super-PACs Are Not So "Super" After All

Stripped of their mythical attributes, Super-PACs are less threatening and radical than demagogues would have the public believe. A logical outgrowth of First Amendment doctrines set forth over 35 years ago, Super-PACs give equal sway to corporations *and* unions, and they are subject to a strict public disclosure regime. Super-PACs undoubtedly are poised to have a significant impact on federal elections, and a post-election assessment of their activity in 2012 will be informative. Viewed in their totality, however, they appear to pose no more mortal a threat to our democracy than does uninformed and sensational political commentary–which demagogues put forth in abundance, and which the First Amendment also protects.

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[1] At the date of this writing, well-known Super-PACs supporting presidential candidates include: Priorities USA Action (Obama); Restore Our Future (Romney); Winning Our Future (Gingrich); Red, White and Blue Fund (Santorum); and Endorse Liberty (Paul). Other Super-PACs such as American Crossroads, support multiple federal candidates at any given time.

[2] *Citizens United v. Federal Election Comm'n*, 558 U.S. 50, 130 S. Ct. 876 (2010).

[3] Statement by Jay Carney, White House Press Secretary, Press Conference, (Feb. 7, 2012) ("the rules being what they are, the campaign has made clear that they cannot unilaterally disarm in a circumstance like this.").

[4] Statement by U.S. Sen. Al Franken: "corporations can now spend an unlimited sum of money to buy elections, and the American people generally won't even know about it. Corporations and super wealthy individuals no longer have to play by any sensible rules when it comes to the checks they write for campaigns. *Citizens United* ushered in the wild, wild west of political spending." Sen. Al Franken, Senate Floor Statement, Jan. 26, 2012.

[5] *See Washington Post* columnist E.J. Dionne criticized *Citizens United* for unleashing "the brute force of millionaires and billionaires determined to have their way." E.J. Dionne, Jr., *The Citizens United Catastrophe*, Wash. Post, Feb. 5, 2012. *See also New York Times* columnist Gail Collins asserted that "all these billionaires would not be so worrisome if the Supreme Court had not totally unleashed their donation-making power in the *Citizens United* case." Gail Collins, *Who Wants To Be a Millionaire*, N.Y. Times, Jan. 14, 2012 at A21.

[6] *Buckley v. Valeo*, 424 U.S. 1, 20-21 (1976). Under the Federal Election Campaign Act, which *Buckley* invalidated in part, an "independent expenditure" is an expenditure "expressly advocating the election or defeat of a clearly identified candidate" that is "not made in concert or cooperation with or at the request or suggestion of such candidate, the candidate's authorized political committee, or their agents, or a political party committee or its agents." 2 U.S.C. § 431(17). "Express advocacy" is a legal term of art, meaning "communications containing express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'" *Buckley*, 424 U.S. at 44 n.52.

[7] *Buckley*, 424 U.S. at 20-21. The Supreme Court reaffirmed the constitutionality of contribution limits in *McConnell v. Federal Election Comm'n*, 540 U.S. 93, 136-138 & n.40 (2003).

[8] *See* T.W. Farnam, *In Race For Campaign Funds From Billionaires, Romney Outpaces Obama*, Wash. Post, Dec. 5, 2011, (noting the $24 million figure).

[9] *Citizens United,* 130 S. Ct. at 913. In so doing, the Court struck down a ban on such independent expenditures by corporations or unions that was codified at 2 U.S.C. § 441b.

[10] *Citizens United* left unanswered the question whether the federal contribution limits of $5,000 per year to a given "political committee," and $69,900 in total biennially, would apply to independent expenditure-only organizations. *See* 2 U.S.C. §§ 441(a)(1)(C) & a(a)(3); *see also* Price Index Increases for Contribution and Expenditure Limitations, 74 Fed. Reg. 7437 (Feb. 17, 2009) (increasing the limit from $57,500 to $69,900). In 2010, the U.S. Court of Appeals for the D.C. Circuit decided this issue, holding that these limits were *unconstitutional* as applied to an independent expenditure-only group. *SpeechNow.Org v. Federal Election Comm'n*, 599 F.3d 686 (D.C. Cir. 2010).

[11] Although commentators typically condemn the potential sums of new political money from corporations, they often overlook the fact that labor unions historically spent tremendous sums on federal elections even before *Citizens United*. To take but two examples, in 2008–the most recent presidential election year–the American Federation of State, County, and Municipal Employees spent $67 million on political activities, and the Service Employees International Union spent $85 million on its election program. *See* Kevin Bogardus and Sean J. Miller, *Unions to Spend $100M in 2010 Campaign to Save Dem Majorities*, The Hill, May 21, 2010. According to the National Institute for Labor Relations Research, in 2010 alone–a non-presidential election year–labor unions reported to the U.S. Department of Labor that they spent $572.4 million on political activity. *See* NILRR Research Paper (Sept. 1, 2011).

[12] 2 U.S.C. § 441e(a) (foreign nationals and corporations); *id.* § 441c (government contractors); *id.* § 441b(a) (national banks and congressionally-authorized corporations).

[13] The U.S. Supreme Court recently upheld the prohibition on foreign nationals making contributions or expenditures in federal elections, including

direct or indirect expenditures for express advocacy. *Bluman v. Federal Election Comm'n*, 800 F. Supp. 2d 281 (D.D.C. 2011) (3-judge court), *aff'd*, No. 11-275, 2012 BL 4968 (U.S. Jan. 9, 2012) (summary affirmance by U.S. Supreme Court).

[14] *See generally Federal Election Comm'n v. Beaumont*, 539 U.S. 146 (2003) (noting that "since 1907, federal law has barred corporations from contributing directly to candidates for federal office," and tracing the sources and history of this prohibition).

[15] For example, Fred Wertheimer, the president of Democracy 21—a self-proclaimed campaign finance "watchdog" group—has decried the "laundering of secret money into a super PAC." Fredreka Schouten, *Conservative group funnels money to super PAC*, USA Today, Feb. 5, 2012. Likewise, the *New York Times* recently put a sinister spin on Super-PACs in a recent news article: after listing the names of many major Super-PAC donors, the piece went on to assert that donors "can find ways to guard their identities" and that "some checks came from sources obscured from public view." Nicholas Confessore & Michael Luo, *Secrecy Shrouds 'Super PAC' Funds in Latest Filings*, N.Y. Times, Feb. 2, 2012, at A1.

[16] 2 U.S.C. §§ 432(c)(3) & 434(b).

[17] *Id.* §§ 432(c)(5) & 434(b).

[18] 11 C.F.R. §§ 104.3(b)(3)(i)(B) & (4)(i)(A). *See also id.* Part 104, FEC Statement of Policy: "Purpose of Disbursement" Entries for Filings with the Commission (Dec. 27, 2006) (setting forth examples of acceptable, and unacceptable, purposes of disbursement).

[19] 2 U.S.C. §§ 432(a) & 433(b).

[20] Commentators typically use sarcasm to imply that candidates control Super-PACs. *E.g.*, Mike Jones, *Enough*, (Op-Ed.) Tulsa World, Feb. 19, 2012, at G6 ("[Super-PACs] are, by law, not allowed to coordinate with the candidate they are trying to help (wink, wink)."). Similarly, Stephen Colbert's infamous faux Super-PAC is called the "Definitely Not Coordinating with Stephen Colbert Super PAC." Jack Coyle, *Colbert's Rolling Super PAC Donations*, Wash. Post, Feb. 1, 2012, at C5.

[21] *See generally* 2 U.S.C. § 437(g).

[22] 11 C.F.R. §§ 109.21(d)(4) & (5).

[23] Id. § 109.21(h).