

SUPER PACS: HOW WE GOT HERE, WHERE WE NEED TO GO

A speech by Trevor Potter
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I'm glad that my work as the lawyer for Stephen Colbert's Super PAC makes introductions so easy: you can just show some of the clips of me giving legal advice on air! As that video illustrated, though, even the communications genius of Stephen Colbert cannot always make the legal intricacies of Super PACs easy. So, let me start by summarizing how we got to where we are today.

The seed for Super PACs was actually planted by the Supreme Court in its 1976 case *Buckley v. Valeo*. There, the U.S. Supreme Court reviewed the constitutionality of the laws Congress had passed to regulate and disclose spending in federal elections after the Watergate scandal, and rewrote important parts of them. Congress had limited the size of individual contributions to candidates, limited independent expenditures to elect candidates, prohibited (or restated the long-standing prohibitions) on political contributions and expenditures by corporations and labor unions, and required persons engaged in activity "in connection with a federal election" to register as political committees with the Federal Election Commission ("FEC") and disclose their funding sources and expenditures.

Since Congress passed those laws in 1974, and the Supreme Court rewrote them in its *Buckley v. Valeo* Opinion in 1976, each of these provisions has been the subject of long and repeated legal attacks and political controversy:

- Limits on individual contributions to candidates, party committees and PACs.
- Independent expenditures — what is independent vs. coordinated? May independent expenditures be limited?

- Limits on corporate political contributions and expenditures.
- Disclosure of spending “in connection with a federal election”: —disclosure by whom? Of what?

In *Buckley*, the seeds of today’s Super PAC world were planted by the Court’s announcement that government could limit the size of individual contributions to candidates, but not the size of “independent” spending by individuals to elect a candidate, because the Court believed the first was potentially corrupting and the second was not. Thus, a contribution to a candidate could be limited to \$1,000 per election, because giving more to a candidate might corrupt them, but the same individual could go out and spend \$1 million or \$10 million or \$100 million — to elect the same candidate, and that spending would not be corrupting according to the court — so long as it was “totally independent” of the candidate. Significantly, there is no footnote sourcing the Court’s conclusion that spending millions to elect a candidate is not corrupting. It was simply a conclusory assumption reached by the Court. And since the Court held in *Buckley* that Congress could only limit money in elections to prevent “corruption and the appearance of corruption,” and it found that independent expenditures are by definition not “corrupting,” the Court held that independent expenditures by individuals could not be limited.

Fast forward to 2009, almost 35 years later, and the Court was asked to rule in *Citizens United* that corporations had the same constitutional right as individuals to make unlimited “independent expenditures” in federal elections. The Court had held twenty years before, in *Austin v. Michigan Chamber of Commerce*, that corporations were different than individuals — they are creations of the law, given limited liability, perpetual life and other legal advantages that make it easier for them to amass money. The Court concluded in *Austin* that these legal advantages, intended to facilitate success in the economic marketplace, gave corporations an

unfair advantage in the political marketplace and, therefore, that corporations could be prohibited from spending their treasury funds to elect candidates. In 2003, the Supreme Court narrowly reaffirmed the *Austin* holding on corporate political speech in the legal challenge to the McCain-Feingold law, ruling 5-4 in *McConnell v. FEC* that corporations could be banned from paying for campaign ads close to an election. However, by 2009, Justice Sandra Day O'Connor, who was the fifth vote for that holding in *McConnell*, had left the Court and been replaced by Justice Alito. We all know how this turned out: five Justices voted to overturn *Austin* and hold that corporations, like individuals, have a First Amendment right to spend unlimited corporate funds on advertising and other communications to elect federal candidates.

Now, I helped file a brief in *Citizens United* urging the Court not to do this, and I think it is a horrifically misguided decision that threatens our representative democracy. Corporations are not voters, and their decisions on political expenditures will be (and arguably, are required to be) one dimensional: what is best for the corporation's profitability? What is best for the country is a question citizens ask—not corporations. That said, *Citizens United* is not responsible for every evil attributed to it.

Citizens United did NOT say corporations have a constitutional right to contribute to candidates — only to make independent expenditures. The federal prohibition on corporate contributions to candidates was not challenged in *Citizens United*, and would be subject to a different first amendment analysis.

Citizens United did NOT say independent expenditures groups could coordinate messaging, fundraising, strategy, or filming with candidates — it built on the *Buckley* definition of independent expenditures as “totally independent” of candidates.

Citizens United did NOT say that the corporations have a First Amendment right to keep their spending secret — it said the opposite. By an 8-1 vote — the only section of *Citizens United* which all Justices except Clarence Thomas agreed on — the Court said, in the words of Justice Kennedy, “Today, for the first time, corporate spending in elections is permitted, and will be fully disclosed.” Of course, that turned out to be one of the more dramatically wrong statements in the opinion, but Justice Kennedy and the Court did hold that requiring disclosure of political spending was not only constitutional, but a positive boon to our election system — shareholders should know how their money is being spent, and voters will be better able to judge political advertising because they will know who is financing it.

What *Citizens United* DID give us though , was SuperPACS—even though the decision never mentioned them, and there is no evidence the Justices ever conceived of such a development. What the Supreme Court held was that both individuals and corporations had a constitutional right to make unlimited independent expenditures because: a) they do not corrupt candidates; and b) there is no difference between independent speech by individuals and by corporations for First Amendment purposes.

Using these two dubious propositions, the DC Circuit Court of Appeals then held in a case called *Speech Now v. FEC* that if independent expenditures could not be limited as to the amount that could be spent because they are not corrupting, then there is no justification for limiting the amount that can be raised for those expenditures. Until that moment, individuals and political committees could make unlimited independent expenditures under federal law, but a group of people working together were defined as a political committee, and political committees were limited to accepting no more than \$5,000 from any one person per year to pay for

independent expenditures. In *Speech Now*, the DC Circuit held that it is unconstitutional to limit the size of contributions to political committees that make only independent expenditures.

Presto: By August of 2010, the FEC had announced that it would accept registrations of a new kind of committee: An Independent Expenditure Only Multicandidate Non-Connected Political Committee. A mouthful, so these new groups became quickly known as “Super PACs — because the new committee could accept unlimited contributions from individuals and corporations, and use those unlimited funds to make unlimited independent expenditures to elect or defeat federal candidates.

This was an awful lot of radical, swift change in federal election rules and practices, and you might have thought that the law would rest there for a while. But NO — all those newly-freed lawyers and political professionals, no longer bound by the limitations on corporate expenditures, set out to test the limits of their new power.

The first thing that happened was an attack on disclosure. Contributions to Super PACs have to be disclosed by law, but what about contributions to Super PACs from shell corporations? Or from incorporated 501(c)(4) or 501(c)(6) organizations — tax exempt social welfare or trade association organizations — that do not themselves publicly disclose the sources of their funds? There have been well-publicized efforts to use these vehicles to hide the true sources of Super PAC contributions. And what about direct expenditures by these other entities—are they required to disclose the sources of their funding? For different reasons, neither the IRS (apparently adverse to dealing with politically controversial issues), or the FEC—for reasons I will explain--have shown any inclination to wade into these turbulent waters.

The second development was the arrival of the “candidate” Super PAC. Now, remembering that the whole point of Super PACs is that they are “independent expenditure only”

committees, and the Supreme Court has defined independent expenditures as “totally independent of any candidate,” you might think a “candidate Super PAC” was an oxymoron. But you would be discounting the chutzpah of political professionals — especially those who understood that the FEC, the campaign finance cop, is not on the beat, but instead is tied up in knots, making strange noises. More on that in a moment.

So “candidate Super PACs” sprung up, run by close friends and former staffers of Presidential candidates. There was even a contest of sorts to argue about who was closer to the candidate — because supporters only wanted to give their money to the “real thing” — the Super PAC that knew what the candidate and campaign needed, and would do that and only that and not embarrass anyone in the process. The FEC helpfully ruled that candidates could raise money for these Super PACs — only up to the “federal limit” of \$5,000 applicable to other, non-“Super” PACs — and, more importantly, that candidates could attend, speak and be featured guests at Super PAC fundraising events so long as the candidate did not actually ask for the unlimited contributions. The endorsement by a candidate, or appearance at a fundraising event or a thank you dinner is priceless for the Super PAC — it is the candidate’s own “Good Housekeeping Seal of Approval” bestowed on them.

Not content with this, all these lawyers and campaign professionals came up with the next big idea — only months ago. Let’s film candidates talking about their issues, and run the ads in key states, but it won’t count as “coordinated” with the candidate under the FEC’s “Swiss cheese” definitions because the ads won’t have the candidate say “vote for me.”

You might think I’m making this up, but I’m NOT! Let me quote from an official Advisory Opinion Request filed with the FEC just over one month ago by attorneys for American Crossroads, a well-known Super PAC. Attorneys for American Crossroads wrote:

In recent weeks, several news media outlets reported that a Democratic state party committee has aired, and plans to continue airing, advertisements featuring an incumbent Member of Congress who is up for re-election in 2012. American Crossroads wishes to produce similar advertisements, featuring incumbent Members of Congress who are federal candidates and whose legislative and policy positions, and re-election, are supported by American Crossroads, but only if the Commission deems those actions to be consistent with the Federal Election Campaign Act, as amended.

The advertisements that American Crossroads plans to produce and distribute would feature an incumbent Members of Congress facing re-election in 2012, speaking on camera (or in voice-over, in the case of a radio advertisement) about one or more legislative or policy issues. The legislative or policy issues discussed will be issues that will likely also be debated and discussed that Member's upcoming 2012 re-election campaign.

For example, if the incumbent Member's campaign website prominently features job creation as one of his or her signature issues, the American Crossroads advertisement would also feature that Member discussing job creation. Or, if the incumbent Member's campaign has chosen to focus on opposing reforms to Social Security and Medicare, the American Crossroads advertisement would feature that member discussing his or her opposition to various Social Security and Medicare reform proposals.

These advertisements would be fully coordinated with incumbent Members of Congress facing re-election in 2012 insofar as each Member would be consulted on the advertisement script and would then appear in the advertisement.

American Crossroads seeks the Commission's confirmation that it may, as an independent expenditure-only committee, produce and distribute advertisements featuring incumbent Members of Congress who are also federal candidates, provided those communications do not qualify as "coordinated communications," as that term is used at 11 C.F.R. §109.21.

You really can't make this stuff up!

Then, Stephen Colbert's Super PAC, Americans for a Better Tomorrow, Tomorrow, wrote the FEC, officially commenting on the American Crossroads AOR. As it pungently said, mocking the American Crossroads request:

American for a Better Tomorrow, Tomorrow wholly endorses American Crossroads' Request. We hope the Commission is able to begin with the Supreme Court's definition of Non-Coordinated as "expenditures...made totally

independently of the candidate and his campaign” in *Buckley v. Valeo*, and end up with a ruling that allows outside groups to produce ads with the candidate’s cooperation, themes, and message. That will prove to our nation’s critics that America is a country that still makes something: strained rationalizations.

American for a Better Tomorrow, Tomorrow believes that Super PACs can and should coordinate with candidates in every sense of that word—except in the legal or biblical sense. In fact, pending the outcome of American Crossroads’ Request, Americans for a Better Tomorrow, Tomorrow plans to coordinate a non-“coordinated” ad with presidential novelty candidate Buddy Roemer. A rough example of which can be found here: www.colbertsuperpac.com/undaunted-non-coordination.

Well, your timing is perfect, because the FEC has just met to rule on American Crossroads’ Advisory Opinion Request. It had received a highly unusual flood of comments from average citizens, as a result of the Colbert Report coverage, almost all of them giving the FEC a piece of their minds. But the FEC was unable to advise the requestor on the state of the law because it deadlocked 3-3, as it has on almost every important campaign finance issue for the last several years.

You see, the FEC has six Commissioners — it is almost unique among federal agencies in having an even number of Commissioners — and the law setting it up says it may only take action by a vote of four Commissioners — or a requirement of approval by a 2/3rds vote. Further, the law says that no more than three Commissioners can be of any one party, which in practice results in a Commission with three Republicans and three Democrats, meaning that any vote to take action has to be bipartisan (which is a good thing) but that one party can block all action if it chooses (which is not a good thing, if one party basically believes in total deregulation and refuses to enforce the existing laws, which is pretty much where we are now). So, whatever deregulation we have not gotten from the Courts, we get *de facto* from a gridlocked FEC unable to act.

I spend some time overseas talking with government officials, party activists and political scientists about how to improve their campaign and election systems. As you might expect, this makes me nervous — I am always careful to issue a disclaimer saying that American values of free elections, transparency, and anti-corruption are very noble and important and worth emulating — just don't copy our campaign finance or enforcement systems!

Our current state, though, is not immutable. It is not even the state that the *Citizens United* majority thought they were creating, as I have noted. So, what can we do to correct the situation? I believe there are several issues that lawyers, lawmakers, and regulators can and should focus on:

- **Disclosure.** The Supreme Court has been unusually clear in saying that the sources of funding of political advertising and other spending can constitutionally be required to be disclosed. This applies not only to the Super PACs, but to c4s, c6s, and other groups running campaign ads. We just need the political will to do so.
- **Coordination.** The Supreme Court has assumed that independent expenditures are “totally independent of a candidate.” This means that there is only a constitutional right to use unlimited individual and corporate money for unlimited independent expenditures if the activity is “totally independent” of the candidate.” At the federal level, the FEC has done everything in its power to avoid saying this — including basically ignoring two federal court decisions holding that the FEC's existing coordination regulations are insufficient. Now, with the American Crossroads AOR behind us, is the time to fix this inadequate definition and produce a coordination standard that the Supreme Court would recognize.

- **Corruption from independent expenditures.** As I have noted, the Supreme Court has held — on no evidence — that independent expenditures have no potential to corrupt candidates and officeholders. For those who are sure this is not the case, now is the time to assemble a record that can be used in the future to prove in court that even truly independent spending — or the threat of it — can corrupt the legislative process.

In the meantime, all of us will just have to learn to swim with the sharks in the rough and uncharted seas created by *Citizens United*, *Speech Now*, Super PACs, a dysfunctional FEC, and a conflict-adverse IRS.