

Getting a Handle on the Super PAC Problem

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The Super PACs are the bêtes noires of campaign finance reform, except for those who are quite keen on them, in which case they represent the flowering of free speech. But for present purposes, they will be discussed more as they are seen and critiqued by those concerned that these PACs are landing the final blows on the badly battered campaign finance system. In this view, these PACs are particularly brazen but not unfamiliar examples of “circumvention,” as getting around the campaign finance laws has come to be known, and the threat they present can be mitigated, if probably not eliminated, by regulatory measures on the familiar model.

To hold this position, one has buy into into certain propositions that are open to serious question or reexamination.

One has to do with the nature of “independence” sufficient to relieve a committee from limits on what it spends to advocate expressly on behalf of a particular candidate. This is related, in turn, to a reading of *Buckley* for which there is no support. Condemn or applaud *Buckley* for drawing the line the way it does: the case is fairly clear about the side of that line on which legal independence lies, and Super PACs as they currently operate can meet that definition with little difficulty.

A second proposition related to the first is that the measures that can be adopted to limit Super PACs will address only that problem and create no others. That is to say, it is somehow believed that, unlike the experience with most campaign finance regulation, these steps can be taken with little collateral damage, or minimal unintended consequences. And that is also dubious.

And, finally, perhaps most important, these propositions are tied to a larger perspective on Super PACs and contemporary campaign finance problems: that they matter because they raise to a significant degree the risks of corruption and/or seriously exacerbate conditions of political inequality.

But what about their effect on *campaigns*? This question seems to be missing from the standard critique. Super PACs are also a problem for the electoral process and for those—candidates, parties, and other political organizations—that we rely upon to enter into and compete within it. With the emergence of Super PACs, they face distortions of the electoral process that bear directly, and adversely, on the quality, fairness and cost of competition.

Independence

Buckley is very clear: independence attaches to particular expenditures and the constitutional right to proceed without limit is a function of candidate lack of control over or involvement in that expenditure. It is not true, as some say, that these organizations-- the PAC and the candidate committee--have to be “wholly independent” of each other. No one can imagine that the Roberts Court, or even many Courts before it, would uphold a prohibition on a longtime friend of the candidate running a political committee to support him. The case against independent expenditures by that committee would rest on the coordination of activity around *its expenditures* -- the fact that, having been coordinated, the expenditures would be little different from contributions, because the candidate had effectively requested, planned for or helped to shape the communication being paid for.

This may be frustrating, but it is frustrating only if we confuse the risk of corruption with the risk of absurdity. Obviously, as a commonsense matter, it strikes everyone as absurd that a committee run by a candidate’s father could be viewed as “independent” of the candidate. It seems to stretch the term “independence” beyond recognition. It is, however, a legal term, adopted to enforce a constitutional standard, and we are where we are. The question is not whether *Buckley* decided the issue correctly but what *Buckley* actually said. And it made clear that the distinction between a contribution and an expenditure -- and here we are speaking of the actual use of money -- turns on the question of whether the candidate can have the confidence in the spending’s effectiveness that comes with some measure of control over whether it happens at all, its timing, or its content.

What further galls critics is that individuals can support the independent committee with contributions that are themselves unlimited. But those same individuals can spend the same money on the same unlimited basis on their own, without moving it through the committee. It's not clear how much more vexing it is that they can pool their independent efforts through a committee, rather than spend in looser coordination with one another but individually. The answer does not lie in disclosure, which is about the same if the individual files a report of her own spending, or appears in the Super PAC report as a contributor.

Effects

Another proposition important to the conventional critique of Super PACs is that somehow the most obvious abuses can be regulated without undesirable ripple effects or unintended consequences.

We seen where this line of reasoning takes us, in a number of the current reform proposals. They strive to remove all possibility that an independent committee is operating to the advantage of the candidate it supports. So they would apply the coordination rules, and convert the independent spending into limited

contributions, if the candidate expresses private or public approval of the spending. We have also seen proposals for restrictions on the classes of individuals who can form or operate Super PACs.

Now other than the inconsistency of these proposals with *Buckley* -- because these particular restrictions don't focus on specific expenditures but attempt to enforce insulation of the PAC from virtually any contact with the candidate, or any possibility that it is on the right strategic path in aiding that candidate -- they also raise large free speech and association issues. What would it mean to apply the coordination rule to the private speech of the candidate who quietly expresses satisfaction with independent spending? What sort of discovery would an enforcement agency be justified in initiating, and on what initial showing of a potential violation, to establish the circumstances in which the statements were made, to whom, and with what substance? And if a rule like this could be upheld, who could say that the jurisprudence providing for it would not invite invasive investigative activity directed toward other speech of this kind?

After all, these sorts of restrictions would be ready for use to police politically significant activities by other organizations. By operation of the peculiar *Colorado Republican* case, political party committees make independent expenditures, and it is impossible to imagine that an official of the party committee on the so-called "coordinated" side, walled off from the independent spending program, will at no time express an opinion on the performance of the independent wing of the party operation. Does that bring down the entire party independent spending operation -- effectively suggesting that it could not be set up plausibly in the first place? How would that be consistent with *Colorado Republican*, much less with *Buckley*?

Similar questions follow from an attempt to establish classes of individuals who cannot run political organizations. Once again the goal here is to root out and eliminate any advantage to the candidate if his allies can be associated with an independent effort on their behalf. The same approach could be taken to limiting the effectiveness of the issue advertising financed by 501(c) organizations: could the law on that theory prohibit someone connected to the candidate from running an organization devoted to the promotion of issues that the candidate is also widely and profitably associated with?

The long and short of it is this: it is not enough to simply say that we are concerned about Super PACs and then apply a series of rules that we expect to be limited to that case alone.

The Concern About Campaigns

When campaign finance is described as a problem, it is a problem discussed very much in 1970s terms: the flow of money that is turning into a flood washing away honest government, or producing oligarchic rule, or both. And now most recently,

as championed by Rick Hasen, among others, there is renewed concern that the failure of campaign finance controls has eviscerated reasonable standards and expectations of political equality.

To prove that these concerns are legitimate, or simply to prove them as true, critics of Super PACs are continually conducting studies to show that a) the money behind Super PACs is corrupting or b) if it is not invariably corrupting, in the sense that it routinely facilitates the purchase of public policy, it is allowing an ever smaller number of people to exercise control over the political process. These debates are notably inconclusive, and the social science arriving at particular conclusions is suspect or vulnerable to serious challenge. The evidence put up by critics are countered by deregulationists with evidence of their own; or the evidence is subject to systematic attempts to discredit it.

It seems to be a mistake to put too much of the burden of these arguments on Super PACs. The rich people who give to Super PACs can exert control over the public policy process with money in numerous other ways, if they so choose and are sufficiently lucky: they don't need Super PACs. The wealthy have had plenty of influence in the many years before the appearance of Super PACs. And the same is true of conditions of political inequality, which are a function of numerous factors, including lobbying, campaign finance, and opinion-molding activity outside the realm of Super PACs. To what extent do Super PACs make this situation worse? That would be hard to measure.

But there is another concern, usually considered too pedestrian, and that is what Super PACs are doing to the *electoral process*.

Start with this: Super PACs have an effect on how the press rates the prospects of candidates, with effects on the support they can draw on in the early going. Whether a candidate can expect to have the support of a Super PAC is a consideration in contemplating a race: encouraging to some, discouraging to others.

But there is more. The rules around Super PACs, including the much maligned coordination rules, are complex and introduce a range of inefficiencies into the way candidates and others plan for and conduct campaigns. They are also generating significant confusion within the electorate because the public no longer can separate out the PACs that are functioning side-by-side with the candidate who is helping the committee any way she can, from those that purport to support the candidate but lack her support and blessing. Super PACs have driven up the cost of advertising for many political organizations, including parties. And, finally, Super PACs are an additional element in the so-called spending "arms race": they are surely driving up what candidates believe is required to run competitive federal races.

We can deplore these developments out of concern for the electoral process without having to make the case that this is the fast road to government corruption or will result in unfettered oligarchic control of our politics. Within just the political

process, these committees have made a mess. Perhaps worst of all are the problems presented by Super PACs that operate as single candidate PACs. They may be contributing to most of the confusion, placing the most stress on candidates and parties, and leading to the most cynicism within the electorate about how the political process operates.

There is no simple answer, because Super PACs have sprung out of a system in collapse, breaking out of the ground like weeds through cracks created by a decrepit statutory scheme whose obsolescence is being hastened by major changes in constitutional law. More than anything else, Super PACs call attention to the need to rethink the campaign finance laws as they should be structured in a world, unavoidably, in which Super PACs operate. Put differently: we need to adjust for these PACs, not dream that we can be rid of them.

Stated briefly, there are two approaches to the redesign of the campaign finance laws that would help address aspects of the Super PAC problem while remaining focused on the larger law reform program that is urgently needed:

1) Transparency: we can change reporting requirements so that the public has a better understanding of which Super PACs are working hand in glove with candidates. The PACs will still be able to spend freely, if they meet a coordination test consistent with *Buckley*, but the candidates would not be able to exploit the situation available to them today, in which they can pretend when it suits them to have nothing to do with Super PACs while actively encouraging their formation, influencing their staffing, helping to raise money for their operation, and including PAC fundraising totals in their own when promoting quarterly yields to the press. If candidates are to have these relationships (and the advantages flowing from them), then it seems fair and entirely constitutional to have the relationship disclosed.

2) Resources: no candidate, no party committee, will tell you that to raise and spend the money they wish to spend, they are happy proceeding under complex coordination rules designed protect against the sham "independent" spending. It's grossly inefficient, introduces the unpredictability that candidates and parties committee abhor, and exposes them to elevated legal risk.

So *without* bringing down the entire structure of limits and disclosure, advances have to be made in freeing up resources that will reduce the appeal and growing significance of super PACs. One proposal in wide circulation is that political parties be provided with more money and more flexibility to coordinate their spending with their candidates. There are other possible reforms, such as making preferred broadcast rates available to political parties, tightening and more vigorously enforcing lowest unit rate rules, and providing targeted relief for candidates when raising and spending money for specified voter mobilization purposes.

So the overall suggestion here is: Super PACs should be built into a broader campaign finance law reform project, which anticipates continued constitutional

protections provided to independent spending, accounts for the ways that the political process has changed, and accepts that Super PACs will remain with us. This is different from a reform program that resists these changes and strains mightily to return to the political and regulatory state of affairs of the 1970's.

And while this law reform project has to reflect concerns with corruption and with political equality, it cannot be overwhelmed with unrealistic visions of what can be accomplished on either score by aggressive campaign finance regulation. It must also, more modestly but importantly, concern itself with the structure and quality of the competitive electoral process: it must take seriously what is happening to political campaigns today, which in the end determines the clarity and quality of the choices facing the voters.