

SUPER PACS AND THE 2012 PRESIDENTIAL ELECTION: WHAT HAPPENED? WHAT'S IN STORE?

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WHAT IS A SUPER PAC?

The term originated in 2010, when a new breed of political animal arose on the campaign finance landscape in the aftermath of the U.S. Supreme Court's *Citizens United v. FEC*¹ decision. Officially known as “independent expenditure-only committees”—and unofficially dubbed “super PACs”—these political action committees are able to raise unlimited amounts of money from individuals, corporations, unions, and other organizations.

What really makes these new committees super is that the unlimited money they raise can be spent on advertisements that expressly advocate for the election or defeat of federal candidates. This is what the Federal Election Commission (FEC) calls “independent expenditures.” Previously, if a group wanted to fund ads that instructed people to vote for or against a candidate, it could only accept contributions of \$5,000 per person per year. Now the sky is the limit on how much a person can annually give to super PACs. The super PACs then can say almost whatever they want about federal candidates, whenever they want.

It is important to note that not all new politically active groups are super PACs, which section 527 of the Internal Revenue Code governs. Nonprofit organizations—particularly those organized under sections 501(c)(4), 501(c)(5), and 501(c)(6) of the federal tax code—have also seen their political abilities expanded in the wake of the *Citizens United* ruling. As a result, there is a growing concern that some “social welfare” nonprofits, as 501(c)(4) groups are called, function as stealth super PACs—and, thereby, avoid disclosing their

* Center for Public Integrity. These remarks were presented at the Willamette University College of Law Campaign Finance and the 2012 Election Symposium on February 8, 2013.

1. *Citizens United v. FEC*, 558 U.S. 310 (2010).

funders.

Super PACs' receipts and expenditures must be regularly reported to the FEC, including all donors who give more than \$200. This is not true for politically active nonprofits. Nonprofits, like super PACs, must report their political spending, but the FEC has said that only donors who give for the specific purpose of "furthering" a particular advertisement must be publicly revealed—something that rarely happens.

Notably, both nonprofits and super PACs are prohibited from making direct contributions to candidates, as well as coordinating their expenditures with candidates' campaigns. That prohibition played an important role in the logic of the Supreme Court when it reached its decision in *Citizens United*. The five justices of the majority opinion wrote that "[i]ndependent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption."²

It is also worth noting that super PACs are allowed to use 100 percent of the funds they raise to influence elections, while nonprofits are not. The Internal Revenue Service has never issued precise guidance on exactly how much political activity is too much, but many experts in the field have suggested nonprofits can spend up to 49.9 percent of their money on election-related advocacy without running afoul of the law.

WHAT ACTIVITY HAVE WE SEEN FROM SUPER PACS?

During the 2010 election cycle, about 50 nascent super PACs collectively spent more than \$80 million, according to the Center for Responsive Politics. Those figures soared during the 2012 election cycle, when more than 850 super PACs collectively spent more than \$830 million. In both election cycles, a handful of elite groups accounted for the bulk of all receipts. That is to say, in the current political arena, there are super PACs, and then there are *super* PACs.

Arguably, the very first super PAC was Women Vote!, a committee run by EMILY's List, a group that seeks to elect Democrats who support abortion rights. During the January 2010 special election to fill the U.S. Senate seat of the late Senator Ted Kennedy, Women Vote! used a six-figure contribution from Chicago media mogul Fred Eychaner to fund advertisements designed to aid

2. *Id.* at 314.

Martha Coakley, who eventually lost to Republican Scott Brown by five percentage points.

Ultimately, the top dog in the super PAC game in 2010 was American Crossroads, the conservative group that was co-founded by GOP strategists Karl Rove and Ed Gillespie. Its approximately \$28 million in revenue accounted for about one-third of all super PAC receipts.

Women Vote!, by contrast, raised \$6.5 million.

Fast-forward two years and American Crossroads ranked as the number two super PAC in terms of both fundraising and expenditures during the 2012 election cycle, being eclipsed only by Restore Our Future, the main super PAC that supported Republican Mitt Romney's unsuccessful presidential bid. According to the Sunlight Foundation, both groups spent more than 90 percent of their money on negative ads ahead of the November 2012 election. During that same period of time, American Crossroads raised more than \$117 million, while Restore Our Future raised more than \$153 million—accounting for nearly \$1 out of every \$5 that all super PACs raised.

No other super PAC raised more than \$100 million.

By comparison, Priorities USA Action, the main super PAC backing President Barack Obama's re-election efforts, raised about \$80 million. This made Priorities USA Action—which former White House aides Bill Burton and Sean Sweeney started—the third largest super PAC in 2012, according to the Center for Responsive Politics. The pro-Democratic Senate Majority PAC and House Majority PAC earned the number four and number five spots, raising roughly \$42 million and \$36 million respectively. And, after the dust had settled on Election Day, these three Democratic groups had much to celebrate.

Priorities USA Action had been a ruthless attack dog on the campaign trail. Fully 100 percent of the group's spending was on negative ads. The group coined the memorable slogan, "if Mitt Romney wins, the middle class loses." One of its ads linked Romney to the death of a woman who lost her battle with cancer. Another of Priorities USA Action's unforgettable ads featured a worker describing how building the stage on which officials announced his plant's closure (after Romney's firm, Bain Capital, bought it) was like building his "own coffin" and made him "sick."

At one point in the campaign, Paul Begala, an adviser to the group, wrote an opinion column arguing that politics needed more

negative ads, not less. He wrote:

Elections present a mutually exclusive choice. It is legal to buy a can of Coke and a can of Pepsi on the same day, but you can't vote for Obama and Romney in the same election. That mutual exclusivity pushes campaigns to frame the choice more sharply. Imagine if we had Cola Day once every four years—and you were stuck with your choice for those four years. Coke would say Pepsi makes you fat; Pepsi would counterattack that Coke makes you impotent. And they'd go downhill from there.³

The other two largest Democratic super PACs pummeled down-ballot Republicans. The Sunlight Foundation calculated that 97 percent of the spending by House Majority PAC was on negative ads, while 90 percent of the spending by Senate Majority PAC was on negative advertisements. At the Center for Public Integrity, we calculated that over the course of the 2012 election cycle, House Majority PAC saw its preferred candidates prevail in 40 of 71 races where it spent money, and Majority PAC's success rate was even better: 14 wins versus only three losses. It helped Democrats retain control of—and even gain seats in—the U.S. Senate, gains that surprised many political prognosticators.

While some Democratic groups—such as EMILY's List's Women Vote! and Senate Majority PAC (which was previously named Majority PAC and Commonsense Ten prior to that)—have been on the leading edge of the new super PAC era, overall, Republicans have embraced more widely these new vehicles. During both the 2010 and 2012 election cycles, conservative groups accounted for about 60 percent of all super PAC receipts, while Democratic super PACs accounted for about 40 percent.

Despite the fact that Democrats were slower to embrace super PACs than Republicans, their success in 2012 is likely to breed an increased acceptance rather than a de-escalation—even as Democratic politicians decry the role of big money in politics and the party's platform supports both “campaign finance reform, by constitutional amendment if necessary,” and legislation to “require greater disclosure of campaign spending.” By contrast, the Republican Party platform in 2012 called for repealing the campaign finance reform

3. Paul Begala, *Why We Need More Negative Political Ads*, THE DAILY BEAST (Mar. 19, 2012), <http://www.thedailybeast.com/newsweek/2012/03/18/paul-begala-why-we-need-more-negative-political-ads.html>

law that Senators John McCain, R-Ariz. and Russ Feingold, D-Wis. authored. The Republican platform also explicitly opposed Democratic-sponsored legislation called the DISCLOSE Act that sought to institute new disclosure requirements for groups that run political ads.

As evidence of Democrats' continued embrace of super PACs, seven newly elected House Democrats sung the praises of House Majority PAC in an online video in late January 2013.

"We were grateful to see House Majority PAC form so we could actually have allies on our side that were helping us get our message out," Representative Ami Bera, D-Calif., said in the video. "That really was, in many ways, the difference in the outcome and one of the big reasons why we won this time."

"Karl Rove and the outside interest groups were filling the airwaves, trying to drown us out," added Representative Cheri Bustos, D-Ill. "And there was House Majority PAC, offering critical push back exactly at the time that we needed it." Other new members explicitly said that they "wouldn't be here today" if it weren't for the outside assistance from House Majority PAC.

ROMNEY BUOYED BY SUPER PACS, NONPROFITS

Conventional wisdom in some quarters already holds that super PACs offered more bark than bite, especially as many big-spending Republican groups failed to help deliver the White House to Romney or regain control of the U.S. Senate. But the reality is more complex. Throughout the entire presidential campaign, Romney's operations were buoyed by support from super PACs and other independent—but aligned—groups.

Super PACs and politically active nonprofits—such as Crossroads GPS, the "social welfare" counterpart to American Crossroads that Republican strategist Rove also co-founded—offered vehicles for essentially outsourcing large portions of the political advertising wars. The potential negative cost of this outsourcing included a high upside. While candidates would lose control of the messaging done through super PACs and politically active nonprofits, these groups had access to unlimited funds. Donors to candidate committees "max out" at \$2,500 per person. Donors to super PACs and nonprofits have no contribution limits—and even corporations, trade associations, and unions can make direct donations of unlimited size to these groups.

According to the Wesleyan Media Project's analysis of data from Kantar Media/CMAG, the Obama campaign aired some 503,255 ads between April 11, 2012, and October 29, 2012. Romney's campaign aired 190,784 ads during the same period. In fact, according to the Wesleyan Media Project, Obama's advertising barrage in the presidential race exceeded that of the Romney campaign, the Republican National Committee, and four of the biggest Romney-aligned groups combined. The challenger needed the outside help from the likes of Restore Our Future, American Crossroads, Crossroads GPS, and Americans for Prosperity, the conservative nonprofit that is the main political outlet of billionaire industrialists Charles and David Koch.

FEC records show Obama's campaign raised more than \$717 million ahead of his re-election, 60 percent more than Romney's \$448 million. Even when including money the Democratic and Republican National Committees raised that could be used to get out each party's rank-and-file voters, Team Obama still enjoyed a cash advantage of more than \$180 million over Team Romney: just over \$1 billion versus just under \$850 million.

Super PAC operatives say their organizations helped keep Romney in the game until the bitter end. "In the month of August, we were one of the key factors keeping Governor Romney afloat," Charlie Spies, one of the founders of Restore Our Future, told *Mother Jones* in October. "That's the time period that traditionally the underfunded candidate gets knocked out." Meanwhile, after the election, Jonathan Collegio, the spokesman for the two Crossroads organizations, told the Center for Public Integrity that, "by leveling the financial playing field, conservative super PACs kept this race close and winnable all the way until the end."

Even before the November general election—ahead of which Restore Our Future spent nearly \$100 million only to see Romney's path to victory fall out of reach—the group played a dominant role in helping Romney secure the GOP's nomination in the first place. While wealthy super PAC backers kept the cash-strapped campaigns of former Senator Rick Santorum and former House Speaker Newt Gingrich afloat longer than many anticipated, Romney's donor network also helped the former Massachusetts governor stay on track to win the nomination.

According to the Sunlight Foundation, Restore Our Future spent more than \$42 million during the Republican presidential primaries, out-spending Romney's primary rivals and their allies in key states

such as Florida. At the time, some in the media even dubbed Restore Our Future “Romney’s Death Star.” During the first weeks of January 2012, the Wesleyan Media Project found that Restore Our Future aired nearly as many ads as the Romney campaign itself—and nearly aired more than Gingrich and Santorum and their supporting super PACs combined.

All told, the Wesleyan Media Project found that super PACs were responsible for more than 60 percent of the ads Team Romney, Team Santorum, and Team Gingrich aired between January and mid-April.

SUPER PACS FOR ALL

Romney and Obama weren’t the only ones with super PAC supporters in 2012. Allies of every major contender in the GOP presidential primary launched super PACs during the 2012 election cycle. Gingrich had Winning Our Future, which billionaire casino magnate Sheldon Adelson and his relatives almost fully funded. Santorum had the Red White and Blue Fund, which he decided to head after he dropped out of the presidential race. Texas Governor Rick Perry had a super PAC called Make Us Great Again. And former Utah Governor Jon Huntsman had a super PAC called Our Destiny, which his father, Jon Huntsman, Sr., primarily funded. Even talk show host Herman Cain; Representative Ron Paul, R-Texas; and Representative Michele Bachmann, R-Minn., had super PACs in their corners.

The proliferation of candidate-specific super PACs extended to down-ballot races—and single-candidate groups likely will continue to multiply in the months and years ahead. Just as super PACs helped shape the GOP presidential primary, big-spending groups, unfettered by contribution limits, also shaped numerous congressional primaries. For instance, in Texas’ contentious 2012 GOP U.S. Senate primary, super PACs and other independent groups aided tea party favorite Ted Cruz, the state’s former solicitor general, as he upset the party establishment favorite, Lieutenant Governor David Dewhurst. According to the Sunlight Foundation, all such groups spent approximately \$6.5 million ahead of the state’s May 29 primary—and an additional \$8 million in the subsequent runoff between Dewhurst and Cruz. Overall, Cruz’s allies spent about \$8.1 million, while Dewhurst’s allies spent about \$6.4 million on independent expenditures. Dewhurst, the owner of an energy company, outraised

Cruz 3-1, having collected more than \$33 million, including \$25 million of his own personal funds.

Meanwhile, in Utah's 2012 GOP U.S. Senate primary, a nonprofit group called Freedom Path aided six-term incumbent Senator Orrin Hatch. Hatch wanted to avoid the fate of fellow Utahan Bob Bennett, an incumbent Republican senator who tea party activists ousted in 2010 at the state's Republican convention. As Hatch faced the prospect of a mutiny from conservative activists, Freedom Path spent upwards of \$1 million on ads designed to help Hatch's electoral prospects.

Freedom Path released its first ad in July of 2011. It touted Hatch and tea party-backed freshman Senator Mike Lee, who bested Bennett in 2010, as "leading the fight in Washington to get spending under control," though Lee had declined to endorse Hatch before the June primary. Another ad in January championed Hatch as "leading the conservative charge to repeal Obamacare." One ad in March trumpeted the balanced budget amendment that Hatch and Lee introduced. Ultimately, Hatch prevailed, capturing about two-thirds of the vote against primary rival Dan Liljenquist.

In November, long after voters had cast their votes in both the general election and the primary, we at the Center for Public Integrity revealed that the drug lobby's main trade group, the Pharmaceutical Research and Manufacturers of America (PhRMA), was responsible for \$750,000 of the first \$850,000 that Freedom Path raised in 2011. This information was never reported to the FEC but instead surfaced in an annual report that PhRMA filed with the IRS.

In future elections, primary contests are likely to be especially ripe opportunities for advocacy by super PACs and politically active nonprofits.

VEHICLES FOR WEALTHY INTERESTS

According to a Center for Public Integrity analysis of FEC data that the Center for Responsive Politics compiled, just 958 individuals contributed at least \$50,000 to super PACs—fewer than twice the number of lawmakers who serve in Congress. These donors accounted for nearly 60 percent of all money the groups collected in the 2012 election season. By way of comparison, according to the U.S. Census Bureau, the median household income in 2011 was \$50,054.

The top 91 individual super PAC donors—each of whom had

contributed at least \$1 million—were responsible for more than \$330 million in contributions, or about 40 percent of all super PAC funds raised. This concerns campaign finance reformers such as Adam Smith, communications director of Public Campaign, an organization that advocates for publicly financed elections. “Our elections are turning into a parlor game for millionaires and billionaires,” Smith told the Center for Public Integrity in 2012. “It skews the policymaking process and pushes regular people out of the political system.”

Campaigns have traditionally heavily relied on a wealthy donor class for funds, with members of Congress spending hours each day “dialing for dollars.” During the 2012 election cycle, the Center for Responsive Politics estimated that only 0.5 percent of American adults contributed at least \$200 to any sort of political committee or federal candidate—and only 0.1 percent of American adults contributed at least \$2,500, the maximum gift to a candidate under the law. The Center for Responsive Politics calculated that donors who gave at least \$200 during the 2012 election season accounted for roughly two-thirds of the money raised by all candidates, parties, and PACs.

In the 2012 general election, money from grassroots supporters bankrolled Obama’s campaign committee to a large degree, while Romney’s campaign relied more on deep-pocketed donors. According to the Campaign Finance Institute, individuals who gave \$200 or less accounted for 28 percent of Obama’s war chest. Meanwhile, such small-dollar donors were responsible for only 12 percent of the Romney campaign’s haul. At the same time, according to the Campaign Finance Institute, roughly 61 percent of the money Obama’s campaign committee raised came from donors who gave less than \$1,000, while two-thirds of Romney’s receipts came from donors who gave \$1,000 or more. All the while, only 11 percent of Obama’s donors gave the legal maximum of \$5,000, while 25 percent of Romney’s did. Michael Malbin, the executive director of the Campaign Finance Institute, has said that candidates in the future are unlikely to match Obama’s small-dollar fundraising successes without institutionalized incentives, such as a program providing matching donations for small-dollar donations.

The fundraising pressure on politicians has only increased in the wake of *Citizens United* and the threat of 11th-hour attack ads. The involvement of a super PAC or nonprofit in an election can change the dynamic of a race overnight. And with their ability to collect

donations of unlimited size, it is far easier for a super PAC or nonprofit to become flush with the funds necessary to launch an advertising blitz. This worries many incumbent politicians, who were already spending significant time each week fundraising.

“I think most Americans would be shocked—not surprised, but shocked—if they knew how much time a United States senator spends raising money,” Senator Dick Durbin, D-Ill., told National Public Radio’s “Morning Edition” in 2011. “And how much time we spend talking about raising money, and thinking about raising money, and planning to raise money.”

And when new House members came to Washington in 2013, the *Huffington Post* reported that the Democratic Congressional Campaign Committee urged them to spend at least four hours a day in “call time”—soliciting funds for their re-election bids nearly two years away.

Ultimately, money alone doesn’t guarantee success. But the better-funded candidate wins most of the time. And all candidates need a certain amount of funds to get their message out. In the meantime, the wealthy donors that candidates and super PACs solicited also can have a legislative agenda. The *New York Times* reported in January 2013 that Sheldon Adelson, the casino magnate, was directly reaching out to Republican senators “to urge them to hold the line” against the confirmation of former Senator Chuck Hagel, R-Neb., to be the next defense secretary.

Additionally, unions such as the United Auto Workers, National Education Association, AFSCME, and the AFL-CIO—which were all among the top donors to super PACs in 2012—have been working to ensure their voices are heard in the legislative and regulatory process with professional lobbyists. The same is true of companies such as Chevron, which dumped \$2.5 million into a super PAC closely tied to House Speaker John Boehner, R-Ohio, in the final weeks of Election 2012. Meanwhile, groups including the National Association of Realtors and the Autism Super PAC have already said that their potentially unlimited bank accounts could come into play as they lobby the 113th Congress. “As a super PAC, you can speak to power with so much more clarity,” Craig Snyder of the Autism Super PAC told *Politico* in September 2012. “Whatever you think of the *Citizens United* decision and super PACs, if these are going to be the rules, why not use them for causes you feel are important?”

STEALTH SUPER PAC ACTIVITY

Some have posited that fans of political transparency should be big fans of super PACs because they are required to disclose their funders. But under the existing campaign finance reporting regime, there are still ways for super PACs to be active in races without revealing their donors before people head to the polls. This is particularly true for super PACs that are created late in the game—or that surge to life during the final stretch of a campaign. Current campaign finance rules require near-immediate disclosure of expenditures, via 48-hour or 24-hour notices filed with the FEC. But real-time reporting of super PAC funders is not required.

During the 2012 Republican presidential primaries, several major super PACs changed the frequency at which they filed reports with the FEC. In practice, this meant that they were allotted a few more weeks before information about their funders was required to be disclosed—a time during which people were casting their votes or attending caucuses in Iowa, New Hampshire, Nevada, South Carolina, and Florida. A similar situation could play out again in early 2016, assuming states continue to hold nomination contests in January. Depending on the weight of these early contests, voters could essentially determine the nominees of both major parties before the general public knows who funded the super PAC cavalries of each candidate that are all-but-certain to exist.

Already amid multiple contests in 2013, we have seen super PACs pop up ahead of elections and make last-minute expenditures to help get out the vote for their preferred candidates—all while keeping their funders' identities secret until after votes are cast.

Even though railing against those who are trying to “buy” an election makes for good talking points on either side of the partisan divide, neither side, as operatives on both sides often say, wants to “unilaterally disarm” or “fight with one hand tied behind their backs.”

At this juncture, one thing appears certain: Super PACs of all stripes are unlikely to go away any time soon.