

THE MYTHOLOGY OF SUPER PACS: MUCH ADO ABOUT (ALMOST) NOTHING

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It is a pleasure to be here today. I am here in my capacity as an election law practitioner from a Washington, D.C. law firm, sitting side by side with the academics. I am going to pretend that I am one of the academics, since, as of this semester, I am now an adjunct professor of law myself. And frankly, I get a kick out of hearing myself referred to as “professor.” I take it as a license to pontificate a little bit, from my new perch in the ivory tower, and I plan to pontificate today, with abandon, about the Great Super PAC Scourge of 2012.

Early in the 2012 election cycle, we heard a great deal of talk in the media about the evils of Super PACs. Super PACs were almost universally reviled, and the *Citizens United*¹ decision that spawned them was portrayed as having unleashed on the nation a tidal wave of corrupt corporate money.

Conventional wisdom ascribed to Super PACs the power to let special interests and plutocrats buy the election. Super PACs were also expected to raise and spend “dark money” that would allow special interests to buy the election in secret.

With the 2012 election now behind us, we are in a position to re-evaluate those myths. And with the benefit of hindsight, it is fairly clear that all the froth and fear mongering about Super PACs was seriously misguided. Super PACs, and even the *Citizens United* decision itself, have turned out to be much ado about nothing. Or at least, much ado about close to nothing.

Looking back not just on the 2012 election, but also what came before it, we can now see with greater clarity trends that began a

* Partner, Covington & Burling LLP. These remarks were presented at the Willamette University College of Law Symposium on Campaign Finance and the 2012 Election on February 8, 2013.

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

decade before *Citizens United*, and that will appear in even sharper relief in the 2014 election cycle and beyond. I will offer a few high level observations about the role of money in 2012 and try to fit those observations into the larger recent history of campaign finance reform.

In 2012, the role of corporate money was not much different than before *Citizens United*. Practically none of the Super PAC money came from public companies, or for that matter corporations generally, with Chevron being the only household name company that contributed to a Super PAC. No major corporations made federal independent expenditures in 2012, and exceedingly few corporate entities of any kind made independent expenditures. The vast bulk of Super PAC money came from individuals.

However, corporate money was not absent from the election. To the contrary, corporations had been spending massively on federal election related activities before *Citizens United*, and they kept right on doing so after the decision. Most of that corporate money flowed, as before, through 501(c)(4) “social welfare organizations” and 501(c)(6) trade associations, where the money was largely undisclosed; just as it was before *Citizens United*.

What corporate money we know about, like Chevron’s, we know about precisely because SuperPACs are required to disclose. Indeed, that is one of the salient benefits of *Citizens United* and its progeny. After a decade in which more and more election related funds have crept into the shadows, Super PACs have been pulling a lot of that money back into the daylight, one of their most unheralded contributions to the progress of humanity. That is a direct product of *Citizens United*, which created a viable and attractive vehicle for spending large sums on election ads, but only on the condition that the sources of those funds must be disclosed.

At the Presidential level, Super PACs played an inconsequential role in the general election. Instead, Super PACs had their greatest impact during the Republican primaries, where they substantially contributed to something that is almost unheard of in American elections these days—genuine competition. The 2012 Republican primaries were the most vibrant, substantive, and intensely competitive in decades. Political scientists normally view this as a good thing.

Ironically, from a partisan point of view, this offered a huge assist to President Barack Obama. The duration and vibrancy of the GOP primaries, which weakened Governor Mitt Romney on many

levels, together with the critical fact that Barack Obama had no primary challenger, were the two most critical factors leading to Barack Obama's victory. In that sense, Super PACs played an indirect role in President Obama's ultimate victory.

I doubt Super PACs did anything that was outcome determinative, but they did generate a lot more political speech and a much more vibrant debate among the candidates, principally by providing a financial umbilical cord to the financially weaker candidates. Of course, you could accomplish that much more efficiently with direct campaign contributions, of the sort we had before the Federal Election Campaign Act (FECA), when an angel or two could finance a dark horse candidate like Eugene McCarthy. But by the time the general election rolled around, Super PAC spending by both parties was largely a wash. A big yawn.

During the 2012 election, we saw much greater transparency than we had seen in the last decade. That is largely a product of *Citizens United*. Super PACs pulled tens of millions of dollars up from beneath the radar line and into the federally regulated and disclosed system. In past election cycles, you might never have even known about Sheldon Adelson. A great deal of money still remains below the radar line, but that was true before *Citizens United*, and is not a consequence of it.

And what about the billionaires? Didn't *Citizens United* for the first time allow billionaires, like Sheldon Adelson and Foster Fries, to buy advertising for candidates? Actually, this is one of the most fascinating misconceptions about *Citizens United*. If you have a problem with Sheldon Adelson, then your problem is not with *Citizens United* but with *Buckley v. Valeo*.² Billionaires could make unlimited independent expenditures before *Citizens United*. And, in fact, once or twice they actually did—though this fact now seems forgotten in the mists of time.

Any billionaire has been free since time immemorial, and certainly since *Buckley*, to spend millions on an independent expenditure in support of or opposition to a federal candidate. The FECA requires that the source and amount of the independent expenditure be reported through the FEC. But the sky has always been the limit.

The reason that so few wealthy individuals bought campaign ads

2. 424 U.S. 1 (1976).

prior to *Citizens United* actually has very little to do with the campaign finance laws or the FEC. It mainly has to do with another alphabet-soup agency with a middle C instead of an E – the FCC. Under the federal communications laws, a broadcast advertisement must identify its true sponsor. So if Sheldon Adelson had wanted to buy a television advertisement expressly advocating for the candidacy of President George W. Bush in 2004, the ad would have had to conclude with an awkward “Paid for By Sheldon Adelson.” That didn’t go over very well with most billionaires, at least back then.

In the lead up to *Citizens United*, election lawyers were beginning to formulate ways of solving this problem, even under the decisional law that existed at that time. For example, a series of FEC advisory opinions seemed to recognize the ability of an individual to form a limited liability company that could in turn make an independent expenditure. Under the federal communications laws, it is likely that the advertisement bought by the LLC would have carried a disclaimer going something like this: “Paid for By the Better Tomorrow Fund LLC.” The LLC, however, would have had one very wealthy natural person member.

So if the law allowed wealthy individuals to make independent expenditures, why did relatively few of them do it? And why are so many of them doing it now, after *Citizens United*? What changed is not so much the law—though *Citizens United* did change the law a bit—but a social norm. The clarity afforded by *Citizens United*, even though it represented really only an incremental change in the law, burned off the fog of uncertainty and anxiety that kept some major donors from ponying up for television ads.

Now, if what has changed is the law, then reformers have a simple solution for that. They can simply change the law back. Or change the Justices, so that they will change the law back. But if what has changed is instead a social norm, then there is no going back. Even if *Citizens United* were overturned tomorrow, Sheldon Adelson and his compatriots aren’t going to crawl back into hiding. They have tasted freedom, as it were, and it tasted sweet. Unless the Supreme Court overturns *Buckley*, including its bedrock holding that independent expenditures by individuals cannot be limited, then billionaires buying election ads are here to stay. You can’t go home again, Fred Wertheimer.

As I noted, there are larger trends at work, causing tectonic changes in our electoral system, that long pre-date *Citizens United* and that are more profound than the advent of Super PACs. Most

importantly, the accelerating decline of the national parties relative to outside groups is changing in fundamental ways how campaigns are fought and won. While the national political parties didn't die during 2012, both the Republican National Committee (RNC) and Democratic National Committee (DNC) are shadows of their former selves. On their current trajectory, they could both be largely irrelevant by the 2016 election. Neither of them was particularly relevant even in 2012.

The explanation for this national party death spiral is straightforward: the McCain-Feingold law of 2002. McCain-Feingold has been quietly starving the national parties of resources for a decade, relative to outside groups such as 501(c)(4)s, 501(c)(6)s, and other exotic inventions of tax lawyers. 2012 was the first election year where this trend had a decisive effect.

It is no accident that Mitt Romney had a weak get-out-the-vote operation on Election Day. It is no accident that he performed well in early voting among the one-third of voters who voted early, but was crushed on Election Day, when get out the vote machinery is critical. Years ago, the Republican nominee would have been handed a pre-packaged GOTV program by the RNC, richly funded. This year there was very little of that. Both the RNC and DNC have atrophied in profound ways. Democrats will see this the next time they have to run without a Democrat already in the White House. They will go looking for the DNC, with its get-out-the-vote operation, and they will not find it.

The Republican Party machinery was not there in a big way on Election Day 2012 because of the now salient and corrosive effects of McCain-Feingold. McCain-Feingold banned "soft money"³ for national parties, but only limited it modestly for outside groups. The party committees that challenged McCain-Feingold in *McConnell v. FEC*⁴ said, at the time, that McCain-Feingold would lead to a flood of money to outside groups. And that since the limits on outside groups were more constitutionally suspect the trend would be even worse if and when the modest limits on outside groups were struck down. That is exactly what happened. With the national parties

3. Soft money generally refers to funds that are not subject to the contribution limits and source prohibitions of the Federal Election Campaign Act of 1971, 2 U.S.C. §§ 431 *et seq.* For example, campaign finance lawyers refer to large and unlimited donations from individuals and corporations as "soft money."

4. *McConnell v. FEC*, 540 U.S. 93 (2003).

banned from raising funds in large increments, the biggest donations have flowed to the outside groups where, ironically, they were no longer subject to the FEC disclosure that is required of the national parties.

Recall that long before *Citizens United*, in 2004, we saw a surge in outside groups, with the best known examples being Swift Boat Veterans, Move On.org, and Americans Coming Together. Not to mention the US Chamber of Commerce. The vast bulk of this money was undisclosed. In 2008, the trend continued, but was blunted by Senator John McCain's appearance on the ballot and his demand that outside groups not air ads in support of his candidacy. Then came the *Wisconsin Right to Life* decision,⁵ and ultimately *Citizens United*, which overturned *McConnell* in part by holding that McCain-Feingold's restrictions on outside groups were unconstitutional. With the parties still handcuffed, but the outside groups good to go, the stage was set for a rout of the national parties.

What's wrong with that? Here's what's wrong: parties are a moderating and mediating force in our politics. Without them, loss of party discipline leads to radicalization. It empowers the fire breathers in both parties, but especially so for the party that is out of power in the government and therefore lacks any platform for party discipline.

A strong party system has been one of America's hallmarks, and it is a major reason for the stability of the American political system. We are now, at an accelerating pace, moving toward a world in which both parties will be forced to outsource most of their core functions to 501(c)(4)s and other outside groups that are able to raise unlimited resources from soft money donors. Those outside groups will handle get-out-the-vote operations, as well as the more mundane functions of the party committees. Once withered, it will be very difficult to rebuild the parties, on either side of the aisle. The consequences for our democracy may not be dire, but they are certainly unpredictable.

It is likely that at some point in the relatively near future, as the agony of the parties becomes more audible to the political class, an effort will be made to implement a legislative fix. There are any number of ways that current law could be changed to level the playing field between parties and the outside groups. But that fix will not be made until incumbent members of Congress in both parties begin to assimilate the new realities, and perceive that the parties are a

5. *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449 (2007).

bulwark against the barbarians at the gate, so to speak. Sadly, a necessary reform of the tragically misguided McCain-Feingold reform law will not be made until it is clearly in the best interest of all incumbents to make that fix.