



[Ben W. Heineman Jr.](#) - Ben Heineman Jr. has held top positions in government, law and business. He is the author of *High Performance with High Integrity* (Harvard Business Press, 2008).

Super PACs: The WMDs of Campaign Finance

By: Ben W. Heineman Jr.
January 6, 2012

How the opaque and increasingly powerful organizations are shaping the future of American elections -- and how they might be stopped.



Super PACs can receive unlimited contributions and make unlimited campaign expenditures for or against a candidate, often with actual donors hidden from view. This election year will see an exponential growth in their number and in the funds available to them.

Partisans from left and right will use them. No reforms to limit them will occur. And there is a looming war of attrition as the negative, superficial cannonading of Super PACs in political ads threatens to obliterate any semblance of a policy debate.

Exhibit A (we will likely run the alphabet this year) is Restore Our Future, the Super PAC organized by the political director of Mitt Romney's 2008 campaign and supposedly "independent" of the Romney campaign itself. On November 30, 2011, Newt Gingrich led Mitt Romney in Iowa by a 14 percentage point margin (31 percent to 17 percent), per a *New York Times/CBS* poll. In the next 30 days, Restore Our Future spent more than \$3 million on negative, anti-Gingrich ads -- twice the amount spent by the Romney campaign itself. The final result: Romney in first (barely) with 25 percent of the vote, Gingrich in fourth, with 13 percent of the vote.

Super PACs are, of course, the progeny of the Supreme Court's January, 2010 decision in *Citizens United*, which declared unconstitutional the legislative provisions that had prohibited corporations and unions from their organizational treasuries to pay for ads, even if those ads were made independently of a candidate's campaign.

Now, so long as the Super PACs are "independent" of a politician's own efforts, they can raise and expend unlimited funds either for a) "independent expenditures" that support or oppose a particular candidate or b) "electioneering communications" that may mention the candidate favorably or unfavorably in a discussion of campaign issues, but which do not expressly advocate election or defeat.

Moreover, many of the Super PACs' real donors will not be disclosed. Super PACs themselves, which are organized under federal election laws, must register with the Federal Election Commission (FEC) and disclose contributors. But many Super PAC donors will be tax-exempt "social welfare organizations" or trade associations or "issue organizations" organized under the Internal Revenue Code -- the so-called 501(c)(4), 501(c)(6), or 527 entities. And, under long-standing IRS rules, such tax-exempt organizations are not required to disclose their corporate or individual donors, who will thus not be listed in Super PAC reports filed with the FEC.

In 2010, 80 Super PACs registered with the FEC. In this election cycle, more than 250 Super PACs have already registered. This includes a pro-Obama Super PAC (Priorities USA Action), a behind-the-curve pro-Gingrich one (Winning Our Future), a number organized by prominent Republicans like Karl Rove in a reprise of 2010 (e.g. American Crossroads), and even one promoted by Stephen Colbert (Americans for a Better Tomorrow, Tomorrow). Super PACs spent \$90 million in 2010. The amounts they spend this year will be many multiples of that (\$32 million has already been raised, and the war has barely begun).

For conservative critics of campaign finance regulation, Super PACs are an excellent development (just as *Citizens United* was rightly decided), allowing money from all points on the political spectrum to be aggregated and spent "independently" for or

against candidates. To them, the "marketplace of ideas" is now well-funded and even more robust.

For critics of *Citizens United* and the large amounts of "independent" money flowing into tax-exempt entities and Super PACs, this marketplace is seriously flawed. But, as I will note, there are no solutions on the horizon for the problems the new PACs present, which include these:

DISCLOSURE

The Supreme Court in *Citizens United* expressly endorsed legislative disclosure requirements and both liberals and conservatives used to agree about the need for donors to be identified. But there are no current disclosure rules to deal with the tax-exempt entities who give to Super PACs and who do not divulge the names of their own donors. A Democratic bill requiring such disclosure was defeated last year, and a bitterly divided Congress won't touch the issue this year as historic bipartisanship on campaign finance has broken down. Absent some legislative mandate, the IRS won't act. If the IRS doesn't act, neither will the Federal Election Commission which is divided on partisan lines (3-3) and stymied from doing almost anything. Some large corporations make limited disclosures about dues over a certain amount that they pay to trade associations, but this represents only a tiny fraction of money flowing into those tax-exempt groups -- from public and private corporations, other business entities, wealthy individuals etc -- that, in turn, fund Super PACs. The SEC has received a petition to require publicly held companies to disclose all types of campaign expenditures, but that, too, is expected to go nowhere this year, given the SEC's Dodd-Frank agenda and intense political scrutiny of the agency on the Hill.

CORRUPTION

Even if one accepts the Supreme Court's position that, when it comes to election spending, corporations have the same First Amendment rights as people, that constitutional right may still be overridden by legislation if Congress has a "compelling interest." The Court said that corruption or the appearance of corruption from business and union contributions made directly to candidates' campaigns is such a compelling interest. This compelling interest, in turn, justifies the existing prohibition on direct business and union giving to campaigns from their organizational treasuries and also justifies the limits (\$5,000 per election) on campaign contributions from corporate or union PACs (which are different than Super PACs) funded with employee or member dollars. Common sense would suggest that a threat or promise, express or implied, from Super PACs or politically active tax-exempt groups to use "independent expenditures" or "electioneering communications" in large amounts for or against a candidate constitutes exactly the same corrupt influence or appearance of corrupt influence that would constitute a compelling interest, in a constitutional sense. This compelling interest would justify prohibitions or limits on "independent"

expenditures. Nonetheless, the Supreme Court held exactly the opposite with little analysis of such corrupting threats or promises. It will take a dramatic act of corruption -- involving independent expenditures, played prominently as a national story and followed by more wide-ranging fact-finding -- to change attitudes and possibly to provide the foundation for new legislation that could be held constitutional. But, without the facts and the drama, we are a long, long, long way from such a development.

"INDEPENDENCE"

As noted, the structure of post-*Citizens United* campaign finance turns on the idea of independence -- that there is no cooperation and coordination between the Super PAC and the candidate. Eyebrows bounce off ceilings when these organizations are headed by former campaign operatives of candidates or prominent politicians within a party -- and when those Super PAC donors who are disclosed are individuals who have already "maxed" out in contributions to a candidate's campaign. But, as with corruption, blowing a hole in the possible fiction of "independence" will turn on facts, not suppositions or suspicions. Great reporting or courageous whistle-blowing or some other method of making damning facts public will be necessary to present a case in an appropriate legislative, regulatory or judicial forum that systematically unmask the claim of independence. But, such revelations will have to be widespread. Otherwise, a single case involving a single sanctioned entity will not erode the broad premise upon which the constitutionality of such "independent" expenditures is now built.

DISTORTION

Critics say that the Super PACs will do the dirty work for the candidates by bombarding opponents with distorted, short-take negative ads. This is likely to be so. But, negative ads, in one form or another, have been a fact of political life forever. The answer is not content regulation which would run afoul of the First Amendment (other than defamation suits). It is a media focused on the accuracy of political ads (as is now often the case) and powerful, timely candidate rebuttals (requiring great campaign vigilance and the ability to act quickly).

INEQUALITY

Critics also say that Super PACs favor rich Republicans and make the political playing field un-level. This may have been true in the 2010 election cycle, but history shows that Democrats have, as often as not, been able to out-raise the Republicans in total candidate, party and independent contributions. If the electorate is energized -- big if -- Super PACs or politically active tax-exempts can also raise money on the internet. On this issue, there is no answer except frenetic dialing for dollars by both parties (because even if, *mirabile dictum*, equalizing public financing of candidates' campaigns were enacted, independent expenditures would still exist, given *Citizens United*).

The rise of the Super PACs will be one of the most important developments of this electoral season. At a time when our major national problems -- budget, economy, defense posture, energy, environment -- demand bipartisan solutions and bipartisan assignment of public and private roles, the Super PACs are yet another hammer blow to our broken political culture. They are far more likely to push the parties to further extremes than usher in an era when moderates from both sides of the aisle can work together for the commonweal. Political Darwinism shall reign.

###