

CLARITY ABOUT SUPER PACS, INDEPENDENT MONEY AND CITIZENS UNITED

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It is almost two years since the Supreme Court handed down *Citizens United*. In that time, the opinion has come to serve as a popular shorthand for all that is wrong with the campaign finance system. With the emergence of Super PACs as the latest vehicle for sidestepping contribution limitations, the overwhelming temptation is to attribute this latest money pit to the Supreme Court's contributions to this woeful area of law. For example, just today, the *New York Times* intones, "A \$5 million check from Sheldon Adelson underscores how a Supreme Court ruling has made it possible for a wealthy individual to influence an election."

From the *Times*, one does not necessarily expect further legal analysis – and one does not get it. The article goes on to claim only the following: "The last-minute injection underscores how last year's landmark Supreme Court ruling on campaign finance has made it possible for a wealthy individual to influence an election. Mr. Adelson's contribution to the super PAC is 1,000 times the \$5,000 he could legally give directly to Mr. Gingrich's campaign this year."

The simple concern is that this compressing of campaign finance law misrepresents the problematic holding of *Citizens United*, a

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case that addressed the use of corporate and union treasury funds for electioneering activity. Nothing in BCRA at issue in *Citizens United* would have addressed Mr. Adelson's outpouring of money into the latest permutation of third-party control over campaign activities. At best, *Citizens United* provided indirect legal cover for Mr. Adelson by reaffirming the long-standing (from *Buckley v. Valeo*) narrow definition of corruption to cordon off all uncoordinated uses of money that cannot be deemed in sufficient proximity to candidates or political parties.

But the more difficult problem is the flip-side of the inquiry. The activities of Mr. Adelson reveal just how thread-bare have become the legal covers for money in politics. To the extent that the concern is that a contribution of \$5 million directly from Mr. Adelson to Mr. Gingrich would invite corruption or the appearance of corruption, can anyone believe that this one-step remove alleviates the problem? Will Mr. Gingrich be any less likely to take a phone call from Mr. Adelson, or any less likely to be influenced by the needs of Mr. Adelson's pursuits than if he had received the money directly?

It is more than a decade since Pam Karlan and I wrote about the "hydraulics" of circumvention in the political arena. Among the concerns was the redirection of money into the hands of putatively independent third-party actors, ones who can dominate campaign debate without putting themselves directly before the voters. No better example is necessary than Mr. Romney's claims at one of the New Hampshire debates that he had no responsibility for the independent attacks of his Super PAC on Mr. Gingrich, followed by his use the electoral platform to endorse those same attacks.

The rise of the Super PACs is a real problem for the shaky system of campaign finance as it now exists. But the problem is not *Citizens United* — there is scant evidence, even anecdotally, of corporate or union treasuries being the source of funding at issue for the new candidate-specific Super PACs. By contrast, there are genuine concerns for transparency of donations, and for accountability of the relation of the donors to the candidates before and after the elections. Super PACs are only the latest of the institutional forms

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of circumvention, a list that runs through ordinary PACs, 527s, 501(c)(4)s, and so forth. But they are a particularly virulent form of circumvention because of the proximity they offer between candidates for office and lobbyists, patronage seekers, and contractors for government services. The issue is one that requires a serious regulatory response, not the incantation of *Citizens United*. //