

LEGAL CHALLENGES WILL NOT STOP SUPER PACS

BY JEFF BRINDLE | 07/12/17 2:35pm



THE U.S. SUPREME COURT BUILDING. DREW ANGERER/GETTY IMAGES

There is growing concern nationally over the outsized role in elections played by super PACs and other independent groups.

In the past year, super PACs in particular have come into the cross hairs of good government advocates.

Super PACs are political fund-raising committees that can raise and spend unlimited amounts independently of candidates or parties. Unlike some other independent groups, they must publicly disclose their activities to the Federal Election Commission (FEC). They cannot make contributions to candidates.

On Nov. 4, 2016, a bipartisan group of congressional members and candidates represented by several well-known attorneys filed a federal lawsuit, *Lieu et al. v. FEC*, with the intent of ending unlimited contributions to super PACs. In effect, it would abolish them.

The lawsuit demands that the FEC reverse decisions letting super PACs accept unlimited contributions. In a response brief filed Jan. 13, 2017, the FEC said no.

While the legal skirmishing continues, the obvious intent of the lawsuit is to try to get the matter before the U.S. Supreme Court. That would give the litigants a chance to try to overturn the decision of the U.S. Circuit Court of Appeals for the District of Columbia Circuit in the 2010 case *SpeechNow.org v. FEC*. In that ruling, the judges abolished a \$5,000 limit on political committees and effectively created super PACs after the FEC issued advisory opinions allowing them.

“Super PACs take their cue from a judicially-made loophole that stems from a lower court decision (*SpeechNow*) that, to this day, the Supreme Court has never reviewed,” said Laurence Tribe, one of the lawyers opposed to the ruling. “The Supreme Court Justices, including some who joined the *Citizens United* decision, may well be aghast at how a lower-court misinterpretation of the First Amendment gave birth to the super PAC takeover of American politics.”

In Florida, a separate effort is taking place with the aim of curtailing super PACs.

Recently, the St. Petersburg City Council passed a measure that would ban super PAC activity in the city. This was a preliminary vote with a final vote to take place in July.

The ordinance assuredly will be challenged if it passes. And if so, that lawsuit likely would proceed through the 11th Circuit U.S. Court of Appeals and could be taken up by the Supreme Court.

Although the concern about the growing influence over elections by super PACs is understandable, these efforts to curb their activities are misguided.

Reaching back to the Supreme Court's landmark *Buckley v. Valeo* ruling in 1976, independent spending is constitutionally protected speech by virtue of the First Amendment.

The court's 2010 decision in *Citizens United v. FEC* went further by saying freedom of speech prohibits the government from restricting independent political expenditures by corporations and unions.

Opponents of super PACs contend that the FEC and the *SpeechNow* judges erred by wrongly applying *Citizens United's* holdings to contributions as well as expenditures, but the *SpeechNow* ruling, approved 9-0 by a panel of the D.C. Circuit Court of Appeals, seems unflinching in its reasoning:

"In light of the court's holding [in *Citizens United*] as a matter of law that independent expenditures do not corrupt or create the appearance of quid pro quo corruption, contributions to groups that make only independent expenditures also cannot corrupt or create the appearance of corruption. The court has effectively held that there is no corrupting 'quid' for which a candidate might in exchange offer a corrupt 'quo.'

"Given this analysis from *Citizens United*, we must conclude that the government has no anti-corruption interest in limiting contributions to an independent expenditure group such as *SpeechNow*. This simplifies the task of weighing the First Amendment interests implicated by contributions to *SpeechNow* against the government's interest in limiting such contributions."

Further, the U.S. Supreme Court, as currently constituted, is not likely to overturn *SpeechNow* or *Citizens United*.

It is highly doubtful that the high court will reimpose contribution limits on super PACs, because a majority is likely to view that as an unconstitutional curb on First Amendment rights of speech and assembly.

Last July, David Keating, who originated the *SpeechNow* lawsuit and is now president of the Center for Competitive Politics, told the *Washington Post* he doubts the ruling will ever be overturned.

"I think they're here to stay, because it's basically Americans getting together and speaking about the government," Keating said.

The future is no more promising for reformers, either. Aside from recently appointed Justice Neil Gorsuch, who is expected to take positions similar to those of the late Justice Antonin Scalia, three more justices may leave the court during the Trump era.

This would give the president additional opportunities to appoint justices in the mold of Scalia, assuring a conservative majority.

So, the prospects are dim for either of the two aforementioned efforts to rein in super PACs through the courts.

A better approach toward offsetting the influence of independent groups over elections at the national and state levels is to strengthen political parties and their candidates.

In New Jersey, independent group spending followed the trend started at the national level. Super PACs and other independents have been active in gubernatorial and legislative campaigns. Last year almost \$30 million was spent supporting ballot questions, primarily involving casinos and transportation. Increasingly, outside groups also have begun participating at the local level.

In the 2013 gubernatorial and legislative elections, \$41 million was spent by independent groups, almost 200 percent more than was spent by the political parties.

In this year's gubernatorial primary such groups as New Way for New Jersey, Coalition for Progress, and Building a Better Way for New Jersey, along with six others, combined to spend \$8.8 million. These groups were supportive of potential candidates for governor.

During this year's legislative primaries, independent spending — led by \$640,574 from Garden State Forward (a 527 group funded by the New Jersey Education Association) — reached \$1.8 million. The recent budget showdown in Trenton also witnessed considerable spending by organizations other than the parties.

So it is expected that spending by independent groups during the November election will be huge.

The New Jersey Election Law Enforcement Commission has put forth recommendations to offset the growing influence over the state's elections and to reset the balance between these groups and political parties and candidates.

Under current state law, unless a super PAC or 501(c) group specifically supports or opposes a candidate in their advertisement, there is no requirement to disclose their donors or their expenditures.

They are required to report their expenditures only if they use magic words like "support" or "oppose."

The *Citizens United* ruling, as well as *SpeechNow*, while being roundly criticized by many, is often overlooked from the standpoint that both come out strongly for disclosure.

Therefore, ELEC's proposal to treat independent groups in the same way that state law treats parties, candidates and political action committees is constitutional.

In addition to its proposal to require registration and disclosure by independent groups, the commission has recommended additional steps to reset the balance between independents, parties and candidates.

These are: increase contribution limits to parties, exclude parties from the pay-to-play law while including PACs in it, permit county parties to give to each other, permit state parties to contribute to gubernatorial candidates, require that contractor donations to independent groups be disclosed, and at the federal level, loosen restrictions on federal accounts.

In addition to these proposals, ELEC also has offered recommendations for reforming New Jersey's pay-to-play law.

These proposals have been incorporated into legislation separately introduced by Assembly Minority Leader Jon Bramnick, a Republican, and Assemblyman Troy Singleton, a Democrat. Hopefully the Legislature will consider these bills that would offset independent groups and bring back the parties in New Jersey.

Jeff Brindle is the executive director of the New Jersey Election Law Enforcement Commission. The opinions presented here are his own and not necessarily those of the commission.