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A Democracy 21 Report:

Leading Presidential-Candidate Super PACs and The Serious Questions That Exist About Their Legality

“... he gave to me. He’s given to me before.”

Mitt Romney describing himself as the recipient of a \$1 million contribution made to the Super PAC supporting his presidential campaign

Independent expenditures are only those “without any candidate’s approval (or wink or nod)....”

Supreme Court decision in *FEC v. Colorado Republican Federal Campaign Comm.* (2001)

Introduction to Report

By Democracy 21 President Fred Wertheimer

Mitt Romney’s comment describing a \$1 million contribution made to Restore Our Future PAC -- the Super PAC supporting Romney -- as a contribution made to him captures in a nutshell the reality of presidential candidate-specific Super PACs.

The leading presidential candidate-specific Super PACs are serving as vehicles for candidates and donors to massively evade and circumvent candidate contribution restrictions. These restrictions have been enacted over a period covering more than a century to prevent the corruption of federal officeholders and government decisions – in other words, to prevent the corruption of our democracy.

Each presidential candidate-specific Super PAC is raising unlimited contributions from individuals and/or from corporations and unions for the explicit purpose of being spent by the Super PAC to directly support its favored presidential candidate. Such contributions would be illegal if given directly to the presidential candidate, so they are instead being given to Super

PACs controlled by close political and personal associates of the presidential candidate and which are directly serving the campaign interests of the presidential candidate.

In essence, the unlimited contributions are being given by the wealthy supporters of each presidential candidate to a Super PAC dedicated to supporting that candidate. The donors know that their contributions will be spent to directly support that presidential candidate. The Super PAC is spending the contributions only to directly support the associated presidential candidate. The presidential candidate knows (or will know) the identity of the donors who are providing huge contributions to the Super PAC supporting the candidate's campaign.

For all practical purposes, these unlimited, corrupting contributions are being given to the presidential candidates. As such, candidate-specific Super PACs are eviscerating candidate contribution limits and restoring the system of legalized bribery that existed in our country in the pre-Watergate era.

To date (and based on the limited disclosure information reported so far), individual contributions as large as \$2 million have been given to presidential candidate-specific Super PACs.

It strains credulity to believe that these presidential candidate-specific Super PACs sprung up on their own without some initial involvement, approval or sign-off from either the candidate for whose benefit they were established, the candidate's campaign operatives or agents of the candidate or campaign. In each case, the leading presidential candidate-specific Super PACs were established by or are being run by individuals who are closely linked with the presidential candidate.

The claim made by these Super PACs is that they are "independent" of the candidate with which they are associated and are making only "independent expenditures."

The Supreme Court has spoken in the broadest terms about the degree of independence that is necessary for "independent expenditures" to be considered free of the legal constraints that would otherwise apply to in-kind contributions. Such expenditures must be "totally independent," "wholly independent," "truly independent," and made "without any candidate's approval (or wink or nod)....," according to the Court. (The Supreme Court decisions and applicable law are discussed on pages 15 to 19 of the report)

If the presidential candidate or the candidate's campaign (or agents of either the candidate or the campaign) were in any way, formally or informally, involved in the formation or operation of the candidate-specific Super PAC aiding that candidate, it would defeat the "total independence" that such PACs must have, and constitute the requisite coordination to turn all of the expenditures made by the Super PAC into illegal in-kind contributions to the candidate's campaign.

The information presented in the report raises serious questions about whether each of these leading candidate-specific Super PACs meets the Supreme Court standard of being "totally independent" from the candidates they are supporting, and whether each of these Super PACs

meets the Supreme Court’s test for independence – of being formed (or operated) “without any candidate’s approval (or wink or nod)....”

To date, there is no indication that any of the presidential candidates have made a serious effort to shut down the Super PACs supporting them, or have called on their associated Super PAC to cease operations.

Candidate-specific Super PACs are the most dangerous vehicles for corruption in American politics today. They are a monstrosity and the logical extension of the *Citizens United* decision given to the nation by five Supreme Court Justices who have done enormous damage to our democracy.

Unless stopped, candidate-specific Super PACs will continue to eviscerate the contribution restrictions enacted by Congress, signed into law by Presidents and repeatedly upheld by the Supreme Court as constitutional because they are necessary to prevent corruption. And these Super PACs will engulf not just our Presidential elections but also our elections for Congress to which they will spread like wildfire.

The ability to determine whether any presidential candidate-specific Super PACs have violated the laws is severely hampered by the consistent refusal of the three Republican Commissioners on the six-member FEC to support any civil enforcement of the law, and by the Department of Justice being limited to bringing only criminal prosecutions.

Congress needs to pass legislation to protect the integrity of the Nation’s campaign finance laws and ensure that candidate-specific Super PACs are not used as vehicles to circumvent candidate contribution limits. Democracy 21 is working to develop legislation that would accomplish this goal.

Democracy 21 Report on Presidential Super PACs

In the 2012 presidential campaign, for the first time, individuals who have for years been closely associated with particular presidential candidates have set up candidate-specific “Super PACs” that are dedicated to supporting that single presidential candidate.

These Super PACs are run by political operatives and associates who have long histories with, or close ties to, the candidates or the campaign operatives working for the candidates; they are publicly identified with the candidates; they are self proclaimed to have the sole purpose of raising and spending money to support those candidates; they are explicitly or tacitly blessed by the candidates or their agents; they are raising funds from the same donors as the presidential candidates; in at least one case they have been directly and personally assisted in fundraising by the presidential candidate, and in another case the major donor to the Super PAC is the presidential candidate’s father.

As one published report noted, the presidential candidates and their associated Super PACs “are intertwined by personnel.”¹ According to this same article, the head of a Super PAC supporting former Governor Huntsman’s presidential campaign said:

“Super PACs are headed by political people that know the campaign already,” said Fred Davis, a Republican strategist who left Huntsman’s presidential campaign this year to direct the super PAC benefiting the former governor. “They know the candidate and they know the players.”

Davis estimated that about half of the group’s small staff used to work on Huntsman’s official campaign. *Id.*

FEC Commissioner Ellen Weintraub has said, “Super PACs are functioning as the alter-egos of the campaigns. . . .”² A report in *The Washington Post* said these candidate-specific committees “are emerging as de facto subsidiaries of the traditional presidential campaigns.”³ An article in *The New York Times* said these groups “function as auxiliary units of the campaigns.”⁴

In some cases, the Super PACs are “running ads that are almost indistinguishable from commercials run by the campaigns themselves.”⁵ One report stated:

In the past two weeks, for example, Make Us Great Again PAC has aired at least \$700,000 in ads in Iowa and South Carolina on behalf of Texas Gov. Rick Perry, touting the GOP hopeful’s hardscrabble beginnings and budget-cutting credentials. The ads began on the same day that the Perry campaign started running similar feel-good spots in Iowa.

In other cases, Super PACs are launching the negative attacks on their candidate’s opponents, so the candidate can remain aloof from the negative advertising while benefiting from its impact.

¹ T. Hamburger & M. Mason, “‘Super PACs’ are showing their power,” *The Los Angeles Times* (Jan. 1, 2012).

² D. Levinthal & K. Vogel, “Super PACs go stealth through first contests,” *Politico* (Dec. 30, 2011).

³ D. Eggen, “The Influence Industry: ‘Candidate Super PACs’ surge ahead in the 2012 money race,” *The Washington Post* (Aug. 24, 2011).

⁴ J. Zeleny and N. Confessore, “Perry and Romney Set Clear Lines of Attack,” *The New York Times* (Sept. 24, 2011).

⁵ D. Eggen, “New ad shows cozy ties between super PACs and candidates,” *The Washington Post* (November 16, 2011).

As one report stated:

The highest profit victim so far is Newt Gingrich, whose rapid descent in opinion polls correlates with the drubbing he received in negative ads produced by a super PAC aligned with Mitt Romney.

The group, Restore Our Future, has outspent the official Romney campaign on TV and radio in Iowa by more than 2 to 1, according to sources familiar with ad buys. Ultimately, the independent committee will spend \$3.1 million in the state, according to the organization's director, Carl Forti.⁶

In another case, a presidential candidate ran ads that made use of footage that was identical to footage used in ads run by the Super PAC supporting the presidential candidate.⁷

Federal campaign finance laws provide that expenditures made "in cooperation, consultation, or in concert with or at the request or suggestion of a candidate, his authorized political committees, or their agents, shall be considered to be a contribution to such candidate." 2 U.S.C. § 441a(a)(7)(B)(i). Any involvement of a presidential candidate or his campaign in the establishment or operation of a candidate-specific Super PAC to support that campaign would constitute coordination that would render all of the Super PAC's subsequent expenditures as having been made in coordination with the presidential campaign.

While court rulings allow political committees that make only "independent expenditures" to raise and spend unrestricted contributions, *e.g.*, *Speech Now v. FEC*, 599 F.3d 686 (D.C. Cir. 2010), these activities must be "totally independent" of a candidate. *Buckley v. Valeo*, 424 U.S. 1, 47 (1976).

Absent such total independence from the candidate it is supporting, the spending by the outside committee is considered to be an in-kind contribution to the candidate, and is subject to the contribution limits and source restrictions applicable to federal candidates. 2 U.S.C. § 441a(a)(1)(A) (contribution limit of \$2,500 per election); 2 U.S.C. § 441b(a) (prohibition on contributions from corporations and unions). Further, the contributions made to the candidate-specific Super PACs would be subject to the \$5,000 per year limit, 2 U.S.C. § 441a(a)(1)(C), and to the prohibition on corporate and union contributions. 2 U.S.C. § 441a(b).

The information presented in this Report indicates that Restore Our Future PAC (associated with the Romney for President campaign), Make Us Great Again PAC (associated with the Perry for President campaign), Priorities USA Action PAC (associated with the Obama re-election campaign), Winning Our Future PAC (associated with the Gingrich for President campaign) and Our Destiny PAC (associated with the Huntsman for President campaign) are in essence each functioning as an arm of the presidential campaign they have been created to

⁶ T. Hamburger & M. Mason, "'Super PACs' are showing their power," *The Los Angeles Times* (Jan. 1, 2012).

⁷ P. Hirschhorn, "Unlimited campaign cash fuels Super PACs," *CBS News* (Dec. 10, 2011).

support. This information accordingly raises serious questions of whether these candidate-specific Super PACs fail to meet the test of being “totally independent” of the candidates they are solely devoted to supporting.

If these Super PACs are in fact not “totally independent” of the presidential campaigns they support, their spending should be considered violations of the campaign finance laws on a massive scale. The five Super PACs discussed below are, in aggregate, likely to raise and spend tens of millions, and perhaps hundreds of millions, of dollars to advocate the election of the presidential candidates with whom they are solely associated.

Most of this money will consist of contributions in amounts that cannot be contributed to the candidates themselves, or are from sources that cannot make contributions to candidates, because such contributions are prohibited by law.

So this money is instead being funneled through a Super PAC that is closely aligned with the candidate. It is given with the certain knowledge that it will be spent for the benefit of that candidate. In this fashion, tens or hundreds of millions of dollars of potentially illegal contributions are likely to flow through these Super PACs for the benefit of presidential candidates in the 2012 election. To the extent the spending by the Super PACs is not “totally independent” of the candidate being supported, this scheme effectively eviscerates the limits and source prohibitions on contributions to candidates that are core provisions of the campaign finance law.

Facts About the Candidate-Specific Super PAC Committees

A. Restore Our Future PAC

The Restore Our Future PAC registered with the Federal Election Commission as a “Super PAC” on October 8, 2010. Its stated goal is to make expenditures to support former Governor Mitt Romney’s presidential campaign.⁸ One report states, “[T]he group’s organizers have explicitly said their goal is to elect Romney president (and Romney has appeared at its fundraising dinners.)”⁹ One of the PAC’s founders said of the mission of the PAC, “This is an independent effort focused on getting Romney elected president.”¹⁰

According to one published report, “Restore Our Future is run by a trio of top operatives who worked on Romney’s 2008 campaign – lawyer Charlie Spies, political director Carl Forti

⁸ M. Viser, “Romney gets a boost from new funding environment,” *The Boston Globe* (June 9, 2011).

⁹ M. Isikoff, “‘Independent’? Maybe, but super PAC heavily backs Perry,” *NBC News* (Aug. 17, 2011).

¹⁰ D. Eggen and C. Cillizza, “Romney backers launch ‘super PAC’ to raise and spend unlimited amounts,” *The Washington Post* (June 23, 2011).

and adman Larry McCarthy.”¹¹ Forti was Romney’s national political director in his 2008 presidential campaign; McCarthy was part of Romney’s media team in the 2008 campaign and Spies was general counsel to the 2008 campaign.¹²

Romney appeared in person at a fundraiser for the PAC in June, 2011. As one article reported, his appearance “bestowed an unofficial blessing on the group, helping it to pull in a whopping \$12.2 million from some of Romney’s wealthiest career patrons in its first six months of fundraising.”¹³ This included four contributions of \$1 million each. According an *iWatch News* report, Romney attended a private dinner on July 19, 2011 “to show his appreciation for about two dozen current and potential donors to his PAC in New York.”¹⁴

Further, “some of the PACs largest donors are also big bundlers for the campaign. On August 28, hedge fund mogul John Paulson, who has donated \$1 million to the PAC, is hosting a big bash for the campaign at his home in Southampton.” *Id.*

There has also been movement of staff between the Romney campaign and the Restore Our Future PAC. A “top Romney campaign fundraiser,” Steve Roche, “jumped to Restore Our Future to help spearhead the Super PAC’s multimillion-dollar fundraising operation, in another sign of synergies between the campaign and the PAC.” *Id.* Another article described Roche as “one of Mitt Romney’s most trusted advisers, helping the former Massachusetts governor raise tens of millions of dollars in his long quest for the White House.”¹⁵

The Romney campaign has publicly welcomed the efforts of Restore Our Future PAC, a public signal to potential donors that the campaign considers the efforts of the PAC important to the Romney campaign’s own activities. According to this report in the *Washington Post*:

Gail Gitcho, the Romney campaign’s communications director, said outside support is welcome, given the existence of Democratic Super PACs and predictions that the Obama campaign could raise as much as \$1 billion for his reelection bid.

¹¹ K. Vogel, “Super PACs’ new playground: 2012,” *Politico* (Aug. 10, 2011).

¹² M. Viser, “Romney gets a boost from new funding environment,” *The Boston Globe* (June 9, 2011).

¹³ K. Vogel, “Super PACs’ new playground: 2012,” *Politico* (Aug. 10, 2011).

¹⁴ P. Stone, “Romney fundraiser jumps from campaign to super PAC,” *The Center for Public Integrity iWatch news* (Aug. 24, 2011).

¹⁵ D. Eggen, “The Influence Industry: ‘Candidate Super PACs’ surge ahead in the 2012 money race,” (Aug. 24, 2011).

“We are pleased that independent groups will be active in fighting this entrenched power so the country can get back to work,” Gitcho said.¹⁶

Published reports stated that the Restore Our Future PAC received two separate \$1 million donations from small companies that appeared intended to mask the identity of the actual sources of the funds. After media scrutiny of the donations, the individuals who were the actual donors disclosed themselves and both had long histories of donating large sums to Romney’s political campaigns and leadership PACs.

One of the donations came from W. Spann LLC, a corporation established in March and dissolved in July. According to one report, “Under the pressure of official investigation and intense media scrutiny, one individual – Edward W. Conard – stepped forward and told *Politico* that he was the man behind W. Spann LLC.”¹⁷ Conard had been a managing director at Bain Capital, a company Romney helped to create. According to *Open Secrets*, Conard and his wife have donated \$55,900 to Romney’s campaign committees and leadership PACs since 1994. *Id.*

According to one published report, Romney himself considers the contributions to the Super PAC to be contributions to him. When Romney was asked about the controversy generated by the Conard donation to the Super PAC through the corporate entity, he said:

Well, there’s no need to have the company if he’s not going to give to any other candidates so he gave to me. He’s given to me before. One of my partners – so it’s not hidden, it’s all out in the open.¹⁸

By these comments, Romney made clear that he considers the contribution that Conard made to Restore Our Future PAC as a contribution that Conard “gave to me.”

Another \$1 million donation to Restore Our Future PAC was from Eli Publishing, a Utah corporation. The owner of Eli Publishing is Steven Lund. Since 1990, Lund and his wife have donated \$45,100 to Romney’s campaigns and leadership PACs, according to *Open Secrets*.¹⁹

B. Make Us Great Again PAC

¹⁶ D. Eggen and C. Cillizza, “Romney backers launch ‘super PAC’ to raise and spend unlimited amounts,” *The Washington Post* (June 23, 2011).

¹⁷ B. Hooker, Men Linked to Corporate Donations to Pro-Romney Super PAC Have Long History of Donating to Romney,” *Open Secrets* (Sept. 13, 2011).

¹⁸ P. Blumenthal, “Mitt Romney Dismisses Secrett Corporate Contributions: ‘No Harm, No Foul,’” *Huffington Post* (Aug. 25, 2011) (emphasis added).

¹⁹ B. Hooker, Men Linked to Corporate Donations to Pro-Romney Super PAC Have Long History of Donating to Romney,” *Open Secrets* (Sept. 13, 2011). A third \$1 million donation received by Restore Our Future PAC was from F8 LLC, another Utah corporation, founded by Lund’s son-in-law, Jeremy Blickenstaff. According to *Open Secrets*, Blickenstaff does not have a history of making campaign contributions.

Make Us Great Again PAC registered with the Federal Election Commission as a Super PAC on July 27, 2011. On its website, the PAC states that its goal is to support the campaign of Rick Perry for President: “The mission of Make Us Great Again is to support Rick Perry for the Republican nomination for President in 2012, to oppose Barack Obama’s reelection, and to support Rick Perry in the general election in November 2012.”²⁰ According to published reports, the Super PAC has set a goal of raising and spending \$55 million during the primary season.²¹

The PAC was formed by “three Perry loyalists, including Perry’s former chief of staff, Austin lobbyist Mike Toomey.”²² Toomey has been described as “[o]ne of Perry’s closest confidantes”²³ and “a loyal and constant Perry political ally throughout this career.”²⁴ According to *The New York Times*, “In Rick Perry’s world, one man stands above them all: Mike Toomey.”:

Should Mr. Perry, who is seeking the Republican presidential nomination, reach the White House, it will be in no small measure because of the efforts of Mr. Toomey. A lobbyist, former legislator and onetime chief of staff to the governor, Mr. Toomey has tapped a sprawling network of donors, business allies and friendly (or indebted) lawmakers to help Mr. Perry accomplish ambitious political and legislative goals.²⁵

According to a *Politico* article, “Toomey maintains close ties both to Perry and his top political strategist Dave Carney (reportedly co-owning a private island in New Hampshire with Carney). . . .”²⁶ One report stated:

Toomey accompanied Perry on a controversial trip to the Bahamas in 2004 with large GOP donors, other staff, anti-tax advocate Grover Norquist and political adviser Dave Carney. He now owns a private island in New Hampshire with Carney, who’s Perry’s chief political consultant. That relationship has raised red flags concerning Toomey’s role as head of a Super PAC raising money for the

²⁰ See <http://makeusgreatagain.com/mission/>

²¹ K. Tumulty, “Perry and ex-aide have deep, mutually beneficial ties,” *The Washington Post* (Sept. 16, 2011).

²² K. Vogel, “Super PACs’ new playground: 2012,” *Politico* (Aug. 10, 2011).

²³ D. Eggen, “Perry has deep financial ties to maker of HPV vaccine,” *The Washington Post* (Sept. 13, 2011).

²⁴ P. K. Hart and P. Fikac, “Austin lobbyist has played a key role in Perry’s career,” *The Houston Chronicle*, (Sept. 13, 2011).

²⁵ J. Root, R. Ramsey and J. Rutenberg, “For Perry, Lobbyist Is a Take-No-Prisoners Ally,” *The New York Times* (Oct. 15, 2011).

²⁶ K. Vogel, “Super PACs’ new playground: 2012,” *Politico* (Aug. 10, 2011).

Perry presidential effort because its efforts legally can't be coordinated with the Perry campaign.²⁷

A number of press reports have stressed the close and longstanding relationship that Toomey has with Governor Perry. According to a report in the *Washington Post*, in Perry's career, "few relationships have been more mutually beneficial than one that began back in the mid-1980s, when both [Perry] and Toomey were members of the Texas House and roomed together during legislative sessions. Since then Toomey has made himself useful to Perry in a number of capacities. . . ."²⁸ Another report in the *Houston Chronicle* stated, "Toomey and Perry served together in the Texas House in the 1980s and have been linked ever since, from Perry's personal finances to his public legacy."²⁹ According to another report:

With the rise of super PACs in this year's presidential race, Toomey will be doing what he always does: helping Perry by tapping business donors, many who are Toomey clients.

Since 2001, 42 of Toomey's clients have donated about \$5.5 million, or about 5 percent of Perry's contributions, during the governor's tenure.³⁰

Prior to the formation of Make Us Great Again PAC, several other pro-Perry Super PACs had registered with the FEC. According to reports, Toomey and the other co-founders of Make Us Great Again PAC wrote to would-be donors to "urge potential supporters to ignore other independent efforts for Perry in favor of the new organization."³¹ According to the same report, the message to potential donors said, "Our advice is to avoid any other group claiming to be 'the' pro-Perry independent effort and, when the timing is right, to support 'Make Us Great Again.'" *Id.* Toomey is quoted as saying that this message was "an effort to tell people who might want to help if Perry gets in to hold off, and this is the proper forum that will handle their business appropriately."³² According to another report, "Toomey's involvement signaled to many Perry allies that Make Us Great Again has the unofficial endorsement of Team Perry."³³ One of the

²⁷ P. K. Hart and P. Fikac, "Austin lobbyist has played a key role in Perry's career," *The Houston Chronicle*, (Sept. 13, 2011).

²⁸ K. Tumulty, "Perry and ex-aide have deep, mutually beneficial ties," *The Washington Post* (Sept. 16, 2011).

²⁹ P. K. Hart and P. Fikac, "Austin lobbyist has played a key role in Perry's career," *The Houston Chronicle*, (Sept. 14, 2011).

³⁰ L. Copelin, "Perry has long history with super PAC friend," *The Austin American-Statesman* (Sept. 16, 2011).

³¹ R. Ramsey, "Another Super PAC Run by Close Perry Associates," *The Texas Tribune* (Aug. 8, 2011).

³² K. Vogel, "Super PACs' new playground: 2012," *Politico* (Aug. 10, 2011).

³³ K. Vogel, "Perry's cash dash sparks worries," *Politico* (Aug. 16, 2011).

organizers of another pro-Perry Super PAC, Robert Schuman, is quoted as saying of the Make Us Great Again PAC, “To the extent that there is an official PAC...they’re it.”³⁴

According to further reports, the Make Us Great Again PAC has a budget of \$55 million and “is preparing for what amounts to a full-service primary campaign, with television advertisements, direct mail and social media outreach.”³⁵ The same report notes, “Officials at Make Us Great Again said they were expecting their own spending to be matched by that of other Super PACs, notably Restore Our Future, a group founded by allies of Mitt Romney, the former Massachusetts governor.” *Id.*

C. Priorities USA PAC

Priorities USA Action PAC registered with the Federal Election Commission as a Super PAC on April 28, 2011. According to one press report, “It was formed with the explicit purpose of helping President Obama with unlimited donations from corporations, unions and wealthy individuals.”³⁶ According to another article, “[I]t was started by a pair of former top White House operatives” and for this reason, “appears to have benefited from an unofficial affiliation with the president.”³⁷ The PAC states on its website, “We are committed to the reelection of President Obama and setting the record straight when there are misleading attacks against him and other progressive leaders.”³⁸

The two White House aides who started the Super PAC are Bill Burton, deputy press secretary for Obama’s 2008 campaign and deputy press secretary during the first two years of his Administration,³⁹ and Sean Sweeney, a White House political aide during the Obama Administration. *Id.* They started the PAC in April, 2011, “just two months after they left their jobs at the White House in February.”⁴⁰

³⁴ M. Isikoff, “‘Independent’? Maybe, but super PAC heavily backs Perry,” *NBC News* (Aug. 17, 2011).

³⁵ N. Confessore, “Super PAC Plans Major Primary Campaign for Perry,” *The New York Times* (Sept. 7, 2011).

³⁶ J. Rutenberg, “New Video Attacks Romney,” *The New York Times* (Nov. 2, 2011).

³⁷ K. Vogel, “Super PACs’ new playground: 2012,” *Politico* (Aug. 10, 2011).

³⁸ See <http://www.prioritiesusaaction.org/about>

³⁹ A. Hunt, “Super PACs Line Their Coffers for 2012 Battle,” *Bloomberg News* (Aug. 21, 2011).

⁴⁰ N. Confessore, “Lines Blur Between Candidates and PACs with Unlimited Cash,” *The New York Times* (Aug. 27, 2011).

According to press reports, Priorities USA held a reception for Obama's national finance committee members immediately after and in close proximity to a meeting of the finance committee members held by the Obama reelection committee:

A meeting of the top fundraisers for President Obama's 2012 reelection campaign kicks off tonight in Chicago with a speech-watching party at Obama's headquarters. Right afterward, the national finance committee members have been invited to another event – a reception hosted by Bill Burton and Sean Sweeney, two former White House aides who formed an independent “super PAC” to support Obama's reelection.

The reception hosted by Priorities USA will be at the University Club, right down the street from the Palmer House Hilton, where the national finance committee members are staying and meeting Friday.⁴¹

D. Winning Our Future PAC

Winning Our Future PAC was registered with the Federal Election Commission as a Super PAC on December 13, 2011. On its website, the PAC states: “**Winning Our Future** means nominating Former Speaker Newt Gingrich for President in 2012. And advancing that goal is what **Winning Our Future** is all about.”⁴²

According to published articles, the chair of the PAC is Becky Burkett, “who was the lead fundraiser for Gingrich's main political vehicle over the past few years, the fundraising juggernaut American Solutions for Winning the Future.”⁴³ According to another report, “The aide, Becky Burkett, is an experienced fund-raiser who served until earlier this year as chief development officer for American Solutions, a political action committee that Mr. Gingrich founded in 2007.”⁴⁴

Similarly this report in *Real Clear Politics* noted the close ties between Winning Our Future PAC and the Gingrich campaign:

Winning Our Future, which is being helmed by longtime Gingrich fundraiser Becky Burkett, appears to be the outside group that enjoys the unofficial blessing of Gingrich's inner circle.

⁴¹ M. Gold, “Pro-Obama ‘super PAC’ to host event after speech,” *The Los Angeles Times* (Sept. 8, 2011).

⁴² See <http://www.winningourfuture.com/about>.

⁴³ M. Haberman and K. Vogel, “Newt's loot: Billionaire commits \$20M,” *Politico* (Dec. 15, 2011).

⁴⁴ N. Confessore, “Former Gingrich Aide Forms Fund-Raising Group,” *The New York Times* (Dec. 13, 2011).

Burkett told RCP that she has spoken recently with former Gingrich spokesperson Rick Tyler, and a second source close to Gingrich confirms that Tyler is moving toward joining the super PAC.⁴⁵

Again, another report notes that Tyler did join the PAC: “Rick Tyler, longtime aide and confidante to Gingrich, announced recently that he would join Winning Our Future, the new super PAC set up by another close Gingrich aide.”⁴⁶

E. Our Destiny PAC

Our Destiny PAC was registered with the Federal Election Commission as a Super PAC on September 1, 2011. Its Statement of Organization filed with the Commission states that the Committee “supports/opposes only one candidate. . .” On its website, the PAC states: “On August 25, 2011, Our Destiny PAC was created to help elect Jon Huntsman the next president of the United States.”⁴⁷ The PAC website contains a link – “Learn more at JonHuntsman.com” – which is to the website of the authorized Huntsman for President Committee. *Id.*

According to one press report, the PAC was formed by Thomas Muir, who is a vice president at the Huntsman Corporation, a corporation owned by the Huntsman family where Jon Huntsman was once the CEO.⁴⁸ As this report further states:

[T]he company is also inseparable from the Huntsman family and its fortune. Jon Huntsman Sr., who founded the company, is chairman of the board. Peter Huntsman, the candidate’s brother, is CEO. Jon Huntsman Jr. made millions of his own substantial fortune at his dad’s firm. *Id.*

According to another press report, “The PAC, which formed in August, is being advised by at least one former Huntsman aide: ad guru Fred Davis, who produced several web ads for Huntsman in the run-up to his candidacy.”⁴⁹ According to one report in the *Washington Post*, Davis “helped create a series of attention-getting commercials kicking off the former Utah governor’s presidential campaign earlier this year.”⁵⁰ The PAC itself touts the fact that Davis, a former adviser to the Huntsman for President Committee, recently left the authorized campaign

⁴⁵ S. Conroy, “Gingrich’s Shaky Infrastructure Shows Cracks,” *Real Clear Politics* (Dec. 15, 2011).

⁴⁶ T. Hamburger & M. Mason, “‘Super PACs’ are showing their power,” *The Los Angeles Times* (Jan. 1, 2012).

⁴⁷ See <http://ourdestinypac.com/about-our-destiny-pac.html>.

⁴⁸ A. Burns, “Jon Huntsman Corporation distances from PAC,” *Politico* (Aug. 30, 2011).

⁴⁹ H. Bailey, “Pro-Huntsman super PAC launches ad in New Hampshire,” *Yahoo News* (Nov. 14, 2011).

⁵⁰ D. Eggen & T.W. Farnam, “New ad shows cozy ties between super PACs and candidates,” *The Washington Post* (November 16, 2011).

committee to work for the Super PAC. On the PAC website, it states: “Our Destiny PAC is excited that Fred Davis, of Strategic Perception Inc., who resigned from the Jon Huntsman for President campaign on July 27, 2011, will be an important part of the PAC’s team.”⁵¹ As a *Politico* article states, “Our Destiny PAC already has something of an official seal of approval from Huntsman-world, thanks to the involvement of GOP ad man Fred Davis, who worked for Huntsman’s campaign before heading to the independent expenditure group.”⁵²

The *Post* report noted that the PAC “has the backing of Huntsman’s billionaire father, Jon Huntsman, Sr.”⁵³ Another report in *The New York Times* said that Jon Huntsman’s father may become the largest donor to the Huntsman Super PAC, and stressed the relationship between Huntsman’s father and the Huntsman Super PAC:

[T]he “super PAC” Our Destiny, is buying up hundreds of thousands of dollars worth of advertising time in what is in effect a last-ditch effort to help raise Mr. Huntsman’s standing in New Hampshire.

The move is the result of an emotionally fraught, behind-the-scenes drama over whether Mr. Huntsman’s father, the founder of Huntsman Chemicals, Jon M. Huntsman Sr., will come to the rescue of his son’s financially depleted campaign by dumping millions more in to the PAC so it can do what Mr. Huntman’s team cannot afford to: deluge the airwaves with advertisements calling attention to a candidacy his team still believes can catch fire, if it only had the money to light it.

. . .

Mr. Huntsman has been loath to ask his father to up his commitment to the outside group, several people familiar with the situation said. His father, on the other hand, they said, has been unwilling to do so without being asked, especially given the uncertainty of whether the investment would make a huge difference.⁵⁴

According to the *Post* article, Jon Huntsman expressed his gratitude for any spending on his behalf that might be done by the Super PAC. According to this report:

While campaigning in New Hampshire, Huntsman told NBC News this week that he had not seen the super PAC’s new ad nor talked to his father about it.

⁵¹ See <http://ourdestinypac.com/about-our-destiny-pac.html>.

⁵² A. Burns, “Jon Huntsman Corporation distances from PAC,” *Politico* (Aug. 30, 2011).

⁵³ D. Eggen & T.W. Farnam, “New ad shows cozy ties between super PACs and candidates,” *The Washington Post* (November 16, 2011).

⁵⁴ J. Rutenberg and N. Confessore, “Major Ad Blitz for Huntsman in New Hampshire, by Group Backed by His Father,” *The New York Times* (Nov. 14, 2011).

“But anything from the outside that serves to bolster our efforts in New Hampshire I am mighty grateful for,” he said.⁵⁵

Similarly, one of Huntsman’s campaign aides was also quoted as expressing appreciation for the spending by the Super PAC. One press report states: “Still, one of his political aides acknowledged that his competitiveness depends on ‘things we can’t control, which is outside funding.’ The aide said of Our Destiny’s advertising, ‘If they keep up the levels they’ve been at, that would be helpful.’”⁵⁶

The Applicable Law

A cornerstone of the federal campaign finance laws is the limit on contributions to federal candidates that was enacted in 1974, following the Watergate scandals, to prevent corruption.

Since the landmark decision in *Buckley v. Valeo* in 1976, the Supreme Court has recognized that without contribution limits, “the integrity of our representative democracy is undermined.” 424 U.S. at 26-27. The Court also stated in *Buckley* that “Congress was surely entitled to conclude” that “contribution ceilings were a necessary legislative concomitant to deal with the reality or appearance of corruption inherent in a system permitting unlimited financial contributions.” *Id.* at 28 (emphasis added).

A core corruption danger posed by candidate-specific Super PACs is that they provide a means for donors to evade and circumvent the candidate contributions limits: wealthy donors can make a maximum contribution of \$2,500 to a presidential candidate’s authorized campaign committee and then make additional contributions in unlimited amounts – \$10,000, \$100,000, a \$1 million or more – to that candidate’s related Super PAC to support the same candidate, knowing that their money will be used for that purpose.

Candidate-specific Super PACs thus serve as a ready vehicle for eviscerating the candidate contribution limits that were enacted to prevent corruption. As one news report stated, “A super PAC allows politicians with large networks of wealthy donors to collect millions of dollars from individuals who have already given the maximum contribution to the candidate.”⁵⁷

Wealthy donors are taking advantage of the opportunity to use Super PACs as a way to give money in excess of the candidate contribution limits to directly benefit their preferred candidate. According to this *NPR* report:

⁵⁵ D. Eggen & T.W. Farnam, “New ad shows cozy ties between super PACs and candidates,” *The Washington Post* (November 16, 2011).

⁵⁶ J. Rutenberg, “Huntsman Campaign Gets Aid from Group Tied to Father,” *The New York Times* (Dec. 3, 2011).

⁵⁷ N. Confessore, “There’s Nothing Like a ‘Super PAC’ for the Serious Contender,” *The New York Times* (Oct. 19, 2011).

Nineteen wealthy Republicans gave presidential hopeful Mitt Romney the maximum legal contribution – and also sent between \$100,000 and \$1 million each to an independent committee supporting the former Massachusetts governor.

The finding comes in a new report looking at overlap between donor lists for Romney’s campaign and the super PAC Restore Our Future.

In all, the report shows 55 donors maxed out to Romney and also gave to the super PAC. Those 55 accounted for more than half of the super PAC’s early money.⁵⁸

The Supreme Court has repeatedly stressed the importance of provisions in the campaign finance laws that prevent circumvention of the contribution limits, and has held that such anti-circumvention measures serve the same compelling anti-corruption interests as do the contribution limits themselves.⁵⁹

The treatment of coordinated expenditures as in-kind contributions, subject to contribution limits, is a fundamental statutory provision to prevent circumvention of the contribution limits.

In *Buckley*, the Court distinguished for constitutional purposes between limitations on “contributions” to a candidate’s campaign, and limitations on “expenditures” by an independent outside spender in support of, or opposition to, a candidate’s campaign.

Buckley also recognized that, to be effective, any limitations on campaign contributions must apply to expenditures made in coordination with a candidate, so as to “prevent attempts to circumvent the Act through prearranged or coordinated expenditures amounting to disguised contributions.” *Id.* at 47. Coordinated expenditures, in practical effect, thus amount to “disguised contributions.”

⁵⁸ P. Overby, “Top Donors Use Super PACs To Sidestep Money Limits to Candidates,” *NPR* (Oct. 4, 2011).

⁵⁹ *E.g., McConnell v. FEC*, 540 U.S. 93, 144 (2003), (upholding the restrictions on political party “soft money,” and stating that “anti-corruption interests have been sufficient to justify not only contribution limits themselves, but laws preventing the circumvention of such limits.”); *FEC v. Colorado Republican Federal Campaign Comm.*, 533 U.S. 431, 455 (2001) (*Colorado II*), (upholding the coordinated party spending limits in order to prevent the “exploitation of parties as channels for circumventing contribution and coordinated spending limits binding on other political players.”); *California Medical Ass’n v. FEC*, 453 U.S. 182, 197-98 (1981) (upholding limits on contributions to political committees in order “to prevent circumvention of the very limitations on contributions that this Court upheld in *Buckley*.”); *FEC v. Beaumont*, 539 U.S. 146, 155 (2003) (upholding the restriction on corporate contributions on grounds that it “hedges against ... use of corporations as conduits for ‘circumvention of valid contribution limits.’”).

Buckley emphasized the difference between expenditures “made totally independently of the candidate and his campaign,” *id.* at 47 (emphasis added), and “coordinated expenditures,” construing the contribution limits to include not only contributions made directly to a candidate, political party, or campaign committee, but also “all expenditures placed in cooperation with or with the consent of a candidate, his agents or an authorized committee of the candidate....” *Id.* at 46-47 n.53 (emphasis added); *see also id.* at 78.

The Court noted, “The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate.” *Id.*

The 1976 amendments to the Federal Election Campaign Act (FECA) codified *Buckley*’s treatment of coordinated expenditures. The law was amended to provide that an expenditure made “in cooperation, consultation, or in concert with or at the request or suggestion of a candidate, his authorized political committees, or their agents, shall be considered to be a contribution to such candidate.” Pub. L. No. 94–283, § 112, 90 Stat. 475 (codified at 2 U.S.C. § 441a(a)(7)(B)(i)).

Similarly, the 1976 FECA amendments defined an “independent expenditure” as:

[A]n expenditure by a person expressly advocating the election or defeat of a clearly identified candidate which is made without cooperation or consultation with any candidate, or any authorized committee or agent of such candidate, and which is not made in concert with, or at the request or suggestion of, any candidate, or any authorized committee or agent of such candidate.

Pub. L. No. 94–283, § 102, 90 Stat. 475 (emphasis added) (codified at 2 U.S.C. § 431(17)).

The broad language of *Buckley* regarding coordination was echoed in subsequent Supreme Court decisions on the same topic. In *Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604 (1996) (“*Colorado I*”), the Supreme Court held that a political party ad aired prior to a candidate’s nomination would not be treated as coordinated because the ad was developed “independently and not pursuant to any general or particular understanding with a candidate....” *Id.* at 614 (emphasis added). The Court stressed that “the constitutionally significant fact ... is the lack of coordination between the candidate and the source of the expenditure.” *Id.* at 617.

In *FEC v. Colorado Republican Federal Campaign Committee*, 533 U.S. 431 (2001) (“*Colorado II*”), the Court—again in the context of party spending—underscored “the good sense of recognizing the distinction between independence and coordination.” 533 U.S. at 447. The Court recognized that there is a “functional, not a formal” line between contributions and expenditures, and contributions include expenditures made in coordination with a candidate. *Id.* at 443.

Of particular importance, the Court noted that independent expenditures are only those “without any candidate’s approval (or wink or nod)....” *Id.* at 442.

The Court stated, in the context of spending by a party:

There is no significant functional difference between a party's coordinated expenditure and a direct party contribution to the candidate, and there is good reason to expect that a party's right of unlimited coordinated spending would attract increased contributions to parties to finance exactly that kind of spending. Coordinated expenditures of money donated to a party are tailor-made to undermine contribution limits.

Id. at 464 (emphasis added). The Court went on to conclude that “a party’s coordinated expenditures, unlike expenditures truly independent, may be restricted to minimize circumvention of contribution limits.” *Id.* at 465 (emphasis added).

In *McConnell v. FEC*, 540 U.S. 93, 144 (2003), the Court again noted that the relevant “dividing line” was “between expenditures that are coordinated—and therefore may be regulated as indirect contributions—and expenditures that truly are independent.” 540 U.S. at 221 (emphasis added). The Court explained:

[T]he rationale for affording special protection to wholly independent expenditures has nothing to do with the absence of an agreement and everything to do with the functional consequences of different types of expenditures. Independent expenditures are poor sources of leverage for a spender because they might be duplicative or counterproductive from a candidate’s point of view. By contrast, expenditures made after a “wink or nod” often will be as useful to the candidate as cash. For that reason, Congress has always treated expenditures made “at the request or suggestion of” a candidate as coordinated.

Id. at 221-22 (internal citations and quotation marks omitted) (*quoting Colorado II*, 533 U.S. at 446) (emphasis added). The Court thus continued to adopt a broad view—a “wink or nod” view—of what constitutes coordination between a candidate and an outsider spender, a position it had earlier set forth in both *Colorado I* (“general or particular understanding”) and *Colorado II* (“wink or nod”).

In short, the Supreme Court has spoken in the broadest terms about the degree of independence that is necessary for “independent expenditures” to be considered free of the restrictions that would otherwise apply to in-kind contributions. Such expenditures must be “totally independent,” “wholly independent,” “truly independent,” and “without any candidate’s approval (or wink or nod). . . .”

The FEC has promulgated a regulation that governs “coordinated communications,” 11 C.F.R. § 109.21, but that regulation is limited to communications which meet certain restricted “content” standards.

The FEC, however, has also promulgated a broader regulation which repeats the statutory coordination standard and which applies to all other spending that is “made in cooperation,

consultation or concert with, or at the request or suggestion of” a candidate or agent of a candidate. 11 C.F.R. § 109.20. Under this regulation, where the candidate and outside spender have “coordinated” in the establishment or operation of an outside spending group, all expenditures made by the outside spender should be considered to be a function of the coordinated efforts.

This understanding of the statutory and regulatory language is based on the Supreme Court’s consistently demanding requirement that campaign expenditures by an outside spender be “totally,” “truly” and “wholly” independent of a candidate to qualify as independent spending.

Conclusion

The facts discussed above raise serious questions about whether the millions of dollars being spent by the candidate-specific Super PACs in the 2012 presidential election fail to meet the rigorous standards to qualify as “independent” activity required by statute, by rule and by multiple Supreme Court rulings.

These facts show that the five presidential-candidate candidate Super PACs at issue here are each closely intertwined with their respective candidates and were each established by or are being operated by close political operatives or associates of the candidates they support. Those operatives and associates have long histories with the candidates themselves, and/or with the political operatives running the authorized presidential campaign committees.

Mike Toomey, who founded the Make Us Great Again PAC, is described as “one of Perry’s closest confidantes.”⁶⁰ The organizers of the Restore Our Future PAC all played key roles for Romney’s authorized campaign committee in his 2008 presidential campaign. The founders of Priorities USA PAC left White House jobs this year where they worked for President Obama and quickly established the Obama-specific Super PAC. The founder and head of the Winning Our Future PAC is a key fundraiser and political aide to Newt Gingrich. The key adviser for Our Destiny PAC worked for the authorized Huntsman campaign committee until just before he left to work for the Super PAC.

These and other facts presented in the report raise serious questions about whether these Super PACs were established or are operating “in concert with, or at the request or suggestion” of the presidential candidates they are supporting. They also raise serious questions as to whether the overall expenditures being made by these Super PACs meet the test of being “totally independent,” “wholly independent” and “truly independent” of the candidates with whom they are aligned.

The practical function of the presidential candidate-specific Super PACs is clear: their purpose is to serve as vehicles for donors and presidential candidates to circumvent and evade the contribution limits and source prohibitions set forth in the campaign finance laws.

With the introduction of the candidate-specific Super PACs in the 2012 presidential election, donors now have the opportunity to make a maximum hard money contribution to a

⁶⁰ D. Eggen, “Perry has deep financial ties to maker of HPV vaccine,” *The Washington Post* (Sept. 16, 2011).

presidential candidate's campaign and then also make additional unlimited contributions to the related candidate-specific Super PAC which is operating, in essence, as an arm of that same presidential campaign. Or donors can just make unlimited contributions to a presidential candidate's related Super PAC that is far in excess of the contribution restrictions that apply to donations made to that presidential candidate.

Such unlimited contributions are permitted under the law only if the presidential candidate-specific Super PAC is operating "truly," "totally" and "wholly" independently of the candidate it is organized to support, and without "wink or nod" approval from that candidate, the candidate's campaign or their agents.

Absent such total independence, the raising and spending of such contributions should be considered to be violations of the campaign finance law by the Super PAC, the presidential candidate and the donors contributing to the Super PAC. 2 U.S.C. §§ 441a(a), 441a(f), 441b(a).

The stakes for the country are enormous in addressing the abuses involved with candidate-specific Super PACs and preventing a return to the system of legalized bribery that existed in the pre-Watergate era.

It is the responsibility of enforcement agencies, including the Federal Election Commission and the Justice Department, to prevent massive violations of the campaign finance laws that were enacted to protect citizens against corruption. It is the responsibility of Congress to enact legislation to stop candidate-specific Super PACs from serving as vehicles for evading and circumventing the campaign finance laws and thereby to protect the integrity of our democracy.