

From Super PACs to Dark Money:
Politics after *Citizens United* (Part 1)
A talk with **Richard Briffault**

I. Campaign Expenditure and Contribution Limits

- A. Importance of money in politics
 - 1. Impact on an election
 - a. Money plays a role in how big and wide array of potential voters a candidate can reach.
 - b. Though a candidate need not have the most money, she must have at least enough to reach voters and get her message out.
 - 2. Impact on the resulting government after the election
 - a. Question of to what extent elected officials will be attentive to the interests of their election donors.
- B. Expenditure and contribution limits
 - 1. Federal Election Campaign Act of 1971 (FECA), effective 1972
 - a. Required full reporting of campaign contributions and expenditures; limited spending on media ads. These were later repealed.
 - b. Provided basic legislative framework for separate segregated funds, political action committees (PACs), established by corporations and unions.
 - c. Although the Tillman Act and Taft-Hartley Act of 1947 banned direct contributions by corporations and labor unions to influence federal elections, FECA provided an exception whereby corporations and unions could use treasury funds to establish, operate, and solicit voluntary contributions for the organization's separate segregated fund.
 - 2. No expenditure limits
 - a. The Supreme Court overturned expenditure limits in *Buckley v. Valeo*, finding that expenditure limits restrict quantity of campaign speech by individuals, groups, and candidates.
 - 3. Contribution limits
 - a. *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010)
 - i. SpeechNow is a nonprofit formed by individuals to pool their resources to make independent expenditures expressly advocating election of candidates. It challenged the constitutionality of FECA provisions related to political committee registration, contribution limits, and disclosure.
 - ii. US Court of Appeals for the DC Circuit ruled that contribution limits of 2 USC § 441a are unconstitutional as applied to SpeechNow. It stated, in part, that in light of the Supreme Court decision in *Citizens United*, contributions to groups that make only independent expenditures cannot corrupt or create the

appearance of corruption. Thus, the government has no anti-corruption interest in limiting contributions to an independent group. While disclosure and reporting requirements impose a First Amendment burden, they impose no ceiling on campaign related activities and do not prevent anyone from speaking. Since public had interest in knowing who is speaking about a candidate and who is funding that speech, disclosure and organizational requirements are sufficiently important governmental interests.

- b. A candidate has no caps on how much contribution from donors she may receive.
- c. Individuals, groups, and certain entities may be subject to contribution limits.
- d. Federal contribution limits¹:
 - i. Individuals may give:
 - 1) \$2,700 to candidate committee
 - 2) \$5K to PACs
 - 3) \$10K to state/district/local party committee
 - 4) \$33,400 to national party committee
 - ii. Candidate committee
 - 1) May give:
 - a) \$2K to candidate committee
 - b) \$5K to PACs
 - c) Unlimited amounts to state/district/local party committee
 - d) Unlimited amounts to national party committee
 - 2) May receive:
 - a) \$2,700 from individual
 - b) \$2K from candidate committee
 - c) \$5K from PAC
 - d) \$5K from state/district/local party committee
 - e) \$5K from national party committee
 - iii. PACs
 - 1) May give:
 - a) \$5K to candidate committee per election
 - b) \$5K to any other PAC
 - c) \$5K to state/district/local party committee
 - d) \$15K to any national party committee
 - 2) May receive:
 - a) \$5K from any individual, PACs, or party committee
 - iv. Super PACs

¹ Contribution Limits for 2015-2016 Federal Elections: <http://www.fec.gov/info/contriblimitschart1516.pdf>

- 1) May receive unlimited contributions, including from corporations and labor organizations.

II. Political Action Committees (PACs) and Super PACs

A. Origin of PACs

1. First PAC created when the Congress of Industrial Organizations, a federation of industrial unions, formed a PAC to raise money for the re-election of Franklin D. Roosevelt. Its funds came from voluntary contributions of union members, rather than from the union treasury, to circumvent the ban on unions contributing to candidates.
2. PACs today are organized for the purpose of raising and spending funds to support or defeat candidates in an election. Most represent business, labor, or ideological interests.
3. PACs may make independent expenditures

B. Independent expenditures

1. What are independent expenditures?
 - a. Expenditure for a communication which expressly advocates the election or defeat of a clearly identified candidate and which is made independently from the candidate's campaign.
 - b. Communication may not be made with the cooperation, consultation or concert with, or at the request or suggestion of, any candidate or her authorized committees, or agents.
2. Independent expenditure limits
 - a. Individuals or PACs may make unlimited independent expenditures in connection with federal elections.
 - b. Independent expenditures are subject to reporting requirements and disclosure of funds.

C. Coordinated communications

1. What are coordinated communications?
 - a. When an individual or political committee pays for communications that is coordinated with the party committee or candidate, the communication is subject to the limits and requirements of federal campaign finance law.
 - b. Generally, communication is "coordinated" if it is made in cooperation, consultation or concert with, or at the request or suggestion of, a candidate, a candidate's authorized committee or agents.²
2. Federal Election Commission's 3-prong coordination test
 - a. Payment prong – communication need only be paid for by someone other than the candidate or political party committee.

² 11 CFR 109.21: http://www.ecfr.gov/cgi-bin/text-idx?SID=a8f74e22426c2a67f75a4884e2b2348f&mc=true&node=pt11.1.109&rgn=div5 - se11.1.109_121

- b. Content prong – communication that meets any of the four standards satisfies this prong:
 - i. Public communication that expressly advocates support or defeat of a clearly identified candidate;
 - ii. Electioneering communication, or a broadcast communication that mentions a federal candidate and is distributed to the relevant electorate 30 days before the primary election or 60 days before the general election (defined in 11 CFR 100.29).
 - iii. Public communication that republishes, disseminates or distributes campaign materials prepared by the candidate or campaign committee; or
 - iv. Public communication made within 90 days of an election and refers to a candidate or political party and publicly distributed.
 - c. Conduct prong – examines the interactions between the person paying for the communication and the candidate.
3. Dark money
- a. Dark money typically refers to contributions made to nonprofits or LLCs by donors whose identifies are not disclosed. Certain politically active nonprofits formed under §§ 501(c)(4) and (c)(6) are not required to publicly disclose their donors.
 - b. These organizations may receive unlimited corporate, individual, or union contributions.
 - c. IRC § 501(c)(6): business leagues, chambers of commerce, boards of trade, and similar organizations
 - d. IRC § 501(c)(4): Social Welfare Organizations
 - i. Organization must not be organized for profit and must be operated exclusively to promote social welfare.
 - ii. Organization may engage in unlimited amount of lobbying, provided that the lobbying is related to the organization's except purpose and may engage in political campaigns on behalf or in opposition to candidates provided that such intervention does not constitute the organization's primary activity.
4. Anonymous speech
- a. Donors may make anonymous contributions for a variety of reasons, including not wanting to taint the effect of the speech, which may be undermined if the public knew the source of contributions.
 - b. Anonymous contributions are also useful when used to support an unpopular opinion or candidate, lest the donor open himself up to public scrutiny or unfavorable business consequences.

III. Citizens United

- A. *Buckley v. Valeo*, 424 U.S. 1 (1976)³
1. Senator James Buckley (NY) and Senator Eugene McCarthy (MN) challenged key provisions of the 1974 amendments to the Federal Election Campaign Act of 1971 (FECA) which placed strict limits on contributions and expenditures, applicable to all candidates for federal office and to political committees influencing federal elections.
 2. The Court upheld contribution limits because it found the limits served the government's interest in safeguarding the integrity of elections.
 3. The Court, however, overturned expenditure limits, finding that expenditure limits restrict the quantity of campaign speech by individuals, groups, and candidates. The Court acknowledges both contribution and spending limits had First Amendment implications but that expenditure ceilings impose more severe restrictions on protected freedom of political expression than do limitations on financial contributions.
- B. Bipartisan Campaign Reform Act of 2002 (BCRA)
1. Often referred to as the McCain-Feingold Act, was designed to curb soft money.
 2. The BCRA prohibits national parties from raising or spending nonfederal funds; requires state, district and local party committees to fund certain federal election activities with federal funds (hard money) and, in some cases, with money raised according to new limitations, prohibitions, and reporting requirements (Levin funds), or a combination of both; limits fundraising by federal and nonfederal candidates and officeholders on behalf of party committees, other candidates, and nonprofit organizations.
 - a. Levin funds are donations allowable under state law, raised directly by the specific state or local party that intends to use the, and limited to no more than \$10K in a calendar year from any person, corporation or union.
 3. Soft money
 - a. Contributions made outside the federal contributions limits to a state or local party, candidate, or outside interest group. Soft money was considered by many to be a major loophole in campaign finance law that allowed the parties to raise hundreds of millions of unregulated money.
 - b. Prior to ban, national political parties accepted unlimited soft money to use for direct "issue ads" intended to influence outcome elections when they were actually intended for generic party building activities.
 4. Hard money

³ <https://supreme.justia.com/cases/federal/us/424/1/case.html>

- a. Regulated contributions from an individual or PAC to a federal candidate, party committee, or other PAC, where the money is used for federal elections. Hard money is subject to contribution limits and prohibitions and can be used to directly support or oppose a candidate running for federal office.
5. Electioneering communications
 - a. Commonly referred to as “issue ads”
 - b. Some defining characteristics include as follows: refers to a clearly identified candidate for federal office; publicly distributed on radio or TV for a fee; distributed within 30 days of a primary election or 60 days of a general election; and targeted to the relevant electorate.
- C. *Citizens United v. FEC*, 558 U.S. 310 (2010)⁴
 1. Citizens United sought injunction in DC District Court to prevent application of BCRA to its film *Hillary: The Movie*. The movie expressed opinions about how Clinton would fare as the president. The organization argued that §§ 203, 201, which prohibits electioneering communications within 30 days from a primary or 60 days from a general election violated the First Amendment. It also argued that the disclosure requirements were unconstitutional.
 2. BCRA § 203 prevents corporations and labor unions from funding “electioneering communications” from their general treasuries. § 201 and 311 require the disclosure of donors to such communication and a disclaimer when the communication is not authorized by the candidate it intends to support.
 3. A 5-4 majority held that:
 - a. Under the First Amendment, corporate funding of independent political broadcasts in candidate elections cannot be limited because the corporation is entitled to free speech rights.
 - b. BCRA’s disclosure requirements as applied to *The Movie* were constitutional, justified by a governmental interest in providing the electorate with information about election-related spending resources.
 4. The Court upheld disclosure requirements for political advertising sponsors and the ban on direct contributions to candidates from corporations and unions
- D. *SpeechNow.org* was the first case to apply *Citizens United*.

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https://scholar.google.com/scholar_case?case=6233137937069871624&q=Citizens+United+v.+FEC&hl=en&as_sdt=6,33&as_vis=1