

Super PAC Wars: Get Ready for the Political Machines to Start Legal Maneuvering

Former Florida Governor Jeb Bush's Super PAC is reportedly primed to launch a harsh attack against Senator Marco Rubio, his onetime protégé. The senator's agility during the Oct. 28 debate forced Bush to change his plan of taking on front-runner Donald Trump. Yet Rubio and any other 2016 presidential candidates who face barrages of rough ads must look for help beyond the remarkably dysfunctional Federal Election Commission, which has proved unable to enforce current laws regulating political contributions.

Candidates could instead strike preemptively with a court injunction that would halt potentially damaging Super PAC ads. Under the U.S. Supreme Court's Citizens United ruling, any ad using content coordinated between a campaign and a Super PAC is illegal and should be disallowed.

The key issue is that Super PACs that support a candidate must act independently of that candidate's campaign machinery. In many cases, however, the PACs have been less than pristine in following the rules. Some in the 2016 election cycle may already have stepped over the line.

The Federal Election Commission's delay in acting means targeted candidates have few options other than going to court. There, by arguing imminent harm, they can seek an injunction against the ads on the grounds that the ad campaign is based on material coordination between a campaign committee and its aligned Super PAC.

This would not be easy. Proving complicity or inappropriate coordination requires complicated data mining. It means searching through campaign finance reports, candidate statements and news stories to find connections between the campaign and the Super PAC. It also involves tracking any

activities that would amount to a declaration of candidacy, investigating the relationships between key staffers in the campaign and the Super PAC and looking for vendors hired by both the Super PAC and the candidate's campaign.

In some instances, just the thought of having a candidate or staffer appear under oath in the white-hot spotlight of a deposition could have the desired chilling effect. Campaigns and PACs rarely want their operations subject to the intense scrutiny of subpoenas and courtroom discovery. So even the thought of that happening could cause a Super PAC to pull a negative ad.

If there is any legal action, the Super PACs would likely invoke the First Amendment right of free speech. Nonetheless, a candidate who can show imminent harm may be able to successfully argue for an order halting an ad. Third-party political committees are not afforded the same level of broadcast discretion in public communications as candidates. Stations have essentially no choice but to run a candidate's ads, yet the same does not extend to third-party groups.

The issue here is not whether Super PACs are "good" or "bad" for democracy. They exist and are crucial components of many campaigns. But the regulations that govern them, are, at times, likely not being followed and the rules not enforced.

Watchdog groups have already filed complaints with the Federal Election Commission. They charge that a number of politicians, including Bush, former Pennsylvania Senator Rick Santorum and former Maryland Governor Martin O'Malley, have abused the law by raising millions through outside groups while shielding themselves behind the concept that they had not technically declared their candidacy. Trump is the only candidate who has disavowed Super PACs.

Before Bush officially announced his candidacy, for example, he traveled around the country for his Super PAC, Right to Rise USA, helping raise more than \$100 million. Yet Bush can say no laws were broken. Other candidates, including Ben Carson, have openly used information gathered by their Super

PACs once they did announce their candidacy.

Under current federal parameters, individual contributions to a candidate's campaign committee are limited to \$2,700 an election. Corporate contributions are illegal. The independent expenditure-only political committees, however, can receive unlimited contributions from individuals, corporations and labor unions. These Super PACs can then, in turn, make unlimited "independent" expenditures in support of a particular candidate.

The FEC has been slow to take action on this. Its attorneys recently released a draft opinion that politicians can be bound by fundraising restrictions even if they had not formally declared their candidacy. Rather than adopt the findings, however, the commission has scheduled the draft for "further consideration."

Meanwhile, at least one state has acted. California's Fair Political Practices Commission just issued more stringent rules defining activities deemed to be coordinated with a candidate. Expenditures from independent groups that fail to meet these guidelines – which focus on the participation of family and former staff members as well as the candidate's involvement in fundraising – will be viewed as in-kind contributions and subject to the candidate's contribution limits.

Other states will soon be following suit. Expect Massachusetts to be next.

Another legal strategy that might work is to seek a writ of mandamus – having a judge order the FEC to do its job. One FEC commissioner has actually suggested this.

Because some Super PACs and candidate committees do not appear capable of policing themselves, aggrieved candidates need to look for new and innovative ways of fighting back.

Previously relegated to the back bench of a campaign – as a second thought for ballot access, recounts and compliance –

seeking legal action is increasingly taking a seat at a campaign's political-strategy table. {eo}

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