

PostEverything

Here's what I learned when I helped Stephen Colbert set up his Super PAC



By Trevor Potter January 21 at 6:00 AM

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It's been five years since the Supreme Court handed down its *Citizens United* decision. The ruling gave rise to a complicated mess of super PACs, dark money, and “coordinated non-coordinated expenditures” — a world that likely surprised even the Supreme Court.

Viewers of Stephen Colbert's late lamented “Colbert Report,” however, knew just how tricky this new world had become.

In 2011, Colbert formed his own Super PAC. And he reported on the process every step of the way, explaining to viewers how the wacky post-*Citizens United* world worked (or, perhaps, didn't work). I was his lawyer for the venture, which meant I did everything from drafting a Federal Election Commission Advisory Opinion Request to accompanying Colbert to hearings. I even figured out how to make the money “disappear” from public view when the PAC was closing. (Hint: It's not that hard.)

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At this five-year anniversary, here are four things I learned about how *Citizens United* and Super PACs have reshaped our elections and democracy:

1) No one — including Supreme Court justices and campaign finance lawyers — fully understood the breadth of the changes this decision would have on campaign fundraising and spending.

Before *Citizens United*, there were limits to how much money unions and corporate donors could spend on elections. The 2010 ruling changed that. Though donations directly to candidates were still limited, donors could give to super PACs, who could spend it on elections and advertising.

But no one understood exactly what still needed to be disclosed and how super PACs could interact with corporations. Even the FEC didn't understand how these new PACs, with the right to take unlimited contributions from individuals, corporations and unions and spend them directly for election advertising, would work, and how much of the existing system they would effectively supersede.

2) The *Citizens United* decision was based in part on the important assumption that all of the money being released into our elections would be disclosed. This has proven incorrect.

Shortly after forming his Super PAC, Colbert asked why his PAC had to disclose its donors when so many other groups did not. I answered that donors now essentially have a choice as to whether their contributions will be disclosed. They can give directly to Super PACs, which must disclose their donors, or they can give to a 501(c)(4) or (c)

(6) or other “non-political” organization, which does not publicly disclose its donors. The 501(c) organizations can spend money on the very same campaign ads that a Super PAC can, or it can even give to a Super PAC.

In either case, only the name of the 501(c) organization is disclosed to the public, and not the underlying source of the money. As Colbert asked on his show, “What is the difference between that and money laundering?” The answer is that money laundering is both bad and illegal — this is only bad (because the Supreme Court has told us that knowing who is paying for campaign ads gives voters information they need to judge the advertising, and helps us hold members of Congress accountable by knowing who they are indebted to).

3) The court’s decision was based on another incorrect assumption — that the independent spending made possible by the decision would in fact be independent of candidates. Unfortunately, the court’s description of independent spending as “totally,” “truly” or “wholly” independent is a far cry from the narrow scope of activity the FEC considers “coordinated” and thus not independent.

As Colbert so pointedly demonstrated on his show, supposedly independent Super PACs can be run by a candidate’s close associates and former staff and a candidate can discuss his campaign with Super PAC representatives so long as they do not discuss particular ad buys. A candidate can even fundraise on behalf of their official unofficial Super PAC, and personally thank the donors.

To guffaws, Colbert demonstrated the extent of commonsense coordination that was permissible without actually being considered coordination under the narrow legal definition. He turned his Super PAC over to his friend and former colleague Jon

Stewart, and they proceeded to meet on air and wink and nod their way through a discussion of the election without technically crossing the “non-coordination” line. In the last election, [party committees were actually](#) caught communicating poll data to outside groups via secret coded Twitter accounts to give the supposedly “independent” groups instructions on where to spend their money.

4) The final takeaway from my work with Colbert was a sense of the enormous and detrimental impact *Citizens United* has had on our campaigns and elections. Colbert is known for pushing the envelope with his comedy. He took this same approach with his Super PAC – finding the boundaries of what is legally permissible and teasing out the absurdities in the law. Once he discovered that the new game for people who wanted to avoid disclosing their political spending was to give to a 501(c)(4), he then created such a tax-exempt entity and had an on-air discussion about how donors to the Super PAC were required to be disclosed, but the same donor could give to the (c)(4) to avoid disclosure – and then that money could then be transferred straight to the Super PAC, thereby making a farce of the disclosure requirements for PACs.

On screen it looked like a bad joke – who would actually do such things? But Super PACs aren't something to be laughed at. They've come to represent our essentially bifurcated campaign finance system: On one side, a world of limited campaign contributions and full disclosure, and on the dark side, huge unlimited contributions to Super PACs and secret money spent through unknown shell groups, all poured without our knowledge into elections which will determine the course of our country.

When the Colbert Super PAC closed down, I told Stephen that he would make a brilliant Supreme Court advocate, because he can absorb complicated facts and make them seem straightforward and understandable. Colbert went one step further – he got them down

to a five-minute summary, and made them funny as well. We can only hope that someone half as skilled can get the Supreme Court to understand how badly wrong the post-*Citizens United* political system has gone.