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It's bold, but legal: How campaigns and their super PAC backers work together

By Matea Gold July 6, 2015

The 2016 presidential contenders are stretching the latitude they have to work with their independent allies more than candidates in recent elections ever dared, taking advantage of a narrowly drawn rule that separates campaigns from outside groups.

For the first time, nearly every top presidential hopeful has a personalized super PAC that can raise unlimited sums and is run by close associates or former aides. Many are also being boosted by nonprofits, which do not have to disclose their donors.

The boldness of the candidates has elevated the importance of wealthy donors to even greater heights than in the last White House contest, when super PACs and nonprofits reported spending more than \$1 billion on federal races. Although they are not supposed to coordinate directly with their independent allies, candidates are finding creative ways to work in concert with them. Before former Florida governor Jeb Bush ® announced his bid in mid-June, the Right to Rise super PAC filmed footage of him that the group plans to use in ads. Hillary Rodham Clinton's campaign is collaborating directly with Correct the Record, a super PAC providing the Democratic hopeful's team with opposition research.

Top advisers to Wisconsin Gov. Scott Walker ® have been positioned at two big-money groups as they await his presidential announcement next week. GOP candidate Carly Fiorina has gone even further, outsourcing core functions such as rapid response and event preparation to her allied super PAC, the aptly named CARLY for America.

The widespread cooperation – which many campaign finance experts say stretches the legal boundaries – indicates that candidates and their advisers have little fear that they will face serious scrutiny from law enforcement, despite the Justice Department's successful prosecution this year of a Virginia campaign operative for illegal coordination.

One main reason: Under Federal Election Commission rules, there is no wall dividing candidates and independent groups. In practice, it's more like a one-way mirror – with a telephone on each side for occasional calls. “The rules of affiliation are just about as porous as they can be, and it amounts to a joke that there's no coordination between these individual super PACs and their candidates,” said Rep. David E. Price (D-NC), who has sponsored legislation that would put stricter limits in place.

A close reading of FEC regulations reveals that campaigns can do more than just publicly signal their needs to independent groups, a practice that flourished in the 2014 midterms. Operatives on both sides can talk to one another directly, as long as they do not discuss candidate strategy. According to an FEC rule, an independent group also can confer with a campaign until this fall about “issue ads” featuring a candidate. Some election-law lawyers think that a super PAC could share its entire paid media plan, as long as the candidate's team does not respond.

But those who defend the current system say that broader rules could infringe on rights to free speech. “Every discussion you have cannot trigger illegal coordination,” said Lee E. Goodman, a Republican appointee to the FEC. “I understand some people look at relationships between candidates and independent spenders and sense that those relationships are too cozy,” he added. “Yet the courts have said that you cannot prohibit friendships and knowledge of each other.”

But many experts say that the limited-coordination rules are emblematic of an outdated, incoherent and often contradictory campaign finance framework. “We're at this transitional point where the way money is raised and spent and the costs of campaigns have changed so dramatically,” said Bob Bauer, a prominent campaign finance

lawyer who served as White House counsel for President Obama. “The problem isn’t that the law isn’t being enforced – the problem is that we need to rethink the whole thing from the ground up.”

Political strategists on both sides of the aisle agree, saying that navigating the complex legal thickets is increasingly difficult. “If you talk to three lawyers, you are likely to get three different answers,” said Phil Cox, executive director of America Leads, a super PAC supporting Chris Christie, the Republican governor of New Jersey. “The system makes no sense. It’s crying out for reform. We need to put the power back in the hands of the candidates and their campaigns, not the outside groups.”

At the moment, though, an overhaul of campaign finance has little bipartisan support in Congress. And members of the long-polarized FEC appear more divided than ever. A discussion at a recent public meeting about stricter regulations devolved into hostile barbs. The public is left with the sense that no one is following the rules, said Ellen L. Weintraub, one of the Democrats on the FEC. “There is this basic notion that super PACs are supposed to be separate from the candidates,” she said. “They look at what’s going on and they say: ‘This doesn’t look separate. Where are the lines?’”

A sweeping boundary was drawn by the Supreme Court in its seminal 1976 *Buckley v. Valeo* decision, which said that political activity by outside groups must be done “totally independently” of candidates and parties. A similar standard was set in the 2002 McCain-Feingold Act, which said that independent expenditures cannot be made “in cooperation, consultation, or concert” with a candidate.

But in practice, defining coordination has not been easy. The FEC wrestled mightily with where to draw the lines, issuing regulations that were challenged repeatedly in the courts. A set of FEC rules approved in 2010 prohibits a campaign from coordinating with an independent group on a paid communication. The agency laid out specific tests to determine whether a campaign has illegally shared internal strategy used to guide an independent group’s advertising.

But the rules do not ban coordination in general – much less conversations between each side. Bobby Burchfield, a Republican campaign finance lawyer, said that the clarity of current regulation helps avoid the kind of intrusive investigations into groups, such as the Christian Coalition, that the FEC once pursued. “That had the effect of suppressing and chilling political activity,” he said.

Now, there’s plenty of room to maneuver. Although a campaign cannot share private strategy with a super PAC, it can give a campaign information about its plans, as long as the group is not sharing something of value that could be considered a contribution. The FEC also has given candidates its blessing to appear at super PAC fundraisers, as long as they do not solicit more than \$5,000 – a decision that came in response to a query from two Democratic super PACS in 2011. Taken together, critics say, the narrow rules offer far too many opportunities for candidates and their well-funded outside allies to work in agreement. The FEC “couldn’t imagine how bold people would be,” said Larry Noble, senior counsel at the Campaign Legal center, which supports tougher restrictions.

Right to Rise, the super PAC run by longtime Bush adviser Mike Murphy, is set to serve as a massive external ad operation bolstering the former governor’s campaign. Murphy told donors in a recent conference call that before Bush announced his candidacy, the super PAC filmed footage of him that the group plans to use in digital and TV spots, according to an account in BuzzFeed. “One of the new ideas, that, you know, the governor had – he’s such an innovator – is we’re going to be the first super PAC to really be able to do just positive advertising,” Murphy said. Paul Lindsay, a spokesman for Right to Rise, said that Murphy was referring to “Governor Bush’s historical preference for positive advertising, which was consistent in his previous elections and is not secret.”

Clinton’s campaign is working closely with Correct the Record, a liberal rapid-response group that refashioned itself as a super PAC this year. The group says it can coordinate directly with the campaign under a 2006 FEC rule that made content posted free online off-limits to regulation. Correct the Record has more than 20 staffers

and plans to disseminate much of its research on its Web site and through social media. Any non-public information of value that it shares with the Clinton staff will be purchased, according to a campaign official.

Already, partisan critics have pounced, filing complaints with the FEC alleging that the pro-Bush and pro-Clinton super PACs are engaged in illegal coordination.

But if the agency launches an investigation, it would be a first. Since 2010, the FEC has yet to open an investigation into alleged illegal super PAC coordination, closing 29 such complaints. In 28 of those cases, the agency's general counsel did not recommend pursuing the matters, according to Goodman of the FEC.

"We could capture all of this stuff if we had real rules," said Fred Wertheimer, a longtime advocate of reducing the influence of big money in politics. "For all practical purposes, there are no prohibitions against coordination."