



Democracy 21

2000 Massachusetts Avenue, NW
Washington, DC 20036
p: 202.355.9600 f: 202.355.9606
www.democracy21.org

February 15, 2012

The Honorable Eric Holder
Attorney General of the United States
U.S. Department of Justice
Main Justice Building
950 Pennsylvania Ave NW
Washington, DC 20530

Re: Obama and Romney candidate-specific Super PACs in 2012 elections

Dear Attorney General Holder:

I am writing to request an investigation by the Justice Department into whether the candidate-specific Super PACs associated with President Obama and presidential candidate Mitt Romney are engaged in massive violations of the campaign finance laws.

Democracy 21 believes that the Super PACs supporting President Obama and presidential candidate Romney are violating the law and need to be held accountable.

Last week, President Obama's campaign announced that it would send Cabinet members, White House staff and campaign officials to speak at, and participate in, fund raising events for Priorities USA Action, the allegedly "independent" candidate-specific Super PAC supporting President Obama's re-election. Days later, the Romney campaign announced that its senior campaign aides would similarly appear and speak at fundraising events for Restore Our Future, the allegedly "independent" candidate-specific Super PAC supporting Mitt Romney's campaign.

These announcements of plans by both the Obama and Romney campaigns for further direct entanglements with the respective Super PACs supporting their campaigns present compelling new evidence that these two Super PACs are engaged in illegal activities.

On January 10, 2012, I sent you letter and enclosed a Report prepared by Democracy 21 which raised serious questions about the legality of five leading presidential candidate-specific Super PACs. In a letter I sent to you on January 13, 2012, we supplemented the original information we provided and raised concerns about a sixth presidential candidate-specific Super PAC.

Our two previous letters called on the Justice Department to closely monitor the activities of these Super PACs in the 2012 presidential election.

I am writing today to formally request the Justice Department to promptly open an investigation into the activities of the Super PACs supporting President Barack Obama and presidential candidate Mitt Romney pursuant to the Department's jurisdiction and responsibility to enforce the nation's campaign finance laws. It is essential for the Department to enforce the campaign finance laws in order to protect the integrity of our elections and the interests of the American people.

The activities of these two Super PACs and the presidential campaigns they support have escalated beyond the boundaries of the campaign finance laws. They are making a mockery of the laws enacted to prevent corruption.

Our earlier letters, and the accompanying report, documented the web of connections and relationships between candidates for President in 2012 and the candidate-specific Super PACs supporting them. These Super PACs are raising and spending tens of millions of dollars in unlimited contributions to support their respective presidential candidates. As we noted, they are serving as vehicles for the candidates and their supporters to evade and circumvent the \$2,500 per person, per election limit on individual contributions to candidates, which is a bedrock anti-corruption provision of the federal campaign finance laws.

Contributions as high as \$10 million from one couple already have been given to a presidential candidate-specific Super PAC. Both the Obama and Romney candidate-specific Super PACs have received contributions of \$1 million or more.¹

Although the premise of these candidate-specific Super PACs is that they are operating "independently" of the presidential candidate they support, the web of ties and connections between the Super PACs and their respective candidates is in clear contravention of the standard for independence established in multiple Supreme Court decisions and in the federal campaign finance statute.

The Supreme Court, in decisions going back to *Buckley v. Valeo* (1976), has described the standard for "independent spending" as requiring such spending to be "totally independent," "wholly independent," "truly independent" and operating "without any candidate's approval (or wink or nod)."

Recent published reports demonstrate that the requirement for Super PACs to be "totally independent" from the presidential campaigns they support is being breached in a flagrant and willful fashion.

As widely reported, President Obama's campaign manager last week announced the Obama campaign's overt support for the candidate-specific Super PAC supporting President

¹ C. Palmeri & B. Jinks, "Adelson's \$10 Million PAC Bet Gives Gingrich Boost for Southern Primaries," *Bloomberg News* (Jan. 25, 2012).

Obama's re-election, Priorities USA Action. As we previously documented in our January 10 Report on Super PACs, this Super PAC was established by two former White House aides who set up the Super PAC shortly after leaving their White House jobs in the Obama Administration.

In nothing less than an extraordinary development, the campaign manager for the Obama reelection committee, Jim Messina, publicly announced in a campaign blog posting on February 6, 2012 that the Obama campaign will "do what we can" to "support Priorities USA." *See* <http://barackobama.com/news/entry/we-will-not-play-by-two-sets-of-rules>. He explained that "what this change means practically" is that "senior campaign officials as well as some White House and Cabinet officials will attend and speak at Priorities USA fundraising events."

According to a published report, this decision was personally approved by President Obama, although his current plan is not to attend Priorities USA Action events himself, but rather to send his campaign aides and surrogates:

Aides said the president had signed off on a plan to dispatch cabinet officials, senior advisers at the White House and top campaign staff members to deliver speeches on behalf of Mr. Obama at fund-raising events for Priorities USA Action....²

The report noted that, by these actions, "President Obama is signaling to wealthy Democratic donors that he wants them to start contributing to an outside group supporting his reelection...." *Id.*

According to the same report, "several members of [President Obama's] inner circle from the West Wing and his Chicago campaign headquarters have been designated to deliver speeches about the re-election effort. The intent is to imply his blessing for Priorities USA Action...."

This group reportedly includes HHS Secretary Kathleen Sebelius, White House senior advisers Valerie Jarrett and David Plouffe, President Obama's top political adviser David Axelrod and his campaign manager, Mr. Messina. A more recent press report indicated that four other Cabinet members would participate in similar fundraising as well: Interior Secretary Ken Salazar, Energy Secretary Steven Chu, Education Secretary Arne Duncan and U.S. Trade Representative Ron Kirk.³ All reportedly will attend and speak at events, including fundraising meetings, held by Priorities USA Action.

According to another report, the announcement by the Obama campaign "provided the most forceful blessing yet" that the President has bestowed on his Super PAC.⁴ This report noted that the Super PAC is now planning to target "Obama supporters who have been major

² J. Zeleny and J. Rutenberg, "Obama Yields in Marshaling of 'Super PAC,'" *The New York Times* (Feb. 7, 2012).

³ M. Beckel, "Four Cabinet Members Willing to Help Democratic Super PAC," *iWatch News* (Feb. 13, 2012).

⁴ N. Confessore, "Unleashed Democrats Hunt for 'Super PAC' Donors," *The New York Times* (Feb. 7, 2012).

donors and bundlers for the president's own fund-raising efforts but who have not donated to independent expenditure groups.”

This report also stated that the planned interactions between the Super PAC and the Obama aides and campaign officials will not be limited to their appearance at large events, but will also include small group meetings hosted by Priorities USA Action with potential Super PAC donors. According to the article:

Mr. Obama's campaign aides have also begun discussing the matter with donors in more intimate settings. In a previously scheduled meeting with about 40 top Obama donors from the New York City area on Tuesday, Jim Messina, Mr. Obama's campaign manager, said the president and his aides had decided to help Priorities after watching Restore Our Future, a super PAC backing Mitt Romney, bludgeon Mr. Romney's Republican rivals with millions of dollars in attack ads.

Id. This article also noted that the Obama campaign aides would communicate directly with the Obama Super PAC “to the extent necessary to facilitate the aides' appearances and speeches.”
Id.

The open collaboration that is now occurring between the Obama campaign and the candidate-specific Super PAC supporting the Obama campaign cannot plausibly be said to meet the statutory standard that activities by a supposedly independent group cannot be “in cooperation, consultation or concert with, or at the request or suggestion of” a candidate, a candidate's campaign committee or any agent of the candidate or his campaign. 2 U.S.C. §441a(a)(7)(B)(i).

Nor can such close and direct interactions between a candidate's campaign operatives and a candidate-specific Super PAC supporting that candidate plausibly be said to meet the standard set by the Supreme Court that “independent” spending must be “totally independent,” *Buckley*, 424 U.S. at 47; “wholly independent,” *McConnell v. FEC*, 540 U.S. 93, 221 (2003) “truly independent,” *id.*, and made “without any candidate's approval (or wink or nod)...” *FEC v. Colorado Republican Federal Campaign Committee*, 533 U.S. 431, 442 (2001).

Under the plan announced by Mr. Messina, President Obama's top campaign advisers and political operatives, his White House officials and one or more of his Cabinet members are going to meet face-to-face on a regular basis with officials of the candidate-specific Super PAC supporting the President Obama's re-election campaign, and with potential donors to the Super PAC.

Whether or not the Obama campaign officials and White House aides directly and explicitly solicit donations for the Super PAC is of no moment to the issue of coordination. The presence of campaign officials at Super PAC events demonstrates that the campaign and the Super PAC are working directly and collaboratively together to promote the re-election of the President. This collaboration falls squarely within the statutory standard that prohibits a candidate from working “in cooperation, consultation or concert with” an outside spender.

This conduct is so egregious that it even falls within the notoriously lax prohibition of the coordination regulation relating to “coordinated communications” promulgated by the Federal Election Commission. This regulation deems as coordination any spending for a campaign ad by an outside group that is based on “substantial discussion” between the group and the candidate or his campaign. 11 C.F.R. § 109.21(d)(3). Discussion is deemed “substantial” if “information about the candidate’s . . . campaign plans, projects, activities or needs is conveyed to a person paying for the communication and that information is material to the creation, production or distribution of the communication.” *Id.*

It defies common sense to believe that top Obama campaign officials and top political aides to President Obama will not be discussing “campaign plans,” “campaign activities” or “campaign needs” when they meet at fundraising events and small gatherings with potential million-dollar donors to a Super PAC exclusively devoted to helping the Obama campaign. Such discussions would constitute coordination between the campaign and the Super PAC. It would also mean that contributions raised by the Super PAC in excess of the contribution limits that apply to federal candidates would be illegal, both for the Super PAC to receive and the donors to give.

However, the FEC’s section 109.21 regulation that applies to “coordinated communications” is not the sole regulation that governs and implements the coordination restriction in the statute.

The FEC has a second regulation at 11 C.F.R. § 109.20 which applies to all expenditures other than those for “coordinated communications.” Such expenditures might include, for instance, fundraising expenses incurred by a Super PAC in solicitation of donations.

The regulatory standard for “coordination” that governs such expenditures is the same as the statutory standard – any expenditure “made in cooperation, consultation or concert with, or at the request or suggestion of” a candidate or his agents. 11 C.F.R. § 109.20(a). To the extent the Obama Super PAC is hosting and presenting Obama campaign officials at its fundraising events, it is plainly engaged in making expenditures for fundraising activities “in cooperation with” the Obama campaign. Such expenditures meet the standard of coordination in both the statute and the second regulation, and would be illegal.

In response to the announcement that Obama campaign officials would work directly with Priorities USA Action, Romney campaign officials moved quickly to announce that they will do the same thing and work directly with the candidate-specific Super PACs promoting Mitt Romney, Restore Our Future.

According to a published report, “Mitt Romney has decided to allow senior aides to headline fund-raising events held by a pro-Romney organization, a move that blurs the lines between his official campaign and supporting groups that are supposed to be independent.”⁵ The report further stated, “President Obama’s decision opens a new chapter in this campaign, and we

⁵ B. Mullins & P. Nicholas, “Romney Matches Obama in Stance on Outside Groups,” *The Wall Street Journal* (Feb. 10, 2012).

will not play by different rules,' said Romney campaign manager Matt Rhoades in a memo to senior staff expected to be sent late Thursday.”

For the same reasons that such active collaboration between the Obama campaign and Priorities USA Action would contravene the law restricting coordination, the similar cooperation between the Romney campaign and its candidate-specific Super PAC, Restore Our Future, would also contravene the law.

Some observers have expressed a mistaken assumption that a different FEC regulation, and a 2011 FEC advisory opinion based on it, authorize the activities announced by the Obama and Romney campaigns, because they allow a federal candidate (and the agents of such candidate) to “attend, speak or be a featured guest” at a fundraising event held by a group raising non-federal funds. *See* 11 C.F.R. §300.64; Ad. Op. 2011-12 (Majority PAC).

However, the regulation and advisory opinion do not supersede the statutory prohibition on coordination between a candidate and an outside group that is devoted exclusively to spending money to promote that candidate’s campaign.

Nor do they authorize participation by a candidate or the candidate’s agent in a fundraising event for an outside group where that participation would constitute prohibited coordination between the candidate and the outside group with regard to campaign spending by the outside group for the benefit of that candidate.

In particular, the advisory opinion does not address the situation here, where the candidate or his agents is participating in fundraising events for an outside group that is devoted exclusively to promoting the election of that candidate.

It is one thing for a candidate to “appear, speak or be a featured guest” at an event held by a group dedicated to supporting a range of other candidates, the situation addressed in the advisory opinion. It is something very different for a candidate to appear at an event for a group dedicated to supporting only that candidate’s election, and for the candidate or his agents to discuss his campaign plans, campaign message, campaign needs or campaign activities with that group. Neither the regulation nor the advisory opinion purports to allow this kind of coordination between a candidate and an outside group supporting only that candidate.

The announcement by the Obama campaign that it will actively collaborate with Priorities USA Action, and the parallel announcement by the Romney campaign that it will actively collaborate with Restore Our Future, both represent an alarming and dangerous escalation of the threat posed by candidate-specific Super PACs to eviscerate the limits on contributions to candidates that were enacted to prevent corruption.

Everyone knows – indeed, the Obama and Romney officials do not even deny – that the point of their joint efforts with their respective Super PACs is to encourage large donors to give six- or seven-figure donations to those PACs. Whether the Obama and Romney campaign officials make these solicitations overtly or implicitly, the bottom line is that this scheme operates as a circumvention of the limits on contributions that can be given to the Obama and

Romney campaigns in a situation where the candidates, or their agents, and the Super PACs are directly interacting and collaborating with each other.

By “blessing” a Super PAC devoted to campaign spending on its behalf and by then collaborating with that Super PAC in meeting with its potential donors, the Obama and Romney campaigns and their respective Super PACs are involved in active evasion of the law’s limits on contributions to candidates. Democracy 21 believes that these activities violate the campaign finance laws.

The statutory coordination restrictions that apply to activities by an outside spender “in cooperation, consultation or concert with” a candidate are specifically intended to protect the integrity of the federal contribution limits.

Without enforcement of the coordination provisions in the law, the limits on contributions to federal campaigns will continue to be circumvented on a wholesale basis by federal candidates actively collaborating with candidate-specific Super PACs dedicated to supporting their campaigns.

The relationship between Mitt Romney and his agents, and the candidate-specific Super PAC supporting Mitt Romney, Restore Our Future, also raises additional serious questions that warrant investigation by the Justice Department.

In our earlier letters, we noted regarding the Super PACs supporting Mitt Romney and President Obama that “it strains credulity to believe that the presidential candidate-specific Super PACs were established without some formal or informal involvement or signoff by the presidential candidates being supported or their campaigns or agents.”

We further noted that any such involvement would mean that future expenditures by the Super PAC were made in coordination with the campaign under the coordination provisions in the statute. A candidate cannot create or encourage the creation of a Super PAC and then claim the future operations of the Super PAC are taking place independently of the candidate.

This assertion in our earlier letters is supported by recent evidence with regard Mitt Romney and the Romney Super PAC.

In a published report dated January 17, 2012, Governor Romney said that he “encouraged the creation of a Super PAC.” This report, in *The Los Angeles Times*, stated:

“It’s not that I don’t support super PACs,” Romney told reporters Tuesday when asked how he squared appearing at fundraisers for the committee, Restore Our Future, with his distaste for the outsized role that the groups have played in the 2012 cycle. “We raise money for super PACs. We encourage super PACs. Each candidate has done that.”

“Like the others,” he said, “I also encouraged the creation of a super PAC, and following the guidelines laid out by the Supreme Court, encouraged people to make contributions to the super PAC.”⁶

This statement indicates that the Restore Our Future PAC was set up with the “approval” of, and with a “wink and nod” from, Mitt Romney who expressed his “encouragement” for the creation of the Super PAC established to undertake spending on behalf of his presidential campaign.

Democracy 21 believes the role played by Mitt Romney in the formation of the candidate-specific Super PAC supporting his campaign means the Super PAC does not and cannot operate independently from the Romney campaign, within the meaning of the law and Supreme Court decisions.

In addition, Mitt Romney reportedly has recently talked to and met with a multimillion dollar donor to the candidate-specific Super PAC supporting New Gingrich.

According to a recent report, Mr. Romney had a telephone conversation two weeks ago with Sheldon Adelson who, with his wife, has reportedly given \$10 million to Winning Our Future, the candidate-specific Super PAC supporting former Speaker Newt Gingrich.⁷

According to another report, Governor Romney subsequently met with Adelson in Nevada on February 3, the day before the Nevada caucus.⁸

Federal candidates are prohibited from soliciting unlimited contributions. These reports raise serious questions about whether the Romney phone call to Adelson or his meeting with Adelson involved any explicit or implicit request by Romney for Adelson to make unlimited contributions to Restore Our Future. Such questions should be investigated by the Justice Department.

Meetings between a presidential candidate or the candidate’s agents, and donors, or potential donors, of unlimited contributions to the Super PAC supporting that candidate contravene the purpose of the prohibition on coordination.

As the Supreme Court in *Buckley* discussed, it is the “absence of prearrangement and coordination of an expenditure with the candidate” that “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.* at 47 (emphasis added).

⁶ M. Reston, “Mitt Romney defends raising funds for ‘super PAC’,” *The Los Angeles Times*, (January 17, 2012).

⁷ J. Zeleny and J. Rutenberg, “Gingrich Patron Could Have a Plan B,” *The New York Times* (Feb. 5, 2012).

⁸ M. Haberman, “Adelson met with Newt, then Romney, last week,” *Politico* (Feb. 8, 2012).

When a presidential candidate or his agents meet directly with large donors to the Super PAC supporting that candidate, or with a donor whose support that candidate is seeking, the “danger” that unlimited contributions will be given to the Super PAC “as a quid pro quo for improper commitments from the candidate” is at a zenith.

We strongly urge the Justice Department to carefully review the new information we are submitting today along with the information we have previously provided.

We strongly urge the Justice Department to promptly open an investigation into the candidate-specific Super PACs supporting the Obama and Romney campaigns to determine whether they are engaged in violations of the nation’s campaign finance laws.

Sincerely,

A handwritten signature in black ink, appearing to read "Fred Wertheimer", with a long horizontal flourish extending to the right.

Fred Wertheimer
President

Copy to:

Lanny Breuer, Assistant Attorney General, Criminal Division
Jack Smith, Chief, Public Integrity Section