

Federal Judge Rebuffs Congressional Bid to Eliminate Super PACs

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On February 28, federal District Judge Emmet Sullivan rejected an attempt by Sen. Jeff Merkley, Rep. Ted Lieu, and the late Rep. Walter Jones (among others) to invalidate the legal precedent that recognized super PACs. While the outcome was expected given existing judicial precedent, the continued progression of this case through the federal court system is worth watching to see whether other courts reconsider the lawfulness and constitutionality of super PACs.

The federal case began when a group of elected officials, activists, and organizations – spearheaded by a group called Free Speech for People – filed a July 2016 complaint with the Federal Election Commission (FEC) against 10 super PACs. The complaint alleged that these committees, including those aligned with both Democratic and Republican interests, were accepting contributions greater than the \$5,000 annual limit that the federal campaign finance statute permits committees to accept. While the D.C. Circuit’s *en banc* decision in *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010), held that this statute was unenforceable after the U.S. Supreme Court’s *Citizens United* decision, the complainants alleged that developments since 2010 have shown that the “widespread perception of quid pro corruption” associated with super PACs requires reinstatement of the \$5,000 limit.

The FEC dismissed the administrative enforcement case unanimously in May 2017, noting that the agency had even issued a 2010 advisory opinion recognizing that *SpeechNow* was binding precedent. The complainants, however, were undeterred by this authority, sought review of the FEC’s dismissal from the federal courts, and argued that the FEC should have refused to acquiesce to the *SpeechNow*

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decision. Judge Sullivan was clear, however, that as a lower court judge, he was bound by existing legal precedent and upheld the FEC's dismissal of the enforcement action. The judge's opinion explained that he was not prepared to label a "binding precedent of the D.C. Circuit [as] unlawful."

Based on public sources, the larger aim of those behind the lawsuit is to continue pursuing this case through the appellate courts until the case reaches a level where those hearing the case are authorized to overrule existing precedent. Originally, supporters of this strategy expected that Hillary Clinton would likely defeat Donald Trump in the November 2016 elections, replacing the late Justice Antonin Scalia with a more moderate Justice who would be willing to reconsider the rationale behind super PAC-related decisions. While that did not happen, as President Donald Trump appointed conservative Justice Neil Gorsuch to succeed Scalia, proponents of the lawsuit nevertheless believe that "Chief Justice Roberts has given signals that might suggest he would be willing to sustain limits on contributions to super PACs even within the framework of *Citizens United*." So the litigation appears likely to continue for the foreseeable future.

Given that super PACs are now well-established players in modern political campaigns, any reversal in the underlying judicial opinions would have a significant impact on the political process and the First Amendment rights of individuals and entities. Wiley Rein will continue to track developments in this litigation as they occur.

Judge Sullivan's opinion is available from the FEC's website at https://www.fec.gov/resources/cms-content/documents/Lieu_dc_opinion.pdf.