

MONEY IN POLITICS 101:

WHAT YOU NEED TO KNOW ABOUT CAMPAIGN FINANCE AFTER *CITIZENS UNITED*

Reports on the 2012 election focus as much on the role of big money as they do on the latest polls. One can't read a newspaper without seeing a story on the outsized role of Super PACs or the record-breaking amounts spent by secretive non-profits. Hardly an hour passes on the cable news networks without a report on whether Mitt Romney or Barack Obama has more money in the bank.

While there's no shortage of reporting on the latest fundraising totals, it's a lot harder to find any straightforward explanations of how the current campaign finance system works. To help make sense of the current campaign finance system and how it came to resemble the Wild West, here are some answers to frequently asked questions.

Q: There are a lot of stories about unlimited political spending and million dollar donations. Aren't there limits on the size of political contributions?

A: To understand contribution limits, one has to understand that different limits apply depending on who is giving and who is receiving the contributions.

There are limits on donations to candidates and political parties.¹ The Supreme Court has declared that such restrictions are constitutional because allowing unlimited contributions to elected officials (or political parties) could lead to corruption.² Current rules set a \$2,500 per-person per-election limit for federal candidates.³ (Each state sets its own limits on donations to state or local candidates.)⁴ There is a \$30,800 per-person per-year limit on donations to national party committees, and a \$10,000 total limit on per-person contributions to state, district or local party committees.⁵

But different rules apply to non-party, outside groups called political action committees, known as PACs. If a PAC contributes directly to candidates, the most a person can donate to the PAC is \$5,000.⁶ Significantly, if a PAC declares that it will spend its money totally independently from a candidate's campaign, then there are no limits on donations to the PAC. These groups, which can receive unlimited contributions from individuals, corporations, or unions, are commonly called "Super PACs."

Finally, some non-profit groups, called “social welfare” organizations, or “501(c)(4) groups,” can also accept unlimited contributions from individuals, corporations, and unions. The primary purpose of these groups cannot technically be political, but they can spend substantial amounts on political activities, such as TV commercials.⁷

**Q: Is there more outside spending this year than in previous years?
How much more?**

A: Yes. Outside groups are on pace to spend more during this election than ever before. So far, third party groups—including PACs, Super PACs, and 501(c)(4)s—have reported spending nearly \$330 million—nearly five times the amount reported at the same point during the 2010 midterm elections and nearly three times the amount reported at the same point during the 2008 elections.⁸ With several weeks remaining in the election, the amount of outside spending has surpassed the 2008 total by nearly \$30 million, and since outside spending usually spikes in the final month before an election, the total outside expenditures are likely to dramatically increase from four years ago.⁹

Q: About these Super PACs—what are they and where did they come from?

A: Traditional PACs wield influence by either donating directly to candidates or spending independently (by airing television advertisements, for example). But traditional PACS have a contribution limit of \$5,000 per-person per-year.

By contrast, there are no limits on Super PAC donations. Super PACs are a consequence of the Supreme Court’s ruling in *Citizens United v. FEC*. Remember that the Supreme Court previously upheld donor limits for direct contributions to campaigns and party committees because the Court believed that unlimited contributions could lead to corruption. But in *Citizens United*, the Court declared that independent political spending, because it was not coordinated with candidates, could not lead to corruption concerns.¹⁰

After *Citizens United*, a federal appellate court in Washington, D.C. heard a case called *SpeechNow.org v. FEC*. In *SpeechNow*, the court interpreted *Citizens United* to mean that as long as a PAC spends its money independently (i.e. does not contribute to, or coordinate with, a candidate), the PAC is free from any contribution limits.¹¹ Provided a political committee restricts their spending to independent expenditures, it can accept unlimited contributions. These political committees are what is commonly known as Super PACs.

Q: So *Citizens United* is responsible for Super PACs. Is *Citizens United* responsible for the high levels of outside spending this year?

A: At least in part: the extraordinary levels of outside spending this year would not be possible without *Citizens United*. In the 2010 election, the first campaign cycle after *Citizens United*, outside groups reported spending \$298 million, more than a fourfold increase over the amount of outside spending in 2006, the last midterm election before *Citizens United*.¹² Prior to 2010, outside groups engaged in political activity were routinely fined by the FEC for accepting contributions that exceeded federal limits.¹³ Seven-figure contributions that undoubtedly would have provoked FEC enforcement actions before 2010 are a major source of Super PAC funding today.

As of June 30 2012, 47 donors contributed \$1 million or more to Super PACs, accounting for 57 percent of individual donations to these groups.¹⁴

If Super PACs had to adhere to the contribution limits in place before *Citizens United*, they would have raised only \$11.2 million in contributions from individuals during the 2012 cycle compared to the \$346 million they have actually raised. In other words, 97 percent of contributions to Super PACs would not have been possible without *Citizens United*.

Q: What about Super PACs that work closely with candidates? How can Super PACs work closely with campaigns if they're supposed to be "independent?" What are the coordination rules?

A: While Super PACs are supposed to be totally independent—after all, that's the only reason they don't have contribution limits—the reality is that they can do a whole lot that looks to most people like “coordination” with campaigns.

The Federal Election Commission sets the rules about what activities are considered independent or “coordinated” with a campaign. At first glance, the rules are simple. As the FEC's website explains, “In general, a payment for a communication is ‘coordinated’ if it is made in cooperation, consultation or concert with, or at the request or suggestion of, a candidate, a candidate's authorized committee or their agents, or a political party committee or its agents.”¹⁵ But the FEC's rules have evolved in such a way that determining what is coordination is now a highly technical and murky exercise.¹⁶

Unfortunately, the FEC rarely provides clear guidance. Part of the problem is that each party appoints three of the FEC's six commissioners, which makes consensus difficult. A majority vote is required for an advisory opinion. But since *Citizens United*, the Commission has repeatedly deadlocked on specific

questions about coordination and independence. When the commissioners split 3-3, the FEC doesn't issue clear guidance.

In perhaps the most notorious case, American Crossroads, Karl Rove's Super PAC, requested an opinion from the FEC declaring that advertisements were not "coordinated" with campaigns, even if the candidates appeared in the ads and consulted with the Super PAC on developing the scripts. Under any common sense approach, such ads would be deemed coordinated. But not to the FEC—it deadlocked on whether or not such ads constituted "coordinated communications"—and, in the end, the agency offered no guidance at all.¹⁷ In another logic defying ruling, the FEC has said that it is not coordination if a candidate solicits funds for a Super PAC.¹⁸

With no bright line rules about coordination, and with the FEC allowing conduct that would seem to most people to be coordination, Super PACs can work extremely closely with campaigns without fear of sanctions.

Q: *Citizens United* also made election spending by corporations legal. How much are corporations spending vs. individuals? What about unions?

A: As of June 30, 2012, businesses had contributed \$34.2 million to Super PACs, nearly twice the amount donated by unions (\$17.3 million). But individuals dominated giving to Super PACs, contributing more than \$230 million.¹⁹

But the amount of corporate spending cannot be fully determined because of tax-exempt groups that do not disclose their donors. An investigation by the *New York Times* uncovered several large contributions by corporations to tax-exempt groups, including six- and seven-figure contributions from American Electric Power, Aetna, Prudential Financial, Dow Chemical, Merck, Chevron and MetLife.²⁰

By donating to non-profits, corporations can avoid shareholder criticism about using revenues for political purposes as well as consumer reaction to their political stance. Consequently, it is reasonable to suspect that, because of non-profits' ability to hide donations, they are the preferred vehicle for corporate political spending.

Q: Has outside spending benefited one party more than the other?

A: In 2010, conservative groups reported nearly twice the outside spending as liberal groups. So far in the 2012 election cycle, conservative groups have reported three times more spending than liberal groups.²¹

Q: How much outside spending is disclosed vs. not disclosed?

A: During the 2010 election, non-profit “social welfare” organizations—which do not disclose their donors—outspent Super PACS—which do—by a 3-2 margin, accounting for \$95 million in spending.²² Trade organizations such as the U.S. Chamber of Commerce, which spent \$33 million during the 2010 elections, are also exempt from federal disclosure requirements.²³

Initial indications suggest that secret spending by non-profits is playing an equally central role in the 2012 elections. The Campaign Media Analysis Group estimates that as of July 2012, dark money totaling nearly \$100 million accounted for two-thirds of all spending by the largest outside spenders.²⁴ The Huffington Post found that groups that do not have to disclose their donors had spent \$172 million through the end of July—nearly as much as the \$174 million spent by outside groups that do disclose their contributors, though total spending by non-profit groups is likely far greater.²⁵ ProPublica reports that as of July 2012, two of the largest political non-profits, Crossroads GPS and Americans for Prosperity, have eclipsed the combined ad buys of both Super PACs (\$55.7 million) and political parties (\$22.5 million) with \$60 million in television spending.²⁶

Non-profit groups have also dramatically escalated spending on express advocacy—ads urging voters to vote for or against specific candidates. Through September 13, 501(c) organizations have spent \$67.4 million on express advocacy compared to \$44,000 and \$3.3 million at the same point in 2006 and 2008 respectively, the two elections before *Citizens United*.²⁷ Though only a fraction of secret outside spending, the figures offer a snapshot of the growing role of undisclosed spending.

Q: How responsible is the FEC for the current system? What about the IRS?

A: The FEC has helped foster today’s hidden system of campaign finance. For example, by not clearly defining what constitutes coordination with a campaign, the FEC has opened the door to all sorts of mischief between campaigns and allegedly independent groups, which, unlike campaigns, do not have donor limits. As a result, contribution limits have been rendered virtually meaningless.

The FEC’s failure to enforce federal disclosure laws has also enabled large amounts of secretive spending in elections. Federal law requires groups to report their donors to the FEC if they run either of two types of election advertisements: (a) ads that expressly advocate the election or defeat of candidates (e.g., “Vote for Smith”);²⁸ or (b) “electioneering communications” or “sham issue ads”—ads that mention a specific candidate in the days immediately before an election but stop short of saying “vote for” or “vote against” the candidate (e.g., “Call Smith and tell him to lower taxes”).²⁹ But the FEC has issued regulations that open up giant loopholes in federal disclosure law.³⁰

The FEC's regulations say that outside groups only have to report their donors if contributions are earmarked for specific advertisements.³¹ Unsurprisingly, almost no donors earmark donations in this way, so the FEC's regulations allow outside spending groups to avoid reporting their donors.

The IRS has helped facilitate the current system by not investigating whether non-profits are engaged in extensive political activity and abusing tax regulations. 501(c)(4) organizations are supposed to be "social welfare" organizations, whose primary purpose is advancing the public good, according to the tax code.³² Yet these organizations are now operating essentially as unregulated political committees. Like the FEC, the IRS has shirked its regulatory mandate, failing to set unambiguous rules about what percentage of funds these non-profits may spend on political activity. The IRS has an obligation to investigate these groups to ensure they're not violating tax laws. The IRS should revoke tax-exempt status for groups that are political committees in disguise and are primarily engaged in election-related activity, but it has not yet done so.³³

Q: Are publicly-financed elections the cure for big money in politics? Isn't public financing a failed experiment?

A: After Watergate, Congress adopted a public financing system for presidential elections. The system served the country well for more than two decades. Unfortunately, Congress never modernized the system, and the pool of available public funds did not keep pace with the dramatic escalation in campaign costs. As a result, in 2008, President Obama chose not to use public financing for his primary or general election campaigns. In 2012, neither candidate is using public financing.³⁴ Reps. David Price (D-NC), Chris Van Hollen (D-MD) and Walter Jones (R-NC) have introduced legislation to repair the presidential campaign finance system.³⁵ A companion bill has been introduced by Sen. Mark Udall (D-CO).³⁶

Public financing has succeeded in several states and cities. Arizona, Connecticut, and Maine, for example, have highly successful public financing systems for state elections. In 2011, the Supreme Court ruled unconstitutional one provision of a certain type of public financing that was used in Arizona that provides additional funding to publicly financed candidates facing high-spending opponents or large amounts of independent expenditures.³⁷ Nevertheless, the Court reaffirmed the basic constitutionality of public campaign financing.³⁸

An alternative, New York City's public financing system, has thrived more than 20 years and is a model for national reform. It poses no constitutional problems. The program is simple, but has powerful consequences. The role of small donors is amplified because donations up to \$175 from New York City residents are matched at a rate of 6:1. In other words, a \$20 donation is actually worth \$140 to the candidate (6 x \$20 = \$120 + the \$20 original contribution = \$140). In 2009, small donations and matching funds accounted for 63 percent of the individual contributions in the New York City elections.³⁹

Q: What else can be done? What does the future look like?

A: A public financing system based on small donor matching funds can provide an important counterforce to the role of big money. Internet and social media fundraising will make a small donor matching funds system even more powerful. Such a system would decrease the opportunities for corruption of federal officeholders and government decisions. Candidates would have an alternative means to finance their campaigns without becoming obligated to special interests. A small donor matching system should be adopted for both congressional and presidential elections.

But small donor matching funds alone cannot repair the broken campaign finance system. More robust disclosure is necessary so the electorate knows the identities of those seeking to influence them. Congress should pass legislation that replaces the obsolete regulations on “coordination” with meaningful rules that ensure groups claiming to be legally “independent” are not merely campaign subsidiaries. The IRS needs to police groups claiming non-profit status to prevent exclusively political organizations from abusing the tax code by hiding their donors. And the chronically dysfunctional FEC should be replaced by a new agency that does not deadlock along partisan lines, so that the campaign finance laws are actually enforced.

For more information contact Jonathan Backer at (646)292-8371 or at jonathan.backer@nyu.edu.

ENDNOTES

¹ See *Contribution Limits 2011-2012*, FEC, <http://www.fec.gov/pages/brochures/contriblimits.shtml> (last visited Aug. 12, 2012).

² *Buckley v. Valeo*, 424 U.S. 1, 28-29 (1976).

³ *Contribution Limits*, *supra* note 1.

⁴ NAT'L CONFERENCE OF STATE LEGISLATURES, STATE LIMITS ON CONTRIBUTIONS TO CANDIDATES 2011-2012 (2011), *available at* [http://www.ncsl.org/Portals/1/documents/legismgt/Limits to Candidates 2011-2012.pdf](http://www.ncsl.org/Portals/1/documents/legismgt/Limits%20to%20Candidates%202011-2012.pdf).

⁵ *Contribution Limits*, *supra* note 1.

⁶ *Id.*

⁷ ALLIANCE FOR JUSTICE, ELECTION YEAR ACTIVITIES FOR 501(C)(4) SOCIAL WELFARE ORGANIZATIONS, *available at* <http://www.afj.org/assets/resources/nap/election-year-activities-for-501c4s.pdf>.

⁸ Ctr. for Responsive Politics, *Total Outside Spending by Election Cycle, Excluding Party Committees*, OPENSECRETS.ORG, http://www.opensecrets.org/outsidespending/cycle_tots.php?cycle=2012&view=Y&chart=N # viewpt (last visited Sept. 11, 2012).

⁹ Spending in October of 2010 accounted for more than 57 percent of the outside spending reported during the election cycle. Calculations based on data from the Ctr. for Responsive Politics.

¹⁰ *Citizens United v. FEC*, 130 S. Ct. 876, 910-11 (2010).

¹¹ *SpeechNow.org v. FEC*, 599 F.3d. 686, 695 (2010).

¹² *Total Outside Spending*, *supra* note 8.

¹³ Press Release, Fed. Election Comm'n, FEC to Collect \$775,000 Civil Penalty From America Coming Together (Aug. 29, 2007), *available at* http://www.opensecrets.org/outsidespending/cycle_tots.php?cycle=2012&view=A&chart=N# viewpt; Press Release, Fed. Election Comm'n, FEC Collects \$630,000 in Penalties From Three 527 Organizations (Dec. 13, 2006), *available at* <http://www.fec.gov/press/press2006/20061213murs.html>; Press Release, Fed. Election Comm'n, Club for Growth Agrees to Pay \$350,000 Penalty for Failing to Register as a Political Committee (Sept. 5, 2007), *available at* <http://www.fec.gov/press/press2007/20070905cfg.shtml>.

¹⁴ BLAIRE BOWIE & ADAM LIOZ, DEMOS & U.S. PIRG EDUC. FUND, MILLION-DOLLAR MEGAPHONES: SUPER PACS AND UNLIMITED OUTSIDE SPENDING IN THE 2012 ELECTION 8 (2012), *available at* <http://www.demos.org/sites/default/files/publications/MegaphonesMillionaires-DemosUSPIRG.pdf>.

¹⁵ *Coordinated Communications and Independent Expenditures*, FEC (Feb. 2011), <http://www.fec.gov/pages/brochures/indexp.shtml#CC>.

¹⁶ 11 C.F.R. § 109.21.

- ¹⁷ Paul Blumenthal, *Karl Rove's 'Fully Coordinated' Super PAC Ads Drive the FEC to Deadlock*, HUFFINGTON POST (Dec. 1, 2012, 3:59 PM), http://www.huffingtonpost.com/2011/12/01/karl-roves-stephen-colbert-fully-coordinated-super-pac-ads_n_1123999.html.
- ¹⁸ Peter H. Stone, *Democrats and Republicans Alike Are Exploiting New Fundraising Loophole*, IWATCHNEWS.ORG (July 27, 2011, 5:06 PM), <http://www.iwatchnews.org/2011/07/27/5409/democrats-and-republicans-alike-are-exploiting-new-fundraising-loophole>.
- ¹⁹ BOWIE & LIOZ, *supra* note 14, at 8 fig. 8.
- ²⁰ Mike McIntire & Nicholas Confessore, *Tax-Exempt Groups Shield Political Gifts of Businesses*, N.Y. TIMES, July 7, 2012, at A1.
- ²¹ Ctr. for Responsive Politics, *supra* note 8.
- ²² Michael Beckel, *Secret Donors Underwrite Attack Ads*, IWATCHNEWS.ORG (June 18, 2012, 3:35 PM), <http://www.iwatchnews.org/2012/06/18/9147/nonprofits-outspent-super-pacs-2010-trend-may-continue>.
- ²³ McIntire & Confessore, *supra* note 20.
- ²⁴ *Id.*
- ²⁵ Paul Blumenthal, *'Dark Money' Hits \$172 Million in 2012 Election, Half of Independent Group Spending*, HUFFINGTON POST (July 29, 2012, 6:17 PM), http://www.huffingtonpost.com/2012/07/29/dark-money-2012-election_n_1708127.html.
- ²⁶ Kim Barker, *Two Dark Money Groups Outspending All Super PACs Combined*, PROPUBLICA (Aug. 12, 2012, 1:50 PM), <http://www.propublica.org/article/two-dark-money-groups-outspending-all-super-pacs-combined>.
- ²⁷ Robert Maguire, *What Citizens United (et al) Wrought: The Shadow Money Explosion*, OPENSECRETS Blog (Sept. 18, 2102, 12:53 PM), <http://www.opensecrets.org/news/2012/09/what-citizens-united-et-al-wrought.html>.
- ²⁸ 2 U.S.C. § 434(g)(2).
- ²⁹ 2 U.S.C. § 434(f).
- ³⁰ Josh Israel, *Court Rules FEC Ignored Law; Shielded Donors from Disclosure*, THINKPROGRESS (Apr. 9, 2012, 4:00 PM), <http://thinkprogress.org/justice/2012/04/09/460378/court-rules-fec-ignored-law-disclosure/>
- ³¹ 11 C.F.R. § 140.20(c)(9).
- ³² *Social Welfare Organizations*, IRS, <http://www.irs.gov/Charities-&-Non-Profits/Other-Non-Profits/Social-Welfare-Organizations> (last visited Sept. 18, 2012).
- ³³ Press Release, Campaign Legal Ctr., *IRS to Consider Changes to 501(c)(4) Eligibility Rules as Requested by Campaign Legal Center and Democracy 21* (July 23, 2012), *available at* http://www.campaignlegalcenter.org/index.php?option=com_content&view=article&id=1811:july-%202012-irs-to-consider-changes-to-501c4-eligibility-rules-as-requested-by-campaign-legal-center-and-democracy-21&catid=63:legal-center-press-releases&Itemid=61
- ³⁴ Michael Luo & Jeff Zeleny, *Obama, in Shift, Says He'll Reject Public Financing*, N.Y. TIMES, June 20, 2008, at A1.

³⁵ Presidential Funding Act, H. 414, 112th Cong.

³⁶ Presidential Funding Act, S. 3312, 112th Cong.

³⁷ *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2827-2828 (2011).

³⁸ *Id.*, at 2828.

³⁹ Michael J. Malbin, Peter W. Brusoe & Brendan Glavin, 11 ELECTION L.J. 3, 15 (2012).