

A stylized map of the United States composed of a grid of dots. Some dots are grey, some are red, and some are white, creating a pixelated effect. The map is centered on the page.

Citizens United

Super PACs and exploding costs of American Elections

BARBARA KENNELLY, JOHN TANNER

November 2012

- Costs of political campaigns in the United States, already high by world standards, are increasing exponentially, while regulation of campaign finance is eroding with a pervasive focus on negative advertising. Recent decisions by the U.S. Supreme Court are widely perceived to be a primary factor in this increased spending and the trend toward undisclosed and regulated, independent expenditures by a very small number of extremely wealthy individuals, corporations and unions.
- The impact of these developments on the outcome of elections and upon the American public's perception of government integrity is hotly debated, but some conclusions are possible.
- A number of proposals are on the table to address these issues. We support re-establishing a balanced, integrated approach to campaign finance regulation that combines elements of public financial support, contribution limitations and donor disclosure, a pattern common to other Western democracies.
- Resolution of these issues however will only come when neither major party perceives a distinct advantage in the explosion of unregulated election spending and when the American people make it clear that they will not accept current trends.

The Explosion of Campaign Spending since 2000

American political campaigns have always cost money, although Abraham Lincoln managed to be elected spending only 2.8 million in current dollars. Adjusted for inflation, presidential campaign spending between 1972 and 2000 was relatively stable, between 300 million and 500 million in 2011 US-Dollar. In 2004 the candidates spent 1.2 billion US-Dollar followed by 2008 in which they doubled this total to 2.4 billion US-Dollar. The Center for Responsive Politics predicts that 2.5 billion US-Dollar will be spent this year, but of perhaps greater concern are the soaring sums being raised by outside groups that will total at minimum 750 million US-Dollar.

Congressional and local election costs have escalated sharply as well. The Massachusetts Senate candidates have already raised over 50 million US-Dollar, and seven other Senate races are above 20 million US-Dollar and counting. When we first entered Congress, 200,000 US-Dollar was a substantial campaign. This year in one district alone, Ohio's 8th, the candidates have already raised more than 18 million US-Dollar. The race in Connecticut's 5th district has reached nearly 10 million US-Dollar. Both candidates in this race have received 90 percent of their money either from large contributions or by self-financing.¹ This pattern is increasingly typical across the country.

Negative campaigning is not new either. The personal attacks endured by our nation's founding fathers would be considered well beyond the bounds of decency, even in today's sharply hostile and partisan environment. But the predominance of negative advertising is high and appears to be growing. An analysis of television advertisements by the *Washington Post* through August 30 concludes that 80 percent were negative. Both candidates exceeded 70 percent negative in their direct advertising. Two of the largest outside groups, American Crossroads and American Prosperity were 100 percent negative.²

A visitor from another planet after watching endless negative campaign ads might conclude that the whole

process is to find the absolute worst people to serve in public office, not the best. All too often, even those of us here on earth get the same impression.

The Impact of Citizens United and other Supreme Court decisions on American campaign finance

Current campaign rhetoric, especially from Democrats, blames the Citizens United decision, *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010), along with the earlier 1976 decision in *Buckley v. Valeo*, *Buckley v. Valeo*, 424 U.S. 1 (1976), and the subsequent decision to strike down the state of Montana's prohibition on corporate contributions as the cause of both increased spending and the concentration on very large, undisclosed funding.

These court decisions have opened up a floodgate of oftentimes intransparent and unlimited funds into the political system. Super PAC's, although the main target of criticism, are not the only players in this game. A century ago Congress created 501(c)(4) nonprofits, which is a legal status that allows groups to operate tax-free so long as they are »operate exclusively for the promotion of social welfare.« The IRS later amended this making the requirement that enhancing social welfare must be the »primary« purpose of the group. These groups, like super PACs can collect unlimited contributions, but unlike Super PAC's do not have any obligation to make public the names of their donors. It is technically against the rules for these groups to engage in politics if they wish to keep their tax-exempt status, but for these organizations it does not matter because there are no institutions or mechanisms to enforce the rules.

Take two examples: In 2008 the American Future Fund applied to the IRS for tax exempt status as a 501(c)(4) organization and checked »no« on whether it planned to participate in politics. On the same day it submitted its application, it uploaded a YouTube ad praising a Republican member of congress. A different »social welfare« organization, the Center for Individual Freedom, reported 2.5 million US-Dollar on advertising to election officials in 2010, but it reported to the IRS that is spent nothing to influence the elections, labeling these ads as »educational« or »legislative activities.«

1. OpenSecrets.org, Center for Responsive Politics, September 6, 2012.

2. Kantar Media/CMAG, Wilson Andrews, et al., »Tracking TV ads in the Presidential Campaign,« *Washington Post* online.

The share of ads from outside groups that don't disclose donors has risen from 2 percent in 2006 to 40 percent in 2010 according to the Center for Responsive Politics, and will no doubt be much higher in 2012. In many ways »groups« is a misnomer for the leading Super PACs. Over 80 percent of Super PAC funds have come from less than 200 individuals, and half have come from just 22 billionaires.³

Although big money is winning this cycle, accounting more than 75 percent of donations, candidates have not given up on small donors. In fact they use the specter of the big money donations to constantly hammer at small donors. Once a person gives to a party or candidate, they can expect multiple emails and phone calls daily seeking further donations. Hard strapped middle class donors can't help but get frustrated when they compare the 50 or 100 US-Dollar they can ill afford against the multimillion checks of the super wealthy.

Corporations have been hesitant to donate to super PACs for fear of a public relations backlash. Target is a cautionary case study when in 2010 its CEO ended up apologizing for a 150,000 US-Dollar donation to an outside group supporting an anti-gay gubernatorial candidate in Minnesota. Therefore, if a corporation wishes to engage in the political process without alienating potential customers, 501(c)(4) organizations are the smarter choice, as they do not have to disclose their donors.

Technically, billionaires could make big contributions before Citizens United and related cases. George Soros and others began this trend, in his case for Democrats, as early as 2004, when he and other wealthy liberals spent 200 million US-Dollar to try to defeat George W. Bush.⁴ But the Supreme Court has now removed much of the uncertainty around this type of activity by throwing out ambiguous rules and potential liability for violation. So at a minimum, Citizens United et al. gave a clear green light to this type of spending. Justice Kennedy in his opinion on Citizens United warned of the importance of disclosure and transparency as the means to prevent

abuse.⁵ What we have now in the case of the 501(c)(4)'s is neither disclosure nor transparency. In the case of super PACs, the disclosure oftentimes happens after the election, at which point it is too late for the voters to voice their disagreement at the polls.

The Impact of the New Campaign Finance Environment

To what extent has the explosion of undisclosed outside campaign spending affected elections and government officials? Those bankrolling Super PACs must believe they will help swing elections their way or they wouldn't be spending such vast sums. As we have mentioned, the effort against George W. Bush didn't prove decisive, although spending by groups such as the Swiftboat Veterans – a political group of United States Vietnam veterans formed during the 2004 presidential election for the purpose of opposing John Kerry's candidacy – may have been a good investment in defeating Senator Kerry.

At the presidential level there is a good case that beyond a certain point more and more ads have a diminishing return. President Obama even made a joke of this during his convention speech when he noted that people were likely tired of hearing messages he approved. Americans are generally well aware of the candidates, and have a plethora of means in the new age to receive campaign messages other than television advertisements. There is even some evidence that voters are turned off by negative advertising, increasing the likelihood that they do not vote, rather than changing their vote. It also remains to be seen to what extent the impact of the additional advertising is offset by attacks on Super PACs by Democrats as a major campaign issue. A Washington Post/ABC News poll in March found that 69 percent of the public supports a ban on Super PACs, and this number climbs to 78 percent among independents. Nonetheless, the Obama campaign has now decided to actively join the effort to solicit big money donors fearing being outspent and losing the election for taking the moral high ground.⁶ It reminds us of the nuclear arms race overkill.

3. Sen. Dick Durbin, Hearing of the Senate Judiciary Committee, Subcommittee on the Constitution, Civil Rights and Human Rights, »Taking Back Our Democracy: Responding to Citizens United and the Rise of Super PACs,« July 24, 2012.

4. Matt Bai, »How Much Has Citizens United Changed the Political Game?«, *New York Times* online, July 17, 2012.

5. Steven Engelberg and Kim Barker, »Citizens United and the Rise of Secret Campaign Cash«, *Huffingtonpost*, August 27, 2012.

6. Peter Wallstein and Tom Hamburger, »The Fundraising Gap: A worried scramble for more donations«, *Washington Post*, September 6, 2012, p. 1

At the state and local level, the impact may be much more decisive. Information sources are more limited and a million dollars can still be real money. Connecticut has responded to a series of corruption cases by enacting a voluntary public financing plan for state legislators linked to raising small in-district contributions and a ban on money from lobbyists and state contractors that has worked quite well thus far.⁷ Whether it can withstand the flood of potential big money contributions remains to be seen.

Elections are decided on a myriad of factors and we will probably never be able to conclusively determine the precise extent that large dollar contributions play. But big dollar dominance intuitively reinforces perceptions of corruption in government and dominance of special interests. The increased demands of fundraising claim more and more time of legislators at all levels of government, reducing the time and effort they can spend on studying problems and developing innovative solutions to them. We can both attest that fundraising is the least attractive aspect of public service and serves as a deterrent to many otherwise well qualified men and women choosing to run for office.

A little noted aspect of the shift from fundraising toward independent »groups« is a potential lack of control by candidates over their own campaigns. This leads to a dilemma: If the candidate accepts the backing of super PACs or 501(c)(4)'s he or she is then obligated to support the agenda of this group even if it is not in line with his or her political beliefs or more importantly the best interest of the constituency. Even after Citizens United, these outside groups are legally prohibited from coordinating with the campaigns, although this prohibition has loopholes, for example with hiring the candidate's former staff members and consultants. To the extent they truly remain independent they may stress different issues, in different ways than the candidate might desire. If nothing else they have the potential to box in a candidate on a hard position, making it more difficult than it already is to have flexibility and ability to compromise, values essential for legislating. There is a real danger of the tail wagging the dog.

7. Beth Rotman, Director of the Connecticut Citizens' Election Program, »The Citizens Election Program, Creating Change in the Land of Steady Habits«.

Potential Resolution of the Issue

There are potential tools in place today that could better regulate the system. The Federal Election Commission could be more forthright in the enforcement of its rules. The Internal Revenue Service might take a closer look at the true nature of these groups in determining tax exempt status.


Over the years the federal government along with its states and localities, has, on a bipartisan basis, enacted elements of public financing, contribution limitations and disclosure to provide an integrated system that respects legitimate opportunities for free speech without speech going to the highest bidder. As former Congressman and Governor Buddy Roemer, who has been elected as a Democrat and Republican, noted, that when he was in the House of Representatives conservatives were for disclosure, liberals were for caps on giving, and now we have neither.⁸ He can also speak from experience about the role of big donor advertising since he was targeted by a last minute 500,000 US-Dollar campaign from the pocket of a company executive who was subject to pollution control action.⁹

Some mix of these approaches is in place in virtually all the Western democracies with generally positive results, although the process has been evolutionary in response to real world developments. Clarity of rules and consistency in enforcement must be a foundation for any such rules of the road.

Insofar as the law now permits unlimited anonymous contributions, one would be hard pressed to design a system which more undermines the confidence of the average citizen in the political and electoral process. Not only is the process now virtually for sale, it is not even possible for the voters to ascertain who is expending vast sums of money or what motive is driving such behavior. We believe that this US Supreme Court decision contributes a real and present danger to our democratic ideals and our republic.

8. Charles »Buddy« Roemer, Hearing of the Senate Judiciary Committee, Subcommittee on the Constitution, Civil Rights and Human Rights, »Taking Back Our Democracy: Responding to Citizens United and the Rise of Super PACs,« July 24, 2012.

9. Allenah, »Buddy Roemer: 2012 Presidential Profile«, *Conservative Daily News*, June 5, 2011.



Whether a Constitutional amendment is required to overcome the impact of Citizens United and other court decisions needs to be the subject of considerable debate. We should not amend our founding charter lightly, especially when it touches on one of our most fundamental rights, free speech. Clearly it would only come about when there is a strong consensus on at least a basic path forward.

Preconditions for Progress

As with many other issues, the past bipartisan consensus on campaign finance has not only eroded, it has been completely washed away. Republicans in their platform are perfectly happy with the current situation, although they would like to do away with the now overwhelmed public funding for presidential races that remains on the books.

Democrats decry the end of the Republic as we know it, with President Obama recently joining those calling for a Constitutional amendment to overturn Citizens United. Should they be defeated in November, they will no doubt put the blame on the Super PACs whether warranted or not.

In the near term, as long as one side sees the new playing field to its distinct advantage there is little chance of major action to stem the tide of big money, increased campaign spending and less transparency. Assuming the pendulum swings back, over time cooler heads may prevail, or lawmakers may find it uncomfortable that their independence is being compromised by the »independent« groups.

A second precondition is a clear message from the American public that it objects to dominance of political discourse by a few wealthy individuals whether they are Republicans or Democrats, liberals or conservatives. Our elections can't become auctions to the highest bidder. Further, it must demonstrate that objection by basing their voting decisions on informed consideration of the issues and candidates, not on who ran the most negative ads. If billionaires conclude they are not getting a certain return on their money, they are unlikely to keep throwing it away. Maybe George Soros already learned this lesson and now it's the turn of the Koch brothers. We can only hope so.



About the Authors

Barbara Kennelly served as a Democratic Member of the U.S. House of Representatives representing Connecticut's First Congressional District from 1981-1999.

John Tanner served as a Democratic Member of the U.S. House of Representatives representing Tennessee's Eight Congressional District from 1989-2011.

Imprint

Friedrich-Ebert-Stiftung
International Dialogue
Hiroshimastraße 28 | 10785 Berlin | Germany

Responsible:
Anne Seyfferth | Head of the Department of
Western Europe/North America

Phone: ++49-30-269-35-7736 | Fax: ++49-30-269-35-9249
<http://www.fes.de/international/wil>

Contact:
ID-INFO-WENA@fes.de

Das FES-Büro in Washington, DC

The Washington Office of the Friedrich Ebert Foundation promotes transatlantic dialogue in the spirit of the basic values of Social Democracy. Our programs link German and European policy debates with discourses in the United States and Canada. We also facilitate »trialogue« between transatlantic partners and representatives from other regions such as the Middle East, Afghanistan, Russia, and Turkey to develop ideas and solutions for common challenges.

Another important element of our work is building and maintaining transatlantic networks between policymakers and re-

presentatives from think tanks, universities, civil society organizations, and trade unions. Focal points of our work are conflict transformation and democracy assistance, disarmament and non-proliferation, minorities and integration, energy and climate policy, and economic and labor relations.

Friedrich Ebert Foundation
1023 15th Street, NW | Suite 801
Washington, DC 20005
Tel: +1-202-408-5444
Fax: +1-202-408-5537
Email: fesdc@fesdc.org
www.fesdc.org

The views expressed in this publication are not necessarily those of the Friedrich-Ebert-Stiftung.

This publication is printed on paper from sustainable forestry.



ISBN 978-3-86498-367-2