CITIZENS UNITED'S IMPACT ON CAMPAIGN FINANCE

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The proliferation of controversial political advertisements in the past decade is a direct result of the Supreme Court's 2010 ruling in Citizens United v. Federal Election Commission (CU), which helped pump billions of dollars into politics from outside sources that are supposed to be unconnected to candidates and political parties.

In CU, the Supreme Court ruled 5-4 that the longstanding prohibition on independent expenditures by corporations violated the First Amendment and cleared the way for corporations, including nonprofits, and labor unions to spend unlimited sums to support or oppose political candidates. The CU Majority, disregarding an overwhelming amount of testimony at Congressional hearings, concluded that political spending from independent actors, even from powerful corporations, was not a corrupting influence on those in office.

The decade that followed was by far the most expensive in the history of U.S. elections. Independent groups spent billions to influence crucial races, supplanting political parties and morphing into extensions of candidate campaigns. Wealthy donors flexed their expanded political power by injecting unprecedented sums into elections. And transparency eroded as "dark money" groups, keeping their sources of funding secret, emerged as political powerhouses.

The explosion of big money and secret spending wasn't spurred on by CU alone. It was enabled by a number of court decisions that surgically removed several restrictions in campaign finance law, and further emboldened by Congressional inaction and the Federal Election Commission's perennial gridlock. Both of these government bodies remain deeply divided, assuring that the mishmash of campaign finance rules created by the Supreme Court's piece-by-piece demolition of campaign finance legislation will likely remain in place in 2020 and beyond.

Key Findings of CRP's Research

- Despite fears that CU would permit elections to be dominated by corporations, the biggest political players as of now are actually wealthy individual donors. The 10 most generous donors and their spouses injected $1.2 billion into federal elections over the last decade. That tiny group of major donors accounted for 7 percent of total election-related giving in 2018, up from less than 1 percent a decade prior.

- The balance of political power shifted from political parties to outside groups that can spend unlimited sums to bolster their preferred candidates. Election-related spending from non-party independent groups ballooned to $4.5 billion over the decade. In contrast, it totaled just $750 million over the two prior decades.

- Even political candidates found themselves dwarfed by independent groups that in many cases morphed into effective arms of political campaigns and parties.

- Despite the CU Court's assertions that moneyed interests would be required to reveal their political giving, the ruling gave new powers to dark money organizations. Groups that don't disclose their donors flooded elections with $963 million in outside spending, compared to a paltry $129 million over the previous decade.

- Corporations didn't take full advantage of their new political powers, accounting for no more than one-tenth of independent groups' fundraising in each election cycle since the CU ruling. But major companies supplied money, in mostly unknown amounts, to secretly funded nonprofits and trade associations that influence elections.

- The CU ruling didn't reverse the ban on foreign money in elections, but it did provide opportunities for foreign actors to secretly funnel money to elections through nonprofits and shell companies.

Influential Cases in CU's Orbit

Cases decided before and after CU have helped boost campaign contributions and spending to unprecedented levels. In Davis v. FEC, decided in 2008, the Supreme Court struck down the so called Millionaire's Amendment, which aided opponents of wealthy self-funding congressional candidates by allowing such opponents to bypass contribution limits.

In Speechnow v. FEC (2010), the federal Court of Appeals for the District of Columbia applied the CU precedent to PACs, ruling that a political committees may accept unlimited contributions from individuals, corporations and unions as long as they do not contribute to candidates or coordinate their activities with candidates or parties. Following the court's decision, the FEC allowed the creation of independent expenditure-only committees, now known as super PACs.

Subsequent court rulings further implemented the anti-regulatory approach of CU. In 2011 in Carey v. FEC, a district court held that PACs could accept unlimited contributions to one bank account solely for the purpose of independent expenditures and maintain a segregated account that can give money to candidates. Following this decision, the FEC allowed the creation of such "hybrid" PACs, which can act as both a PAC and a super PAC.

In 2014, the Supreme Court struck down yet another section of the Bipartisan Campaign Reform Act, this time a provision that limited how much an individual donor could give to candidates and parties every election cycle. The Court ruled 5-4 in McCutcheon v. FEC that these limits were unconstitutional, expanding on the Majority's logic in CU that the increased access to candidates that wealthy donors are granted by virtue of their financial contributions is not corruption. Chief Justice John Roberts ruled "Government regulation may not target the general gratitude a candidate may feel toward those who support him or his allies, or the political access such support may afford." Unsurprisingly, the decision enabled the growth of joint fundraising committees that solicit large checks from a handful of wealthy donors and distribute the money among various committees.

By surgically removing sections of the Bipartisan Campaign Reform Act while keeping some parts intact, the court left behind a hodgepodge of rules that govern the campaign finance system to this day.

Super PACs Prevail

Money talks. And voters often listen.

The candidate with more money wins more often than not. A larger war chest means more money to hire staffers, produce ads, raise additional funds, travel and establish physical infrastructure.

While most candidates build their campaign coffers over the course of several months, super PACs may solicit seven-figure checks and instantly convert them into an influx of ads, mailers or other communications that can appear nearly indistinguishable from those of the candidates themselves.

In some of the most competitive races, outside groups wage ad wars of their own, battling to influence voters by outspending their opponents. Since the 2010 midterms, outside spending (i.e., political expenditures made by groups or individuals independently of, and not coordinated, with candidates' committees) has surpassed candidate spending in 126 congressional races. In the five cycles prior, that phenomenon occurred just 15 times.

So, the primary consequence of CU has been greatly increased outside spending, with non-party groups now dominating presidential elections as well as the most tightly contested House and Senate contests. Non-party outside groups have spent nearly $4.5 billion influencing elections since the 2010 cycle. Over the previous two decades, they spent only $750 million.

Since CU, spending by super PACs and dark money groups, along with non-party independent groups, has accounted for a larger proportion of total election-related spending with every successive midterm and presidential election. As a result, candidate and party spending has declined as a share of the total. Like super PACs, political party committees may make independent expenditures. But they are hindered by contribution limits and cannot take money from corporations or unions. Back in 2004, parties spent a record $265 million on outside spending, a figure that hasn't been surpassed since.

Some super PACs had started to assume the role that parties normally play in tightly contested elections, but their power to do so has vastly expanded since they now can solicit unlimited sums from wealthy donors. The launching of the Senate Majority PAC and the Senate Leadership Fund, with the blessing of Democrat Harry Reid and Republican Mitch McConnell respectively, exemplifies this development. On the House side, party leaders helped launch the liberal House Majority PAC and the conservative Congressional Leadership PAC.

Justice Kennedy wrote in CU, that in order to qualify as "independent" these groups could not coordinate their efforts with candidates or parties. It didn't take for that fatuous expectation to evaporate - - some super PACs now effectively operate as extensions of the campaign, offering wealthy donors a way to continue supporting their candidate after they've hit maximum candidate contribution limits.

Both Parties Take Advantage of PACS and Super PACS

In 2012, both Barack Obama and Mitt Romney attended fundraisers for their own respective super PACs. To stay within the letter of the law, the presidential hopefuls avoided explicitly asking their supporters to give to the unlimited-spending groups. With the candidates carefully performing this charade, Super PACs clearly tied to

party leaders were able to “independently” spend $389 million boosting candidates in 2012, accounting for nearly two-thirds of all super PAC spending.
Candidates and parties have exposed the countless loopholes in coordination rules over the last decade. One of the more ridiculous episodes of coordination took place in 2014, when the two major parties communicated with outside groups in code in public Twitter posts to concoct their ad buying strategy. This activity was a clear abuse of FEC rules that allow outside groups to use information from candidates or parties that is distributed on a public forum.

In 2016, Donald Trump initially railed against modern campaign finance rules, pledging to "fix that system" and calling super PACs "corrupt." After winning the Republican nomination, however, Trump effectively dropped his opposition to super PACs and in May 2019, Trump endorsed a super PAC, America First Action, as the campaign's only "approved" outside group. In November, Trump headlined a big-ticket fundraiser for the group, which is supposed to be “independent” of the Trump campaign.

Trump's flip-flop on super PACs isn't unprecedented. Obama routinely blasted super PACs and pledged in 2011 that he would not fundraise for them. The campaign reversed course just seven months later, giving former White House aides the green light to launch a super PAC, Priorities USA Action.

Outside groups are experiencing a great deal of encouragement from Senate candidates in critical 2020 elections. For example, Sen. Susan Collins (R-Maine) invited outside support by uploading six minutes of soundless, high-resolution campaign footage to YouTube. By publicly publishing b-roll, she, like other candidates, legally provide super PACs with footage for their ads and a group backing her campaign, 1820 PAC, used the footage in pro-Collins ads. Funded mostly by New York investor Stephen Schwarzman, this super PAC had spent $701,000 supporting Collins through mid-January.

Regulatory Dysfunction

By the letter of the law, campaign coordination with outside groups is illegal. But the FEC, the agency tasked with enforcing campaign finance law, has become synonymous with paralysis in recent years. The agency has up to six members — with several seats often left vacant due to partisan impasse in Congress — and no more than three commissioners may be members of the same party. Official actions require four votes, leading to "deadlocks" where Republican and Democratic commissioners can't agree on the best course of action. So it is not surprising that since CU was decided in 2010, the FEC has never once penalized a political candidate or group for unlawful coordination.

In the wake of the CU decision, some Democrats feared that corporations would dominate electoral politics. For the most part, that didn't happen. Corporations continue to curry influence with lawmakers by donating through traditional PACs, which are funded by wealthy executives and are subject to contribution limits. Corporations also spend heavily on lobbying and public relations campaigns to sway lawmakers on specific issues and not all of that spending is disclosed to the public.

But most corporations don't make independent expenditures or give to super PACs at the federal level. Major companies have stayed away due to the risk of backlash from consumers and resentment from lawmakers they want to sway. Just 36 companies on the S&P 500 contributed $25,000 or more to super PACs since 2012. The largest donors on that list are oil and gas companies such as Chevron and NextEra Energy, which consistently support Republicans. Corporations gave $301 million to super PACs and hybrid PACs in the 2012 to 2018 election cycles, 87 percent of which went to conservative groups. These contributions made up 10 percent of funding to these types of PACs in the 2012 cycle, a high water mark, but that figure dipped to just 5 percent in 2018.

Some U.S. subsidiaries of foreign companies have given million-dollar gifts to super PACs. The pro-Jeb Bush Right to Rise USA took $1.3 million from a Chinese-owned company, resulting in a rare fine from the FEC. In this case the violation was clear since the FEC had evidence that Chinese nationals in control of the company facilitated the contribution. But as a general matter, Commissioners have not been able to agree on how subsidiaries of foreign companies should be treated under law.

The most popular destination for corporate funds are the Republican presidential super PACs such as Bush's Right to Rise ($26 million) and Romney's Restore Our Future ($28 million) and Republican Party-connected groups like American Crossroads ($39 million) and Senate Leadership Fund ($34 million).

The amount of election-related giving from corporations is almost certainly higher than disclosed, because corporations prefer to fund trade associations and politically active 501(c) (4) groups that don't disclose their donors, as discussed in this report's dark money section.

Labor unions were among the top outside spenders for Democrats in the years before CU. Then taking advantage of CU, unions created their own network of super PACs and gave heavily to Democratic-allied outside groups. Labor's efforts swelled in 2016 as they organized to oppose Trump. In that cycle, unions gave $91 million to unaffiliated outside groups and spent $92 million through their own PACs, super PACs and union treasuries. United We Can, a super PAC backed by the Service Employees International Union, spent $12 million unsuccessfully supporting Hilary Clinton over Trump. Unions are effectively funded by small donors, as they receive their funding from dues paid by their vast network of donors. Unions are more transparent than corporations as they must disclose their contributions to political groups, including those that don't disclose their donors. Still, that information isn't made public until after voters go to the polls.

While corporations and unions gained potential political power as a result of CU, it is individual donors who are fueling the explosion of money in recent elections.

The Modern Megadonor

Since CU, the top 10 donors and their spouses gave a combined $1.1 billion to outside groups such as super PACs. The top 100 donors and their spouses to these unlimited spending groups accounted for over $2 billion. In an era where outside groups fill crucial roles, between functioning as arms of political parties or as extensions of political campaigns, wealthy donors are indispensable.

The megadonor phenomenon coexists in vivid contrast with the record numbers of Americans giving money to political candidates in the most recent presidential and midterm election cycles. High-profile candidates for Congress and the presidency rely on armies of small donors to fund their campaigns. But one check from a wealthy donor, such as 2020 Democratic presidential contender Michael Bloomberg's record $20 million gift to the liberal Senate Majority PAC, can effectively neutralize the efforts of thousands, even millions, of small donors.

Billionaire donors aren't new. But they didn't have so many ways to directly influence elections before CU. During the 2008 presidential election, the most expensive of its kind at the time, the 10 largest donors accounted for $37 million in total giving. Ten years later, the top 10 largest donors and their spouses gave $447 million, accounting for 7 percent of all election-related giving in the 2018 cycle. Ninety-seven percent of that cash went to outside spending groups such as super PACs.

Super PAC giving is dominated by men, who on average, hold significantly more wealth than women. Economic disparities, including the racialized and gendered wealth gap, mean that women and people of color have fewer resources to spend politically. Men accounted for at least 80 percent of individual contributions to outside groups in every completed election cycle since the CU decision. Following the 2010 cycle, men have given nearly $2.5 billion to outside groups, compared to less than $584 million from women. Republican and conservative groups received more money ($273 million) from women than Democratic and liberal groups ($171 million). But Miriam Adelson, who has given $144 million since 2010, single handedly accounted for over half of that sum.

Just as men have disproportionately driven the growth in giving, the financial sector has taken the most advantage of the radically more permissive post-CU political spending regime, with Wall Street overtaking retirees as the industry donating the most in each of the last four election cycles. And while retirees give almost all of their money to candidates and parties, well-paid Wall Street executives, hedge fund managers and investors give big dollars to outside groups. The financial industry accounts for one-fifth of all money given to outside groups since the creation of super PACs.

In his CU dissent Justice John Paul Stevens predicted that the ruling "dramatically enhances the role of corporations and unions—and the narrow interests they represent—vis-à-vis the role of political parties—and the broad coalitions they represent—in determining who will hold public office." But those narrow interests turned out to be not just corporations or unions. The biggest donors are actually the individuals behind the most powerful and well-funded industries in the country and the current political financing system allows these moneyed individuals to use their wealth to push whatever special interest they favor to the forefront of electoral politics simply by giving millions of dollars.

In contrast, most industries, particularly those that aren't home to many wealthy individuals, barely give any money to outside groups. The education industry gave just 5 percent of its money to outside groups despite ranking as a top-10 industry. Even prolific industries like lawyers/law firms or health professionals give less than one-tenth of their campaign cash to outside groups.

The election law's tilt towards megadonors was enhanced in McCutcheon v. FEC, (2014), when the Supreme Court's conservative majority struck down limits on how much an individual donor can give directly to candidates, parties and PACs in an election cycle. Chief Justice Roberts rejected the idea that donors would abuse the elimination of overall giving limits, arguing that donors seeking influence would rather see their money spent independently to support their preferred candidate "rather than see it diluted to a small fraction so that it can be contributed directly by someone else." By embracing this argument, Roberts undermined a key rationale of the CU decision - - the belief that independent spending cannot give rise to quid-pro-quo corruption. Allowing megadonors to give much more to candidates and parties had dramatic results. During the 2016 election, the first full cycle after limits were removed, donors began giving millions in hard money. The Adelsons gave $4.6 million, and Chicago billionaires James and Mary Pritzker gave nearly $3.4 million. In contrast, during the 2012 cycle, donors were able to give only $46,200 to federal candidates and $70,800 to PACs and parties.

Dark Money Infiltrates Elections

CU suddenly and dramatically increased the power of dark money groups — namely nonprofit groups that are not required to disclose their donors — to directly influence federal elections. These secretive groups spent $963 million on elections over the last decade without informing voters who paid for their ads.

Conservative groups, such as Karl Rove's Crossroads GPS and the Koch brothers-backed Americans for Prosperity, dominated the dark money game, accounting for 86 percent of outside spending from these groups.

Dark money groups, often corporations operating under the Internal Revenue Code as 501(c) (4) nonprofit organizations, may spend unlimited sums on political activities without ever disclosing donors so long as their “primary purpose” is social welfare. The IRS has not clearly defined what “primary purpose” means nor has it issued rules on how to calculate it, but the generally accepted test is that no more than half of a 501(c)(4) nonprofit's activities may be political. As a result, some dark money groups have created complex networks to funnel anonymous cash among themselves in order to stay under the 50 percent threshold, The decade after CU also witnessed the rise of "grey money" groups that disclose only some of their donors. Practically nonexistent before 2010, these types of political groups have increased their presence in most election cycles since then. Grey money nonprofit organizations and secretive shell companies funnel money to super PACs and, although super PACs are required to disclose their donors, they usually disclose no more than the name and address of the nonprofit or company donor, leaving the true source of money hidden.

During the 2018 midterms, dark money groups funneled $176 million to super PACs and hybrid PACs. Although dark money spending fell, the percentage of grey money in outside spending hit a record high in 2018, totaling more than $391 million and accounting for more than a third of spending by all non-party outside groups. Grey and dark money spending by groups that don't fully disclose donors has exceeded $2 billion since CU and that only includes spending that is reported to the FEC, such as independent expenditures and electioneering communications. Not included are the millions of dollars spent on issue ads meant to boost or weaken candidates before election season draws near.

Following the bombardment of ads from non-disclosing groups, it became apparent, even to Justice Kennedy, that the modern campaign finance system was not providing transparency to voters. In 2015, five years after he wrote the Majority opinion in CU, Kennedy lambasted the FEC and other agencies for not doing more to require politically active groups to disclose their donors. The author of CU lamented the modern-age disclosure system he had championed is "not working the way it should." In most cases, the only way to know how much money a major company gives to dark money groups is if it voluntarily discloses its political contributions.

Foreign Money

Foreign nationals and foreign-owned corporations are barred from spending in U.S. elections. But some of the biggest dark money players over the last decade are funded by major corporations and these players do take cash from foreign

companies, raising the prospect that the influx of dark money was at least partially backed by foreign money.
In this connection, the U.S. Chamber of Commerce receives member dues from corporations it represents, including foreign-based companies. The conservative group says it does not use foreign money to fund election-related messages. The Chamber has spent $143 million on elections since the 2010 cycle, making it the top dark money spender post-CU.

The National Rifle Association's 501(c) (4) arm, which has spent $59 million boosting Republicans since CU, has taken big checks from affiliates of foreign-owned gun manufacturers such as Germany's SIG Sauer and Italy's Beretta.

And the American Chemistry Council, another politically active trade association, has several foreign companies among its members.

Even contributions from legally formed companies may not be what they seem. Andy Khawaja, the CEO of a payment processing corporation, was indicted in December 2019 for allegedly routing $3.5 million to political committees in the form of personal donations and contributions from his company, acting as a straw donor for United Arab Emirates adviser George Nader.

Shell companies also provide opportunities for foreign intervention. Jho Low, a Malaysian financier accused of stealing billions from his home country, allegedly funneled more than $1 million to a pro-Obama super PAC through a shell company in 2012. Low was indicted in 2019 on an array of charges including campaign finance violations. It is impossible to say how much foreign money goes to politically active nonprofits and trade associations, as these groups do not disclose information about their funding sources. Shell companies the public knows nothing about reporting contributions that have little or no paper trail may technically comply with the law, but the information is virtually useless in creating transparency.

Dark at the End of the Tunnel

The bitterly divided FEC has proved powerless in the battle against dark money, while Congress has failed to pass dark money legislation. After CU, Democrats attempted to compel transparency with the DISCLOSE Act, which required that any group, including corporations, political nonprofits, trade associations and unions that spent $10,000 or more on FEC-reported spending to disclose the source of all contributions of $10,000 or more that election cycle. Republicans aggressively filibustered the bill, successfully preventing it from garnering 60 votes in the Senate. They argued it unfairly benefitted unions — which receive most of their funding from relatively small member dues — over corporations.

As a result of this stalemate, the top dark money spender of the 2018 election cycle, Majority Forward (linked to the Senate Democratic leadership), could get away with telling the FEC that it did not receive any contributions for political purposes and refused to disclose its donors despite spending more than $45 million to boost Democrats.

But it is not just dark money, but the inordinate financial power of the super-rich, corporations and, to a lesser extent, unions that creates the political leverage which protects and projects their particular interests and privileges. For these players, the chaotic jumble of campaign finance laws in the post-CU era, which allows for unlimited sums of money to flow into U.S. elections, some disclosed and some not, is far from undesirable. And amid deep partisan divisions in Congress and a paralyzed FEC, the loopholes created by CU and other rulings remain wide open in the run up to the 2020 elections.